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## The Trials of Leschi, Nisqually Chief

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Kelly Kunsch<sup>1</sup>

**His people's bitterness is etched into stone:**

*A MEMORIAL TO  
CHIEF  
LESCHI  
1808-1858  
AN ARBITRATOR OF HIS PEOPLE*

*JUDICIALLY MURDERED, FEBRUARY 19, 1858<sup>2</sup>*

There is probably no one convicted of murder more beloved by his people than a man named Leschi. Among other things, he has a neighborhood in Seattle, Washington named after him, a city park, a marina, restaurants and stores, as well as a school on the Puyallup Indian Reservation. His name is revered by Northwest Indians and respected by non-Indians who know his story. And yet, he remains, legally, a convicted murderer. For years there has been a small movement to clear Leschi's name. However, it was only two years ago, almost 150 years after his conviction, that the movement gained momentum and the Washington State Legislature enacted legislation in an effort to vacate his conviction.<sup>3</sup> The Senate Joint Memorial was a strange piece of legislation in that the legislative branch requested the judicial branch to act outside of normal judicial procedure.<sup>4</sup> It was also not particularly well-researched<sup>5</sup> and depended too heavily on the account written by Ezra Meeker—a book that was written fifty years after the fact by a man in his seventies.<sup>6</sup> Meeker's

book is a work that should be taken into account, but it should be weighed against other accounts.<sup>7</sup>

In response to the Memorial, Washington Supreme Court Justice Gerry Alexander met with Nisqually tribal leaders where they agreed to convene a nonlegal “historical court.”<sup>8</sup> The court convened on December 10, 2004, and after four hours of testimony, the court exonerated Leschi.<sup>9</sup>

The author of this article does not oppose the historical court and its exoneration of Leschi. However, although that court claimed to be “searching for the truth,”<sup>10</sup> the time limitations imposed by the proceedings and the chosen witnesses did not allow for the analysis that a search for the truth must entail. The purpose of this article is to discover and reveal, as much as possible 150 years after the fact, what took place throughout the judicial proceedings of this man. This article concludes with a proposed method that would allow resolution of the issue more in accord with the rule of law than that in Senate Joint Memorial 8054.

## I. METHODOLOGY

There are several works that have discussed Washington’s Indian War and Leschi.<sup>11</sup> Most of them were built on prior histories and on reminiscences of pioneers. This article attempts to reanalyze the events of the time by looking at contemporaneously written documents. However, there are several difficulties in doing so. First, one of the difficulties in using primarily contemporaneous writings is the lack of any direct Indian perspective. Despite being quite well-developed linguistically,<sup>12</sup> the Indians of the region had no written language at the time.<sup>13</sup> Thus, their perspective can only be gleaned through those sympathetic to them.

Second, biases of newspaper publishers often provided conflicting accounts of events. The *Pioneer and Democrat* was a “straight-out, radical democratic journal,” according to late nineteenth century historian Hubert Bancroft.<sup>14</sup> Published in Olympia, Washington, the *Pioneer and Democrat* supported the agenda of the Democratic President Franklin Pierce and his

appointee, Territorial Governor Isaac Stevens. The other newspaper in the territory was the *Puget Sound Courier*, a Whig journal published in Steilacoom, Washington.<sup>15</sup> The respective editors of these two newspapers often wrote conflicting accounts of events, most notably of the Indian wars in the territory.<sup>16</sup> Because of their biases, their accounts of events may have been tainted, especially those with political significance. And sadly, some important issues of the *Puget Sound Courier* appear to have been lost over time.<sup>17</sup> Furthermore, the paper appears to have ceased publication shortly before Leschi's first trial in Steilacoom. Its successor in Steilacoom, the *Washington Republican*, began its publication life shortly after Leschi's second trial,<sup>18</sup> and ceased publication before the supreme court review.<sup>19</sup>

Other contemporaneous sources available include the *Oregonian*, published in Portland, Oregon, which often briefly reported events in Washington Territory. Another newspaper also published at the end of Leschi's life was the *Truth Teller*.<sup>20</sup> It was published in Steilacoom by officers of the United States Army;<sup>21</sup> the entire publication was concerned with preventing Leschi's imminent execution, and defending those who supported Leschi's cause. Additionally, the diary of August V. Kautz,<sup>22</sup> an army officer stationed at Fort Steilacoom, and primary author of the *Truth Teller*, provides another contemporaneous account of events near the end of Leschi's ordeal. Kautz had an Indian wife and was sympathetic to Leschi's cause. It is also necessary to note that although the papers of William Wallace (Leschi's lawyer) and William Tolmie (Leschi's friend and court translator) were available and held by the University of Washington, they provided little of use for the purposes of this article.

## II. BACKGROUND

The Washington Territory was created in 1854.<sup>23</sup> Isaac I. Stevens was appointed its first governor and was also named as superintendent of Indian affairs.<sup>24</sup> One of his first duties was to negotiate treaties with the Indians. This duty was imperative because Congress had passed a donation law<sup>25</sup>

granting land rights to settlers in the territory, even though at the time the United States government still had regional boundary disputes with England, as well as no pretense to title over Indian inhabitants.<sup>26</sup> The first treaty was negotiated at Medicine Creek on December 24, 1853.<sup>27</sup> That treaty included the lands of the Nisqually people,<sup>28</sup> of which Leschi was a member. There has long been debate over whether Leschi actually acceded to the treaty, but there is an “X” next to his name written on the treaty.<sup>29</sup> Regardless, he, among others, was dissatisfied with its terms. Under those terms, the Nisqually, a people who lived on fish and the local vegetation, were required to relocate away from the river and its basin to a heavily forested area in the hills.

While Governor Stevens’ entourage continued negotiating treaties throughout the region, Indians east of the Cascade Mountains, which run through the middle of Washington, had engaged the United States Army in battle.<sup>30</sup> Territorial Secretary Charles Mason, acting as governor while Isaac Stevens was traveling, met with Leschi in Olympia and requested him to stay in Olympia until the agitation abated.<sup>31</sup> Leschi departed, and when he failed to return as requested, Mason sent members of the territorial militia to apprehend him.<sup>32</sup> Leschi fled.<sup>33</sup> In the meantime, troops from the U.S. Army based at Fort Steilacoom (west of the Cascades) had marched eastward to help those on the other side.<sup>34</sup> When that action was aborted, the captain sent a dispatch back to the fort to inform those still there of the return. One of those in the dispatch party was a volunteer named A. Benton Moses. On the journey, he and another (Joseph Miles) were killed. It is for the murder of Moses that Leschi was tried.

By early November the following year, Leschi was captured.<sup>35</sup> His brother, Quiemuth, another prominent Nisqually leader, surrendered later that month.<sup>36</sup> Quiemuth, however, was never tried. Instead, he was murdered the night he was taken to the governor’s office.<sup>37</sup>

Leschi was initially indicted and tried in Pierce County, Washington.<sup>38</sup> However, the judge declared a mistrial when the jury could not reach a

unanimous verdict.<sup>39</sup> Leschi was then tried and found guilty in Thurston County, Washington, (home of Olympia, the territorial capital) and sentenced to death by hanging.<sup>40</sup> The Thurston County court also denied various post-trial motions.<sup>41</sup> The conviction was then affirmed by the territorial supreme court and, despite the actions of sympathizers that managed to defer its performance, his execution took place on February 19, 1858.<sup>42</sup>

### III. GEOGRAPHIC BIAS

Geographic bias is a virtually unmentioned yet critical element in Leschi's conviction. Although Thurston and Pierce County were adjacent to each other, the attitudes of their citizens diverged dramatically in the 1850s. This was especially true with respect to relationships with Indians and the British. Settlers in Pierce County were well-integrated with both, while those in Thurston County viewed both Indians and foreigners as nuisances. The disparate views were so strongly felt that they occasionally threatened violence, such as that in the martial law incident discussed below.

First, as mentioned above, the Thurston County newspaper was Democratic and staunchly supported the governor and his policies. By contrast, the Pierce County newspaper was Whig-operated and was often critical of those same policies. Another unique aspect of Pierce County at the time is that it was home to the Puget Sound Agricultural Company, owned by the Hudson Bay Company—a British company. The Puget Sound Agricultural Company was based at Fort Nisqually, which had existed in the region since 1832.<sup>43</sup> Many of its employees were former French Canadian fur traders and many married Indian women. The Puget Sound Agricultural Company also employed Indians in various capacities, and both sides coexisted more or less peacefully for over twenty years. Because of this, many of the inhabitants were sympathetic to the Indian point of view, particularly with respect to the increasingly invasive

“Boston”<sup>44</sup> settlers. However, across county lines in Olympia, there was dismay that a border settlement with Great Britain had not been reached, and that until that time, Hudson Bay Company could not be expelled from the region.<sup>45</sup>

Second, if these disparate viewpoints were not enough, the martial law crisis (infamous in Washington history) took place shortly before the Leschi trials. The martial law incident has been well-chronicled elsewhere, but a brief summary will aid those unfamiliar to it.<sup>46</sup> After the Indian uprising, most families relocated from their farms to a safer haven near Olympia or Fort Steilacoom. Certain settlers in Pierce County, however, remained on their lands undisturbed. Governor Stevens determined that these settlers were enemy sympathizers (many were married to Indians) and had them arrested. When the settlers’ lawyers sought their release through legal processes, Stevens declared martial law within Pierce County. When the chief justice then attempted to hold a hearing on the issues of martial law and habeas corpus, the governor sent a detachment of the territorial militia to arrest him and prevent the hearing. Bloodshed between the militia and citizens of Pierce County was averted only when the justice allowed himself to be arrested. Even so, the anger of the citizens toward the governor who had declared martial law in their county remained. The crisis eventually deescalated, but Olympia’s invasion of Steilacoom was still a recent memory when Leschi was brought to trial.

Finally, the extent of the discord between the two counties was evidenced one last time beginning on January 22, 1858, when Leschi’s execution was scheduled. When the actions of various government officials (all located in Pierce County) resulted in preventing the hanging,<sup>47</sup> outraged citizens in Olympia held what then Governor Fayette McMullan called an “indignation meeting” aimed at the citizens of Pierce County.<sup>48</sup> The governor himself acknowledged attending and participating in the meeting that berated not only the citizens of Pierce County, but several officers of the United States

Army as well. August Kautz also commented on these attitudes in his diaries.<sup>49</sup>

Because of these attitudes, whether Leschi would be tried in Pierce or Thurston County was critical. Most importantly, where Leschi would be tried would determine the type of people who would sit on the jury. Clearly, from Leschi's appellate arguments, his lawyers understood the importance of trial location. Less clear is whether Leschi's opponents came to the same realization after the first trial in Pierce County failed to result in a conviction.

#### IV. THE DEATH OF MOSES

Leschi was tried for the murder of army officer A. Benton Moses. It is that event, therefore, that triggered the judicial proceedings that followed. The obituary of Colonel Moses was published in the November 9, 1855, issue of the *Pioneer and Democrat*.<sup>50</sup> The notice stated: "The particulars of Col. Moses' death will be found in another portion of our paper." On the following page was a letter to the editor titled "Letter from Mr. Rabbeson." The letter was dated November 5, 1855, and was self-described as "a brief detail of the circumstances happening on the route." The letter takes on supreme importance because Antonio B. Rabbeson was ultimately the sole witness against Leschi. Rabbeson named a small group of men who met with "a party of Clickatat and Nisqually Indians, numbering about 150 warriors." He said the party went to the Indians' camp and "conversed awhile with their main chief *Leschi*."<sup>51</sup> The letter continued:

In the meanwhile, all the first Indians were gradually dispersed, but we did not know at that time where. We then mounted our horses again and proceeded on our route, about half a mile, to a deep muddy swamp. There we received a murderous fire—from these very same Indians, who had secreted themselves in ambush—from behind us. Col. A. Benton Moses received a ball, entering the left side of the back and passing immediately under the heart, and



came out through the right breast—going through the centre of a letter in the breast pocket of his over coat.<sup>52</sup>

Rabbeson then described the remainder of the journey and signed: “Yours in haste, A. B. RABBESON.”<sup>53</sup>

#### V. THE GRAND JURY INDICTMENT<sup>54</sup>

Grand jury proceedings were held on November 3, 1856, in Steilacoom (Pierce County) with Judge F. A. Chenoweth presiding.<sup>55</sup> The grand jurors were listed in the clerk’s summary of proceedings.<sup>56</sup> The most notable name listed was A. B. Rabbeson. Three pages later in the proceedings, Rabbeson was listed again as “Foreman Grand Jury.” Thus, the key witness not only sat on the grand jury that indicted Leschi, but was the foreman as well.

Besides the obvious problems with impartiality, there is also some question whether Rabbeson, a sheriff, was eligible to be a juror in Pierce County in the first place. The territorial statute governing grand and petit juries stated: “All qualified electors and house-holders shall be competent to serve as grand jurors, and all qualified electors shall be competent to serve as petit jurors, within the county where they reside, or within any county to which such county may be attached for judicial purposes.”<sup>57</sup> A proviso stated the exception that “county commissioners shall omit the names” of certain officials and other persons from jury lists, which includes “sheriffs.”<sup>58</sup> Although that proviso adds that “no finding or verdict shall be invalid on the ground that any person serving thereon was not compelled by law so to serve,” Rabbeson’s selection for the grand jury remains highly suspect.<sup>59</sup>

For example, as late as May Term 1856, Rabbeson was named as “Sheriff of the County of Thurston” in the official court record of the territory.<sup>60</sup> From that, one would presume that he lived in Thurston County. However, census records for 1860 showed A. B. Rabbeson residing in Pierce County.<sup>61</sup> At that time, Pierce County was in the Third Judicial

District while Thurston was in the Second Judicial District, so Rabbeson would not qualify as being in “such county . . . attached for judicial purposes.”<sup>62</sup> Even so, as a county sheriff, his name should not have been on the jury list. Of course, most problematic was the fact that Rabbeson was the primary witness in the case against Leschi.

