

BYU Law Review

Volume 2007 | Issue 2

Article 2

5-1-2007

Criminal Law Beyond the State: Popular Trials on the Frontier

Andrea McDowell

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Criminal Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

Andrea McDowell, *Criminal Law Beyond the State: Popular Trials on the Frontier*, 2007 BYU L. Rev. 327 (2007).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2007/iss2/2>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Criminal Law Beyond the State: Popular Trials on the Frontier

*Andrea McDowell**

I. INTRODUCTION

Mark Twain famously called America “The United States of Lyncherdom,” and he was not joking.¹ America’s history of popular violence against unpopular individuals is infamously long and varied.² It stretches from tarring and feathering in the colonial period, through ante-bellum mob violence against blacks and abolitionists, to vigilantism on the frontier, and finally to the kind of racist lynching that Mark Twain had in mind.³ Before the Civil War, all such group-inflicted punishments were called “lynching,” and in this sense, lynching happens in every country.⁴ Only in America, however, was it widespread and socially acceptable.

* Associate Professor of Law, Seton Hall Law School. B.A. 1980 Yale College; Ph.D. 1987 University of Pennsylvania; J.D. 1998 Yale Law School. I am grateful to the friends and colleagues who gave me helpful comments and advice, including Gordon Bakken, Robert Gordon, Thomas Healey, Jane Larson, Arthur McEvoy, Frank Pasquale, John Reid, Charles Sullivan, James Whitman, and participants in seminars at the University of Wisconsin Law School, the Yale Law School, George Mason Law School, and Seton Hall Law School. I also wish to thank the librarians and other staff of the Bancroft Library at the University of California, Berkeley; the Beinecke Library at Yale; and the Huntington Library in San Marino, California.

1. L. Terry Oggel, *Speaking Out About Race: “The United States of Lyncherdom” Clemens Really Wrote*, in 25 PROSPECTS: AN ANNUAL OF AMERICAN CULTURAL STUDIES 115–58 (Jack Salzman ed., 2000) (presenting a new critical edition of Samuel Clemens’s essay, which had previously been available only in a mangled version).

2. Cf. John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043 (1974).

3. CHRISTOPHER WALDREP, *THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA* (2002) [hereinafter WALDREP, *FACES*] (reviewing the history of the word “lynch” generally); Christopher Waldrep, *War of Words: The Controversy over the Definition of Lynching, 1899–1940*, 66 J. S. HIST. 75, 78–80 (2000) (discussing efforts by the NAACP and others to narrow the definition of lynching to be able to compile statistics and campaign for a federal anti-lynching law).

4. WALDREP, *FACES*, *supra* note 3, at 34–36 (describing the use of the word “lynching” to describe every kind of group violence in the Jacksonian period).

Modern scholars suggest that this history of communal violence manifests something in the American character. For Maxwell Brown that characteristic is the American propensity to violence⁵ and the willingness of the elites to use force to maintain the traditional community structure and values.⁶ Franklin E. Zimring has focused on a tension between “due process values” and “vigilante values” in American culture.⁷ Similarly, Michael Pfeifer demonstrates that proponents of “rough-justice”—speedy, certain, and severe punishment—rejected the “sentimental” reforms of the criminal justice system.⁸ Zimring and Pfeifer both show that rural and working-class Americans, especially, believed justice must be seen to be done, stressing “the deterrent and morally enobling [sic] effect of the harsh physical punishment of serious crime.”⁹ They were not satisfied with formal, neutral legal proceedings and punishments behind prison walls.

One might expect that if vigilante values triumphed over due process values anywhere, it would have been on the frontier. And, indeed, the American West is famous for its vigilance committees and posses. True, vigilance committees were not anarchic; they often administered trials of some sort.¹⁰ But vigilantism’s goal was not justice but self-defense. Vigilantes organized to rout out gangs and desperados. Their standard approach was to punish an outlaw or two, sending a message to the rest that the neighborhood was too hot to hold them.¹¹

5. RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975).

6. *Id.* at 97.

7. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 119 (2003).

8. MICHAEL PFEIFER, *ROUGH JUSTICE* 14–15 (2004). Although Pfeifer’s book focuses on rural and working-class reactions against legal reforms in the second half of the nineteenth century, he notes that this phenomenon began in the early 1800s. *Id.* at 11–12.

9. *Id.* at 15.

10. At least some vigilance committees held trials, though the vigilantes formed the jury and few suspects were acquitted. This phenomenon has been noted but not studied. *See* BROWN, *STRAIN OF VIOLENCE*, *supra* note 5, at 109 (referring to such procedures but providing no details).

11. JAMES ELBERT CUTLER, *LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES* 81 (Negro Universities Press 1969) (1905) (quoting from Judge James Hall, who wrote in 1828 that early settlers formed “regulating companies” to deal with horse thieves and other desperate vagabonds; a few were arrested, tried, and punished, and “their confederates took the hint and fled”).

The vigilante warning was not aimed at individual farmers and ranchers who might have contemplated crime. Indeed, vigilance committees were hardly suitable for dealing with crime within the community because they were hierarchical and semi-secret. It is hard to imagine Americans delegating authority to a committee to seize and punish one of their own, or allowing a Farmer Brown or Rancher Smith suspected of theft to be hanged or whipped without trial. This Article argues that in such circumstances American communities developed a compromise between pure lawlessness and formal law: individual local suspects were given popular trials with substantial due process. While this thesis cannot be validated generally, there is strong evidence of this phenomenon on the overland trail (which has been documented) and in the California gold mines (which has not).

When a single member of the community was accused of crime, this Article suggests, the whole settlement held a trial along common law lines, with a judge and jury, witness testimony, and, if there was a conviction, a general vote on the sentence. These “trials” were considered “lynchings” in that the participants took the law into their own hands. Observers also called them both “trials” and “lynchings.” They reflected a mix of “vigilante values” and “due process values,” showing that frontiersmen were generally committed to both principles—when they dealt with members of their own community. The advocates of due process were also the advocates of vigilantism.

Recent scholarship on lynching and vigilantism has focused on the very obvious evils of these institutions, partly in reaction to Hubert Howe Bancroft’s “distasteful apology” for lynch law.¹² Those evils are now so well established that it will come as no surprise that many California lynchings were nothing more than summary executions. The time has come for a renewed attention to attempts to provide fair trials under the heading of “lynch law” or in

12. PFEIFER, *supra* note 8, at 6 (arguing that there are more interesting things to be said about lynch law than that it was wrong). For a sample of Bancroft’s position, see HUBERT HOWE BANCROFT, *I POPULAR TRIBUNALS* 143 (San Francisco, The History Co. Publishers 1887) (noting the miners and their criminal law might give Solon or Justinian a lesson in executing justice). Many lynchings described by Bancroft seem patently unjust, however, and Bancroft himself must have recognized his. His two chapters on lynch law in the mining camps are entitled “Mobocracy in the Mines” (Chapter 10, at 142) and “Further Antics of Justice in the Country” (Chapter 11, at 158).

the court of “Judge Lynch.” This Article contends that the California experience illustrates the American talent for self-government as well as the terrible dangers of an amateur criminal justice system.

The Article begins with a thorough study of criminal law in the California gold mines before the state had formal courts.¹³ It is the first such study in over a century.¹⁴ Earlier scholarship on extra-legal punishment of crime in California has either confined itself to San Francisco’s Committee of Vigilance¹⁵ or focused on the excesses of popular trials in the mines.¹⁶ For instance, Christopher Waldrep’s excellent book, *The Many Faces of Judge Lynch*, includes a chapter on “California Law,” describing various forms of lynching in the gold rush: mob violence, the expulsion of Mexicans, and the vigilance committees of San Francisco.¹⁷ But Waldrep does not mention the trial and punishment of suspected criminals by the miners’ courts. This is generally true of published histories of vigilantism. Further, the only modern study of criminal law *in the mines*, that of David A. Johnson, incorrectly conflates vigilantism, popular trials, and mob action.¹⁸ Gordon Bakken, while noting in passing the distinction between these forms of lynching, does not investigate it.¹⁹

13. Gary Lawson & Guy Seidmen, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581, 585–90 (2001) (noting that from May 30, 1848, to December 12, 1849, California had only a de facto military government, not authorized by Congress).

14. Earlier studies include BANCROFT, *supra* note 12; JOSIAH ROYCE, CALIFORNIA, FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANCE COMMITTEE IN SAN FRANCISCO [1856] (Cambridge, The Riverside Press 1886); CHARLES HOWARD SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT (New York, Charles Scribner’s Sons 1885).

15. CUTLER, *supra* note 11, at 130–32.

16. David A. Johnson, *Vigilance and the Law: The Moral Authority of Popular Justice in the Far West*, 33 AM. Q. 558, 564 (1981) (discussing accounts of lynchings as a ritual carried out by a nameless and faceless crowd); Myra K. Saunders, *California Legal History: The Legal System Under the United States Military Government, 1846–1849*, 88 LAW LIBR. J. 488, 508 (1996) (noting in passing that a number of authors have concluded that criminal law in the mines was often little more than “lynch law”).

17. WALDREP, *FACES*, *supra* note 3, at 50–52.

18. Johnson, *supra* note 16, at 564 (stating that “[i]ndividual identities are absent from the reports” and that lynchings were said to be carried out by “the people taken as a single sovereign”).

19. GORDON MORRIS BAKKEN, PRACTICING LAW IN FRONTIER CALIFORNIA 104–05 (1991) (noting the distinction between vigilantism and other forms of lynching, and between lynch mobs and popular justice groups).

This Article demonstrates that popular trials in the California gold mines were exactly like criminal punishment on the overland trail. John Phillip Reid, in his virtuoso study of crime, punishment, and social behavior on the overland trail,²⁰ shows that the emigrants did their best to behave legally, that is, to follow the forms and ceremonies of the criminal law as they remembered them from the States. He argues that this shows the tenacity of legal beliefs and traditions among Americans who were thousands of miles away from the legal institutions that backed them up. In other words, he says, their trials were not “lynchings,” using the word in its modern sense.²¹ Reid suggests, tentatively, that the legal behavior on the overland trail was that of average Americans from towns and cities in the East. His work is about “how nonfrontiersmen acted on the frontier,” and his conclusion is that they kept to the legal behavior of a remembered youth.²² The evidence presented in this Article shows that the gold miners in California, many of whom were frontiersmen, exhibited the same legal behavior. It was common to Americans of both the Eastern states and the frontier.

This Article further suggests that Reid’s thesis applies even more broadly to the frontier generally. Trials similar to those held in California and on the overland trail occurred both before and after the gold rush on parts of the frontier that had not yet come under a territorial government. The scholarly literature contains references to such trials, but lumps them together with other forms of popular violence, especially vigilantism. A closer look at the sources, however, reveals that vigilantism was almost always directed against outsiders to the community—horse thieves and other criminal gangs—and that local suspects were treated differently.

Thus, for at least sixty years, if not longer, there was an alternative criminal law system on the frontier that was relatively orderly, attempted to be fair, and often resulted in acquittal. “Popular trials” in frontier settlements were *not* always a rejection of due process, but could be a more or less sincere effort to provide due process in the absence of a formal legal system. In fact, frontier

20. JOHN PHILLIP REID, *POLICING THE ELEPHANT: CRIME, PUNISHMENT, AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1997).

21. *See id.* at 149.

22. *Id.* at 232.

“lynch law” was a bona fide criminal law system that has hitherto gone unnoticed.

It is clear from their many letters and journals that the California gold miners believed that popular justice was literally “legal” because sovereignty derived from the people. The punishment of criminals, ordinarily delegated to the people’s agents, could be resumed by them at will. This belief in popular sovereignty was uniquely American. The evidence shows that the Europeans in California emphatically rejected the legitimacy of lynchings by their American fellow miners. Similarly, Australians, in their own gold rush, characterized popular justice as the worst form of disorder. To the Australians and Europeans, “order” meant social stability and particularly respect for government and legal institutions. The California experience thus reflects fundamental differences between American and European ideas of order and justice as well as the source of law.

Part II of this Article is a study of lynch law in the California gold mines, in its best and worst guises. Part III discusses Californians’ own views of the legitimacy of lynch law as based in popular sovereignty. Part IV compares the lynch law of the California gold mines to criminal punishments on the overland trail and to the popular trials that took place in frontier towns, both before and after the gold rush. Finally, Part V shows that the American view of the legitimacy of popular trials was unique, in that it was not shared by foreign miners in California or Australians, who faced the same problems of high crime and incompetent officials in their own gold rush.

II. POPULAR TRIALS IN THE GOLD RUSH

A. Background

The first famous lynching in the California gold mines, and the one that gave Hangtown its name, occurred on January 20, 1849. The fullest account is by Edward Gould Buffum, a Quaker from a family of ardent abolitionists, who did his best to stop the proceedings.²³ The lynching began as a fairly typical example of

23. E. GOULD BUFFUM, SIX MONTHS IN THE GOLD MINES: FROM A JOURNAL OF THREE YEARS’ RESIDENCE IN UPPER AND LOWER CALIFORNIA, 1847–48–49, at 83–85 (Philadelphia, Lea & Blanchard 1850). Other accounts, with some variations, appear in 3

American frontier justice. Five thieves broke into a Mexican gambler's room at midnight and robbed him at gunpoint. Someone gave the alarm and a group of citizens rushed in, rescued the Mexican, and arrested his attackers. On the following day, a jury chosen from among the citizens²⁴ tried the robbers and sentenced them to thirty-nine lashes each, to be applied then next day, a Sunday. That happened to be the day when miners generally took time off work to go into town for provisions and socializing. Buffum was from New York, and having never seen a punishment inflicted by lynch law, he walked over from neighboring diggings to watch. He found the prisoners being lashed with a raw cowhide whip, surrounded by a large crowd and a guard of a dozen men who covered them with rifles lest they attempt to escape. After the whipping, all five robbers were laid on the floor of a neighboring house, since they were too weak to stand. At that point, new charges were brought against three of them, namely, that they had committed robbery and attempted murder in the Southern diggings²⁵ in the fall of 1848.²⁶ It was then, as Buffum tells the story, that the events got out of hand.

The charges against them were well substantiated, but amounted to nothing more than an attempt at robbery and murder; no overt act being even alleged. They were known to be bad men, however, and a general sentiment seemed to prevail in the crowd that they ought to be got rid of. At the close of the trial, which lasted some thirty minutes, the Judge put to vote the question whether they had been

THEODORE H. HITTELL, *HISTORY OF CALIFORNIA* 272 (San Francisco, N. J. Stone & Co. 1897); J.M. LETTS., *CALIFORNIA ILLUSTRATED: INCLUDING A DESCRIPTION OF THE PANAMA AND NICARAGUA ROUTES* 108–09 (New York, R. T. Young 1853); MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851*, at 78 (1921) (containing further primary sources); *From the Mines*, DAILY ALTA CAL., Feb. 8, 1849, at 2.

24. The *Daily Alta California* reported that the citizens elected three judges, and that twelve jurymen were drawn by ballot. *From the Mines*, DAILY ALTA CAL., Feb. 8, 1849, at 2.