The purpose of a jury (and a grand jury) is to gather unbiased individuals to listen to testimony and determine guilt (or, in the case of a grand jury, to determine sufficiency of the evidence). That, through oversight, Rabbeson was somehow included in the jury pool, then selected for the jury, and ultimately chosen as foreman, stretches the limits of credulity—particularly when combined with the judicial proceedings that followed. The grand jury indictment was challenged on various grounds in the motion for arrest of judgment, as reported by the *Pioneer and Democrat*<sup>63</sup> as well as in arguments before the territorial supreme court. However, none of those challenges were successful.

## VI. THE TRIAL OF WINYEA

Leschi’s indictment also named another Indian, Winyea. His story has been somewhat of a mystery. However, it appears that he was tried and acquitted in Pierce County at approximately the same time as Leschi’s first trial. There was no contemporaneous mention of Winyea’s trial in the Puget Sound newspapers. Fortunately, however, Oregon’s newspaper, the *Oregonian*, revealed the outcome of the trial (although little more). In summarizing the closure of the session of the “United States District Court for Pierce County,” it said: “Winyea, an Indian belonging to the Nisqually tribe, a principal man, and a participant in the war, who gave himself up last summer, was tried for murder on two separate indictments, and acquitted.”<sup>64</sup>

Based on records from Leschi’s second trial, the testimony of Antonio Rabbeson was crucial in Winyea’s case. The summary of proceedings, as published in the *Pioneer and Democrat*, included several references to the Winyea trial.<sup>65</sup> At least eight witnesses were listed as testifying about

Rabbeson's testimony in that trial.<sup>66</sup> Winyea's acquittal, coupled with the results of Leschi's first trial discussed below, may have created consternation for the prosecution in retrying Leschi.

## VII. THE FIRST TRIAL

Leschi's first trial took place on November 17, 1856, in Steilacoom, located in Pierce County. Unfortunately, there are no official records of Leschi's first trial as, according to Ezra Meeker, the court and county records of Pierce County were burned on April 5, 1859.<sup>67</sup> There are, however, various sources of information about the proceedings including contemporaneous newspaper articles and a book by one of the jurors. The November 28, 1859 issue of the *Pioneer and Democrat* had an article on the events surrounding Leschi's trial and Quiemuth's murder.<sup>68</sup> The article named J. S. Smith and Frank Clark as prosecutors, and H. R. Crosbie and William H. Wallace as defense attorneys. Additionally, an article in the *Washington Republican* also named Clark as one of the prosecutors.<sup>69</sup> If this is true, it adds another bizarre circumstance into the proceedings involving Leschi because Frank Clark was a defense attorney for Leschi in the second trial (with Wallace), as well as in subsequent proceedings. The Second Circuit's summary of proceedings mentioned "J.S. Smith who prosecutes the pleas of the family in their behalf."<sup>70</sup> It also mentioned Smith and Crosbie as defense attorneys, as well as William Tolmie as interpreter. According to the *Pioneer and Democrat*:

The evidence of A B. RABBESON, esq., was conclusive, and to the point. He testified that on the 31st of October, 1855, the day on which the party were attacked, and Messrs. MOSES and MILES were murdered, he saw Leschi, Quiemuth and another Indian issue from the brush, and take a position in the road in front of him, at a distance of not to exceed thirty-five or forty feet; that then and there Leschi deliberately leveled his gun at him and fired; that immediately afterwards either Quiemuth or the other Indian

fired;<sup>71</sup> that he had known Leschi for years, and could not be mistaken in identifying him.<sup>72</sup>

There was no mention of any other prosecution witnesses. The newspaper identified William Tolmie and “the Indian Sluggo” as defense witnesses. It appeared that Tolmie’s testimony was reputational while Sluggo’s was purportedly based on personal knowledge. “Sluggo testified that he was present when MOSES and MILES were killed, *and that he knew, at that time, Leschi was on the other side of the Cascades* [the Cascade mountain range].” The *Pioneer and Democrat* continued: “This evidence, we believe had but little weight with the jury, as it is well-known that he, (Leschi) was in Olympia on the 27th or 28th of October, and those murders were committed on the thirty-first of that month.”

Another source of information about the first trial is *The Tragedy of Leschi* by Ezra Meeker. Meeker was a juror in that trial, one of those who voted for acquittal, according to Meeker.<sup>73</sup> Unfortunately, the book was written fifty years after the trial and his objectivity on certain topics is subject to some question. Sadly, in his more than 250 pages on Leschi’s story, only a few pages recount the trial of which Meeker had first-hand knowledge. He did say that Rabbeson was the only witness.<sup>74</sup> He also stated:

The judge . . . not only told us if the deed of killing Moses was as an act of war the prisoner could not be held, but he also indicated to us what constituted a condition of war. I cannot, of course, pretend to quote his words, though the incident has been so often discussed, his meaning appears vivid in my mind almost as if his words had been spoken but yesterday.

A declaration of war, he said, consisted of acts as well as words, and that in Indian warfare a formal declaration was never expected and that with civilized nations often omitted; that the fact of war between nations often preceded a formal declaration, and that acts of war in such cases shielded the person from individual responsibility, and that if we found, at the time Moses was killed, a state of war existed between our Government and the Indian tribes

as such, then the prisoner could not be held; otherwise, even if proven only an accessory, we must bring in a verdict of guilty.<sup>75</sup>

Meeker went on to say that the “argument in the jury room was that the Indians were at war against our Government and that the United States Government acknowledged the fact by sending organized troops against them.”<sup>76</sup> The counter argument, he said, was that Leschi and those with him did not represent the tribe, but instead were marauders and nothing more.<sup>77</sup>

Meeker then stated that the jury count ended with ten in favor of a guilty verdict, two opposed. The *Pioneer and Democrat* reported the division of the jury as nine in favor of conviction, three opposed.<sup>78</sup> The newspaper also stated that the jury’s actions “created general surprise” and that “judge CHENOWETH [wa]s said to have been astonished.”<sup>79</sup> The paper concluded with:

It is not our business to question the motives of those that hung the jury. It is the opinion of some, with whom we have conversed, that had they been detained until morning they would have brought in a verdict of guilty. Others incline to think that repugnance to capital punishment had something to do in the preventing an agreement, and not the existence of any doubts as to the prisoner’s guilt; whilst others aver that it was the determination of those that hung the jury, that Leschi should not be pronounced guilty, let the evidence have been what it might against him.<sup>80</sup>

Before Leschi could be retried, a series of events altered the trial’s venue. The location of the second trial may have been the most significant factor in Leschi’s conviction and was one of the assignments of error in the appeal.<sup>81</sup> The crime Leschi was charged with took place in Pierce County, where the first trial was held—yet the second trial took place in Thurston County. As noted above, the feelings of the citizens in these two counties toward the territory’s Indian policy, toward Indians generally, and toward Leschi in particular, stood in stark contrast. A peculiar combination of events relating to two pieces of legislation led to the adverse change of venue.

First, shortly before Leschi's first trial, Congress enacted legislation limiting the number of places the territorial courts could sit to three.<sup>82</sup> Although the timing was remarkable and fatal for Leschi, the federal legislation was not likely a piece of some grand federal scheme to move the trial. At the time, the remoteness of the Washington Territory and the difficulties in communication made it improbable from the outset. Furthermore, the proviso (limiting the sites) was part of a larger piece of legislation aimed at reducing the expenses of the federal government in trials of the states and territories.

Not surprisingly, Judges Lander and Chenoweth selected Olympia as the place the Second Judicial District would hold court. What is surprising, however, was the site selected for the Third Judicial Circuit: Penn's Cove on Whidbey Island. This is surprising because the major population centers in the Third Circuit were Steilacoom and Seattle. Yet, the judges chose a location almost sixty miles from Seattle (and more than ninety miles from Steilacoom), that further required crossing the sometimes difficult waters of Puget Sound. Perhaps the judges could justify a reduction in Judge Chenoweth's expenses because he lived on the island,<sup>83</sup> yet the expenses and inconvenience to other parties would have been dramatically increased.

Second, after Leschi's first trial, but before his second, Washington Territory enacted a piece of judicial redistricting legislation. This 1857 judicial redistricting is somewhat troublesome due to its timing, but also raises the obvious question of why redistricting was necessary.<sup>84</sup> After all, the three judicial districts had been created only two years before. However, before condemning the legislature as undermining the judicial system, it merits mention that both Frank Clark and William Wallace, the men who ultimately became Leschi's lawyers, were members of that legislature. Frank Clark was a member of the House of Representatives.<sup>85</sup> William Wallace was a member of the Legislative Council—a small legislative body that was the predecessor to the senate. Wallace was, in fact, president of the council during the fourth legislative session that

created the redistricting.<sup>86</sup> Leschi's prosecutor in both trials, J. S. Smith, was also a member of the house of representatives from Island County.

The change of venue for Leschi's second trial was fatal to his right to a fair trial. As earlier stated, Olympia was the publication site of the *Pioneer and Democrat*. Although it was only published weekly, the local newspaper (and at that time, the only newspaper in the territory) did Leschi no favors. Shortly before the trial, the newspaper referred to "the notorious LESCHI,"<sup>87</sup> clearly an adjective that might taint a jury pool made up of the newspaper's readers.

#### VIII. THE SECOND TRIAL

Leschi's retrial in Olympia took place on March 18, 1857, with Chief Justice Lander presiding. With only three judges in the territory at the time, the selection was limited. However, according to the governor himself, Lander was the commander of a volunteer company that apparently fought against Leschi.<sup>88</sup> Although the appearance of unfairness might call for a judge's recusal today, such was not the case in 1857. After all, the judges uniformly performed appellate review on cases for which they were the trial judge.<sup>89</sup> Ultimately, in Leschi's case, Judge Chenoweth, who presided over the indictment in addition to the first trial, also reviewed the case on appeal. The prosecution's case in chief consisted primarily of Antonio Rabbeson's testimony. The defense then brought several witnesses to impeach Rabbeson. The prosecution countered with its own witnesses to rebut those of the defense and rehabilitate Rabbeson as a witness. A more detailed description follows.

The *Pioneer and Democrat* first reported the trial on March 20, 1857.<sup>90</sup> B. F. Kendall and J. S. Smith were named as prosecuting attorneys<sup>91</sup> and W. H. Wallace and Frank Clark (who prosecuted Leschi in his first trial) were named as defense attorneys. It also pointed out that the principal evidence on the part of the prosecution was Rabbeson's testimony. The newspaper added: "C. H. MASON, Esq., also gave evidence favorable for the

prosecution.”<sup>92</sup> The article also named the following defense witnesses: “Dr. TOLMIE, Chief Factor, H. B. Co., Fort Nisqually, Messrs. Swan, Bradley, Benson, and others, of Pierce county, Col. M. T. Simmons, Indian Agent, and A. J. Simmons.”<sup>93</sup> The distinct mention of “others, of Pierce county” again shows the geographical significance attached to the trial.

According to the article, the trial began Monday morning (October 16) and the jury retired on Wednesday “about 12 o’clock, M., (at night) . . .”<sup>94</sup> The next morning at 8:00 A.M. the jury returned a verdict of guilty. The article ended with the following:

After the verdict of the jury had been rendered, a motion, and lengthy arguments were made by the attorneys for the prisoner, showing cause why a new trial should be granted. To-day (Friday,) the court overruled the motion, and passed the final sentence of death upon the prisoner. The sentence reads that Leschi is to be executed, according to law, at Ft. Steilacoom, June 10th, 1857.<sup>95</sup>

The following week’s *Pioneer and Democrat* had a more detailed description of the trial.<sup>96</sup> Additionally, another (and slightly different) version of the proceedings appeared in the April 10, 1857, issue of the *Washington Republican*.<sup>97</sup>

#### IX. RABBESON’S TESTIMONY

Because the testimony of Rabbeson is so critical to the case, and because the summary is ambiguous to this author, it is reproduced in full from the *Pioneer and Democrat*.

*Antonio B. Rabbeson*, produced, sworn and examined, says—In the latter part of October, 1855, with Bright, Tidd, Moses, left Maloney’s camp—in Connell’s prairie met party of Indians—had a long conversation—several minutes talking with them—among them were several that I knew personally—none that I knew the names of at the time—after we left Connell’s prairie came on three-fourths of a mile to a mile—struck a swamp—after we had got into the swamp—four were in the swamp some 150 yards,



three of us near the edge of the swamp, when we received a volley—when the firing commenced, I looked behind me to see if any one was killed—I discovered Mr. Miles off his horse—I rode back to assist Mr. Miles, and assisted him across the swamp out of gun-shot—while I was assisting Mr. Miles, holding his horse, three Indians stepped out—two out of the three fired—I then rode on three or four miles, overtook the balance of my company, and there found Mr. Moses was wounded, and I believe was dying at the time—Mr. Moses was left some 50 or 100 yards off of the road on the far edge of Finnell’s prairie—I did not see Mr. Moses after till he was brought in dead—I saw a wound somewhere about left breast—he told me at the time he was shot through the back—Mr. Moses did not tell me when he received the wound—Mr. M. was aware he was dying—I don’t know how long I rode from swamp to where overtook Moses—rode fast—was left alone—Mr. Moses was 100 to 150 yards ahead of me when volley was fired in the swamp—I took one of the Indians who came out to be Quiemuth—the other, Leschi, prisoner at the bar—third did not know—Leschi was one that fired and fired towards me—I had been more or less acquainted with him for ten years—had seen him very frequently before that time—in Connell’s prairie we saw a party of Indians—among them Leschi—he said he supposed the house of Connell was burned by accident—he said four Bostons were living at Lemmon’s bottom, men who had claims there—Leschi was friendly—some three-quarters of a mile from the swamp—the wagon road is three-quarters of a mile and the trail three or four hundred yards—we travelled [sic] the road—it was a large party of Indians we met on the prairie—left Leschi on the prairie—this swamp is in Pierce county—it was either the 30th or 31st of October, 1855—the three Indians were from 30 to 50 feet distant—so close that they didn’t think it worth while to take sight—quite a number guns fired after that—some on high ground—heard no guns except around there—knew A. Benton Moses—several days after I left him, saw his corpse—left him 100 yards from the road in the prairie—would have to travel 100 yards to get to trail—I believe the prisoner at bar is the Indian I saw fire the gun—it was some time after the first volley to the time Indian stepped out and fired the first gun.<sup>98</sup>

On cross-examination, Rabbeson was asked about several subjects. The two that appear most relevant are his testimony at Winyea's trial about the original meeting with the Indians, and the surrounding terrain.

I was a witness on Winyea's trial—did not speak of his hat and coat—did not speak of his having a scar on his forehead—was asked if Winyea was there—spoke of the Indian with a scar.

I described him, the Indian's clothes—Dr. Tolmie said from my description of the clothes that it was Leschi, as he had sold him clothes, but not his hat—afterwards went to Winyea to inquire about the hat—said Leschi had such a hat.

It was  $\frac{1}{4}$  mile from this end of prairie—I went through the trail since—I am confident others of the party, some three or four, talked with the Indians—I think Tidd talked—don't know what Indian first spoke to.

Leschi not with the party when first come up—can't tell what colored horse he was on—cannot tell how many mounted Indians there—some squaws—only two of the Indians talking with are mounted.<sup>99</sup>

Clearly the defense was attempting to elicit from Rabbeson that he had made conflicting statements about the same events at Winyea's trials.

Further cross-examination raised two other issues: whether the Indians were at war with the army at that time and whether the eyewitness identifications were reliable. Initial questioning established that a Dr. Burns was one of the entourage and that Burns said he was going to shoot Leschi. "Burns called him by the name Leschi—I told him not—I don't know what Indian he calculated on shooting for Leschi—an Indian came from the house—did not know him—I don't recollect seeing but one painted Indian on prairie."<sup>100</sup> This portion of the cross-examination seems to raise the issues of self-defense or, more likely, war (thus the reference to war paint). It also brings into question the eyewitness identification of either Burns or Rabbeson or both. The final notes on the cross-examination reverted to Burns, possibly to raise the question of him initiating the gunfire.

I think Burns reached the Indians first—cannot say who next—some little time after we got there he talked of Indian shooting—Burns took gun out of Indian’s hand, and poured the powder out of the pan—then spoke about shooting Indian—Capt. Maloney was moving against Yakamas—22nd October started from Steilacoom—Indians gamble and sell their clothes constantly.<sup>101</sup>

This questioning appears to establish that at that time a state of war existed. The final answer challenges the validity of making an identification of an Indian based solely or primarily on clothing.

The only other witness listed for the prosecution’s case in chief was Charles H. Mason, territorial secretary and acting governor during the events in question.<sup>102</sup> His testimony was about the purpose of the “rangers” (part of the state’s militia), “to watch those trails over the mountains.”<sup>103</sup> This testimony most likely was intended to refute any inference that there was a state of war.

#### X. DEFENSE WITNESSES

Andrew J. Bradley, a member of the party on Connell’s Prairie, was the first defense witness. Bradley testified that he knew Leschi well and that Burns took a gun from a young Indian, saying it was Leschi; however, the implication appears to be that it was not. Bradley then described the ambush, saying he was the first to ride into the swamp. He then testified about the ensuing events, and with respect to Leschi, the notations republished in the newspaper read: “I could not say how many Indians on horseback when we first came up—they got out of the way—I have recognized the place spoken of—I did not see Leschi there.”<sup>104</sup> Later, it reads: “I saw Rabbeson talking with Indians, two men on horseback—neither of them was Leschi.”<sup>105</sup>

The next defense witness listed was A.J. Simmons: “I asked him [Rabbeson] if he saw Indians in the swamp—understood him to say he did not know any of them—was not close enough to distinguish—he said nothing of his acquaintance with Leschi at that time or any other time.”<sup>106</sup>

Simmons' testimony was followed by that of Dr. Tolmie. Tolmie testified of Leschi's friendship to all settlers. He also testified about Rabbeson's earlier testimony (presumably at Winyea's trial), particularly about the commotion in the swamp, Burns taking a gun from an Indian and speaking of killing him, and discussions about Leschi and a certain coat and felt hat. Tolmie's testimony was followed by Israel H. Wright's, a juror at Winyea's trial, who testified that Rabbeson "said he saw Leschi, and he had a scar on his forehead."<sup>107</sup> M.T. Simmons testified next, saying he understood Rabbeson to describe Leschi as having a scar on his face at Winyea's trial as well.

There was some mention of the cross-examination of all of these witnesses and although it may have raised some doubt as to their recollection, particularly with respect to an Indian with a scar, none of that brief material is specifically worth mentioning. A few other defense witnesses were mentioned, but most of their testimony related to Leschi's reputation.<sup>108</sup> The defense then rested.

#### XI. REBUTTAL AND CLOSING

The prosecution's rebuttal testimony began with a witness<sup>109</sup> who testified that he knew Leschi and had known of his being camped near the crime scene.<sup>110</sup> Apparently, part of Leschi's defense was that he would not have been in that location because that was the domain of other Indians and not an area that he frequented. The next six rebuttal witnesses testified that they also were at Winyea's trial and essentially made the point that Rabbeson had not described Leschi as having a scar. The prosecution then rested.

There is no summary of closing arguments and only a brief mention that the instructions were given orally and not made in writing. The article in the *Washington Republican* made substantial comment about the lack of special instructions (presumably the "at war" instruction).<sup>111</sup> It appeared to blame the lack of a request on "the new system of practice" that required

counsel to argue the law to the court when the court refuses to give the instructions sought.<sup>112</sup> As stated above, the jury found Leschi guilty and ordered that he suffer death.<sup>113</sup>

## XII. POST-TRIAL MOTIONS

Immediately following the guilty verdict in Leschi's second trial, counsel for Leschi moved the court for a new trial on several grounds. Perhaps the most intriguing ground for a new trial was based on newly discovered evidence. It surely deserves special mention here because it has elsewhere.<sup>114</sup> The affidavit supporting the motion is in the trial record reprinted in the newspaper. Leschi's attorney, William Wallace, claimed that:

This affiant can prove by A. V. Kautz that the distance from the place where the Indians were discovered in Connell's prairie, as stated by the witness on trial, to the swamp where the attack was made is greater by the trail mentioned in the testimony of said witness, than by the wagon road also mentioned by said witness; and that the road is better and can be travelled [sic] quicker than the trail.<sup>115</sup>

Ezra Meeker wrote of its significance as follows:

By examination of the rough map made by Lieutenant Kautz, afterwards General in the Union army, and here reproduced in all its crudeness, the reader will see the utter impossibility of Leschi being at the two places that Rabbeson testified he saw him. Lieutenant Kautz made a careful survey of the only possible routes the parties could traverse. By this it is shown that Leschi would have had to travel twice as far to intersect the road traveled by the express party and by a rough and difficult trail, while the party would have the direct, open wagon road to make the distance of 68 chains, and by the trail Leschi would have had to travel 104 ½ chains.<sup>116</sup>

What is intriguing about the above analysis is that the map appears to be the only piece of physical evidence offered throughout the proceedings.

Moreover, its offer as “newly discovered” immediately after a verdict in which the jury only deliberated overnight, is suspect. There are several possible explanations for this. For example, if they had such evidence, Leschi’s lawyers may have saved this evidence for just such a motion. On the other hand, Kautz may have been making the measurements while the trial was taking place, and only after he returned could the results be compared with Rabbeson’s testimony. Kautz’s diary, however, only adds to the confusion.

Kautz wrote of surveying the scene from December 28-30, 1856, over nine months later.<sup>117</sup> Unfortunately, the diary does not begin until June of 1857,<sup>118</sup> so there is no evidence of what he was doing during the time of the trial. Perhaps it was a cruder analysis of the scene than the one he would do later. Regardless, the motion was denied on all grounds. It seems probable that Kautz was prepared to conduct the survey if the motion for a new trial was granted, but since it was immediately denied, he put it off until a later proceeding (the pardon).

Following denial of the motion for a new trial, defense counsel then moved that judgment be arrested based on seven different grounds, all essentially attacking the propriety of the indictment and the location of the second trial. The motion that judgment be arrested was “overruled” and Leschi’s counsel then made their exceptions. The court signed and sealed the bill of exceptions and the case proceeded to the supreme court for review.<sup>119</sup>

### XIII. SUPREME COURT REVIEW

Leschi’s case was heard by the Territorial Supreme Court on December 16, 1857.<sup>120</sup> The opinion of the court was *rendered* on December 17, 1857—just one day after counsels’ arguments.<sup>121</sup> Apart from the legal arguments within its text, the opinion itself raises two major issues. The first is whether it was written prior to the case’s argument. The second is its

focus on Indians and the Indian wars rather than the isolated murder for which the defendant was charged.

First, the critical Ezra Meeker claimed that the opinion was written in advance of the hearing,<sup>122</sup> and there was physical evidence that supports the claim. The opinion is substantial in size, consisting of nearly 7,000 words.<sup>123</sup> The official opinion at the time was handwritten in a volume called “Supreme Court Opinions.”<sup>124</sup> That opinion is slightly different than a draft opinion which can be found in the file called “Supreme Court Records and Briefs.”<sup>125</sup> Strangely, the draft itself is almost correction free, suggesting that it was likely the result of prior drafts. Second, there is also internal evidence in the opinion to suggest prior preparation. In addition to word count, there are more than thirty citations to authority in the opinion. They range from constitutional provisions<sup>126</sup> and federal statutes<sup>127</sup> and cases<sup>128</sup> to state statutes<sup>129</sup> and cases. The latter are not merely Washington territorial statutes<sup>130</sup> but also New York statutes, Pennsylvania statutes, Virginia statutes,<sup>131</sup> and cases from a variety of states.<sup>132</sup> Although some of the authorities were introduced and argued by counsel,<sup>133</sup> Justice McFadden undoubtedly supplied many himself. In fact, there is a point in the opinion (on pages twenty-four and twenty-five) that discusses the statutes of other states. In the draft opinion, there is this sentence in the same hand as the remainder of the text: “I have not been able to find any other[.]” Each letter in those words has a single diagonal cross through it, but is quite legible. That sentence is followed in the draft with the sentence: “Other authorities might be brought in support of these but we think it unnecessary.” That sentence remains in the published opinion.<sup>134</sup> The justice, therefore, had not only written the opinion, but researched it as well. That amount of work could not possibly have been done in a single day. The *Pioneer and Democrat* described the opinion as “elaborate, able and well-digested.”<sup>135</sup> Elaborate it was, well-digested it was not—able falls somewhere in between.

A second concern with the supreme court's opinion is its focus on the question of Indians and the Indian war rather than on the individual defendant. The first two paragraphs read as follows:

The case comes before us, on a writ of error to the Second Judicial District. The prisoner has occupied a position of influence, as one of a band of Indians, who, in connection with other tribes, sacrificed the lives of so many of our citizens, in the war so cruelly waged against our people, on the waters of Puget Sound.

It speaks volumes for our people that, notwithstanding the spirit of indignation and revenge, so natural to the human heart, incited by the ruthless massacre of their families, that at the trial of the accused, deliberate impartiality has been manifested at every stage of the proceedings.<sup>136</sup>

Following his diatribe of "us" versus "them," McFadden's last sentence in the paragraph would be laughable if not so tragic. After listing the assignments of error, the opinion may betray its existence prior to argument in explaining the order of proceedings. The opinion claims to "examine the first error assigned, in connection with the second proposition discussed by the counsel for plaintiff in error, under the fourth error assigned . . ."<sup>137</sup> The opinion continues with a detailed analysis of several technicalities relating to the trial's location, the indictment, and jury empanelment and instructions.<sup>138</sup>

One assignment of error that is quickly dismissed is that the verdict was contrary to the evidence. McFadden summarily stated that the testimony of Rabbeson was "clear and positive." He then made an astonishing statement that Rabbeson was "fully sustained by the witness principally relied upon by the prisoner, *except that he did not see or recognize Leschi at the place where the shooting took place.*"<sup>139</sup> How Bradley's testimony that Leschi was not at the murder site sustained Rabbeson's testimony that Leschi was is difficult to rationalize. There was no question as to whether Moses was killed or who the members of the dispatch party were. All the testimony amounted to one question: Was Leschi present and if so, where? That being



said, McFadden properly states that fact finding is the province of the jury and concluded: “We are of the opinion that there is no such preponderance of evidence against this verdict as would warrant us in interfering.”<sup>140</sup> In the end, the supreme court decided against all of the defense arguments and affirmed the trial court’s conviction.