25. The Southern mines were along tributaries of the San Joaquin river, south of the Moquelumne River. JOHN D. BORTHWICK, *THREE YEARS IN CALIFORNIA* 304 (Edinburgh, London, W. Blackwood & Sons 1857), available at <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

26. According to the *Daily Alta California*, the robbers escaped after their whipping. *From the Mines*, *supra* note 24. The *Daily Alta California* of February 15, 1849, reports that the robbers were recaptured “somewhere between the 21st and 25th of January” and were then hanged by the citizens. *Further from the Mines: Three Men Hanged at the Dry Diggings*, DAILY ALTA CAL., Feb. 15, 1849, at 2. The very short newspaper account does not mention Buffum's role.

proved guilty. A universal affirmative was the response; and then the question, "What punishment shall be inflicted?" was asked. A brutal-looking fellow in the crowd, cried out, "Hang them." The proposition was seconded, and met with almost universal approbation. I mounted a stump, and in the name of God, humanity, and law, protested against such a course of proceeding; but the crowd, by this time excited by frequent and deep potations of liquor from a neighbouring groggery, would listen to nothing contrary to their brutal desires, and even threatened to hang me if I did not immediately desist from any further remarks.²⁷

The prisoners spoke no English and called for interpreters, but their voices were drowned out by the mob's shouts. They were hanged on the spot. Buffum concludes, "This was the first execution I ever witnessed—God grant that it may be the last!"²⁸

This was really the story of two lynchings. The first was a relatively orderly jury trial shortly after the robbery, even though the accused were caught in the act and thus clearly guilty. Thirty-nine lashes was the usual punishment for theft under "lynch law," although, as is clear from Buffum's account, it was nearly fatal.²⁹ This sort of lynching was a feature of the American frontier from the earliest days—although never so ordinary as it became in California.

The pattern of events in the second lynching would also become familiar in the gold mines. The trial was very short; the charges did not amount to a criminal offence at common law, let alone a capital one; the accused had no counsel and could not present a defense—they were not even present and were unable to follow the proceedings because they did not speak English; and the question of guilt was put not to a jury but to the crowd. The motion to "Hang him!" came from an anonymous miner and met with nearly "universal" acclaim from the others. Thus, Buffum's account illustrates the two extremes of lynch law in the California gold mines; one, a relatively orderly trial with the procedural safeguards of the common law, the other, a rushed execution.

27. BUFFUM, *supra* note 23, at 84.

28. *Id.* at 85.

29. *See also* REID, *supra* note 20, at 159 (stating that the bylaws of the Oregon Society, an emigrant company, provided that adultery and larceny should be punished with thirty-nine lashes on the bare back; although, in fact, the penalty of flogging was almost never applied on the overland trail by the Oregon Society or any other company).

At the time of the two lynchings that Buffum witnessed, there was no other law. California was a political and legal vacuum when gold was discovered.³⁰ The United States acquired California under the terms of the Treaty of Guadalupe Hidalgo, signed February 2, 1848, but California did not become a state until September 9, 1850.³¹ Under the Constitution, Congress must make all rules and regulations concerning U.S. Territories,³² but Congress never managed to create a government for California because it could not agree on whether to allow slavery in the new territory.³³ When the people of California learned in June 1849 that Congress had once again adjourned without creating a territorial government, they set about organizing one on their own authority.³⁴ The first legislature convened on December 15, 1849.³⁵

Thus, there was no government presence from 1848 through 1849, except what individual communities provided for themselves.³⁶ The legal void extended at least into April 1850, when the legislature enacted criminal laws and statutes governing criminal procedure.³⁷ It then took months to get the courts up and running. On August 16, 1850, a week before the first Court of Sessions was to sit in Marysville, the court had not yet received a volume of the laws defining its powers and duties.³⁸ Practically speaking, therefore, there were no state courts with criminal jurisdiction until the end of August 1850. For the first two years of the gold rush, the only courts in the mining camps were those that the miners ran themselves. Section B below describes lynch law in this early phase.

30. Gold was first discovered on January 24, 1848. Ralph P. Bieber, *California Gold Mania*, 35 MISS. VALLEY HIST. REV. 3, 3 (1948).

31. Lawson & Seidman, *supra* note 13, at 605 (“The treaty was signed on February 2, 1848 and ratifications were exchanged on May 30, 1848.”).

32. U.S. CONST. art. IV, § 3.

33. Andrea McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*, 14 YALE J.L. & HUMAN. 1, 2 n.4 (2002).

34. CARDINAL GOODWIN, *THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA, 1846–1850*, at 77 (1914).

35. *Id.* at 328.

36. See Lawson & Seidman, *supra* note 13, at 581–82 (offering a detailed study of the interregnum and suggesting that no one except the U.S. Congress had the authority to form a government for California and that the so-called *de facto* government of the military governors was unconstitutional once the war was over).

37. GOODWIN, *supra* note 34, at 289–90 (stating that acts to organize the courts were passed in March and April, 1850).

38. *Judicial Matters—The State Laws*, MARYSVILLE HERALD, Aug. 16, 1850, at 2.

Section C turns to the period after August 1850, when the miners and the legal officials clashed repeatedly. The original criminal statutes were not suited to conditions in California. “It is generally understood,” wrote the *Marysville Herald* on January 21, 1851, “that the present legislature will repeal many of the acts passed at the last winter’s session, they having been found, after a few months experience, quite impracticable.”³⁹ A major problem was that the lowest courts with criminal jurisdiction, the Courts of Sessions, met only six times a year in the various county seats.⁴⁰ The District Courts, which had jurisdiction over cases of murder and arson, had a similar schedule and served even larger areas.⁴¹ Moreover, there were no police except in San Francisco,⁴² and many sheriffs and judges were corrupt.⁴³

In areas where the nascent legal system competed with lynch law, sheriffs and lynch crowds fought over possession of prisoners. Lynchings were speeded up and formalities were reduced or skipped altogether. At least some of the miners who favored due process now joined the sheriff against the lynchers instead of working within the system of lynch law. The days of “decent, orderly lynching” were numbered,⁴⁴ even though remote mining camps retained some elements of formal procedure into the mid-1850s.

Finally, Section D distinguishes between the three types of criminal punishment that took place in the mines, namely popular trials, vigilantism, and mobbing. It further shows that the miners generally used the word “lynching” to mean popular trials and that “mob law” was used as a term of condemnation.

B. Popular Trials in Full Swing

David Johnson, in his article on *Vigilance and the Law* in California, suggests that popular trials were “public ritual[s] of punishment, atonement, and example.”⁴⁵ There was no examination

39. *Repeal of Statutes—Juries*, MARYSVILLE HERALD, Jan. 21, 1851, at 2.

40. GOODWIN, *supra* note 34, at 290–91.

41. *Id.* at 289.

42. *Crime in California*, MARYSVILLE HERALD, Oct. 25, 1850, at 2.

43. *See infra* Part II.C.

44. *See* FREDERICK ALLEN, A DECENT, ORDERLY LYNCHING: THE MONTANA VIGILANTES (2004). The title of Allen’s book is a quotation from a newspaper article published in Helena, Montana, in 1883.

45. Johnson, *supra* note 16, at 564.

or deliberation in any meaningful sense, he argues. Although the events sometimes took the form of a trial, in fact the guilt of the accused was apparent from “an inherent, natural understanding of justice, unreachable through the procedures of due process.”⁴⁶ In Johnson’s interpretation, the ritual villain was naturally the accused, playing the part of the irredeemable enemy of society. On the other side was “the crowd” or “the people” acting as a single entity; accounts of lynchings do not mention individuals, he says. The climax of the drama was the execution, which represented the triumph of the people’s moral authority over evil.⁴⁷

Popular trials, however, were far less mechanical than Johnson suggests. As explained below, early trials by Judge Lynch in the gold mines usually followed common law procedure. The proceedings were public. The defendant was tried by a judge and jury. The evidence for and against the accused was considered, and sometimes he was acquitted. The crowd decided the sentence, but it was not always of one mind; in fact, there were often heated arguments about the appropriate penalty. The most common punishment was whipping, rather than hanging, sometimes combined with cutting off the ears and branding, and always accompanied by banishment from the vicinity.⁴⁸ In fact, I have found only two or three accounts of hangings between the wild lynching described by Buffum in January of 1849 and a spate of hangings in the winter of 1850 to 1851.

1. The form of trial

Lynchings were as public as they could possibly be. The whole community attended, and miners might also be summoned from neighboring camps.⁴⁹ The crowd is said on various occasions to have elected the judge and selected the jury.⁵⁰ The crowd also affirmed the jury verdict or reduced the sentence recommended by the jurors.

46. *Id.*

47. *Id.* at 568, 572.

48. Johnson notes that fewer than half of the punishments meted out at lynchings were hangings, but does not discuss how the sentence was decided. *Id.* at 569.

49. See Daniel W. Kleinhans, *Memoirs 13* (unpublished transcript, on file with the Bancroft Library, University of California, Berkeley) (stating that when he was camped near Fiddletown in 1850, a man came by and told him to come to a lynch court that same night; Kleinhans and his companion did not in fact attend).

50. See *infra* note 61.

The administration of the punishment itself was a public event, and members of the crowd sometimes participated in that too.⁵¹

Apart from the crowd, the participants in a lynching varied. At best, they included a sheriff, a judge, a twelve-man jury, a prosecutor, defense counsel, and witnesses;⁵² at worst, there were no such formalities and the crowd itself acted as judge and jury.⁵³ The duration of the proceedings also varied. In one case the condemned man was hung three hours after his conviction,⁵⁴ in another he was given a day,⁵⁵ and in yet a third, a murderer was granted ten days between sentencing and execution.⁵⁶

An example of an orderly trial is one that took place at Spanish Bar in the summer of 1849, “under a tree,”⁵⁷ as a witness recorded. Miners in the neighborhood were “asked to attend,” and when they had gathered, they elected an *alcalde* and a sheriff and selected a jury.⁵⁸ The charge against the accused was that he had stolen a bag of gold from his partner, which the accused denied. “Before proceeding with the trial the sheriff (a rough Oregon Man) said he had some experience both in Oregon and in California in certain lynch cases where the accused were condemned and hung,” one miner wrote. “Of course this was high authority. One point was that a juror was a competent witness, and the other rulings I have forgotten.”⁵⁹

51. Johnson drew mainly on newspaper articles, primarily from the *Daily Alta California*. The *Daily Alta California*, which may have washed out the individual and emphasized the universal.

52. Indeed, Joseph Warren Wood stated that in all cases of lynch law or mob law that he witnessed, “[t]he form of a court most dear to Americans has always been adopted, and the prisoners have been allowed the widest construction of the privileges usual on such occasions.” Joseph Warren Wood, *Diaries of Crossing the Plains in 1849 and Life in the Diggings from 1849 to 1853* (June 25, 1852) (unpublished manuscript, on file with the Huntington Library).

53. Some miners called this worst case, not a trial but a mobbing.

54. DAME SHIRLEY (MRS. LOUISE AMELIA KNAPP SMITH CLAPPE), *THE SHIRLEY LETTERS FROM CALIFORNIA MINES IN 1851–52*, at 155 (Thomas C. Russell ed., 1922) (stating that William Brown was sentenced to be hung in one hour, but that this was extended to three hours).

55. BORTHWICK, *supra* note 25, at 317–18 (robber sentenced to be hanged the next day).

56. FRANKLIN A. BUCK, *A YANKEE TRADER IN THE GOLD RUSH* 110–11 (Katherine A. White ed., 1930), available at <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

57. Kleinhans, *supra* note 49, at 5.

58. *Id.*

59. *Id.*

There was no positive evidence for the court to consider, however. The miners even examined the gold found on the accused to see whether it could be identified, but with no success.⁶⁰ Although the jury had no basis on which it could convict, it believed the man to be guilty and sentenced him to pay the costs of the court and jury, about \$75, and to leave the diggings before night. This compromise was not sound law, but it was lenient under the circumstances.

a. Judge and jury. In most orderly lynchings, as in the Spanish Bar case, the assembled miners elected the judge and selected a jury of twelve men.⁶¹ We read on several occasions that the defendant was allowed counsel, but it is not clear that this was the norm.⁶² Indeed, in one case, the question of whether the accused should have a lawyer was put to the crowd.⁶³

The trial of a group of Chileans accused of murder at Iowa Log Cabins furnishes a particularly elaborate example of jury selection and appointment of counsel. Here, there was an inquest regarding the murder victims. The miners “empanelled a jury to set on the bodys [sic], and returned a verdict accordingly that they came to

60. Gold nuggets were sometimes recognizable by their owners, though gold dust was not.

61. DAVID AUGUSTUS SHAW, *ELDORADO: OR, CALIFORNIA AS SEEN BY A PIONEER, 1850–1900*, at 140 (B.R. Baumgardt & Co. 1900), available at <http://memory.loc.gov/ammem/cbhtml/cbhome.html> (“A judge and jury were selected.”); SHIRLEY, *supra* note 54, at 123 (“[T]hey commenced proceedings by voting in a president and jury of their own.”); George W. Allen, *Diary* (Feb. 27, 1851) (unpublished manuscript, on file with the Beinecke Library) (stating that the miners “selected two Judges & twelve men for A Jury”); Kleinhaus, *supra* note 49, at 5 (“The miners collected and elected an alcalde (or justice) and sheriff. A jury was then selected . . .”). Even at the infamous Downieville lynching, the jury was selected from the crowd. DAVID PIERCE BARSTOW, *RECOLLECTIONS OF 1849–51 IN CALIFORNIA* 22 (1979) (“[A] lawyer by the name of William Spear . . . acted as public prosecutor, and a jury of twelve men was selected from the crowd.”); HENRY VEEL HUNTLEY, *CALIFORNIA: ITS GOLD AND ITS INHABITANTS* 273 (London, T. C. Newby 1856), available at <http://memory.loc.gov/ammem/cbhtml/cbhome.html> (“[A] judge and twelve jurymen were appointed from the people and a trial commenced.”).

62. *Serious Affray at Columbia—Great Excitement*, *DAILY ALTA CAL.*, Nov. 17, 1853, at 3 (describing the lynching of a man named Noble at Columbia: “Counsel was allowed the accused, and the usual forms were observed”).

63. Letter from Sam [] to Willie (Feb. 27, 1851) (unpublished manuscript, on file with the Bancroft Library) (stating that he attended a trial and execution, but “refrained from participating in all proceedings against him, and only voted with the citizens once, and that was in the affirmative on the second proposition to give him a lawyer”).

their Death, by the hands of the Chileans, to us unknown.”⁶⁴ When the suspects were caught, they were tried twice. First, a jury of twelve men from the group that had arrested them found all of the suspects guilty of murder in the first degree.⁶⁵ The sentencing was put off to the next day. Before it took place, however, some ninety men arrived from the neighboring river, the Moquelumne. Thus augmented, the crowd voted not to sentence the accused, but instead “to empanel a jury and give them a fair trial, from Disinterested persons, and cappable [sic] men from the other River.”⁶⁶ It would seem that the outsiders had their doubts about the objectivity of the first jury. The denizens of the Moquelumne also supplied the defendants with “a young and smart Lawyer from the City of Boston, by the name of Mellvilve.”⁶⁷ Two of the Chileans were discharged before the trial, including a boy who had “turned State Evidence.”⁶⁸ Nine of the remainder were found to be peons whose masters had forced them against their will to participate in the murders.⁶⁹ These nine were sentenced to one hundred lashes and to have their heads shaved, and one was also sentenced to have his ears cut off. Only three men, the masters, were sentenced to be shot.⁷⁰ In short, the original lynch crowd was persuaded to place the matter in the hands of outsiders and accepted their verdict.⁷¹

In all cases, the jury pronounced the verdict. If the jury acquitted, that was the end of the matter. For example, on October 26, 1849, a man named Turnball from Virginia was suspected of stealing \$2000 and a valuable watch from miners of the Union Canal Mining Claim. His victims apprehended him two days later, but,

64. John Hovey, *Journal of a Voyage . . . Commencing Jan. 23, 1849, and ending July 23, 1849*, at 79 (unpublished manuscript, on file with the Huntington Library) (describing the trial of Chileans accused of murdering Americans at Iowa Log Cabins on the night of December 27–28, 1849).