#### XIV. A PLEA FOR PARDON AND MACHINATIONS

By the end of Leschi’s judicial trail of tears, Isaac Stevens was no longer governor of the territory. He had been replaced by Fayette McMullen and it was Governor McMullen that Leschi’s counsel sought an executive pardon from. According to McMullen:

I did what probably no other Executive officer ever has done. I went to Steilacoom where the prisoner was confined and heard all their assignments in his favor (without any counsel appearing on the part of the territory) to the end that the pardoning power of the Executive, might be exercised in the prisoner’s behalf should sufficient cause be made to appear to warrant my so doing. But upon a careful investigation I found that I could not interfere without a gross violation of Justice, and I accordingly let the law take its course.<sup>141</sup>

Kautz’s diary entry shows a misplaced confidence on the part of Leschi’s supporters in the pardon and states, “there was no doubt but what he [Governor McMullen] will respite and Williams who is in the Governor’s confidence stated as much.”<sup>142</sup> Ultimately, those supporters blamed the turnaround on the citizens of Olympia.<sup>143</sup>

The date for execution set at the second trial was June 10, 1857.<sup>144</sup> Leschi’s appeal to the Territorial Supreme Court stayed execution until that court decided his case in December of 1857. The Territorial Supreme Court then set the execution date for January 22, 1858.<sup>145</sup> Like so many other events surrounding these proceedings, they took an extraordinary twist. The death warrant commanded the sheriff of Pierce County to, “on that day [the 22nd] between the hours of 10 o’clock in the forenoon and 2 o’clock in

the afternoon . . . you hang the said Leschi by the neck upon a gallows erected for that purpose until he be dead.”<sup>146</sup>

According to a report in the *Pioneer and Democrat*, on that morning the Pierce County Sheriff, George Williams, and his deputy were arrested under a warrant issued by United States Commissioner J.M. Bachelder.<sup>147</sup> Further, the sheriff and deputy remained in custody until after two o’clock when the warrant expired. The report continued with:

It is the fixed conviction of two truthful and reliable men, who witnessed this affair, that Williams remained under arrest willingly, and did not desire to be released. In consequence of this most extraordinary and unprecedented course of conduct, the Indian Leschi was not executed in obedience to the sentence of the law.<sup>148</sup>

The report then named Leschi’s lawyer, Frank Clark, as the instigator of the plot, having signed the affidavit that supported the arrest warrant. There was also a letter from Sheriff Williams in the supreme court records explaining his version of the event.<sup>149</sup>

The *Pioneer and Democrat* reacted with outrage. The Pierce County press responded with two issues of *Truth Teller* devoted to defending the actions of Pierce County and U.S. Army officials attacked in the *Pioneer and Democrat*. The court, in the meantime, issued a writ to the Pierce County sheriff demanding the delivery of Leschi to the court on February 4, 1858.

And yet, all of these events merely deferred what had become inevitable. On February 6, 1858, Leschi went before Judge Chenoweth one final time for resentencing. There was a chiding entry in the Second Judicial District’s official record that virtually blamed the incarcerated Indian for these actions as well.

For reasons which may not be understood by this Court the sentence pronounced by The Supreme Court in December last has not been carried into effect. You yet live and again appear at the bar for sentence. You have had the benefit of a trial by a jury of

twelve men who after hearing all the evidence and the arguments of counsel in your behalf say you are guilty.

Your case has been reviewed by the Supreme Court and no substantial error has been found. The executive clemency has been appealed to, which though not bound by the inflexible rules of lawyer[s,] finds no reason why you should not suffer the penalty of [the] law.

Whatever may be said of the probability or possibility of your innocence one thing is quite certain[,] you have had the benefit of all the favours of law that the most favoured of our own race have in trials for murder. Your case has had lengthy and deliberate consideration. You have had much time to prepare for death unlike those of our own race with whose murder you are charged. The law is not vindictive—punishment is instituted for the protection of society and for this purpose and at this late period are we called upon to review the orders of this court in your case. It is therefore considered by the Court that you be deemed and adjudged a murderer and that you be hanged by the neck until you are dead.<sup>150</sup>

With those harsh words, the judicial proceedings for Leschi ended. All that remained was for the sentence to be carried out.

#### XV. EXECUTION: LESCHI SPEAKS

It is ironic that Leschi, an orator among his people,<sup>151</sup> was silent throughout all the proceedings. In all the reports of proceedings, there is no mention of Leschi speaking in his own defense. In all likelihood, this is because he did not.<sup>152</sup> There remains a question as to why Leschi himself did not testify. Unfortunately, one can only speculate. Although territorial statutes deemed Indians incompetent to testify in many civil actions,<sup>153</sup> a specific statute allowed that “Indians shall be competent witnesses, in any prosecutions in which an Indian may be a defendant.”<sup>154</sup> Still, the only Indian ever mentioned as testifying is “Sluggo” (Sluggia) at the first trial.<sup>155</sup> It may be a statement of the value most jurors would have given to such

testimony. After all, by all accounts there were more than one-hundred Indians near the site of the murder. At a minimum, they could have testified to Leschi being present on the prairie. Yet with the exception of Sluggy, neither the prosecution or defense appears to have called an Indian to testify.

Leschi's inability to speak English and the inadequacy of the Chinook trading language for courtroom testimony might have been factors in why Leschi did not speak. It may also have been a tactical decision still common in criminal defense today. Reading Kautz's diary, Leschi's story may not have sat well with jurors. Kautz, a supporter of Leschi, said this of a private meeting with Leschi and his supporters:

We all were present to receive a voluntary statement from Leschi. The sum and substance of which was to exculpate [sic] himself and implicate others. He misstated and prevaricated very much. Knowing as much I do now about the war I have little difficulty in detecting the truth. He is coming down in my estimation very much. He is bringing his Indian nature to bear and while some petty jealousy leads him to expose some, he lets others more notorious go by.<sup>156</sup>

Regardless, Leschi did not speak publicly until his execution, and then and there he denied his guilt.

The execution of Leschi is written of in the February 26, 1858, issue of the *Pioneer and Democrat*.<sup>157</sup> Nonetheless, a full account of events is beyond the focus of this article. It is worthy of note, however, that the execution was carried out by the deputy sheriff of Thurston County rather than the sheriff of Pierce County.<sup>158</sup> As the newspaper phrased it: "All confidence as to the ability or *will* of the sheriff of the former county to do so, to whom had been entrusted its former execution, having been lost."<sup>159</sup> At the foot of the ladder, Leschi finally spoke:

The prisoner evincing no desire to speak or make any confession, his arms were secured behind him, when perceiving his life was drawing to a close, he bowed himself to the spectators, and for the

space of some ten or fifteen minutes engaged in fervent prayer—said (in the jargon of the country), that he “would soon meet his maker—that he had made his peace with God, and desired to live no longer—that he bore malice to none, save *one* man,” and upon him he invoked the vengeance of heaven.<sup>160</sup>

#### XVI. ANALYSIS: RABBESON’S RELIABILITY

Apart from the defendant himself, the central figure in Leschi’s trials was Antonio B. Rabbeson. In fact, the entire case against Leschi relied on Rabbeson’s testimony, and generally, with no contradictory testimony, it would be hard to question his credibility. There is, however, evidence that calls into question that credibility—his letter to the newspaper shortly after the ambush, and his testimony at prior trials.

Initially, Rabbeson’s letter to the *Pioneer and Democrat* immediately after Moses’ death calls his trial testimony into question.<sup>161</sup> Whether the defense knew of this letter is unknown, as there is no mention of it in the “Evidence and Proceedings” article.<sup>162</sup> Recall that in Rabbeson’s letter, he did, in fact, mention Leschi.<sup>163</sup> After encountering a group of Indians, his party continued riding on:

We then went to the place where we supposed they intended to camp . . . and while there, we saw and conversed awhile with their main chief *Leschi*. In the meanwhile, all the first Indians were gradually dispersed, but we did not know at that time where. We then mounted our horses again and proceeded on our route, about half a mile, to a deep muddy swamp. There we received a murderous fire—from these very same Indians, who had secreted themselves in ambush—from behind us. Col. A. Benton Moses received a ball . . .<sup>164</sup>

It would appear from the letter, then, that the only Indian who certainly was *not* secreted in the swamp was Leschi. The letter continued describing other skirmishes but never mentioned Leschi again, or Quiemuth at all for that matter. And even if Leschi had ridden to the site and gotten involved in latter activity, Moses (whose murder he was convicted of) had already been

shot. In Rabbeson's testimony at the second trial, by contrast, he stated that his party met a party of Indians, "none that I knew the names of at the time," after which he said, "Mr. Moses was 100 to 150 yards ahead of me when volley was fired in the swamp—I took one of the Indians who came out to be Quiemuth—the other, Leschi, prisoner at the bar—third did not know—Leschi was one that fired and fired towards me."<sup>165</sup> It is unimaginable that Rabbeson would not have mentioned in his letter that Leschi shot at him. Additionally, Rabbeson had another reason to change his story. Rabbeson had testified first in Winyea's trial, and that Indian was acquitted.<sup>166</sup> He testified again at Leschi's first trial, and there was no verdict.<sup>167</sup> One wonders whether he decided to make his testimony stick the third time by literally putting a smoking gun in Leschi's hand.

Rabbeson's testimony as recorded at the second trial is also confusing. It began with him saying that the group met a party of Indians that they conversed with. There were "several that I know personally—none that I knew the names of at the time." Then after describing the ambush, he appears to be asked again about earlier events. There he said that "in Connell's prairie we saw a party of Indians—among them Leschi." The entry reads: "Leschi was friendly—some three-quarters of a mile from the swamp—the wagon road is three-quarters of a mile and the trail three or four hundred yards—we traveled the road—it was a large party of Indians we met on the prairie—left Leschi on the Prairie."<sup>168</sup> Was his story simply that there were two different meetings with Indians on the prairie? One that Leschi was in, another that he was not? After all, Rabbeson claimed to know Leschi well, so he would have known him by name. Or was the prosecution merely remedying an earlier misstatement by their witness? In both lines of questioning, there was almost immediate testimony about three-quarters of a mile to the swamp, so there would have appeared to be only a single meeting. The cross-examination provides no enlightenment on that point.

Also remarkable was the identity of the witnesses who did not testify for the prosecution. None of the other members of the entourage testified, not even to place Leschi on the prairie at the time. The only other member of the entourage that testified was Andrew J. Bradley, who testified for Leschi.<sup>169</sup> Another member of the entourage who played a small role in later proceedings was Tidd. He went with Lieutenant Kautz to assist in the survey of the ambush site.<sup>170</sup> That evidence was also favorable to Leschi's defense.

Most conspicuously absent was Dr. Matthew Burns. According to the True Bill cover sheet, he had testified for the grand jury in Leschi's case. He was also listed in the 1860 census,<sup>171</sup> so he was still alive. He might otherwise have been unavailable, but that is unlikely since he apparently did not testify at either trial (never being mentioned by Meeker either). The most likely explanation for his absence is that his testimony would have been inconsistent with Rabbeson's. As Rabbeson explained on cross-examination at the second trial: "Dr. Burns said he was going to shoot Leschi—Burns called him by the name Leschi—I told him not—I don't know what Indian he calculated on shooting for Leschi."<sup>172</sup> If Burns had testified for the prosecution, it would have become apparent that one of the witnesses (if not both) was wrong in identifying Leschi at the site. Obviously, the prosecution thought Rabbeson the stronger witness. That defense counsel did not call Burns himself is a logical tactic. Burns was without question a hostile witness and is reputed to have been somewhat of a loose cannon.<sup>173</sup>

## XVII. ANALYSIS: THE "AT WAR" DEFENSE

The right to kill an enemy in war has been recognized for thousands of years.<sup>174</sup> Thus, a key question in Leschi's case should have been whether there was, in fact, a war being waged. The disappearance of the "at war" argument is a question worth discussion, as is the question of whether it would have succeeded had it been advanced.

The seminal work on the law of war at the time was that of Hugo Grotius.<sup>175</sup> On that question, Grotius stated:

In treating of the rights of war, the first point, that we have to consider, is, what is war, which is the subject of our inquiry, and what is the right, which we seek to establish. Cicero styled war a contention by force. But the practice has prevailed to indicate by that name, not an immediate action, but a state of affairs; so that war is the state of contending parties considered as such.<sup>176</sup>

Grotius' "state of affairs" would typically be a factual question, and the court in Leschi's first trial (according to Meeker) proceeded correctly. Meeker stated that it was the main topic of discussion by the jurors in the first trial. He stated, "[t]he judge had charged that if the deed was done as an act of war the prisoner could not be held answerable to the civil law."<sup>177</sup> He later added:

The judge, in his charge to the jury, had gone further. He not only told us if the deed of killing Moses was as an act of war the prisoner could not be held, but he also indicated to us what constituted a condition of war. I cannot, of course, pretend to quote his words, though the incident has been so often discussed, his meaning appears vivid in my mind almost as if his words had been spoken but yesterday. A declaration of war, he said, consisted of acts as well as words, and that in Indian warfare a formal declaration was never expected and that with civilized nations often omitted; that the fact of war between nations often preceded a formal declaration, and that acts of war in such cases shielded the person from individual responsibility, and that if we found, at the time Moses was killed, a state of war existed between our Government and the Indian tribes as such, then the prisoner could not be held; otherwise, even if proven only an accessory, we must bring in a verdict of guilty.<sup>178</sup>

Meeker then stated the arguments and counter-arguments—that the war began when troops were sent to forcibly carry Leschi away or that Leschi's band did not represent the tribe but instead were marauders and nothing more.<sup>179</sup> One might also argue that the war with the Indians began east of



the Cascades. This is probably the best argument since troops from Fort Steilacoom under Captain Maloney had been sent eastward to support the U.S. Army's effort near The Dalles.<sup>180</sup> Moses had been a member of a dispatch from those troops when he was killed. This argument may be even more compelling in Leschi's case because his mother was a Yakama.<sup>181</sup>

One of the many mysteries of Leschi's trials is the seeming disappearance of the "at war" argument. The "at war" defense was also not mentioned specifically in the supreme court's decision on appeal. It is possible that it was subsumed under arguments such as the verdict was contrary to the evidence. It might also have been deemed as waived since the special jury instruction was not requested. Even so, there is no mention of the defense in the supreme court's opinion. However, looking at the proceedings of the second trial, it would appear Leschi's lawyers were making a case to argue the war defense.

During the second trial, in the cross examination of Rabbeson, the defense attempted to establish a state of war. As reported:

A. Benton Moses, Miles, Tidd, Bradley, Bright, Burns were the six with me, seven altogether—Capt. Maloney is a U.S. officer—there was more than one company under his command—Capt. Hays was under his command—we left them on Naches on the other side—Tidd and Bradley were expressmen—the command was about to return—cannot say why—I belonged to Capt. Hays company.<sup>182</sup>

The obvious intent of this line of questioning was to establish that the seven men constituted a type of military convoy, and yet people like Meeker claimed that there was no "at war" jury instruction. This assertion was based on the newspaper report that said:

As no special instructions were asked for by counsel on either side, he [Lander] dwelt principally upon what Washington Territory was required to prove before the jury could convict; that under our statute the jury must believe the defendant was present aiding and abetting, assisting or encouraging the commission of the offense charged.<sup>183</sup>

The lack of special instructions might be partially explained by the report in the *Washington Republican* that mentioned a “new system of practice” with respect to jury instructions that may have made such a request difficult.<sup>184</sup>

However, before concluding that such an argument would have saved Leschi’s life, one should consider the supreme court’s (albeit later) decision in *Yelm Jim v. Washington Territory*.<sup>185</sup> A mere two years after Leschi’s trial, the exact argument was made before the court in that case. Yelm Jim was an Indian who had been convicted of first degree murder for the killing of a white man in March of 1856.<sup>186</sup> In dicta,<sup>187</sup> the court discussed the situation at some length—almost as though to answer any critics in Leschi’s case. Although Chief Justice Lander and Justice Chenoweth were no longer members of the court, Justice McFadden remained. William Wallace was one of the lawyers representing Yelm Jim.<sup>188</sup> The opinion in *Yelm Jim* was written by Justice William Strong and stated:

In regard to the instructions of the Court, and the refusal to give the instructions, asked for by the counsel for the defendant. This point has been much labored by the counsel, and the Court have listened with interest to their able arguments upon international law, concerning the mutual rights and obligations of belligerents, in a state of war, and also upon the relations sustained by Indians and Indian tribes, towards our government . . . .

. . . It is claimed that the Court should take judicial notice that at the time this murder was alleged to have been committed, the country was in a state of Indian war, and upon this account the defendant was entitled to the instructions asked. While we are not willing to express the opinion that Indian tribes, living within the bounds, and under the protection of an organized territorial government, have such a national character that they can, at their will, make war, and claim immunity for acts of indiscriminate and barbarous murder, on the plea of legal hostility, we are clearly of the opinion that the plea of an Indian war cannot avail to secure immunity for acts of treachery and murder committed by individual Indians, belonging to tribes not engaged in the war, living among the whites, and in a part of the country not involved

in hostility, any more than an alien enemy, living at the time of a war, in the interior of the hostile country could justify himself by a plea of legal war, for killing any unarmed citizen of the country, whom he might happen to meet.

While, therefore, as a part of the history of the country, we know that at or about the time this murder is alleged to have been committed, an Indian war was raging in some portions of the Territory, involving powerful tribes east of the Cascade mountains, we also know, that no tribe, *as a tribe*, west of the Cascades, was engaged in it, and that Thurston county, where this killing occurred, as charged in the indictment, was not what might be called war ground.<sup>189</sup>

Although the facts of Leschi's case were slightly different, the supreme court might well have held similarly in this case to overcome the defense. Perhaps even more telling is the *Pioneer and Democrat* report of Yelm Jim's trial. By 1859, Obadiah McFadden had become chief justice of the Territorial Supreme Court, but sitting as trial judge for the district court for the Second Judicial District he is quoted as follows:

Defendant's counsel requests the court to instruct you, that if at the time of the alledged [sic] killing of White, defendant, with his people, was engaged in a war with the whites, you must bring in a verdict of not guilty, even if you are satisfied he participated in said killing.

In answer to this, we say, that even if you believed that the killing in this case took place in what is commonly known a state of Indian war, or the party killed, and the parties killing, both being armed and rallying in the ranks of the different parties, it would be no defense. It would furnish no justification for the killing.<sup>190</sup>

These were the words of the judge who had the final say in Leschi's appeal. Therefore, one can conjecture that the decision in *Leschi* would have been the same even if the "at war" argument had been made.

### XVIII. A PROPOSED SOLUTION

This author agrees with those that petitioned the legislature that a pardon is not preferred in this case. A pardon is defined as an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.<sup>191</sup> A pardon is obviously not appropriate because the punishment (execution) has been inflicted. There can be no relief from that. But a pardon is also inappropriate on a more profound level. First, it is imperative that the remedy include a finding that the conviction of Leschi for murder was wrongful for any number of reasons. A pardon does not do so. Its definition includes guilt of the individual pardoned. Second, and possibly more important, a pardon is an act of grace by the executive, in this case the governor. It is a travesty of justice to have the office that many believe responsible for the mistreatment of Leschi to commit an “act of grace” posthumously in his behalf.

Whether Governor Stevens was directly responsible for any of the anomalies of Leschi’s travails, his attitude toward Leschi and Indians is stated in his messages to the state legislative assembly. In January of 1856, he states:

Let the blow be struck where it is deserved. . . nothing but death is a mete punishment for their perfidy—their lives only should pay the forfeit. . . . The tribes now at war must submit unconditionally to the justice, mercy, and leniency of our government. The guilty ones should suffer, and the remainder placed upon reservations, under the eye of the military.<sup>192</sup>

The following year, Governor Stevens stated, “One thing yet remains to establish the permanent peace of the Sound, . . . I refer to apprehending and seizing the Sound murderers.”<sup>193</sup> And further, “it is manifest that a peace cannot be considered as achieved, or the functions of the military exhausted, so long as the great leaders and instigators of the war are at large, especially

if such men are arraigned before tribunals of the territory on charges affecting their lives.”<sup>194</sup>

Although Stevens left the territory to serve as a territorial delegate before Leschi’s death, it was clearly his policy that was being carried out. Nobody was ever tried for instigating the Indian uprising. Ultimately, the “justice” the policy sought was accomplished by the murder of Quiemuth and the conviction and execution of Leschi on alternative grounds. One can hardly argue that it was not the character of the governor to achieve his goals by bypassing the safeguards of the judicial system. His declaration of martial law during the Indian uprising is notorious in the history of the region.<sup>195</sup>

But if pardon is wrong, then what should be done? Leschi’s reputation should be officially restored by the body that disparaged it: the judiciary. Unfortunately, there is currently no legal vehicle by which to do this, nor was there in the 1850s. However, the state legislature could create such a process. The legislature could enact a statute that would allow the heirs of a convicted criminal to challenge the conviction posthumously. Although in the context of this article, such a proposal seems specific or limited to one single individual, that is not so. Such legislation might be utilized in overturning more recent convictions, particularly because of the advancement of modern technology. With scientific breakthroughs and courtroom acceptance of its reliability, there are more and more convicted persons being found innocent of the crimes they were convicted of. The most prominent examples are those based on DNA evidence.<sup>196</sup> For the family of a person who was executed, or died in jail, or served the sentence and then died, at least some form of redemption will be available.

The specifics and effects of such legislation are beyond the scope of this article. Much of the procedure should be left to the judiciary to determine how best to implement this new form of petition. However, the following is a list of some major issues such a system would need to address: persons having standing to petition, minimum threshold requirements for consideration (e.g., newly discovered evidence), the forum for hearing,

standards for vacating conviction, appeal rights (if any), and consequences of vacating a conviction.

Although it might take a few years to get such a procedure created, Leschi might finally get his day in court. He has already waited 150 years.

#### XIX. CONCLUSION

The judicial proceedings in Leschi's case were rife with improprieties: a lawyer who went from prosecuting him to defending him, a key witness who was also foreman of his grand jury, a trial judge who had opposed him during war, missing witnesses, unmade legal arguments, and a territorial supreme court opinion written prior to argument. Today, any one of these improprieties might be grounds for reversal of a conviction. Perhaps not so in Leschi's time. Still, on top of procedural irregularities, there were also coincidences such as locating the district court in an obscure location that, although not technically improper, were certainly suspect. Though it is said that a defendant is entitled to a fair trial but not a perfect one, there are strong arguments to be made that Leschi's trials did not even constitute a fair trial.

That being said, one of the basic tenets of the Anglo-American legal system is that nobody is entitled to special treatment. At present, there is no remedy within the judicial system for Leschi. But there should be. Another legal maxim says that justice delayed is justice denied. However, that maxim should be limited to the living. Justice in the case of the long deceased Leschi is better found by creating a method within the system to clear not only his own name but also that of others wrongfully convicted. It can be his final legacy. The legislature should take steps to bring such a process into existence.

Finally, this author would make one final comment about Leschi, the man. The diary of his supporter, August Kautz, seems a useful source for such an evaluation. When Kautz spoke of Leschi's private statement about the death of Moses, he said that "[h]e misstated and prevaricated very much

. . . He is coming down in my estimation very much. . . ,” it reminds us that Leschi was human. He had trusted in a system that he did not understand, that used a foreign language, and that had sentenced him to be hanged. Why would he give any possible incriminating evidence about himself or anyone else after his experience with such a system? And yet Kautz believed he would and should have. Clearly in the minds of many, Leschi had become more than just a man. Not only was he thought of as superior to most men, he had become a symbol of his people. That transformation is always dangerous as shown by example throughout history: witness the martyrdom of people as different as Marie Antoinette and Martin Luther King. As Kautz observed: “Men seek the Leschi [sic] affair for a vehicle to work out their own private dislikes. The Leschi [sic] question becomes the wire by which many a machine, social and political is pulled in action.”<sup>197</sup> It is likely Leschi died entirely for that reason, and perhaps that alone is reason enough to vacate his conviction.

Finally, the story is not complete without stating that Leschi’s sacrifices were not in vain. Even while he was still alive and awaiting trial, the federal government modified the lands reserved for the Nisqually Indians and other tribes by Executive Order,<sup>198</sup> making them more habitable for Leschi’s people.

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<sup>1</sup> Reference Librarian and Adjunct Professor, Seattle University School of Law. B.A. Gonzaga University; J.D., M.L.I.S. University of Washington. The author gratefully acknowledges the people working at the various libraries, archives, and other research centers for their assistance. This article is a condensed version of a more detailed work available from the author.

<sup>2</sup> Words on the headstone of Leschi at Cushman Indian Cemetery in Puyallup, Washington. The first portion is on the front side of the stone. The latter are on the back side. In full, it reads: “JUDICIALLY MURDERED, FEBRUARY 19, 1858, OWING TO MISUNDERSTANDING OF TREATY OF 1854-55. SERVING HIS PEOPLE BY HIS DEATH. SACRIFICED TO A PRINCIPLE. A MARTYR TO LIBERTY, HONOR AND THE RIGHTS OF PEOPLE OF HIS NATIVE LAND. ERECTED BY THOSE HE DIED TO SERVE.”

<sup>3</sup> S.J. Mem’l 8054, 58th Leg., Reg. Sess. (Wash. 2004).

<sup>4</sup> The legislation “pray[s] that the Supreme Court of the State of Washington use its inherent power of providing justice to vacate the conviction of Chief Leschi and republish the record in his case . . .” *Id.*

<sup>5</sup> The legislation asserts that A. Benton Moses was killed in the Battle of Connell’s Prairie. *Id.* Although it took place near that area, the event known as the Battle of Connell’s Prairie took place on March 10, 1856 (several months later). *See, e.g.*, KENT D. RICHARDS, ISAAC I. STEVENS: YOUNG MAN IN A HURRY at 276 (1979). The legislation also claims that the “U.S. Army refused to execute Chief Leschi, who was regarded as a prisoner of war . . .” Wash. S.J. Mem’l 8054, *supra* note 3. The Army, in fact, was not charged with the execution of Leschi. It merely refused to turn over his body on the date of execution when the person named in the warrant did not appear on time to claim the body. *Execution of Leschi*, PIONEER AND DEMOCRAT, Feb. 26, 1858, at 1.

<sup>6</sup> *See* HistoryLink.org, Ezra Meeker—Biography, [http://www.historylink.org/essays/output.cfm?file\\_id=7737](http://www.historylink.org/essays/output.cfm?file_id=7737) (last visited November 4, 2006).

<sup>7</sup> The introduction to 1980 edition reads, “Meeker was criticized by some when he published this book in 1905. To his credit, he includes statements from those who disagreed with him. However, his deep emotions about the unfair treatment of the Indians by some whites, especially Governor Isaac Stevens, obviously had him steaming, even though he wrote this book fifty years after the occurrences he describes herein.” James R. Warren, *Introduction to EZRA MEEKER, THE TRAGEDY OF LESCHI* i-ii (The Historical Society of Seattle and King County 1980) (1905).

<sup>8</sup> *See* John Dodge, *Chief Leschi Gets Day in Court: 1858 Conviction of Nisqually Chief to be Reviewed*, THE OLYMPIAN, Nov. 28, 2004, at 1C. According to the article, the Chief Justice claimed “too many legal barriers exist for the state Supreme Court to simply overturn the conviction.” *Id.* At the meeting, there was an agreement that the chief justice would preside over the historical court that would consist of him and six other judges. *Id.*

<sup>9</sup> *See* Rob Carson, *Justice, 146 Years Later: ‘Historical Court’ Exonerates Nisqually Chief Leschi as Watchers Cheer*, THE NEWS TRIBUNE, Dec. 11, 2004, at A1; John Dodge, *Chief Leschi Exonerated for History Books: Specially Convened Court Rules Against 1857 Conviction*, THE OLYMPIAN, Dec. 11, 2004, at 1A. Reactions to the proceedings varied widely. *See* Thomas Shapley, Editorial, *Historical Revision Rights a Wrong*, SEATTLE POST-INTELLIGENCER, Dec. 19, 2004, at F2; Brian Venable, Letter to the Editor, *Where was Justice in ‘Kangaroo court’?*, THE NEWS TRIBUNE, Dec. 14, 2004, at B7.

<sup>10</sup> Dodge, *supra* note 8.