65. *Id.* at 80 (describing events of December 31, 1849).

66. *Id.* at 81 (describing events of January 2, 1850).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. This last case had an interesting follow up. The people of Stockton held a special meeting to pass a resolution of sympathy with the miners who punished the Chileans. John Hovey, who reported the whole story, explained that this signified that the citizens of Stockton “were willing to go heart and hand with us, in bringing the Criminals to justice.” *Id.* at 83 (describing events of January 4, 1850). This seems to mean that the people of Stockton were ready to share responsibility for the executions.

although they had no doubt of his guilt, they found no evidence on him that would convict him and allowed him to go his way.⁷²

A jury also acquitted a miner who shot his partner, mistaking him in the night for a thief. After it returned a verdict of accidental homicide, the onlookers passed a resolution of sympathy with the victim's family and with the killer himself, adding that they concurred fully with the jury's decision.⁷³ Similarly, a quarrel on Carson's Creek between two former members of the First New York Regiment resulted in the shooting death of one of them. The killer was tried for murder but acquitted on the ground of "justifiable homicide," specifically, acting in self-defense.⁷⁴

b. The role of the crowd. When the jury found the defendant guilty, it was the crowd that determined the sentence. Most often, the onlookers either accepted the jury's recommended sentence or reduced it; in one of the very few cases where someone moved to increase the sentence, the motion was voted down.⁷⁵ The sentencing phase of the trial was in some ways the most interesting, because

72. E.A. Upton, Diary (Oct. 26–29, 1849) (unpublished manuscript, on file with the Bancroft Library); *see also* JOHN W. CAUGHEY, *THEIR MAJESTIES THE MOB* 42 (1960) (referring to a report of a jury examination of a murder suspect named "Oregon Jim," which stated that "but with the total defect of actual proof, though all suspected him, a majority voted for his discharge and even voted down the proposition to banish him from the creek" (quoting ISAAC J. WISTAR, *AUTOBIOGRAPHY OF ISAAC J. WISTAR, 1827–1905*, at 259 (1914))).

73. *A Most Melancholy Death*, *PLACER TIMES*, Nov. 10, 1849. Another acquittal in a murder case is reported in THEODORE TAYLOR JOHNSON, *CALIFORNIA AND OREGON: OR, SIGHTS IN THE GOLD REGION, AND SCENES BY THE WAY* 185 (New York, Baker & Scribner 1850).

74. *Fatal Affray*, *DAILY ALTA CAL.*, May 3, 1849 (describing the incident and naming the victim as Rodrick M. Morrison and the killer as Henry J. Freund); *see also* ENOS LEWIS CHRISTMAN, *ONE MAN'S GOLD: THE LETTERS AND JOURNAL OF A FORTY-NINER* 192 (Florence M. Christman ed., 1931) (discussing a man's acquittal because the only evidence against him was the testimony of a condemned criminal); STEPHEN CHAPIN DAVIS, *CALIFORNIA GOLD RUSH MERCHANT* 21 (Benjamin B. Richards ed., 1956) (noting a crowd prepared to lynch a Mr. Middleton, suspected of stealing \$1250, but since there was no positive evidence against him, they released him); SHIRLEY, *supra* note 54, at 152 (stating that two men accused of stealing \$1800 from their partners were tried before a meeting of the miners and acquitted; later, further evidence against one of them was uncovered and he was retried and executed).

75. ROYCE, *supra* note 14, at 333–34 (citing a *San Francisco Herald* article dated March 22, 1852, which stated that a defendant was sentenced to thirty-nine lashes and banishment; a motion to add cutting off the ears to the punishment was voted down).

insofar as the crowd could alter the sentence, it became responsible for it.

In a number of cases, one person or one group persuaded the crowd to allow a retrial or even to let their prisoner go. A striking example is that of three Indians and a Mexican who had been tried, convicted, and sentenced for killing and attempting to burn the bodies of two Americans. When the ropes were already around their necks, a county judge and some other citizens intervened. They “begged the people not to assume so great a responsibility but to let the law take its own course and justice would be done.”⁷⁶ In fact, the coroner’s inquest revealed that the suspects had found the decomposing bodies of the Americans and were preparing to cremate them according to Indian custom.⁷⁷ They were released. Similarly, in the Iowa Log Cabins incident, discussed above, the jury found all the defendants guilty of murder and recommended the death penalty. A second jury retried the defendants and reduced the sentence of nine of them to whipping.⁷⁸

Sometimes, a portion of the crowd objected to a harsh sentence and got it reduced, as in the case of a sailor caught in the act of stealing \$3000 who was tried, convicted, and sentenced to hang by a jury. There was “some opposition to taking his life,” and the sentence was reduced to a “milder punishment,” which consisted of whipping him, cropping his ears, shaving his head, and banishing him from the diggings.⁷⁹ And in yet another example, a jury sentenced a thief to death, but the onlookers objected to this as too harsh, and the punishment was reduced to lashing, having his ears cropped and his head shaved, and banishment.⁸⁰

In a less dignified case, the crowd disputed whether a condemned man should be hanged immediately or in ten days’ time. “High words ensued. Pistols were drawn and I thought for sometime that half a dozen more lives would be lost in discussing

76. CHRISTMAN, *supra* note 74, at 174–75 (describing events of July 10, 1850).

77. CHRISTMAN, *supra* note 74, at 175.

78. Hovey, *supra* note 64, at 81.

79. SHAW, *supra* note 61, at 143.

80. WILLIAM REDMOND RYAN, 2 PERSONAL ADVENTURES IN UPPER AND LOWER CALIFORNIA IN 1848–9, at 62–64 (London, W. Shoberl 1850); *see also* G.B. Stevens, Letter Journal (July 18, 1849) (unpublished manuscript and transcript, on file with the Beinecke Rare Book and Manuscript Library, Yale University) (stating that friends of the accused got the sentenced reduced from hanging to whipping, cutting off his ears, and banishment).

this point.”⁸¹ The majority, who favored delay, won the day.⁸² In other cases, the friends of the prisoner begged for mercy, and he was released.⁸³

The trial of Jim Hill at Camp Seco provides an example of a crowd strongly divided over the question of the proper sentence. The jury rendered a unanimous verdict of guilty, and “it was then voted,” presumably by the crowd, to hang the prisoner.⁸⁴ When Hill made a moving plea for mercy, however, the good order began to break down. The question was put to the people, “Shall he be hung?” The vote was split. “Immediately some hundreds of pistols were drawn and a universal stampede occurred. Horsemen plunged through the crowd and over them, and the people ran in every direction.”⁸⁵

Even as late as 1853, when lynch crowds were competing with the new legal system, they occasionally observed the formality of a general vote on the sentence. In a stabbing case in which the victim was still alive, the jury “advised” that the accused be handed over to the authorities. “A majority of the meeting sustain[ed] the decision of the jury [and] it was carried into execution.”⁸⁶ Similarly, in 1852, a little delay in getting the rope for a hanging gave the bystanders time to object and to persuade the lynchers to hand the accused over to the officers of the law.⁸⁷

81. BUCK, *supra* note 56, at 110.

82. See SHIRLEY, *supra* note 54, at 155 (stating that the jury sentenced William Brown to be hanged in one hour, but this was extended to three “by the persuasions of some men more mildly disposed”).

83. See, e.g., Stevens, *supra* note 80, at 75. It also happened, of course, that appeals for mercy fell on deaf ears. See, e.g., WILLIAM SHAW, GOLDEN DREAMS AND WAKING REALITIES 59 (London, Smith, Elder & Co. 1851) (explaining that a man who stole a few inexpensive items was sentenced to death, despite the fact “[a]ppeals were made for mercy”).

84. CHRISTMAN, *supra* note 74, at 190 (entry for June 28, 1851) (describing the trial of Hill for stealing a safe from a store). The same incident is described by David C. Ferson, California Correspondence, Shaw’s Flat (July 10, 1851) (unpublished manuscript, on file with the Beinecke Rare Book and Manuscript Library, Yale University).

85. CHRISTMAN, *supra* note 74, at 192. The follow-up to this incident is discussed *infra* in the Section “Popular Trial’s Last Stand.”

86. See *Serious Affray at Columbia—Great Excitement*, *supra* note 62.

87. HUNTLEY, *supra* note 61, at 212–13 (bystanders persuaded the lynchers that their prisoner, a certain Doyle accused of homicide, should be handed over to the authorities at Grass Valley in November 1852); see also Ferson, *supra* note 84 (stating that, after the prisoner told his story and asked for mercy, part of the crowd wanted to let him go and handed him over to the sheriff, but another part of the crowd got him back and hanged him).

Possibly the many commuted sentences led jurors and others to think that a sentence of death would not, in fact, be carried out. This was the case at the hanging of a Swede named William Brown. “[M]any, with their hands on the cord, did not believe even then that it would be carried into effect, but thought that at the last moment the jury would release the prisoner and substitute a milder punishment.”⁸⁸ When it was all over, the great majority of those involved condemned the hanging and blamed the more reckless members of the crowd.⁸⁹ The local *alcalde* had protested the whole proceeding, but this had not galvanized others in time to save Brown.

c. Types of punishment. In the early years of the gold rush, the most common punishment was whipping, sometimes combined with mutilation. Hanging was relatively rare.⁹⁰ In researching this Article, I discovered only three hangings in the mines in 1849, another two executions in 1850, and about twenty hangings in 1851. In comparison, I have discovered four, ten, and sixteen whippings in those same years, respectively.⁹¹

This is not to say that whipping was a civilized alternative.⁹² Spectators appear to have found it more gruesome than hanging. David Shaw, admittedly writing long after the event, stated that some men convicted of stealing horses and mules were sentenced to have their heads shaved, to be branded on the right cheek with the letter “R,” to receive one hundred lashes on the bare back, and to be

88. SHIRLEY, *supra* note 54, at 156.

89. *Id.* at 157–59.

90. *See also* BROWN, *supra* note 5, at 109 (observing the same pattern in lynchings on the frontier).

91. Both the *Daily Alta California* and the *Placer Times*, however, wrote that they did not report all of the punishments in the mines. Editorial, DAILY ALTA CAL., June 15, 1852 (listing some crimes and lynchings in the mines but declaring “that, were [the editor] to give all the particulars to be gathered from his mining exchanges of one day, he could fill a number of his own daily edition”); Editorial, PLACER TIMES (Sacramento, Cal.), Sept. 15, 1849 (stating that it would not publish particulars of whippings to spare the punished men further embarrassment).

92. For a discussion on movements to abolish flogging as a punishment during this period, see Myra C. Glenn, *The Naval Reform Campaign Against Flogging: A Case Study in Changing Attitudes Toward Corporal Punishment, 1830–1850*, 35 AM. Q. 408 (1983). For a discussion on flogging as a degrading punishment, see JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 175 (2003).

banished from the mines. But “[a]fter administering 50 lashes the committee decided to remit the balance, as the men were unable to bear the torture,” Shaw wrote. “It looked cruel and inhuman, and not all eyes among the spectators were tearless.”⁹³ Kimball Dimmick, as judge, sentenced two thieves to fifty and twenty-five lashes respectively. He wrote his wife, “I never saw men so severely whipped before, and never wish to again.”⁹⁴ As discussed at the beginning of this Article, the thirty-nine lashes Buffum saw administered left the recipients too weak to stand or to be present at their subsequent lynch trial.⁹⁵ When whipping was combined with branding and cutting off the ears, the sight—and the experience—must have been ghastly.⁹⁶

d. Execution of punishment. The miners’ letters and diaries seldom specify who applied the punishment. One or two mention that a sheriff⁹⁷ or a marshal⁹⁸ did the whipping, and one miner reported that a doctor cut off the ears of a convicted thief.⁹⁹

Hanging methods are better documented. “Men were hung in the readiest way which suggested itself—on a bough of the nearest tree, or on a tree close to the spot where the murder was committed.”¹⁰⁰ The act itself was sometimes carried out by driving a wagon or a horse out from under the condemned man, leaving him hanging,¹⁰¹ or by kicking out from under him the box on which he

93. SHAW, *supra* note 61, at 141–42.

94. Kimball Hale Dimmick, Letter to Sarah (wife) (Oct. 26, 1848) (unpublished manuscript in the Kimball Hale Dimmick papers, 1837–1886, on file with the Bancroft Library, University of California, Berkeley).

95. BUFFUM, *supra* note 23.

96. Stephen Field wrote that, with such penalties, banishment “was supererogatory; for there was something so degrading in a public whipping, that I have never known a man thus whipped who would stay longer than he could help, or ever desire to return.” STEPHEN J. FIELD, *PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA* 34 (DaCapo Press reprint ed. 1968) (1893), *available at* <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

97. Letter from Allen Varner to David Varner (Mar. 5, 1850) (unpublished manuscript, on file with the Huntington Library).

98. FIELD, *supra* note 96, at 34 (“[T]he marshal marched the prisoner out to a tree, made him hug the tree, and in the presence of the crowd that followed, began inflicting the lashes.”).

99. SHAW, *supra* note 61, at 143–44 (“[A] doctor cut off his ears, from the stumps of which he bled freely while receiving his flogging.”).

100. BORTHWICK, *supra* note 25, at 226.

101. *Id.*; *see also* BUCK, *supra* note 56, at 111 (“[A] wagon on which [the condemned man] was standing was driven out from under which caused his death by strangulation.”).

stood.¹⁰² At other times, a group of men pulled the rope that strung up the prisoner. For instance, the Swede William Brown, mentioned above, was hanged by the jury with the assistance of “all who felt disposed to engage in so revolting a task.”¹⁰³

Being inexperienced, miners often botched the job, which the onlookers found distressing.¹⁰⁴ When Jesus Sevaras was executed, for instance, he hung gurgling and quivering for some time and “the people began to turn away & leave the horable [sic] & painful sight.” Sevaras was only put out of his misery “when a rough looking Customer drew his revolver stepd [sic] up & shot the swinging Man through the body.”¹⁰⁵

As mentioned above, at least one execution was by firing squad. The three men sentenced to death in the Iowa Log Cabins incident were executed at their campground by a line of twenty men.¹⁰⁶ Ten members of the squad had blank cartridges and ten had bullets.