<sup>11</sup> *See, e.g.*, 3 & 4 CLINTON A. SNOWDEN, HISTORY OF WASHINGTON: THE RISE AND PROGRESS OF AN AMERICAN STATE (1909); I HERBERT HUNT, TACOMA: ITS HISTORY AND ITS BUILDERS—A HALF CENTURY OF ACTIVITY 54-65 (1916); W. P. BONNEY, HISTORY OF PIERCE COUNTY WASHINGTON 211-224 (1927); MURRAY MORGAN, PUGET’S SOUND: A NARRATIVE OF EARLY TACOMA AND THE SOUTHERN SOUND 76-138 (1979).



<sup>12</sup> See, e.g., George Gibbs, *Dictionary of the Nisqually (Nisqually) Indian Language – Western Washington*, in 1 CONTRIBUTION TO NORTH AMERICAN ETHNOLOGY, DEPT OF THE INTERIOR (1877).

<sup>13</sup> See J. W. POWELL, INTRODUCTION TO THE STUDY OF INDIAN LANGUAGES 1-3 (1880); JAMES G. SWAN, THE NORTHWEST COAST OR, THREE YEAR'S RESIDENCE IN WASHINGTON TERRITORY 306-308 (J. & J. Harper 1969) (1857).

<sup>14</sup> 31 HUBERT HOWE BANCROFT, *History of Washington, Idaho, and Montana 1845-1889*, in THE WORKS OF HUBERT HOWE BANCROFT 377 (1890).

<sup>15</sup> *Id.* (describing Washington territorial newspapers).

<sup>16</sup> See, e.g., E. T. Gunn, *Governor Stevens' War*, PUGET SOUND COURIER, Oct. 19, 1855, at 1; George B. Goudy, Editorial, *Gov. Stevens' War—Again*, PIONEER AND DEMOCRAT [sic], Nov. 16, 1855, at 2; *A New Man at the Mill—First Grist Ground*, PUGET SOUND COURIER, Nov. 23, 1855, at 2 (rebutting the PIONEER AND DEMOCRAT). The reference to a “new man at the mill” is to George B. Goudy who had become the editor in the absence of prior editor J. W. Wiley.

<sup>17</sup> The newspaper is available on microfilm but the issues filmed in 1951 by the Washington State Library (from the collection of the Oregon Historical Society) are missing those issues that cover the White River massacre and death of Moses, and all judicial proceedings pertaining to Leschi and possibly Winyea. This is especially disappointing when it comes to the first trial, which was held in Steilacoom.

<sup>18</sup> *Salutatory*, WASH. REPUBLICAN, Apr. 3, 1857, at 2.

<sup>19</sup> Another successor, the PUGET SOUND HERALD analyzed the two papers this way in its inaugural issue:

Perhaps it would not be amiss, here, to briefly review the history of the two journals previously published in Steilacoom. Some three years since, the material now used for publication of this paper was devoted to the issue of a Whig organ, styled the *Puget Sound Courier*; which, after a feeble existence of about a year, was compelled to suspend for want of patronage. During this time, however, the peace of the Territory was disturbed, and all its interests paralyzed by an Indian war, long to be remembered by the white inhabitants for its horrors, which was probably one of the leading causes of the failure of the *Courier*. About a year subsequent to the suspension of the above journal, (in April last, we believe,) another party paper, called the *Republican*, made its appearance. This latter was designed as a campaign paper only; but, had it not been such, the probability is that it never would have received a support sufficient for its continued existence, as the population did not at the time, nor does it now, warrant the publication here of a party organ of any denomination whatever. The fact that both the *Courier* and *Republican* were devoted to the interests of party, rather than to the interests of the Territory at large, we may take as the main cause of the failure of both those journals.

*Salutatory*, PUGET SOUND HERALD, Mar. 12, 1858, at 2.

<sup>20</sup> TRUTH TELLER, Feb. 3, 1858 and Feb. 25, 1858. (listing the editor as Ann Onymous and motto below the nameplate reading “Devoted to the Dissemination of Truth, and Suppression of Humbug”).

<sup>21</sup> The diary of August V. Kautz makes it clear that he was the primary author of the publication. NOTHING WORTHY OF NOTE TRANSPIRED TODAY: THE NORTHWEST JOURNALS OF AUGUST V. KAUTZ (Gary Fuller Reese ed., 1978) (1858). On December 28, 1857, he writes: “We have got all the items now running for the publication of a paper and as soon as we can get at it we will got to work.” *Id.* at 147. On February 1, 1858 he writes: “I have written three articles and will probably produce another.” *Id.* at 148. On February 4, 1858 he writes: “The paper is out . . .” *Id.* at 149. On February 14, 1858 he writes: “I have been trying to write something more for the 2<sup>nd</sup> edition of the Truth Teller but my ideas do not flow very readily.” *Id.* at 152. After Leschi’s execution, he writes: “I wrote another article on the homicide of yesterday.” *Id.* at 154.

<sup>22</sup> *See id.*

<sup>23</sup> Act to Establish the Territorial Government of Washington, ch. 90, 10 Stat. 172 (1853).

<sup>24</sup> *See Appointments for Washington Territory*, THE COLUMBIAN, May 14, 1853, at 2. *See also* RICHARDS, *supra* note 5, at 406 (citing to the actual appointment document in the National Archives at Record Group 69, Department of State Appointment Files, Pierce and Buchanan Administrations); *Washington Territory—Gov. Stevens*, THE COLUMBIAN, May 28, 1853, at 2 (giving a full contemporaneous report on the new governor).

<sup>25</sup> Oregon Donation Land Act of Sept. 27, 1850, ch. 76, 9 Stat. 496, *amended by* Act of July 17, 1854, ch. 84, 10 Stat. 305 (extending Washington Territory).

<sup>26</sup> *See Messages of the Governors of the Territory of Washington to the Legislative Assembly, 1854-1889*, 12 U. WASH. PUBL’NS IN THE SOC. SCI. 1, 7 (Charles M. Gates ed., 1940) [hereinafter *Messages of the Governors*].

<sup>27</sup> Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (Ratified Mar. 3, 1855; Proclaimed Apr. 10, 1855).

<sup>28</sup> The author intentionally uses the word “people” here rather than “tribe” to emphasize the character of relations prior to the ensuing conflict. Ethnographer George Gibbs noted: “The Indians occupying this basin . . . are usually mentioned as the Niskwalli nation. They are divided into a vast number of small bands, having little political connection, but gathered into families, allied by similarity of dialect and by relationship.” GEORGE GIBBS, *Tribes of Western Washington and Northwestern Oregon*, in 1 DEPT. OF THE INTERIOR, CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY 169 (1877).

<sup>29</sup> *See, e.g.*, MEEKER, *supra* note 7, at 36-47; 3 CLINTON A. SNOWDEN, HISTORY OF WASHINGTON: THE RISE AND PROGRESS OF AN AMERICAN STATE 275 (1909) (stating, “It has been claimed that he [Leschi] did not sign the treaty, though there can be no doubt that he did so.”).

<sup>30</sup> *See War—The Yakima Indians, &c.*, PIONEER AND DEMOCRAT, Oct. 19, 1855, at 2; William N. Bischoff, S.J., *Introduction* to WE WERE NOT SUMMER SOLDIERS: THE INDIAN WAR DIARY OF PLYMPTON J. KELLY 1855-1856 (1976).

<sup>31</sup> *Evidence and Proceedings in the Case of Leschi*, PIONEER AND DEMOCRAT, Mar. 27, 1857, at 2 (reporting testimony of Charles H. Mason in the trial of Leschi).

<sup>32</sup> *Id.*

<sup>33</sup> According to William Tolmie's letter to Governor Fayette McMullan, Leschi was notified that a party of whites were coming to cease Quiemuth and himself and fled in the night, leaving their families behind. In fact, Tolmie says, the families were concealed in nearby woods when the posse arrived. Tolmie also relays that there was a widespread fear among the Indians that the buying of their lands by treaty "was a prelude to shipping them off in steamers to an imaginary dark and sunless country." Letter from William Tolmie to Fayette McMillan [sic], Governor, (Jan. 12, 1858) (on file in Special Collections at the University of Washington Library under William Tolmie papers, Accession Number 4577-1, Box 2, Folder 3).

<sup>34</sup> See *War—The Yakima Indians, &c.*, *supra* note 30.

<sup>35</sup> *Puget Sound News—Capture of Leschi, the War Chief*, THE OREGONIAN, Nov. 22, 1856, at 2.

<sup>36</sup> *Leschi, Quiemuth, etc.*, PIONEER AND DEMOCRAT, Nov. 28, 1856, at 2.

<sup>37</sup> *Id.* Even though Joseph Benton was generally known to have been Quiemuth's killer, no one was ever tried for the murder.

A coroner's inquest was held in the morning, and a verdict was found that Quiemuth had been killed by some person unknown to the jury. GOV. STEVENS lodged a complaint against Mr. Benton, and he was examined the same day before JAMES C. HEAD, esq., but sufficient evidence was not elicited to warrant that magistrate in binding him over for trial, and he was accordingly discharged.

*Id.* Joseph Benton, the paper says, was a son-in-law of the late Lt. James McAllister and was in the room at the time. It has been claimed that Benton was generally known by residents to have been the killer. The newspaper concludes by showing its political stripes. It practically justifies the murder and makes certain that nobody can place any blame on its beloved governor.

Whether Mr. BENTON killed Quiemuth or not we are not prepared to say, neither is it now materials to know, as he has been discharged for want of evidence to establish his connection with the affair; but it is nevertheless a melancholy fact that those who have lost near and dear relatives by assassination or treachery on the part of the Indians, seem determined to enforce the old Levitical law wherever and whenever an opportunity presents itself for so doing. GOV. STEVENS, we understand, is exceedingly mortified at the occurrence, but the foregoing statements of facts, in which we have attempted to conceal nothing will serve to show that he can in no wise be regarded as censurable for anything connected with the unhappy affair.

*Id.* The *Oregonian* noted the affair as well although it misstated the son-in-law's name: "The person who shot and stabbed Quiemeth [sic] is supposed to be a son-in-law of McAllister, by the name of Jas. Burton." *Puget Sound News—Quiemeth, a Nisqually Chief, Killed at Olympia*, THE OREGONIAN, Nov. 29, 1856, at 2.

<sup>38</sup> *Trial and Conviction of Leschi*, PIONEER AND DEMOCRAT, March 20, 1857, at 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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

<sup>42</sup> *Report of the Committee Appointed to Investigate the Proceedings at Steilacoom on Friday, January 22d, 1858*, PIONEER AND DEMOCRAT, Jan. 29, 1858, at 2-5; *Execution of Leschi*, *supra* note 5.

<sup>43</sup> See CECELIA SVINTH CARPENTER, FORT NISQUALLY: A DOCUMENTED HISTORY OF INDIAN AND BRITISH INTERACTION 35 (1986).

<sup>44</sup> “Boston” was the word that denoted Americans and “King George men” as Englishmen.

<sup>45</sup> See *Messages of the Governors*, *supra* note 26, at 7. “I also call your attention to the rights of the Hudson’s Bay Company and the Puget Sound Agricultural Company, and the position they occupy in the Territory. They have certain rights granted to them by the treaty of 1846, to the security of which the faith of the united States is pledged. It certainly cannot conduce to the welfare of this Territory to have situated in our midst a foreign corporation, usurping a large proportion of the trade, and annually carrying off great amounts of specie from the country.” *Id.*

<sup>46</sup> The actual proceedings are much more convoluted than those summarized here and ultimately involve many more parties who were acting at the behest of Governor Stevens, Chief Justice Lander, and other officials. See *Territory of Washington v. Leshi* [sic], 1 F. Cas. 113-22 (2nd Jud. Dist., Terr. Wash.) (1857) (on file at the Washington State Archives, file AR3-A-67).

<sup>47</sup> See *Report*, *supra* note 42.

<sup>48</sup> “I attended the indignation meeting at this place not for the purpose of participating in the proceedings of the meetings; but for the purpose of satisfying the people of this County that the majority of Citizens of Pierce County were not justly censurable for the failure in the execution of the Laws in the Leschi case.” Letter from Territorial Governor Fayette McMullen to John Floyd, Secretary of War (April 22, 1858) at 3 (on file at the Washington State Archives in McMullen’s Correspondence, Leschi Incident, Box 1B-1-1). See also *Report*, *supra* note 42, at 2-3. Reporting also included resolutions expressing the sense of the citizens on the subject and a mass meeting held by citizens of Pierce County denouncing various officials and other parties associated with the incident. *Id.*

<sup>49</sup> He says of a December 21, 1858 trip from Steilacoom to Olympia: “The Dr. [Tolmie] and I sounded various people by the way, and we found them not all inveterate against him [Leschi] and most of the people indifferent. I conversed with others in Olympia and I found a strong feeling against him.” KAUTZ, *supra* note 21, at 132 (entry made after the second trial and appeal).

<sup>50</sup> *Letter from Mr. Rabbeson*, PIONEER AND DEMOCRAT, Nov. 9, 1855, at 2.

<sup>51</sup> *Id.* (emphasis in original).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> “We learn that there are a number of other indictments found against him [Leschi]—one by the grand jury of King county, for having been engaged in the massacre of the

families on White river last fall or winter.” PIONEER AND DEMOCRAT, Nov. 28, 1856, at 2. There is, in fact, one more affidavit signed by Prosecutor J. S. Smith in the correspondence files of Governor Stevens. There is also in the same folder a subpoena commanding witnesses to appear at a trial with the same named defendants to be held on the fourth Monday of April, 1857. This one is from King County and it states that “on the fourth Monday in October” 1856, a grand jury found Leschi “did kill and murder” Harvey Jones on October 30, 1855. Jones was one of those killed at White River. Ten other Indians are also named but the affidavit states that it was Leschi who shot Jones in the heart and killed him. The cover sheet to the “true bill” lists H. L. Yesler as Foreman of the grand jury. The witnesses listed are: Mike an Indian, John Garrison, Old-Man-Snap(?) (the subpoena is no clearer), and Andrew Burge. Some of the handwritten phonetically spelled names are difficult to decipher. Most notable among the defendants are Leschi’s brother Quiemuth, his nephew “Slug-gy” (who ultimately turned Leschi into territorial authorities), Nelson, and Kitsap. General Files of Governor Isaac I. Stevens (on file at the State Archives). According to Snowden, Nelson and Kitsap were tried and acquitted, although he does not elaborate what the charge was. 3 SNOWDEN, *supra* note 11, at 13.

<sup>55</sup> See *Leschi, Quiemuth, etc.*, *supra* note 36.

<sup>56</sup> On file in the Supreme Court Records and Briefs at the Washington State Archives.

<sup>57</sup> An Act Relative to Grand and Petit Jurors, 1855 Wash. Terr. Laws § 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Territory of Washington v. Leshi [sic], 1 F. Cas. 113, 100 (2nd Jud. Dist., Terr. Wash.) (1857) (on file at the Washington State Archives, file AR3-A-67).

<sup>61</sup> NAT’L ARCHIVES AND RECORDS SVC., 1 POPULATION SCHEDULES OF THE 8TH CENSUS OF THE UNITED STATES 1860, Roll 1398 (listing Rabbeson on the page numbered 52 in Pierce County).

<sup>62</sup> 1855 Wash. Terr. Laws § 1.

<sup>63</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>64</sup> *Puget Sound News—Capture of Leschi, the War Chief*, THE OREGONIAN, Nov. 22, 1856, at 2. Although not mentioned, the other count is probably with respect to Miles.

<sup>65</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>66</sup> *Id.* Two of them were defense witnesses. Israel H. Wright, was a juror for that trial and testified that Rabbeson described Leschi as having a scar on his forehead, which apparently, he did not have. Simmons testified that he was present at the trial and understood Rabbeson to describe Leschi as having a scar on his face. The prosecution in the second Leschi trial introduced six rebuttal witnesses that testified that Rabbeson did not describe Leschi at the trial—the newspaper reports one of the witnesses as saying he heard “testimony as to Indian with scar.” That witness is named as “Porter.” The others are listed as “John Walker,” “A. C. Lowell,” “George W. Corliss,” “Andrew Byrd,” and “W. D. V——.” *Id.*

<sup>67</sup> MEEKER, *supra* note 7, at 214.

<sup>68</sup> *Leschi, Quiemuth, etc.*, *supra* note 36.

<sup>69</sup> *Trial of Leschi*, WASHINGTON REPUBLICAN, Apr. 10, 1857. The article was obviously written several months after the first trial and is actually an article about the

second trial. Still, the *Washington Republican* was published in Steilacoom (the site of the first trial) so presumably, the editors and readers would have known if the *Pioneer and Democrat*'s coverage was in error. This issue of the *Washington Republican* is not in the microfilm available from many libraries. The author found a copy on a microfilm consisting of various papers of Elwood Evans, provided by Yale University Library Photographic Services (1978) (on file at the Washington State Historical Society Research Center).

<sup>70</sup> *Evidence and Proceedings*, *supra* note 31, at 5.

<sup>71</sup> *Leschi, Quiemuth, etc.*, *supra* note 36, at 2 (emphasis in original).

<sup>72</sup> *Id.*

<sup>73</sup> MEEKER, *supra* note 7, at 216. Meeker says he was one of two such jurors. *But see Leschi, Quiemuth, etc.*, *supra* note 36 (asserting the final division as 9-3).

<sup>74</sup> *Id.* at 214. "A painful duty devolves on me here to record the now unquestioned fact of perjury of the chief, and, in fact, the only witness, A. B. Rabbeson." *Id.*

<sup>75</sup> *Id.* at 217.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 218.

<sup>78</sup> *Leschi, Quiemuth, etc.*, *supra* note 36. (agreeing with Territorial Governor McMullen's April 22, 1858 letter to Secretary of War, John Floyd, *supra* note 48).

<sup>79</sup> *Id.*

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

<sup>81</sup> "That the plaintiff in error was entitled to a trial in the district in which the crime was committed, which district should have been previously ascertained by law." *Leschi v. Washington Territory*, 1 Wash. Terr. 13, 15 (1857) (handwritten version on file at the Washington State Archives, Supreme Court Opinions).

<sup>82</sup> "... the Judges of the Supreme Court in each of the Territories, or a majority of them, shall, when assembled at their respective seats of government, fix and appoint the several times and places of holding the several Courts in their respective districts, and limit the duration of the term thereof: *Provided*, That the said Courts shall not be held at more than three places in any one Territory." Act of August 16, 1856, ch. 124, §5, 11 Stat. 49.

<sup>83</sup> *See Leschi, Quiemuth, etc.*, *supra* note 36. "At this time, the regular term of the U. S. district court for Pierce county had been brought to a close; but as judge CHENOWETH had not then left for his home in Island count, governor STEVENS immediately sent an express to him at Steilacoom, informing him of the capture of Leschi . . ." *Id.*

<sup>84</sup> The redistricting was almost certainly a response to the Supreme Court's site selection for the Third Judicial District. The Penn's Cove site chosen by the Supreme Court Justices was so inconvenient that King County residents would prefer to travel farther by road to Olympia than by boat to Penn's Cove. One can only surmise whether members of the Legislature were acting with Leschi's trial in mind during the session. There is no question, however, that issues surrounding the Indian war were on the minds of legislators. There are several pages of the journals devoted to Governor Stevens' declaration of martial law. *See, e.g.*, WASH. TERR. H.R., TERR. J. 1854-1889 at 344 (on file at the Washington State Archives, Record Group AR12-11-5). By the end of the Washington Territory's fourth legislative session, Leschi's retrial was firmly set for Olympia in Thurston County. *Id.*

<sup>85</sup> *Id.* at 334.

<sup>86</sup> WASH. TERR. LEGIS. COUNCIL, COUNCIL J. 1854-57 at 288 (on file at the Washington State Archives, Record Group AR11-11-1).

<sup>87</sup> *Second Judicial District*, PIONEER AND DEMOCRAT, Mar. 13, 1857, at 2.

<sup>88</sup> Governor Isaac I. Stevens' message to the Fourth Annual Session of the Legislative Assembly, December 3, 1856:

The result was the organization of a volunteer company at Seattle, by the election of the Chief Justice of the Territory as its commander, and the sending a force of Indian auxiliaries under Pat Kanim against the hostiles known to be on Green River under Leschi. The Indian Agent of the Sound district accompanied the force up the Snoho-mish river, and the result was one skirmish, resulting in the seizing and hanging two of the hostiles, and a severe battle, inflicting a loss of five killed and six wounded, upon the enemy.

*Messages of the Governors*, *supra* note 26, at 31.

<sup>89</sup> Arthur Beardsley discussed the phenomenon in his unpublished manuscript. After asserting that during the Territorial Supreme Court's first term, Justice Lander had, in fact, reversed himself on appeal, Beardsley says: "It is apparent then, that the judges did sit in judgment over their own decisions and did not hesitate to reverse themselves, if they felt convinced their former decisions were unsound. Such a practice was probably unfair to the judge, but it remained in force until 1884, when Congress provided that no judge could sit in the appeal of any case in which he had been interested in the hearing in the lower court, 23 Stat. 101." Arthur Beardsley, *The Bench and Bar of Washington: The First Fifty Years 1845-1900*, at 190 (manuscript drafted between 1940-1944) (on file at the University of Washington School of Law Gallagher Library, Special Collections, Rare Folio).

<sup>90</sup> *Trial and Conviction of Leschi*, PIONEER AND DEMOCRAT, Mar. 20, 1857 at 2.

<sup>91</sup> *Territory of Washington v. Leschi* [sic], 1 F. Cas. 113, 181 (2nd Jud. Dist., Terr. Wash.) (1857) (on file at the Washington State Archives, file AR3-A-67) (listing only Kendall's name).

<sup>92</sup> *Trial and Conviction of Leschi*, *supra* note 90.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Evidence and Proceedings in the Case of Leschi*, *supra* note 31.

<sup>97</sup> *Trial of Leschi*, *supra* note 69.

<sup>98</sup> *Evidence and Proceedings in the Case of Leschi*, *supra* note 31.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* Governor Stevens was negotiating Indian treaties throughout Washington, Idaho and Montana during this time.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> John Swann, for instance, testified that Leschi came to him “on reserve opposite Steilacoom . . . for the purpose of having a talk about making peace . . . the tenor of his conversation while there was to make peace with the whites—said he had got tired of the war . . .” *Id.*

<sup>109</sup> James K. Hurd. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Trial of Leschi*, *supra* note 69.

<sup>112</sup> *Id.*

<sup>113</sup> “We the jury, find the defendant guilty as charged in the indictment, and that he suffer death.” *Trial of Leschi*, *supra* note 69. For the record, the actual verdict has crossed out language and it appears the original language was: “We the jury finds [sic] the defendant [sic] Guilty of murder in the first degree punishable with death.” General Files of Governor Isaac I. Stevens (on file at the State Archives).

<sup>114</sup> See MEEKER, *supra* note 7, at 219-20.

<sup>115</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>116</sup> MEEKER, *supra* note 7, at 215. Meeker further elaborates at 219-20 and the map is reproduced between those pages. Meeker says that the map was not ready until the case had gone to the supreme court. Although perhaps the map itself was not made, the motion to consider Kautz’s information in some form was certainly made before the case moved to the supreme court.

<sup>117</sup> On December 28<sup>th</sup>, he writes: “I made all preparations to go to Connell’s prairie tomorrow to measure the ground where Rabesson [sic] says he saw Leshi [sic] at the time Moses and Miles were killed.” NOTHING WORTHY OF NOTE TRANSPIRED TODAY, *supra* note 21 at 135. On the 29<sup>th</sup> he writes: “Notwithstanding the rain I set out very early this morning with Tidd. We reached Connell’s prairie about two o’ clock. Dr. Tolmie arrived soon after and we made most of the measurements.” *Id.* at 135-36. On the 30<sup>th</sup>, he writes: “We measured the distance to the swamp which is all that is required and we returned hom [sic].” *Id.* at 136.

<sup>118</sup> *Id.* at 36.

<sup>119</sup> *Territory of Washington v. Leshi* [sic], 1 F. Cas. 113-22 (2nd Jud. Dist., Terr. Wash.) (1857) (on file at the Washington State Archives, file AR3-A-67) (noting motions and the outcome).

<sup>120</sup> *Supreme Court of Washington Territory*, PIONEER AND DEMOCRAT, Jan. 8, 1858 at 1.

<sup>121</sup> *Id.* at 149.

<sup>122</sup> MEEKER, *supra* note 7, at 221.

<sup>123</sup> See *Leschi v. Washington Territory*, 1 Wash. Terr. 13, 13-30 (1857) (handwritten version on file at the Washington State Archives, Supreme Court Opinions).

<sup>124</sup> *Id.*

<sup>125</sup> See *Supreme Court Records and Briefs*, *supra* note 56. The only changes from the draft appear to be substituting the word “prisoner” for “defendant” in several places. At first blush, this might seem prejudicial but a perusal of other opinions shows that



“prisoner” was generally used regardless of the judge or the race of the defendant. *See e.g., Wassissimi v. Washington Territory*, 1 Wash. Terr. 6 (1854) (noting Indian defendant in Chief Justice Lander’s opinion); *Regan v. Washington Territory*, 1 Wash. Terr. 31 (1857) (noting non-Indian defendant in Justice Chenoweth’s opinion).

<sup>126</sup> *Leschi*, 1 Wash. Terr. at 20 (citing U.S. CONST. art. VI).

<sup>127</sup> *Id.* at 16 (citing 9 U. S. Stats. at Large 49).

<sup>128</sup> *Id.* at 17 (citing *Matthers v. Zane*, 20 U.S. 164).

<sup>129</sup> *Id.* at 24-25 (mentioning New York, Pennsylvania and Virginia statutes).

<sup>130</sup> *Id.* at 16 (citing Act of 1854, Laws Wash. Terr. § 6, at 448).

<sup>131</sup> *Id.* at 24-25 (citing Laws Wash. Terr. §122 at 120 (1854)).

<sup>132</sup> *Id.* at 20, 22 (citing *State v. Keys*, 8 Vermont 57 and *State v. Jones*, 2 Yerg. Ten. Rep. 22).

<sup>133</sup> *See Id.* at 23 (stating, “In the case of *People vs. Enoch*, 13 Wendell Rep., 173, a case most elaborately argued by counsel . . .”).

<sup>134</sup> *Id.* at 25.

<sup>135</sup> *Supreme Court of Washington Territory*, *supra* note 120.

<sup>136</sup> *Leschi v. Washington Territory*, 1 Wash. Terr. 13, 13-14 (1857) (handwritten version on file at the Washington State Archives, Supreme Court Opinions).

<sup>137</sup> *Id.* at 15.

<sup>138</sup> The author’s issue-by-issue analysis of the Supreme Court decision is on file with the author.

<sup>139</sup> *Leschi*, 1 Wash. Terr. at 28 (emphasis added).

<sup>140</sup> *Id.* at 29.

<sup>141</sup> Letter from Territorial Governor Fayette McMullin, *supra* note 48, at 2-3.

<sup>142</sup> NOTHING WORTHY OF NOTE TRANSPIRED TODAY, *supra* note 21 at 143.

<sup>143</sup> On January 21<sup>st</sup>, Kautz writes:

We were all much put out by the news today that the Governor has refused the Executive clemency. It seems that when the Governor reached Olympia he found a remonstrance awaiting him with about seven hundred signatures and some threats that the people would burn the Gov. in effigy if Leshi [sic] was respited decided [sic] him. There were no new features in the case simply a heavy pressure of public opinion put the Governor down. He sent for Mason [Territorial Secretary Charles Mason who had been acting Governor at the beginning of the war] and obtained his written opinion which, of course, was adverse to Leshi [sic] except to prop up his decision on the side of seven hundred voters.