2. *Summation*

In short, the most orderly lynchings replicated at least some of the ordinary, common law procedures, including trial by judge and jury. The best evidence that the miners tried to be just, at least some of the time, is that a number of suspects were acquitted and that others were released for lack of evidence although they were believed to be guilty. Further, the miners often argued about the proper punishment and reduced the sentence recommended by the jury. On the other hand, the miners imposed incredibly harsh punishments, even when they “reduced” the sentence from execution to whipping, branding, cropping the ears, and shaving the head. The method of execution, namely strangulation rather than a clean drop that broke the neck, was also harsh.

102. BORTHWICK, *supra* note 25, at 226.

103. *Id.* at 226. In some instances the criminal was run up by a number of men, all equally sharing the hangman’s duty. SHIRLEY, *supra* note 54, at 155.

104. BORTHWICK, *supra* note 25, at 226 (“[L]ife was only crushed out of him by hauling the writhing body up and down, several times in succession.”).

105. John Clark, *The California Guide*, at 142 (entry for Aug. 10, 1853) (unpublished manuscript and transcription, on file with the Beinecke Rare Book and Manuscript Library, Yale University).

106. Hovey, *supra* note 64, at 82 (describing the execution on January 3, 1850).

3. Breakdowns of procedure

The discussion to this point describes relatively orderly proceedings, but there were also other lynchings that degenerated into summary punishment. Although many chroniclers claimed that Judge Lynch never executed an innocent person, others say what one must have supposed in any case, that once a lynch crowd became thoroughly excited, “however innocent you may be, you stand no chance.”¹⁰⁷ In Buffum’s description of the lynchings at Hangtown in January of 1849, the accused, two Frenchmen and a Chileno, were not present at their trial, and their request for an interpreter was never granted.¹⁰⁸ Moreover, the charges against them were attempted murder and robbery, not any completed act, but as “they were known to be bad men,” the miners agreed that they “ought to be got rid of.”¹⁰⁹ Buffum was convinced that they were executed unjustly.

Another example of near injustice was mentioned above, namely, that of the three Indians and a Mexican who were discovered burning the bodies of two Americans and were sentenced to be hanged.¹¹⁰ One was already dangling in the air when the county judge and some others persuaded the crowd to hand them over. Since they were found innocent, the lynchers had definitely made a mistake.¹¹¹ Similarly, two other individuals who had been given one hundred lashes each for theft were later thought to have been innocent.¹¹²

Just as disturbing as wrong verdicts were breakdowns of procedure, as when an excited crowd whipped or hanged the accused on paltry evidence or without allowing the defendant to speak. This might happen because the crowd was drinking and grew wilder as

107. BUCK, *supra* note 56, at 111; FIELD, *supra* note 96, at 56 (stating that “there was seldom any escape for a person tried by a Lynch jury” even if he was innocent).

108. There were also disturbing near-misses. A group of miners who discovered that a shovel was missing blamed a Chilean and nearly executed him before they were persuaded to release him. Vicente Pérez Rosales, *Vicente Pérez Rosales 1807–1866*, in *WE WERE 49ERS! CHILEAN ACCOUNTS OF THE CALIFORNIA GOLD RUSH 1*, 63–64 (Edwin A. Beilhzarz & Carlos U. López eds., 1976).

109. BUFFUM, *supra* note 23, at 84.

110. CHRISTMAN, *supra* note 74, at 174–75.

111. *Id.*

112. *Judge Lynch*, *DAILY ALTA CAL.*, Oct. 18, 1850, at 2.

the day went on.¹¹³ Trials were often held near a store on the miners' free day (often a Sunday), and men who had worked hard all week took advantage of the opportunity to drink.¹¹⁴ At the lynching described by Buffum,¹¹⁵ the first trial was relatively orderly, but by the time of the second the crowd was intoxicated and beyond reason.¹¹⁶ In a very similar case,¹¹⁷ some miners caught a thief who confessed to the crime and promised to hand over the money in return for his liberty. He kept his end of the bargain, but the crowd split over the question of whether to hang him. In the end, those in favor of hanging won the day. They then proceeded to hang the other prisoners in the local jail, also without a trial.¹¹⁸

The young woman lynched at Downieville was given counsel and a jury trial, but this appears to have been an empty formality.¹¹⁹ According to a widely accepted version of the story, a group of drunken men had pushed down her door in the night, and she stabbed one of them. Following a jury trial that lasted a full day, she was hanged "with the hungriest, craziest, wildest mob standing

113. The jurors might also be mellowed by drink. See Field, *supra* note 96, at 63 (describing how he persuaded jurors, "a little mellowed by their indulgence," to stop their trial and send the accused to Marysville).

114. SHIRLEY, *supra* note 54, at 119 (stating that a civil suit for debt was heard in the barroom of the Empire Hotel and the justice of the peace stopped the court twice to treat the jury); *id.* at 122 (stating that at whichever establishment the trial took place, the owner would make a large profit from the sale of dinners and drinks to the crowd); *Lynch Law in the Gold Diggings*, BARRE PATRIOT, Mar. 28, 1851, at 1 (Barre, Massachusetts) (quoting a California correspondent in stating that "our gambling houses are often turned into courtrooms on account of their size."); Wood, *supra* note 52, at entry for Dec. 1, 1849 (stating that the Jacksonville election for *alcalde* and sheriff was held on the same day as an auction at which liquor was sold and by night the town was full of drunken men).

115. See *supra* notes 23–28 and accompanying text.

116. In the first trial, the crowd of about two hundred men "organized themselves into a jury, and appointed a pro tempore judge." BUFFUM, *supra* note 23, at 84. In the second trial, the crowd was intoxicated. See *supra* note 27 and accompanying text.

117. Ezra Bourne, *Diary of an Overland Journey to California in 1850*, at 33 (unpublished transcript, on file with the Bancroft Library, University of California, Berkeley) (describing events in Spanish Flat and Coloma in 1850 or 1851).

118. *Id.*

119. See BARSTOW, *supra* note 61, at 21, 23 (adding that "[n]o jury or law in Christendom would have held the woman guilty of murder"); see also ALEXANDRE JEAN JOACHIM HOLINSKI, *LA CALIFORNIE ET LES ROUTES INTEROCÉANIQUES* 232 (Leipzig, 1853). But see WILLIAM B. SECREST, *JUANITA* (1967) (reconstructing a different version of the story, much less sympathetic to the Mexican woman Juanita). Borthwick also wrote that she killed her victim without provocation. BORTHWICK, *supra* note 25, at 222–23.

about that ever I saw anywhere,” wrote David Barstow.¹²⁰ The mob then drove some of her friends out of town and also “turned on” a Dr. Aiken because he had tried to defend her. Barstow said the young woman was acting in self-defense and that the hanging was murder. From the time he witnessed it, he had “no sympathy with, nor confidence in mobs.”¹²¹

Still, before there were state courts, the overwhelming majority of accused criminals were given a jury trial of some sort. The exceptions fell into two categories. First, individuals who killed Native Americans were not punished, while some Native Americans suspected of crimes were executed without a trial.¹²² Second, other persons of non-European descent were often summarily punished without a determination of guilt. For instance, very few blacks were accused of crimes, but those few were less likely to get a trial than white suspects. The thief mentioned above, who was hanged although he had returned the stolen money, was black.¹²³ Another black man was sentenced to forty lashes, without a trial, for stealing a mackerel.¹²⁴ Yet another was whipped until he confessed that he had stolen \$2000 and then, after some debate, was handed over to the authorities.¹²⁵ Similarly, a “Hindoo” was summarily whipped because he falsely accused some Indians of theft.¹²⁶

The many Mexicans in the mines were both suspected of crimes and victims to crime.¹²⁷ Highway murders, especially, were frequently assumed to have been committed by Mexicans, but, as these murderers usually escaped, their identities were never

120. BARSTOW, *supra* note 61, at 23.

121. *Id.*

122. See William Tell Parker, Notes by the Way, (entry for Nov. 15, 1851) (unpublished transcript, on file with the Huntington Library) (writing that after Indians killed two Americans, the miners seized an Indian whom they suspected, and “[a] few of those present thought it unworthy of Americans to kill a prisoner without a trial, but a majority were in favor of shooting him”); see also Clark, *supra* note 105, at 158 (entry for Apr. 30, 1854) (stating that two Indians were hanged on suspicion of murder after “the[y] were first cleared by the jury then the mob dissatisfied with the decision caught & hung them”).

123. Bourne, *supra* note 117, at 32.

124. *Judge Lynch’s Court*, MARYSVILLE HERALD, Jan. 21, 1851.

125. *Sacramento and Placer Intelligence*, DAILY ALTA CAL., Apr. 17, 1850.

126. RILEY SENTER, CROSSING THE CONTINENT TO CALIFORNIA GOLDFIELDS (1938) (entry for July 7, 1850).

127. See, e.g., BORTHWICK, *supra* note 25, at 306 (observing that the miners in the Northern mines were almost all Americans, while in the Southern mines, there were many camps made up entirely of Mexicans, Frenchmen, Chileans or Chinese).

confirmed.¹²⁸ In one of the rare cases when two specific Mexicans were accused of killing an American, they were lynched and hanged without a trial.¹²⁹ Few crimes by Americans against Mexicans are documented, possibly because they were not prosecuted.¹³⁰ When a Mexican was accused of killing another Mexican, however, the suspect was usually arrested but not lynched,¹³¹ suggesting that Americans took crimes against Mexicans less seriously than crimes against Americans.

C. Popular Trial's Last Stand

The number of summary executions without any form of trial increased after 1850. The main reason for the disintegration of due process, where it occurred, was that lynch law came into competition with the nascent state courts. In its first years, the official legal system was impracticable and its officers were corrupt. Frustrated by the courts' inability to bring criminals to justice, angry crowds repeatedly seized prisoners and punished them outside the law. With the crowd and the sheriff literally fighting over the possession of the prisoner, the miners often skipped procedural formalities and hanged suspects as quickly as they could. As one miner wrote, "[m]any of

128. *See, e.g., id.* at 235.

129. *Tremendous Excitement at Sonora—Two Mexicans Hung and Two Chilenos Shot!!*, MARYSVILLE HERALD, June 19, 1850 (reporting that two Mexicans accused of murdering an American were taken from the officers of Sonora, brought to Shaw's Flat—the scene of the crime—and hanged).

130. The Downieville lynching was one exception; another was described by Ferson, *supra* note 84, (entry for Apr. 20, 1851). Some Americans were suspected of killing some Mexicans. The dead men's compatriots prepared to hang the Americans without trial, but before they could do so, the Americans drove all Mexicans out of that part of the mines. In his letter of July 10, 1851, Ferson, *supra* note 84, wrote "tha [sic] mak [sic] the old Mexicans toe the mark pretty here . . . than was one hung ashort [sic] time ago a little ways from here for steeling [sic]"; *see also* CHRISTMAN, *supra* note 74, at 174 (Mexican suspects "were taken before the magistrate but before the hearing was gone through with, the excited people seized the prisoners, took them to the top of an adjacent hill, selected a jury under a tree, tried and found them guilty, and sentenced them to be hung." The county judge persuaded them to give up the prisoners, and they were tried and acquitted.).

131. *Murder*, STOCKTON TIMES, May 11, 1850 (reporting that a Mexican accused of killing another Mexican was apprehended); *Robbery*, STOCKTON TIMES, Sept. 28, 1850 (reporting that a suspected accomplice of Mexicans who stole \$970 was arrested in the town of Sonora); *The Stabbing Case*, STOCKTON TIMES, Jan. 25, 1851 (reporting that a certain Joe Morea was arrested for killing a Mexican boy in a saloon at Moquelumne Hill; the newspaper stated that the accused may be not guilty by reason of insanity); Upton, *supra* note 72 (entry for Sept. 8, 1850).

the worst criminals escape from the law on account of its delays and this makes men anxious to execute it while they can.”¹³²

Some of the lynchings during this period were truly horrific. As will be demonstrated below, however, more remote mining camps continued to use the due process form of lynching. Even when the crowd had snatched the accused from the authorities, the lynching sometimes maintained a minimal semblance of a trial. Community punishment of criminals after 1850 illustrates both the hubris of miners, who believed they could “do justice” without formal procedure, and a surprising commitment to due process where still feasible.

The deficiencies of the legal system in the early 1850s were conveniently summarized by Mary Floyd Williams and are discussed in the following paragraphs.¹³³ In short, they fell under four headings: (1) California’s lack of jails and prisons, (2) the difficulties of transporting suspects to the place of trial and compelling witnesses to attend, (3) impracticable laws, and (4) incompetent and corrupt office holders.

For a long time, no jails were built in the mining camps or even in the towns. In August of 1850, Marysville had no jails, “nor the law defining the manner we shall have one.”¹³⁴ Prisoners had to be sent to Sacramento.¹³⁵ The Marysville county jail was finally completed in January 1851.¹³⁶ Even after jails had been built, however, jailbreaks were frequent; in June 5, 1851, for instance, ten prisoners escaped when their guard was away from his post.¹³⁷ It was

132. Wood, *supra* note 52 (entry for June 25, 1852).

133. WILLIAMS, *supra* note 23, at 142–47 (describing the problems of the legal system in the 1850s); *see also* PETER H. BURNETT, RECOLLECTION AND OPINIONS OF AN OLD PIONEER 390 (New York, D. Appleton & Co. 1880), *available at* <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

134. *Judicial Matters*, *supra* note 38, at 2.

135. *Id.*

136. *The County Jail*, MARYSVILLE HERALD, Jan. 7, 1851, at 2 (reporting on the new jail built at Marysville; its timbers were twelve inches thick and lined with heavy sheet iron).

137. *General Jail Delivery—Escape Extraordinary!*, MARYSVILLE HERALD, June 5, 1851, at 2 (reporting the escape and noting that the prisoners included two Englishmen, one Irishman, two Manilans, one French Canadian, and presumably four Americans, illustrating the diversity of the criminal population); *see also Re-Arrest*, MARYSVILLE HERALD, May 1, 1851, at 2 (reporting that two men who broke out of jail had been retaken).

widely believed that guards and sheriffs created opportunities for escape in exchange for bribes.¹³⁸

Getting suspects from remote mining camps to the county seat for trial was difficult, involving a journey of several days on horseback, during which the prisoners had many chances for escape.¹³⁹ It might then be months before the court met. Witnesses were bound to appear at trial, but they did not receive a fee for attending, even though they had to travel great distances and be available for days at a time.¹⁴⁰ It is no wonder, therefore, that when the trial finally did take place, key witnesses were often absent.¹⁴¹

The problems of distance were exacerbated by procedural rules poorly suited to the topography of the mines. Local justices had no criminal jurisdiction, even over petty misdemeanors, so all suspects had to be tried at the county seat.¹⁴² The District Court, which tried serious cases, sat only three to five times per year.¹⁴³ And then there was a probability that the case would be postponed because of objections raised by the defendant's lawyer.¹⁴⁴

Finally, the judges and sheriffs were notoriously incompetent and corrupt.¹⁴⁵ The Grand Jury of Tuolumne County made a presentment on the disrespect for the laws, which it blamed, in part,

138. HUNTLEY, *supra* note 61, at 136–37 (stating that in the cases of bailable offenses, the accused would give \$1000 in cash to the recorder and his personal security for another \$1000; then, “if his case is clearly a bad one, he ‘slopes’”); *Murderers of Smith and Foster*, DAILY ALTA CAL., Sept. 14, 1850, at 2 (reporting that an accused murderer, Marianna Hernandez, escaped from captivity in San Jose when, on the order of some unnamed person, his manacles were taken off and he was taken in the night to give a “deposition”).

139. WILLIAMS, *supra* note 23, at 146.

140. *Expenses of Witnesses in Criminal Cases*, DAILY ALTA CAL., Oct. 15, 1851.

141. *Id.*

142. WILLIAMS, *supra* note 23, at 146.

143. *Expenses of Witnesses in Criminal Cases*, *supra* note 140.

144. *Id.*

145. See BANCROFT, *supra* note 12, at 130–31 (stating that there is scarce a political office holder “who has not entered upon his duties and responsibilities as the means of making money enough to carry him home” (quoting EVENING PICAYUNE, Aug. 1850)); see also *Judge Turner*, MARYSVILLE HERALD, Aug. 6, 1850, at 3 (reporting on Judge Turner and his incapacities); *San Francisco Correspondence*, MARYSVILLE HERALD, Aug. 9, 1850 (“[M]agistrates and judges are tainted with scoundrelism and corruption . . . successful crime of [every] character goes unpunished.”); *The World is Governed Too Much*, MARYSVILLE HERALD, Aug. 27, 1850, at 2 (stating that an incompetent legislature had enacted useless laws).

on “failures, neglects, and incompetency of public officers.”¹⁴⁶ This sorry state of affairs was due in large part to the Californians’ own failure to elect decent public officials,¹⁴⁷ but that did not make the miners less angry about the courts’ failure to convict criminals. As one miner wrote, the chances of escape afforded by the slow process of law “created a disposition to inflict summary punishment on the offender rather than allow him the chances of escape afforded by the slow process of the law.”¹⁴⁸ Many other miners made comments along the same lines.¹⁴⁹

Because the miners had so little faith in the authorities, they sometimes seized prisoners and summarily executed them, as when a jealous husband shot a man with whom his wife was too friendly: “He was put into jail, and the crowd took him out and hung him forthwith.”¹⁵⁰

The most dramatic and confusing incidents were those in which the crowd and the legal officers battled over the prisoner’s person, with the officers attempting to get him safely in jail or keep him in jail and the mob fighting to get its hands on him and hang him on the spot. In a typical example, a man in Hangtown was to be tried for murder, but was instead merely examined before the judge and the sheriff and, presumably, remanded for trial. At that point, “the

146. *Presentment of the Grand Jury of Tuolumne County*, SONORA HERALD, Aug. 3, 1850, at 1.

147. *See id.*; *see also* FIELD, *supra* note 96, at 64 (stating that “[i]t was difficult to interest the miners in [the election]; most of them had come to the country in the hope of improving their fortunes in one or two years, and then returning to” the States); *see also* ROYCE, *supra* note 14 at 275 (explaining that lynching deterred crime only temporarily and that established social institutions are necessary for long term security); *What Does California Need?*, MARYSVILLE HERALD, Oct. 4, 1850, at 2 (containing an anonymous contributor’s statement that Californians need to elect good officers).

148. *See Serious Affray at Columbia—Great Excitement*, *supra* note 62, at 3; Letter from Sam [] to Willie, *supra* note 63 (stating that “the citizens were compelled to take the execution of justice into their own hands” because “the law has not punished one man”).

149. *See, e.g., Letter to the Editor* (dated San Jose, Sept. 13, 1850), MARYSVILLE HERALD, Sept. 22, 1850 (stating, with respect to horse thieves recently imprisoned, that “so little confidence is placed in the authorities . . . that it was suggested last night, by one of the best citizens of the place, to take the thieves out and call on Judge Lynch to preside”); *Tremendous Excitement in San Francisco*, MARYSVILLE HERALD, Feb. 28, 1851 (reporting that during the trial of Stewart and Wildred for the murder of Janson on February 19, 1851, a handbill was circulated stating that the law appeared to be a nonentity and that no redress was to be had but by the code of Judge Lynch). These were the same circumstances that led to the emergence of lynch law elsewhere on the frontier. BROWN, *supra* note 5, at 112–13.

150. Charles H. Chamberlain, Statement 2 (1877) (unpublished manuscript, on file with the Hubert Howe Bancroft Collection, Bancroft Library, University of California, Berkeley).

mob raised the cry ‘Bring him out! [H]ang him!’” and made a rush for the prisoner.¹⁵¹ He “was seized by the hair and dragged a short distance to an oak tree a rope was put around his neck and over the limb of the tree and some men took hold of the end and hoisted him up as they would a hog to be dressed where he hung until he was dead.”¹⁵² In another affair, a crowd that had hanged one man for theft decided to keep going. Two other prisoners, both from Sydney, were in the jail. Once the “mob” had hanged the thief, someone shouted, “Let’s hang the Sydney Convicts.”¹⁵³ The excited crowd rushed over to the jail, pushed in the door, brought the men out, and hanged them on the same tree as the thief.¹⁵⁴

Mary Floyd Williams suggested that the mining population abandoned its commitment to due process after 1850. Before the California Constitution was enacted, she argued, the miners believed that their lynch courts were the law’s legitimate enforcers and felt the responsibility of their position. But after the creation of the courts, the miners’ tribunals “lost their dignity and their ideals of deliberate justice Inevitably, they degenerated into angry mobs, that hastened to whip or to hang the accused before the sheriff could intervene . . . to forestall punishment or acquittal by the courts.”¹⁵⁵ In other words, Williams suggests that good faith popular trials lasted only from 1848 to 1850.

Williams’s description of lynch law before and after 1850 is too simple, however. Orderly lynchings continued to be held for several

151. Shubael Wescott Stowell, *Diary* (Oct. 25, 1850) (unpublished manuscript in the Shubael Stowell family papers (1850–1930), on file with the Beinecke Rare Book and Manuscript Library, Yale University).

152. *Id.*; see also Letter from Ephriam Delano to Wife (Jan. 19, 1852) (unpublished manuscript, on file with the Beinecke Rare Book and Manuscript Library, Yale University) (stating that a man was hanged for robbery and murder, and “the authorities tried to get him but no use since the people has taken the law in their own hands”).

153. Bourne, *supra* note 117, at 32–33 (the execution of the thief with which this story begins is discussed *supra* note 152); see also Allen, *supra* note 61 (entry for Mar. 15, 1851) (stating that after Judge Frank acquitted a suspect, the miners “followed and arrested him and tryed [sic] and found him guilty [sic] and sentenced him to 200 Lashes or own up that he stole the Oro”).

154. Bourne, *supra* note 117, at 32–33.

155. WILLIAMS, *supra* note 23, at 151 (stating that when the miners’ tribunals found themselves pitted against the dilatory courts, they “lost their dignity and their ideals of deliberate justice in conducting a struggle for the possession of a prisoner, and in making a hurried disposition of his fate”); see also THE COURSE OF EMPIRE 23 (Valeska Bari ed., 1931) (stating that after 1850, when a state criminal justice system was established, lynching was no longer legal).

years. New mining camps sprang up beyond the reach of the authorities, and these new camps dealt with crime in their own way.¹⁵⁶ Furthermore, even when the miners did seize criminal defendants from the officers of the law, they often granted them some form of trial.

Long after 1850, new mining communities confronted the problems of law in the wilderness and used the methods of the lynch trial. Jacob Engle wrote a letter to his brother dated June 3, 1852, in which he reported a theft of \$200 from a miner upstream.¹⁵⁷ A suspect was seized and the stolen money was found in his possession, “so the miners gathered together and appointed a jury which found him guilty.”¹⁵⁸ Since the crowd could not decide between the options of hanging the thief or whipping and branding him, a committee was formed to make that decision. It recommended that the thief be given fifty lashes, branded on the cheek, and banished from the region on pain of hanging. These proceedings were indistinguishable from those commonly followed in 1849. Similarly, when a man named Noble was tried for stabbing a man in November of 1853, “[c]ounsel was allowed the accused, and the usual forms were observed.”¹⁵⁹ The jury advised that the accused should be handed over to the authorities, and a majority of those present sustained the decision.

The miners who took back suspects from the authorities often punished them without a trial, as discussed above, but on other occasions they did hold a trial of some sort. William Binur wrote that “[t]he Officers have got a way of letting Criminals off and the people wont [sic] stand it so they take them from the Shireff [sic] choose a Jury try them and have them strung up in an hour or two which is

156. For an orderly lynching as late as November 1853, see *Serious Affray at Columbia—Great Excitement*, *supra* note 62, at 3, which states that the jury advised that the accused should be handed over to the authorities and a majority of those present sustained the decision.

157. Letter from Jacob H. Engle to Brother (June 3, 1852) (manuscript, on file with the Huntington Library; this letter is also reproduced in JANE B. GRABHORN, *A CALIFORNIA GOLD RUSH MISCELLANY* 34–35 (1934)).

158. *Id.*

159. See *Serious Affray at Columbia—Great Excitement*, *supra* note 62, at 3; see also SHAW, *supra* note 61, at 140 (describing the miners’ trial of an accused murderer, with judge and jury, on the Consumnes River in 1854).

the only wae [sic] to do it in these parts.”¹⁶⁰ Although Binur makes the hearing sound like a mere formality, in fact a number of trials of prisoners taken from the authorities were as elaborate as any reported from the mines. For instance, Jesus Sevaras, also known as Charley the Bullfighter, was alleged to have been involved in the gruesome murder of Jacob Mincer.¹⁶¹ He was in the courtroom being tried by the civil authorities when the “five or six hundred miners standing round” decided to try him themselves.¹⁶² They wrested him from the sheriff and took him to the edge of town. There they selected twelve jurymen and “a justice named A.J. Lowell, of St. Louis Council, administered the oath.”¹⁶³ A string of witnesses testified that Charley had been seen in the area about the time of the murder and identified the knife found at the scene as Charley’s.¹⁶⁴ The jury retired briefly, returned a verdict of guilty, and “asked the people to pass the sentence. Several hundred rose to their feet & declared he should be hung in one hour,” which he was.¹⁶⁵ Other descriptions of such trials contain less detail but follow the same pattern.¹⁶⁶

What finally put an end to lynching was the growth of stable communities with a long-term interest in the State.¹⁶⁷ Order and respectability were strengthened, Bancroft says, “by the presence of

160. WILLIAN BINUR, *WOODED UP IN LOG TOWN: A LETTER FROM THE GOLD FIELDS 12* (1851) (letter to Sarah, Mar. 8, 1851). Binur makes the outcome seem like a foregone conclusion, but this could be mere swaggering.

161. Clark, *supra* note 105, at 138–42 (entries for August 5, 9, and 10, 1853).

162. *Id.* at 140.

163. *Id.* at 142.

164. *Id.*

165. *Id.*

166. BUCK, *supra* note 56, at 110–11 (stating that Michael Grant, arrested for murder, was taken by the people, tried to a judge and jury, found guilty, and executed ten days later); CHRISTMAN, *supra* note 74, at 174 (Mexican suspects “were taken before the magistrate but before the hearing was gone through with, the excited people seized the prisoners, took them to the top of an adjacent hill, selected a jury under a tree, tried and found them guilty, and sentenced them to be hung.”). The subsequent fight over the prisoner’s fate is described in HUNTLEY, *supra* note 61, at 190–92. Huntley also described the events following a stabbing at Columbia in 1852. The people took the accused from the authorities and hanged him from the limb of a tree, but when the limb broke, they decided to try him to a jury. During the hearing, which lasted five or six hours, the Sheriff of Sonora tried to recover the prisoner, but the miners fended him off. Huntley does not report the verdict, if any, but says that at the end of the proceedings the Sheriff managed to obtain the accused and take him to Sonora. *Id.*

167. Johnson, *supra* note 16, at 584 (noting that after the 1850s, lynching came to be seen as a crime in itself). Lynching did not die out entirely in California or in any of the Western and Southern states.

woman, when she came, as well as of churches, schools, lyceums and piano-fortes.”¹⁶⁸ Whether lynching petered out or was actively stopped varied from place to place. Colonel Norton reported that at Placerville in 1853, some eighty miners organized “in the interest of law and order, and determined that promiscuous hanging should be stopped, and that the laws of the country should be enforced in all cases, criminal as well as civil.”¹⁶⁹ Soon afterwards, one man killed another in a drunken brawl. The civil authorities arrested the accused and, predictably, a mob of several thousand demanded that he be surrendered to them. Norton and his compatriots managed with great difficulty to hold on to the prisoner and take him to Coloma, the county seat, where he was in due course tried, convicted, and hanged. According to Norton, this marked the end of lynching in El Dorado County. “The old Hangtown Oak was cut down and principally manufactured into canes, which are carefully kept in remembrance of the days of gold excitement, riot, and blood-shed.”¹⁷⁰

D. Popular Trials Versus Mob Law and Vigilantism

The legitimacy of popular trials as a form of *law* as opposed to self-help was reflected in its perceived difference from mob law. To most miners, lynch law was legitimate, or at least justifiable, while mob law was morally wrong. Indeed, the defining characteristic of the miners’ meeting was that it was *not* the mob, but The People.¹⁷¹ Opponents of “lynch law,” however, said popular trials were no better than mob law, condemning both.¹⁷² In both. In effect, both sides were arguing about the difference between law and self-help.¹⁷³

168. BANCROFT, *supra* note 12, at 124.

169. LEWIS ADELBERT NORTON, LIFE AND ADVENTURES OF COL. L. A. NORTON 291 (Oakland, Pacific Press 1887), *available at* <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

170. *Id.* at 293.

171. *See The Gold Fever Abroad*, CALIFORNIAN, Sept. 9, 1848 (“[T]he second sober thought of the people is always right and never wrong.”).

172. There were also a few of miners who used the words “people,” “miners,” and “mob” interchangeably and for whom “mob law” was not a bad thing. This group has the least to say about the legitimacy of lynch law.

173. Meanwhile, a minority used the terms lynch law and mob law interchangeably and without disapproval; these individuals were evidently less bothered by the issue of self-justification. *See SHAW, supra* note 61, at 139–40 (using both Judge Lynch and mob law in describing the trial and punishment of a thief and of a murderer).

For the great majority of miners, the term “lynch law” carried no negative connotations; it was simply the operative criminal law of the diggings just as the local mining code was the basis of property law. In fact, a mining company prospectus explaining how the company was founded used the term “Lynch Code” for legal procedure in the mines generally.¹⁷⁴ Events that some miners called “lynchings” were called “trials” or “miners’ meetings” by others.¹⁷⁵

1. Lynch-law distinguished from mob law

Proponents of lynch law distanced themselves from the worst outrages in the mines.¹⁷⁶ For instance, under the heading “Judge Lynch,” the *Daily Alta California* of October 13, 1850, wrote that “[w]e are really becoming the friend of this much abused old gentleman [Judge Lynch]. He has done some things badly in his day, but suffers more from his counterfeit rival Mob Law, than from any act of his own.”¹⁷⁷ Shortly thereafter, the *Alta* reprinted an article about a lynching from the Sacramento *Placer Times* with the following introductory words: “The Times does ‘Judge Lynch’ wrong by the heading of the following article. It was Mob Law, not Lynch Law. His Honor never proceeds to punishment without some evidence of guilt.”¹⁷⁸ The *Alta* here neatly condemns the particular event it reported while affirming its sympathy towards lynching.¹⁷⁹

174. *Rocky-Bar Mining Company, California Circular, Articles of Association, Resolutions etc. 1850*, facsimile of original prospectus bound between pages 6 and 7 of CARL I. WHEAT, *THE ROCKY-BAR MINING COMPANY* (1934) (stating that in forming the company, all the requisitions of the “*Lynch Code*, or miner’s law were complied with,” including meetings, public notices, and committee reports).