*Id.* There are at least five such petitions. The number of signatures on each petition varies. *See Citizens of Thurson County against the pardoning of Leschi*, Governor Papers, Files of the Fayette McMullin Administration (on file at the Washington State Archives, in the Leschi Pardon file, box 1B-1-1). Note to future researchers: 1 GUIDE TO THE GOVERNORS’ PAPERS, TERRITORIAL GOVERNORS 1853-1889 lists the box as 2B-1-1 but that is incorrect.

<sup>144</sup> Territory of Washington v. Leschi [sic], 1 F. Cas. 113, 189 (2nd Jud. Dist., Terr. Wash.) (1857) (on file at the Washington State Archives, file AR3-A-67).

<sup>145</sup> There is an unsigned page in the Supreme Court Records that appears to be the sentence that was read. Leschi was almost certainly present at the proceedings because the sentence actually mentions an interpreter: "I shall do this in as brief terms as possible being conscious of the difficulty of addressing you through the medium of an interpreter only." Leschi v. Territory of Washington, Sentence of Prisoner, (2nd Jud. Dist., Terr. Wash.) Dec., 18, 1857 (handwritten Supreme Court Records and Briefs on file at Wash. State Archives). There is also in the file, a writ of execution to the Sheriff of Pierce County with both Justices McFadden and Chenoweth as signators. *Id.*

<sup>146</sup> Death Warrant for Leschi an Indian, (2nd Jud. Dist., Terr. Wash.) Jan., 28, 1858 (handwritten Supreme Court Records and Briefs on file at Wash. State Archives).

<sup>147</sup> *Report, supra* note 42. The charge was selling intoxicating liquors to an Indian.

<sup>148</sup> *Id.*

<sup>149</sup> See Death Warrant for Leschi an Indian, *supra* note 146. It reads, "Owing to the time consumed in the proceedings before the U.S. Commissioner the time mentioned in this warrant for execution to wit: between the hours of "10 AM and 2 PM" had expired consequently I was prevented from carrying into effect the order of the court." *Id.*

<sup>150</sup> Territory of Washington v. Leschi [sic], 1 F. Cas. 113, 250-51 (2nd Jud. Dist., Terr. Wash.) (1857) (handwritten Supreme Court Records and Briefs on file at the Wash. State Archives, file AR3-A-67) (It is not clear whether the underlined language is the result of the judge's markings or later markings).

<sup>151</sup> According to Cecilia Svinth Carpenter: "As he grew to adulthood he became known as a man of great intelligence possessing superb oratorical abilities." CARPENTER, *supra* note 43, at 7. Carpenter is an enrolled member of the Nisqually Indian Tribe and Nisqually Indian Historian. *Id.* at 4, 1.

<sup>152</sup> *But see* HUNT, *supra* note 11, at 58-59. Hunt's history quotes George H. Himes of the Oregon Historical Society who claimed Leschi spoke at his sentencing:

I do not see that there is any use of saying anything. My attorney has said all he could for me . . . I do not know anything about your laws. I have supposed that the killing of armed men in war time was not murder; if it was, the soldiers who killed Indians are guilty of murder, too.

. . .

I went to war because I believed that the Indians had been wronged by the white men, and did everything in my power to beat the Boston soldiers but for lack of numbers, supplies and ammunition I have failed. I deny that I had any part in the killing of Miles and Moses. I heard that a company of soldiers were coming out of Steilacoom and determined to lay in ambush for them; but did not expect to catch anyone coming from the other way. I did not see Miles or Moses before or after they were dead, but was told by the Indians that they had been killed. As God sees me this is the truth.

*Id.* Hunt's account continues:

Leschi made the sign of the cross and said in his own Nisqually tongue: “Ta-te mono, Ta-te lem-mas, Ta-te ha-le-hach, tu-ul-li-as-sist-ah.” This, interpreted, meant: “This is the Father, this is the Son, this is the Holy Ghost: these are all one, and the same. Amen.”

*Id.* The eloquent language used by Himes and quoted by Hunt is suspicious in itself. However, when the text says Leschi then spoke in his own Nisqually language, one must ask in what language did he make the other speech? After all, he did not speak English and the Chinook jargon was not capable of such a speech. This author’s conclusion is that Himes’ “discovery” is an embellishment.

<sup>153</sup> “The following persons shall not be competent to testify . . . Indians, or persons having more than one half Indian blood, in an action or proceeding to which a white person is a party.” Act to Regulate the Practice and Proceedings in Civil Actions, 1854 Wash. Terr. Laws §293.

<sup>154</sup> Act to Regulate the Practice and Pleadings in Prosecutions for Crimes, 1854 Wash. Terr. Laws §95.

<sup>155</sup> *Leschi, Quiemuth, etc.*, *supra* note 36.

<sup>156</sup> NOTHING WORTHY OF NOTE TRANSPIRED TODAY, *supra* note 21, at 151.

<sup>157</sup> *Execution of Leschi*, *supra* note 5.

<sup>158</sup> According to the *Pioneer and Democrat*, Lieutenant Colonel Silas Casey who had custody of Leschi had in his possession a “plea” that had been handed him from Leschi’s attorney Frank Clark. The plea argued that the jurisdiction of the sheriff was co-extensive with the boundaries of the county and that as long as Pierce county had a sheriff, “no other officer unless through deputies appointed by himself could legally perform his duties or exercise his functions.” *Id.* Colonel Casey apparently commented on the argument but decided that it was his duty to submit to decrees of the courts rather than judge the merits of matters of law. Since the Thurston County Deputy had a death warrant issued by the District Court, Casey believed he was bound by duty to enforce it.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (emphasis in original). See also C. T. Conover, *Hanging of Leschi*, SEATTLE STAR, May 22, 1946, at 4 (citing similar account of Leschi’s final words found in the French book MY SIX YEARS IN AMERICA written by Abbe Rossi, who administered last rights).

<sup>161</sup> *Letter from Mr. Rabbeson*, *supra* note 50.

<sup>162</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>163</sup> *Letter from Mr. Rabbeson*, *supra* note 50.

<sup>164</sup> *Id.*

<sup>165</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>166</sup> *Id.*

<sup>167</sup> See *Leschi, Quiemuth, etc.*, *supra* note 36.

<sup>168</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>169</sup> *Id.*

<sup>170</sup> NOTHING WORTHY OF NOTE TRANSPIRED TODAY, *supra* note 21 at 135-36.

<sup>171</sup> POPULATION SCHEDULES OF THE 8TH CENSUS, *supra* note 61, at Roll M653-1398, line 6.

<sup>172</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>173</sup> See MORGAN, *supra* note 11, at page 106 (describing Dr. Burns as “an eccentric surgeon from Steilacoom”). See also Lucile McDonald, *Century-old records at Olympia tell story of colorful Military Surgeon, 1856 Model*, THE SEATTLE TIMES, Jan. 15, 1956, Magazine at 2. The Kautz diary has an entry dated December 22nd, 1858 that would support the assertions: “Mason and I were disturbed by Dr. Burns who came up and claimed Mason’s protection. He said that Mr. Williams, a gambler and store keeper in town, had attacked and beaten him in the Billert Saloon over a card table and he had stabbed him in the neck with a knife. He went away very soon, however, and could not be found this morning.” NOTHING WORTHY OF NOTE TRANSPIRED TODAY, *supra* note 21, at 133.

<sup>174</sup> See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 323 (M. Walter Dunne ed., A.C. Campbell trans., 1979) (1901) (discussing that acceptance of the practice goes as far back as the ancient Greeks).

[T]he annoyance of an enemy, either in his person or property, is lawful. This right extends not only to the power engaged in a just war, and who in her hostilities confines herself within the practice established by the law of nature, but each side without distinction has a right to employ the same means of annoyance. So that any one taken in arms, even in another’s territory cannot be treated as a robber, malefactor, or murderer...

*Id.* at 325.

<sup>175</sup> See, e.g., *id.* at 1.

<sup>176</sup> *Id.* at 17-18.

<sup>177</sup> MEEKER, *supra* note 7, at 216.

<sup>178</sup> *Id.* at 217.

<sup>179</sup> *Id.* at 218.

<sup>180</sup> See *War—The Yakima Indians, &c.*, *supra* note 30.

<sup>181</sup> CARPENTER, *supra* note 43, at 7. See also William Tolmie’s letter to Governor McMullan stating: “He maintains, and I have heard it from others, whilst he was yet at large, that Queyimal and himself intended going direct from Nisqually to the Yakama country where they had numerous relatives . . .” Letter from Tolmie, *supra* note 33. People have used different spellings of the Yakama tribe over the years. The accepted spelling is “Yakama,” different than “Yakima” used for the city, county, river, and valley of the same pronunciation.

<sup>182</sup> *Evidence and Proceedings*, *supra* note 31.

<sup>183</sup> MEEKER, *supra* note 7, at 220. See also *Trial of Leschi*, *supra* note 69 (causing Meeker’s quotation to appear to be a paraphrase of the April 10th, 1857 article).

<sup>184</sup> *Trial of Leschi*, *supra* note 69.

The testimony being closed, under the new system of practice, either party were now entitled to ask the court for instructions in writing—in the event of which, counsel have the privilege of arguing the law to the court, when the

court proceeds to give, modify or refuse to give the instructions asked for. In this case, no special instructions were asked for.

We regard the practice as a gross innovation upon wholesome [sic] custom, and healthy, long established usage, of no earthly use to either party, and sadly calculated to embarrass attorneys.—After a court has pronounced the law, counsel are circumscribed to a mere detail of the facts of the case, which juries are as competent to remember as attorneys. The facts of every case, however, are always so intimately interwoven with, and modifying the law, that when both are handled together properly, juries may be assisted in their deliberations, lawyers can exercise a legitimate sphere of duty, judges use only their proper and legitimate influence. So far as this case is concerned, we are not reflecting upon Chief Justice Lander; his charge was brief, able, clear and impartial.

*Id.*

<sup>185</sup> *Yelm Jim v. Washington Territory*, 1 Wash. Terr. 63, 66 (1859) (referencing, apparently, an act passed January 26, 1857 that amended prior criminal practice acts). Section eight incorporates a different act: “The provisions of the 12<sup>th</sup> section of the act entitled “an act to amend an act, entitled ‘an act to regulate the practice and proceedings in civil actions,’” shall apply to criminal proceedings in the district court, construing, when necessary, the word “plaintiff” to mean “territory.” 1857 Wash. Terr. Laws §8, at 4, 5.

When the evidence is closed, the plaintiff, by himself or one counsel, may argue the law to the court; the defendant, by himself or one counsel, may address the court and reply to the plaintiff upon the law, and if he shall state new propositions, or cite new authorities, the plaintiff, or his counsel, may reply to such new points or new authorities; the court shall then in writing, if required by either party, instruct the jury upon the law of the case, to which instructions either party may except and request other instructions, which exceptions and instructions shall be in writing. The court may then, in writing, if required by either party, modify its instructions, and the instructions, so modified, shall be placed on file and go the jury [sic] in their retirement, as the law of the case, to be afterwards retained on file with the papers in the case as a part of the record.

After the instructions of the jury, the plaintiff, by himself or one counsel, may address the jury upon the facts; the defendant, by himself and one counsel, or by two counsel, may then address the jury; the plaintiff, by himself or one counsel, may then close the case, and it shall go to the jury without further instruction from the court . . .

Act to Amend an Act Entitled, Act to Regulate Practice and Proceedings in Civil Actions, 1857 Wash. Terr. Laws §12, at 10-11. Why such a provision would be overly cumbersome or possibly embarrassing to counsel (see preceding footnote) is

not clear to the author—possibly the lack of law books available to most attorneys would make it difficult to provide authority on issues of law.

<sup>186</sup> *Found Guilty*, PIONEER AND DEMOCRAT, Apr. 29, 1859, at 2.

<sup>187</sup> The Court says, “the entire record does not present a particle of evidence either of the existence of a war, or that the defendant claimed immunity for his acts on the ground that he was an Indian belonging to a tribe of Indians at war with the United States, and that the acts alleged against him were the acts of war, for which he could not be held criminally responsible after its termination.” *Yelm Jim*, 1 Wash. Terr. at 67.

<sup>188</sup> See *District Court for the Second Judicial Dist., W. T. –September Term*, PIONEER AND DEMOCRAT, Apr. 29, 1859, at 1.

<sup>189</sup> *Yelm Jim*, 1 Wash. Terr. at 67-68 (emphasis in text).

<sup>190</sup> *District Court for the Second Judicial Dist.*, *supra* note 188.

<sup>191</sup> BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

<sup>192</sup> *Messages of the Governors*, *supra* note 26, at 27.

<sup>193</sup> *Id.* at 39.

<sup>194</sup> *Id.* at 40.

<sup>195</sup> See e.g., MORGAN, *supra* note 11, at 121-29.

<sup>196</sup> See e.g., Phoebe Zerwick & David Rice, *Governor Pardons Hunt: 20-Year Ordeal Ends for Man Wrongly Convicted*, WINSTON-SALEM JOURNAL, Apr. 16, 2004, at A1. Darryl Hunt had been convicted of rape and murder. When North Carolina reexamined DNA evidence almost 20 years later, it led them to another man who confessed to the crime. As of October 2004, more than 150 prisoners have been exonerated through the use of DNA by “innocence projects.” Tresa Baldas, *Exoneration as a Cottage Industry: Innocence Projects are Multiplying and Changing the Law*, 27 NAT’L. L. J. 5, 1 (2004).

<sup>197</sup> NOTHING WORTHY OF NOTE TRANSPIRED TODAY, *supra* note 21, at 145.

<sup>198</sup> Exec. Order No. 38-1 (Jan. 20, 1857) reprinted in EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS FROM MAY 14, 1855 TO JULY 1, 1912, at 199-200 (Scholarly Resources, Inc., eds., 1975).