175. *Murders in the Mines*, DAILY ALTA CAL., Sept. 16, 1850 (stating that in 1849, the “miners were a law unto themselves” and if a felony was committed “a trial followed as soon as the suspected criminal could be apprehended, and while all the witnesses could be found”).

176. *See, e.g.*, BANCROFT, *supra* note 12, at 142, 515 (“To the outward observer the lines between vigilance and the mob spirit were not in every instance clearly apparent.”).

177. Editorial, *Judge Lynch*, DAILY ALTA CAL., Oct. 13, 1850, at 2.

178. *Id.* at 2; *see also* WILLIAMS, *supra* note 23, at 435 (referring to the lynching of blacks in the Southern United States, Williams wrote, “It seems almost an injustice to associate even remotely the self-restrained members of the Committee of Vigilance with a blood-crazed mob that reverts to the vengeance of savages.”).

179. Strangely, however, the *Daily Alta California* was thoroughly inconsistent in its opinion about whether the term “lynch law” connoted a good or bad thing. In August, 1849, for example, the *Daily Alta California* approved of a trial by jury and execution in Stockton, an event which would later be called a “lynching.” Yet it condemned shaving the head, cutting off the ears, “and other disgraceful mutilations of the person” as “the barbarous forms of Judge Lynch.” *Arrests, Trial and Execution*, PLACER TIMES, Aug. 18, 1849 (reprinting an

The *Placer Times* took the less popular position that some lynchings were patently unjust.¹⁸⁰ On the whole, however, the miners preferred not to hear criticism of an institution in which they had all participated. The *Placer Times*, which later became the *Sacramento Transcript*, was an old and well-established newspaper and could afford to be blunt from time to time.¹⁸¹ The *Sacramento Index*, however, which was first published on December 23, 1850, was forced to fold because of its unpopular condemnations of lynch law.¹⁸²

Individuals who condoned popular trials preferred, like the *Alta*, to deplore summary punishment as something other than lynch law, namely “mob law.” William Lewis Manly, for instance, described the notorious Downieville lynching of Juanita as the work of a mob. “She was given a mock trial . . . it was a foregone conclusion that the poor woman was to be hanged, and the leaders of the mob would brook no interference.”¹⁸³ Both lynchings described earlier in which prisoners were taken from the authorities and hanged without trial were said to be the work of “the mob.”¹⁸⁴ On the one hand, this

article from the *Alta California*. In *Judge Lynch*, DAILY ALTA CAL. Oct. 13, 1850, the newspaper approved of lynching, adding that Judge Lynch “suffers more from his counterfeit rival Mob Law, than from any act of his own.” In *Judge Lynch*, DAILY ALTA CAL., Oct. 18, 1850, the editors again defended lynch law, commenting that “[t]he *Times* does ‘Judge-Lynch’ wrong” in an article about the summary punishment of a suspected thief, since “[h]is Honor never proceeds to punishment without some evidence of guilt.” But on December 16, 1850, the editors reacted against a suggestion that arsonists should be lynched. “We cannot commend Lynch Law,” they said. “Once open the floodgates of unrestrained punishment, and the innocent are in as much danger . . . as are the villains . . .” *Arson*, DAILY ALTA CAL., Dec. 16, 1850, at 2.

180. *Arrests, Trial and Execution*, *supra* note 179, at 1 (printing a description of the lynching of Mickey, alias Bill Lyon, and the arrest and subsequent punishment of others, for burglary and theft; the paper called the punishment by mutilation a “mockery of law and outrage of humanity”). The *Marysville Herald* took the same position when it reported that a black man caught stealing mackerel from a store was “staked out” and given forty lashes. The newspaper states it has “nothing to say as to the justice of this sort of punishment” but titles the article “Judge Lynch’s Court.” *Judge Lynch’s Court*, *supra* note 124, at 6.

181. EDWARD C. KEMBLE, *A HISTORY OF CALIFORNIA NEWSPAPERS, 1846–1858*, at 137 (Helen Harding Bretnor ed., Talisman Press 1962) (1858).

182. *Id.* at 145 (stating that severity of the *Index* on the subject of mob violence eventually led to its failure).

183. WILLIAM LEWIS MANLY, *DEATH VALLEY IN ‘49*, at 449 (1929); *see also* BARSTOW, *supra* note 61, at 23 (stating that the same incident at Downieville “show[ed] from first to last the utter irresponsibility of mobs”); BUFFUM, *supra* note 23 (calling the hanging of two Frenchmen and a Chilean at Hangtown in 1849, a “horrible tragedy” and the work of an “infuriated mob”).

184. Bourne, *supra* note 117, at 33.

distinction could make the justice of lynch law tautological by asserting that anything that was “unjust” was “not lynch law.”¹⁸⁵ On the other hand, it set up a continuum between lynch law (orderly and legal) and mob law (disorderly and illegal) that more or less corresponds to the range of cases we see in the mines.

Critics of lynch law, in contrast, described even a typical miners’ trial and punishment as “mob law.” Henry Veel Huntley, an Englishman whose descriptions of lynch law were always disapproving, used “mob” frequently, as in, “the mob would have Judge Lynch to try him.”¹⁸⁶ In 1851, Charles Doriot wrote to his brother that “this country is in a Reched [sic] Condition.” Among the problems he listed was that the miners did not “[r]espect the laws made in the legislature[;] they make there [sic] own laws[;] thieves and murderers, they generally mob them.”¹⁸⁷ Louise Clappe, also known as “Dame Shirley,” whose letters from Indian Bar provide the most detailed accounts we have of life in any mining camp, also deplored lynchings. The incidents she described were particularly egregious, however, and would have been denounced as “mob law” even by supporters of lynch law. “The mob were for hanging our poor ‘Vattel’ without judge or jury,” she wrote, “and it was only through the most strenuous exertions of his friends, that [his life] was saved.”¹⁸⁸

In short, everyone condemned mob law or mob action—meaning the punishment of an individual without a jury trial—assuming, of course, that the individual was an American of European descent.¹⁸⁹ The judge, jury, counsel, separation of verdict and sentencing, and delay before the execution of the sentence made lynching “legal” in the eyes of its supporters, at least until there were proper courts. They were safeguards for all members of the community accused of crime.

185. Editorial, *supra* note 176, at 2.

186. HUNTLEY, *supra* note 61, at 136; *see also* ERNEST DE MASSEY, A FRENCHMAN IN THE GOLD RUSH 172 (Marguerite Eyer Wilbur trans., 1927) (1851) (describing the hanging of Frederick Roe in Sacramento on February 25, 1851, as lynch law and the work of the mob).

187. Letter from Charles Henri Doriot to Victor Doriot (July 12, 1851) (unpublished manuscript, on file in the Bancroft Library).

188. SHIRLEY, *supra* note 54, at 170.

189. Non-Europeans were not afforded the same protection. *See supra* notes 122–31 and accompanying text.

2. Lynch-law distinguished from vigilantism

The miners never used the term “vigilantes” except for the vigilance committees of 1851, discussed below. Elsewhere on the frontier, however, vigilantism was the most familiar form of organized crime control. The modern view is that vigilantism cannot be distinguished from lynching; that vigilantes were simply lynch parties or that lynching was “instant vigilantism.”¹⁹⁰ Certainly vigilantism was a form of lynching in its broadest sense of extralegal punishment.¹⁹¹ As this section discusses, however, vigilantism differed from lynch law in its hierarchical organization and in that it sought to deal with a particular threat rather than to punish criminals in general.

Vigilantes, also known as Regulators, Rangers, or Volunteers, were groups organized by prominent citizens—“the respectable people.”¹⁹² “The characteristic vigilante movement,” according to Brown, was organized in “command or military fashion and usually had a constitution, articles, or a manifesto to which the members would subscribe.”¹⁹³ Vigilance committees were formed to deal with gangs of horse thieves and counterfeiters, crime waves, or corrupt officials. Their goal was to rid the vicinity of these predators rather than to bring them to justice. Sometimes this required killing one or several members of the gang, but if this sufficed to drive the others away, the vigilantes were satisfied.¹⁹⁴ They did not seek to punish all of the members of the gang.

A number of frontier vigilance committees held trials very similar to those in the mines, with a judge and jury, counsel for the accused,

190. Johnson, *supra* note 16, at 560 (stating that Hubert Bancroft and Richard Maxwell Brown distinguished between vigilantes and lynch parties, but that this distinction is not empirically evident); *see also* BROWN, *supra* note 5, at 103 (suggesting that “instant vigilantism” emerged in the second half of the nineteenth century when the routines of vigilante action were so familiar that the formality of forming a committee was dispensed with).

191. BROWN, *supra* note 5, at 108–09 (stating that vigilante movements were generally “organized in command or military fashion and usually had a constitution, articles, or a manifesto to which the members would subscribe”).

192. CUTLER, *supra* note 11, at 57 (quoting *Letter to the Editor*, S.C. GAZETTE, Sept. 2, 1768) (stating that the respectable people of the remote part of the province had met and adopted a Plan of Regulation); *see also* BROWN, *supra* note 5, at 105.

193. BROWN, *supra* note 5, at 108–09.

194. *See id.* at 110 (stating that vigilante movements often obtained their ends by executing only one or two persons).

and a final vote on the sentence by the crowd.¹⁹⁵ Through 1849, the most common punishment was whipping and expulsion, but from 1850 onwards, the sentence was usually death.¹⁹⁶ Vigilante trials have not been the subject of a separate study, however, and it is not known how hard they tried to be fair.¹⁹⁷

The formal organization of vigilance committees, which distinguished them from lynch crowds, was both useful and dangerous. “Good” or “socially constructive” vigilance committees, as Brown styles them,¹⁹⁸ were disciplined and focused. They lasted anywhere from one week to several months until they completed their self-appointed tasks and then disbanded.¹⁹⁹ “Socially destructive” vigilante movements came about when the committee sought to further personal ends or operated without a community consensus.²⁰⁰ In such cases, rival groups, sometimes known as “moderators,” formed to resist them, resulting in a violent struggle for power.²⁰¹ Lynch crowds, in contrast, were less disciplined, but also disbanded quickly.

The California gold mining region also had its vigilance committees, but outside of San Francisco, they did very little. The San Francisco “Law and Order Party” of 1849²⁰² and the two big San Francisco Vigilance Committees of 1851 and 1856 generated voluminous records and were the subject of many newspaper accounts and much later scholarship.²⁰³ They have come to stand for gold rush law in general.²⁰⁴ All three were formed to deal with gangs of one sort or another.

195. *See id.* at 109.

196. *Id.*

197. Brown states that the accused were almost never acquitted, but he does not appear to have investigated this aspect of vigilantism in any depth. *Id.*

198. *Id.* at 118.

199. *Id.* at 97 (stating that the distinguishing feature of vigilance committees was their regular organization and definite period of existence).

200. *Id.* at 120.

201. *Id.* at 121–22.

202. “The Law and Order Party” of 1849 would later be called a Vigilance Committee, but that label had not yet been invented. *See WILLIAMS, supra* note 23, at 107–08.

203. *See id.* for the most detailed history of the Committees of 1849 and 1851.

204. *See, e.g.,* PFEIFER, *supra* note 8, at 2 (noting a dearth of scholarship on mob violence in the West, except with respect to the activities of the San Francisco committees of vigilance); WALDREP, *FACES, supra* note 3, at 50–52.

The San Francisco Committee of Vigilance of 1851 was the first ever of that name; it invented the term “vigilance committee.”²⁰⁵ The other vigilance committees in the mining region were organized shortly thereafter.²⁰⁶ Stockton, Marysville, Sacramento, and Sonora had their own committees before the end of June 1851, and Nevada City followed suit in July.²⁰⁷ The most notable activities of these “branch committees” appear to have been assisting the San Francisco Committee by sharing information and hunting down the criminals who had escaped the metropolis.²⁰⁸ Other than this, they left little trace in the record, in part because, like all vigilante movements, they were short-lived.²⁰⁹

Several of the vigilante committees adopted constitutions modeled on that of San Francisco.²¹⁰ One glance at the resolutions passed at the first meeting of the Sonora Vigilance Committee shows how different its organization was from that of a miners’ meeting.

Resolved, That no members be admitted to this association except they be unanimously elected.

Resolved, That ten gentlemen be selected to act as a police for the night.

205. John Joseph Stanley, *Vigilance Movements in Early California*, in *LAW IN THE WESTERN UNITED STATES* 55, 70 (Gordon Morris Bakken ed., 2000). Mary Floyd Williams notes that Stockton had appointed a “vigilance committee” to petition the state and military authorities for law enforcement, but this was not yet a Committee of Vigilance in the later sense. WILLIAMS, *supra* note 23, at 375.

206. WILLIAMS, *supra* note 23, at 374–75 (noting that the San Francisco Committee of Vigilance encouraged other communities to organize similarly and that by December Vigilance Committees existed in nearly every county).

207. *Id.* at 376–79.

208. *Id.*; *see also id.* at 375 n.51 (“Other cities in the interior have imitated the example of San Francisco, and have instituted Branch Vigilance Committees, who act in concert with the parent body.” (quoting MARYSVILLE HERALD, July 1, 1851)).

209. The Sonora Committee punished some criminals with floggings, but the details are sketchy. *Id.* at 378–79 (noting inconsistencies in the secondary sources about whether the Committee’s punishments were excessive or restrained); *see also* CHRISTMAN, *supra* note 74, at 203 (reporting that under the auspices of Sonora’s Vigilance Committees, all suspects (unnamed) were tried to a jury, and the Committee hanged at least one horse-thief and whipped and banished a number of others). On the short tenure of vigilance committees, *see*, for example, WALDREP, *FACES*, *supra* note 3, at 52 (stating that the San Francisco Committee of Vigilance of 1851 was founded on June 9 and had stopped operating by October, although the executive committee continued to meet until May 1852). The Vigilance Committee of Marysville handed over its affairs to a standing committee of ten in October 1851. WILLIAMS, *supra* note 23, at 376.

210. WILLIAMS, *supra* note 23, at 376 (Marysville); *id.* at 379 (Nevada City).

Resolved, That the police have a private watch word, "Action!"

. . . .

Resolved, That secrecy should be observed as to the doings of this committee by the members thereof.

. . . .

Resolved, That a committee of five be appointed to draft constitution and by-laws and report tomorrow evening.²¹¹

Where miners' meetings wanted to be inclusive,²¹² only men who had been "unanimously elected" could join the Sonora Committee. Where miners' meetings met spontaneously and dispersed when their work was done, the committee created a standing police force. Where miners' meetings were open, the committee was committed to secrecy.

Another distinguishing feature of vigilance committees in California was that the active ones were all based in towns. Although there are references to committees of vigilance in many mining camps in 1851,²¹³ there are almost no records of such committees in action, either in 1851 or in later years. As noted by Williams, the references to these committees are "so brief and so disconnected" that it is impossible to say anything about them.²¹⁴ The miners did not need to delegate policing and criminal prosecutions to a committee, since they already handled such matters themselves.

211. CHRISTMAN, *supra* note 74, at 191 (stating that these resolutions were passed on or around June 28, 1851).

212. See Kleinmans, *supra* note 49, at 13.

213. CHRISTMAN, *supra* note 74, at 190 ("In almost every camp and city in the country, the most respectable portion of the community have formed what are called 'Vigilance Committees' which appoint officers, organize courts, catch rascals, try them and, when found guilty, punish them by whipping, banishing or hanging."); ALONZO DELANO, CALIFORNIA CORRESPONDENCE 126 (Irving McKee ed., 1952) ("Vigilance Committees were formed even in the mountains, at nearly every extensive digging."); FRANK LECOUVREUR, FROM EAST PRUSSIA TO THE GOLDEN GATE 188 (Josephine Rosana Lecouvreur ed., Julius C. Behnke trans., 1906), available at <http://memory.loc.gov/ammem/cbhtml/cbhome.html> ("[B]ranch committees of the vigilance organization were established throughout the state and many a criminal fugitive from justice was caught in a far away hiding place of the mining districts in the Sierras."); see also WILLIAMS, *supra* note 23, at 383 n.77 (discussing references to vigilance committees in mining camps).

214. WILLIAMS, *supra* note 23, at 383 (stating that it is impossible to say whether these committees were permanent or temporary).

When a suspected murderer or thief had to be hunted down, volunteers almost always came forward to do so. Only once or twice did they send a “vigilance committee” to make an arrest, as at Indian Bar in 1852.²¹⁵

In short, the proponents of popular trials argued that the miners’ courts were not mobs because the miners gave the suspect a jury trial and the right to make a defense. Distinguishing lynching from mob action was another way of saying that lynch law was indeed *law*, though of an unorthodox kind. Lynch trials also differed from vigilance committees in many respects; the former were less formal, less secretive, and less likely to be dominated by a small group.²¹⁶ This relative openness was appropriate for the trial and punishment of members of the community. Additionally, unlike vigilance committees, which were formed to deal with a single threat and then disbanded, Judge Lynch was always open for business.

III. POPULAR TRIALS JUSTIFIED

Participants in lynchings and vigilantism everywhere in America justified their actions in terms of popular sovereignty and the right to revolution, and this was true in California as well.²¹⁷ James Cutler wrote in his study of lynch law that “[i]n a monarchy or highly centralized form of government, the law is made for the people and enforced against them by officials who are in no sense responsible to them.”²¹⁸ But “[i]n a democracy with a republican form of government . . . [t]he people consider themselves a law unto themselves.”²¹⁹ The people in America are sovereign and therefore they *are* the law. “To execute a criminal deserving of death is to act merely in their sovereign capacity, temporarily dispensing with their

215. SHIRLEY, *supra* note 54, at 169; *see also* BORTHWICK, *supra* note 25, at 317–18 (reporting that the Vigilance Committee of Mockelumne Hill had tried, convicted, and hanged a Mexican for theft); HUNTLEY, *supra* note 61, at 251–54 (reporting that the miners of Columbia appointed a twelve man vigilance committee to organize the expulsion of Asiatics and South Sea Islanders from their district and to correspond with other camps).

216. The vigilance committee of Indian Bar, for instance, included some of the rowdies who terrorized the camp. *See* SHIRLEY, *supra* note 54, at 171–72.

217. *See* BROWN, *supra* note 5, at 115–17 (stating that vigilantes frequently claimed the justification of popular sovereignty and the right of revolution); Johnson, *supra* note 16, at 566 (same).

218. CUTLER, *supra* note 11, at 269.

219. *Id.*

agents, the legal administrators of the law.”²²⁰ Nowhere was this principle taken so literally or expressed so formally as in California.

Every time a new mining camp formed, the miners held a meeting to enact a mining code.²²¹ While this was implicitly an assertion of popular sovereignty, a number of codes made the claim explicit by opening with what may well have been a reference to the opening words of the U.S. Constitution: “we, the miners of Such-and-such District, do ordain and establish the following rules and regulations.”²²² One code of a somewhat later date, March 5, 1864, went further and echoed the preamble to the Constitution in full:

We the miners and citizens of Warren Hill, in order to form a more perfect and correct understanding among ourselves and all others that may come among us, respecting our rules of mining [sic] our claims of ground, the condition of becoming peaceable and permanent possession therein, to establish Justice and secure harmony, do enact and draft the Laws as follows.²²³

In such preambles, the miners viewed themselves as a convention or an assembly of the people, a venerable institution in American history. Far from regarding the practice as extra-legal, one young miner wrote in 1852 that such compacts “show how firmly republican principles are engrafted upon the national manners.”²²⁴ At the miners’ meetings “every man was a legislator yes! more than a congress man for he had a vote & what was better made more than 8 dol[lars] a day.”²²⁵ True, the laws they enacted sometimes conflicted with those of the United States, “but the sovereigns claimed the privilege of doing that inasmuch as congress in making laws had never anticipated the peculiar circumstances under which Californians labored and consequently had never made laws adapted

220. *Id.*

221. McDowell, *supra* note 33, at 23–31 (describing how mining codes were enacted).

222. *See, e.g.*, CLARENCE KING, THE UNITED STATES MINING LAWS AND REGULATIONS THEREUNDER 272 (Washington D.C., Government Printing Office 1885) (compiled as part of the tenth census of the United States, 1880) (“We the citizens of Rich Gulch . . . in Convention assembled do hereby enact the following laws to govern us in regard to Quartz Mining.”); *id.* at 273 (“[W]e the miners of Dry Creek in mass meeting assembled do resolve as follows”); *id.* at 308 (“[W]e the miners of this district do ordain and establish the following Rules By-laws and Regulations”).

223. *Id.* at 279.

224. Wood, *supra* note 52 (letter dated June 25, 1852).

225. *Id.*

to the country.”²²⁶ This sort of panegyric to the miners’ ability to organize and govern themselves is ubiquitous in the mining literature, and indeed this self-governance was a remarkable accomplishment. It was a facet of the American character that even foreigners admired.²²⁷

Two mining codes included criminal law sections, indicating that the miners believed they had the power to pass criminal laws as well as mining regulations.²²⁸ The Jacksonville Code enacted at a miners’ meeting on January 20, 1850, is particularly detailed for such an early date.²²⁹ Its section on criminal procedure reads as follows:

ARTICLE IV.

All criminal cases shall be tried by a jury of eight American citizens, unless the accused should desire a jury of twelve persons, who shall be regularly summoned by the sheriff, and sworn by the alcalde, and shall try the case according to the evidence.

ARTICLE V.

In the administration of law, both civil and criminal, the rule of practice shall conform, as near as possible, to that of the United States, but the forms and customs of no particular state shall be required or adopted.²³⁰

The penalty section provides that the penalty for “willfully, maliciously, and premeditatedly tak[ing] the life of another” was death by hanging.²³¹ Penalties for the theft of a beast of burden or of \$100 or more from a tent or dwelling was punishable by death by hanging, while any person convicted of theft of property worth less

226. *Id.*

227. *See, e.g.*, BORTHWICK, *supra* note 25, at 369 (stating that Americans are “certainly of all people in the world the most prompt to organize and combine to carry out a common object”); HOLINSKI, *supra* note 119, at 158–69.

228. The Mariposa Law Code of March 1, 1851, was signed by 215 individuals. JEAN-NICOLAS PERLOT, *GOLD SEEKER: ADVENTURES OF A BELGIAN ARGONAUT DURING THE GOLD RUSH YEARS 104–05* (Howard R. Lamar ed., Helen Harding Bretnor trans., 1985) (stating also that the code was passed to “replace the missing laws of the United States;” that is, laws not yet promulgated in California); Jacksonville Code of January 20, 1850, *reprinted in* DANIEL B. WOODS, *SIXTEEN MONTHS AT THE GOLD DIGGINGS 125* (Ayer Co. Publishing 1973) (1851), *available at* <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

229. *See* WOODS, *supra* note 228, at 125–30.

230. *Id.* at 126.

231. *Id.* at 128.

than \$100 “shall be punished and disgraced by having his head and eye-brows close shaved, and shall leave the encampment within twenty-four hours.”²³² That the miners of Jacksonville adopted such a code indicates that they felt they had the same authority in criminal matters as in civil matters, and it is clear from Article V that they planned to conform as closely as possible to the procedures of the common law courts.

The miners justified their criminal law not only on the basis of their sovereignty, but also on the ground that it was fair. They saw the jury as the most fundamental procedural safeguard for the accused. Walter Colton, who as *alcalde* of Monterey impaneled the first jury in California, wrote in 1846 that “[i]f there is any thing on earth besides religion for which I would die, it is the right of trial by jury.”²³³ Confidence in jury verdicts was high; as the *Californian* newspaper said in its report of one of the first lynchings, “the second sober thought of the people is always right and never wrong.”²³⁴

In practice, however, the line between a jury trial and self-help was not so clear. When a group of gamblers sought revenge for the killing of one of their own, they held a trial that was a kind of formalized self-help. They pursued the killer, a man named Kelly, and “took him & tried him & was to hang him the next day.”²³⁵ In other words, the friends of the victim tried the suspect. Miners rescued Kelly from the gamblers, however, and planned to hand him over to the authorities for trial.²³⁶ In a different incident, a group of Americans transformed themselves into a “jury” when they suspected the only foreigner among them, a Chilean, of stealing a shovel. “Without any further ado the barbarians became the jury,” wrote Vicente Pérez Rosales.²³⁷ The Americans were in the process of hanging the Chilean when Rosales came by and managed to talk them out of it.²³⁸ If Rosales’s version of events is correct, then this trial also looks very much like self-help.

232. *Id.* at 128–29.

233. WALTER COLTON, *THREE YEARS IN CALIFORNIA* 48 (New York, A.S. Barnes & Co. 1850).

234. *The Gold Fever Abroad*, *CALIFORNIAN*, Sept. 9, 1848.

235. Richard Brown Cowley, Richard B. Cowleys Log 80 vs. 81 (unpublished manuscript, on file with the Huntington Library).

236. *Id.*

237. Rosales, *supra* note 108, at 64.

238. *Id.* at 63–64.

Just as the line between the jury trial and trial by the victims of a crime was blurry, so to was the line between jury trial and trial by the crowd. Suspects are sometimes said to have been tried by the “miners’ meeting.”²³⁹ This may be shorthand for “a jury selected by a miners’ meeting,” but in at least one instance, a “jury” was comprised of all two hundred men present.²⁴⁰ In such a case, the “jury trial” can hardly be distinguished from the work of a mob.

As discussed above, there were miners who condemned lynching.²⁴¹ Franklin Buck thought the young man he had seen hanged was guilty and deserved his fate but considered lynch law as an institution to be too dangerous. “Heaven preserve me from falling into the hands of an excited people,” he wrote. “It is a hard tribunal and if circumstances are against you, however innocent you may be, you stand no chance. Give me a dungeon in the Tombs and all the police of New York first.”²⁴² Furthermore, many miners, in their letters home, remarked that their friends and families in the East would disapprove of the practice. As Josiah Royce noted, there is more than a hint of defensiveness in their descriptions of lynching.²⁴³

Nevertheless, most miners thought lynch law was justified, not only by the people’s right to do what they wanted, but also because it afforded trial by jury.

IV. POPULAR TRIALS ELSEWHERE ON THE FRONTIER

A. Popular Trials on the Overland Trail

The orderly and sober punishment of crime by laymen on the overland trail from Missouri was related to criminal law in the mines and, like the earliest lynchings in the mines, represents the ideal to which proponents of lynch law aspired. Two groups of emigrants brought their experiences with criminal law to the mines: those who settled in California and Oregon before gold was discovered and

239. See, e.g., DAVIS, *supra* note 74, at 21 (stating that a man accused of stealing a pick was tried at a miners’ meeting and banished).

240. BUFFUM, *supra* note 23, at 84–85.

241. See *supra* note 180 and accompanying text; see also SHIRLEY, *supra* note 54, at 151–62.

242. BUCK, *supra* note 56, at 111.

243. ROYCE, *supra* note 14, at 249.

those who came as part of the gold rush. Their histories show that criminal law in the gold mines was part of a larger body of criminal law and provide examples of the quiet, orderly trials to which the Californians aspired.

The earliest trains set off for Oregon and California before the gold rush, so they clearly did not draw on the California experience; rather, some of these overland emigrants were among the first Americans to arrive in the gold mines, bringing with them their experience of popular justice. Among these pre-gold rush emigrants was a man who came to the gold mines via Oregon. He served as sheriff at an early California lynching and advised the other miners about proper procedure.²⁴⁴ In July of 1849, one miner attributed the good order in California to the Oregon men who gave “a character & tone to society & things here.”²⁴⁵ He said that “the Oregon fellows” had gone after a man who had stolen three thousand dollars in gold, “caught him, tried him, & sentenced him to be hung.”²⁴⁶ Through the desperate efforts of his friends, the sentence was reduced to receiving fifty lashes, having his ears cut off, and being banished from the mines.²⁴⁷ The prominent role of Oregonians in early lynchings suggests that they had had experience with such affairs on the overland trail or in Oregon itself.

Many of the later emigrant companies were bound straight for the mines, with names like “The California Banner Company.”²⁴⁸ Some of these must have heard of lynch law from their acquaintances in California or through publications and likely modeled their own trials on those accounts. Emigrants described the overland trail itself as “in California,”²⁴⁹ and as soon as they left Missouri, they said that “California laws” prevailed.²⁵⁰

John Phillip Reid has studied every aspect of law on the overland trail and demonstrated that the settlers “carried with them their

244. Kleinhans, *supra* note 49, at 5 (“Before proceeding with the trial the sheriff (a rough Oregon Man) said he had had some experience both in Oregon and in California in certain lynch cases where the accused were condemned and hung.”).

245. Stevens, *supra* note 80 (entry for July 18, 1849, p. 75).

246. *Id.*

247. *Id.*

248. REID, *supra* note 20, at 113.

249. *Id.* at 47 (citation omitted).

250. *See id.* at 195 (relating an experience where emigrants punishing a thief told him that “he was a California emigrant & must submit to California laws”).

traditions, their customs, and their laws.”²⁵¹ With respect to criminal law, this commitment to American legal traditions manifested itself in an attempt to reproduce as closely as possible the forms and procedural safeguards of a common law trial. In murder cases, the emigrants went to great lengths to assemble jurors from other companies who were strangers to the parties involved and had not witnessed the events in question.²⁵² The defendant’s own train, and any other trains who provided jurors, stopped for trials that could last a whole day, at an enormous cost to themselves in time and resources. If there was a judge or a lawyer present, he was asked to take a lead in the proceedings, and the emigrants always allowed the defendant to hire counsel.²⁵³ Many of the forms of a proper trial were observed: the judges instructed the jurors, the jurors retired for deliberation, the jurors submitted a written verdict to the court, and the participants in the trial used the phrases and vocabulary of American courts.²⁵⁴ A number of defendants were acquitted on the grounds that they acted in self-defense or had been provoked.²⁵⁵ In short, everything possible was done to assure the legitimacy and fairness of the trial; the emigrants did their best to deal with offenders “not by vengeance but by applying the remembered trappings of a partly understood judicial process.”²⁵⁶

Reid suggests that the emigrants followed ordinary American criminal procedure as closely as possible in part because many were from settled parts of the United States and were not used to extra-legal punishment.²⁵⁷ Their attitude towards law was that of Americans generally rather than of pioneers in particular. “One small lesson they teach us is how nonfrontiersmen acted on the frontier,” Reid writes.

The broader historical lesson they teach is of Americans who consciously strove to carry beyond the line of forward settlement a mode of social behavior and legal conduct which they had learned

251. *Id.* at 230.

252. *Id.* at 119–21.

253. *Id.* at 117–18.

254. *Id.* at 126–27.

255. *Id.* at 141–42.

256. *Id.* at 233.

257. *Id.* at 232.

during a remembered youth in the towns and cities they left behind in body but not in spirit.²⁵⁸

Reid, in fact, suggests that criminal trials on the overland trail were not lynchings but a rare instance of Americans carrying regular common law institutions with them to the best of their ability. He finds the strongest evidence of this is the number of acquittals that occurred on the overland trail.²⁵⁹

There is at least some evidence, however, that the emigrants considered trials on the overland trail to be “lynchings,” beginning with the references to the trail as being in California and subject to California law. Reid notes, for instance, that “[w]hen an emigrant used the expression ‘lynch law’ it seldom meant condemnation.”²⁶⁰ As an example, he quotes an emigrant who wrote that “[s]ome of the men on the plains . . . seemed to think there was no law on the frontier and that they could do as they pleased, but that is not a country for that way of doing things, for Judge Lynch invariably gave justice.”²⁶¹

Similarly, the term lynching was used in one case to describe a trial for murder at which all of the emigrants present served as jurors. The defendant in the trial was acquitted on the ground that his killing was justified. A witness commented that “[t]he emigrant would have been cleared by a regularly organized court. . . . Lynch law metes out justice under such circumstances.” But, he added, “many a man has been lynched whose provocation was as great as in this instance.”²⁶² This seems to mean that in this particular case, lynch law reached the same result as an ordinary court would have done, but that the defendant was lucky nonetheless because the case could easily have come out the other way. Another emigrant wrote that “Judge Lynch is a hard faced old fellow, but I guess his judgment is generally good and I would rather trust him than any Judge, sitting in any Civil Court.”²⁶³

258. *Id.*

259. *Id.* at 141.

260. *Id.* at 197.

261. *Id.* (citation omitted).

262. *Id.* at 147 (citation omitted).

263. *Id.* at 138–39 (citation omitted). Reid calls the trial in question a “miscarriage of justice,” in part because it took place in Iowa, which had a government. It is at least clear that the writer approved of lynch law. *Id.*

Yet another man, while not calling the emigrant trials “lynchings,” was speaking the language of the mines when he wrote that “[t]he tedious, tardy, and often doubtful manner of administering what is called justice in the States has but few admirers or advocates on the plains.”²⁶⁴ These statements, combined with the similarities between trials on the overland trail and orderly lynchings in California, indicate that the two were at least variations on a theme.

The simultaneous and now well-known criminal trials on the overland trail provide context for lynchings in the gold mines. Most importantly, Reid’s work showing that the emigrants did their best to provide fair, common-law type trials makes it more plausible that some miners, at any rate, intended to do the same. The contributions of Oregonians to the earliest lynchings further suggests that the Californians were drawing on existing practices. The following section investigates this possibility further.

B. Popular Trials in Frontier Towns

One would expect that popular trials similar to those conducted in California and on the overland trail were also held elsewhere on the frontier. There must, after all, have been some means of punishing crime on the frontier, as there was on the overland trail and in the mines. The institution that immediately springs to mind is the vigilance committee. But, as discussed above, vigilantism is described in the modern literature as being directed against outsiders—cattle rustlers, brigands, and gangs who preyed on the pioneer settlers. The aim of vigilantes was to drive off these predators rather than to punish them, although the “driving off” might involve a hanging or two.²⁶⁵ Some vigilantes held formal trials of the accused

264. *Id.* at 132.

265. *See, e.g.*, JOHN WARNER BARBER, OUR WHOLE COUNTRY; OR, THE PAST AND PRESENT OF THE UNITED STATES, HISTORICAL AND DESCRIPTIVE 1109 (Cincinnati, H. Howe 1861) (stating that in 1841 in Ogle County, Illinois, the regulators “generally proceeded with some of the formalities commonly used in administering justice, the accused being allowed to make a defense, and witnesses examined both for and against him”); BROWN, *supra* note 5, at 109 (stating that outlaws captured by vigilantes “were given formal (albeit illegal) trials in which the accused had counsel or an opportunity to defend himself”).

before punishing them, but it is not known how common this practice was.²⁶⁶

What is missing, however, is information on what the frontier population did when one of their own committed a crime. The vigilantes do not seem to have dealt with crimes internal to the local community, nor does “the mob” appear to have dragged suspects from their homes and hanged them. It is probable that popular trials, like those on the overland trail and in the California gold mines, were used to try crimes within the community. Testing this hypothesis, however, is rather difficult. One cannot search databases and indexes for the word “lynching,” because the word was not in common use before 1835 and it was applied indiscriminately to every kind of group violence after 1835. Moreover, since each community improvised the process, it must have varied from one place to the next. Nevertheless, there is evidence that members of frontier communities who were accused of a crime were given some of the benefits of a common law trial—most notably, a trial by jury.

The lead mines of Iowa provide some examples because they, like the California gold mines, attracted a considerable population before Iowa had an adequate criminal justice system.²⁶⁷ “For a time ‘Lynch Law’ was the only one recognized,” wrote John Barber.²⁶⁸ In 1834, a miner named Patrick O’Connor shot and killed his partner. The people of Dubuque asked the authorities in Michigan, on the other side of the river, to take on the trial and punishment of the suspect. Their request was refused, however, because Iowa was beyond the jurisdiction of the Michigan courts. The people “consequently met, selected among themselves a judge and a jury, tried the man and, upon their own responsibility, hanged him.”²⁶⁹ In its account of the

266. See BROWN, *supra* note 5, at 103 (stating that vigilante activity did not always involve a trial).

267. See Paul Walton Black, *Lynchings in Iowa*, 10 IOWA J. OF HIST. & POL. 151–254 (1912).

268. BARBER, *supra* note 265, at 1236.

269. FREDERICK MARRYAT, II DIARY IN AMERICA Chapter 46 (London 1839), available at <http://www.athelstane.co.uk/marryat/diaramer>. This incident was also described by BARBER, *supra* note 265, at 1236 (“[A] court was organized, jury impaneled, trial had, criminal found guilty, and . . . he was executed.”); see also CHARLES AUGUSTUS MURRAY, TRAVELS IN NORTH AMERICA DURING THE YEARS 1834, 1835 & 1836, at 106–07 (London, R. Bentley 1839) (similar); WILLIAMS, *supra* note 23, at 15 (stating that the miners appealed to the governor of Missouri and even President Jackson, both of whom replied that the matter was beyond their authority).

case, the *Niles Register* stated the proposition underlying lynching and vigilantism on the frontier: “the people are the basis of law, even where no written law can be applied.”²⁷⁰ Patrick O’Connor’s trial and punishment was only one of a number of similar incidents in Iowa at about that time.²⁷¹

In another frontier trial, near Balsam Lake, Minnesota in 1848, an Indian was prosecuted for murder by a procedure very similar to California lynch law.²⁷² “H. H. Perkins acted as judge,” a jury was impaneled, and “[a] prosecuting attorney and counsel for the accused were appointed.”²⁷³ The Indian suspect confessed to the murder and said that a man named Miller had hired him.²⁷⁴ The jury brought in a verdict of guilty, and by “unanimous consent” the murderer was hanged the next day.²⁷⁵ The crowd also gave Miller fifteen lashes and then put him on a steamboat and told him not to come back. This was considered an “unexpectedly lenient” sentence.²⁷⁶

Both the Dubuque and the Minnesota incidents were called the work of Judge Lynch by those writing shortly after the event.²⁷⁷ Frederick Marryat, one of those writers, used the 1834 Dubuque case to illustrate his point that “Lynch law” in its original state was different than the lynchings of his own day in that it was “based on necessity” and was “regulated by strict justice.”²⁷⁸ At the time Marryat was writing, in 1839, he believed lynch law had become an abomination and “a violation of all law whatever.”²⁷⁹ Even in later years, however, some frontier trials involved at least some due process.

270. WILLIAMS, *supra* note 23, at 16 (quoting 46 NILES REG. 352 (1834)).

271. Black, *supra* note 267, at 155 (describing the George O’Keaf lynch trial held in 1834 and “the whipping of a man named Wheeler”).

272. W. H. C. FOLSOM, FIFTY YEARS IN THE NORTHWEST 89 (St. Paul, Pioneer Press Co. 1888); *see also* E.S. SEYMOUR, SKETCHES OF MINNESOTA, THE NEW ENGLAND OF THE WEST 206 (New York, Harper & Bros. 1850) (“Judge Lynch was regarded as fully competent to pronounce sentence of death, after a fair trial had been granted to the Indian, before a jury of twelve men.”).

273. FOLSOM, *supra* note 272, at 89.

274. *Id.*

275. *Id.*

276. *Id.*

277. *See, e.g.*, STEPHEN J. LEONARD, LYNCHING IN COLORADO, 1859–1919, at 18 (2002) (describing relatively orderly lynchings, some ending in acquittal, in the 1820s).

278. MARRYAT, *supra* note 269, at Ch. 46.

279. *Id.*

The 1863 trial of George Ives in Nevada City, Montana, is one of the best documented popular trials of the frontier.²⁸⁰ It lasted three days.²⁸¹ A crowd of several hundred first voted on the procedure to be followed in the trial.²⁸² After some debate, it was agreed that Ives would be tried before two twelve-person juries—one jury from Nevada City and one jury from Junction, the nearest settlement—but the crowd itself would have the final say on any possible punishment.²⁸³ Over a thousand men attended the trial itself. Ives had engaged four lawyers who did their best for him, objecting forcefully to the admission of hearsay and irrelevant evidence, but the crowd overruled the objections.²⁸⁴ Ultimately, the juries split, twenty-three guilty to one not guilty, and the miners voted to hang Ives.²⁸⁵ It had not been a model trial, but it was certainly not a summary punishment.²⁸⁶

The Ives trial led to the formation of a committee of vigilance.²⁸⁷ The participants felt that the proceedings had taken too much time and trouble.²⁸⁸ They had also discovered that Ives and his companions had been responsible for a host of robberies and murders.²⁸⁹ Not only would it take too long to try the others, but it was possible that, once caught, the prisoners' lawyers would get them off or their friends would rescue them.²⁹⁰ The community felt that a vigilance committee would achieve justice more quickly and surely. Twenty-four men pledged, in writing, to form "a party for

280. See ALLEN, *supra* note 44, at 168. For an account of the affair by Wilbur Sanders, the lawyer for the prosecution of Ives, see JOHN XAVIER BEIDLER, X. BEIDLER: VIGILANTE 70–79 (Helen Fitzgerald Sanders & William H. Bertsche, Jr. eds., 1957).

281. BEIDLER, *supra* note 280, at 72.

282. *Id.* at 70.

283. *Id.* A proposal to add a third jury representing Virginia City was voted down.

284. According to Allen, Ives had engaged all the lawyers in the city. See ALLEN, *supra* note 44, at 169.

285. See BEIDLER, *supra* note 280, at 70–71.

286. See R.E. MATHER & F.E. BOSWELL, GOLD CAMP DESPERADOES: A STUDY OF VIOLENCE, CRIME, AND PUNISHMENT ON THE MINING FRONTIER 147 (1990). The authors point to the procedural flaws, an "atmosphere of predetermined guilt," and the heightened emotion of the crowd. *Id.* Sanders, the prosecutor, however, doubted seriously whether he could get a conviction, from which it can be concluded that this was more than a show trial. See, e.g., BEIDLER, *supra* note 280, at 70–79.

287. See BEIDLER *supra* note 280, at 79.

288. See *id.*

289. See *id.*

290. See *id.* at 70–79.

the laudable purpos [sic] of arresting thieves [sic] & murderers & recovering stollen [sic] property” and swore to reveal no secrets and never to desert one another.²⁹¹ Thus, the most famous Montana Vigilante Committee was formed. Here the difference between a popular trial and vigilantes is explicit; the vigilance committee’s members were a small fraction of the population, their purpose was set out in writing, they took an oath of secrecy,²⁹² and their trials would be more efficient than those of the people’s court. In short, one and the same community held a lynch trial and formed a vigilance committee in quick succession, and these differed significantly in their proceedings and aims.

Since emigrants to Oregon held similar popular trials before the gold rush in California, as noted earlier,²⁹³ there is solid evidence that popular trials were held on the frontier and that these trials were significantly different from vigilantism.²⁹⁴ Naturally, there are many more references to lynch law as summary punishment without judge or jury.²⁹⁵ I would be surprised, however, if further study does not uncover more examples of popular trials by communities beyond the reach of the official courts.

V. FOREIGN VIEWS OF POPULAR TRIALS

The necessity of lynch law and the right of the people to protect themselves may have been obvious to most American miners, but the rest of the world did not see it. Indeed, as the miners realized, even Americans in the Eastern states did not understand and thought the lynchers no better than their victims.²⁹⁶ Foreign miners in California roundly condemned the practice of lynch law, although they were as vulnerable to theft and murder as the Americans. Australians were

291. ALLEN, *supra* note 44, at 195 (quoting the vigilantes compact, dated December 23, 1863).

292. *Id.*

293. *See supra* note 244.

294. *See* Waldrep, *supra* note 3 (discussing popular trials at Bannack, Montana).

295. For the definitions of “lynch law” in the writings of visitors to the United States, see JAMES LOGAN, NOTES OF A JOURNEY THROUGH CANADA, THE UNITED STATES OF AMERICA, AND THE WEST INDIES 187 (Edinburgh, Smith, Elder & Co. 1838) (explaining that in the Southern states, “lynch law . . . authorizes rioters to hang up any one to whom they have a dislike”); HENRY COOK TODD, NOTES UPON CANADA AND THE UNITED STATES: FROM 1832 TO 1840 (Toronto, Rogers & Thompson 2d ed. 1840) (“Lynch law, or the union of judge and accuser in the same person, is a practice but too common in republics.”).

296. *See, e.g.*, ALLEN, *supra* note 44.

also horrified by the stories coming from the California gold mines, and they made it their first priority to prevent similar incidents in their own gold mines. The key difference between the Americans and non-Americans was that the former were willing to take legal authority upon themselves and the latter were not. For the Australians, in particular, violence without the pretence of legality was preferable to assumed authority.

A. Foreigners in the California Mines

Alexandre Holinski summed up foreign miners' objection to lynch law as a system of law enforcement, namely, that the crowd—which was lawmaker, judge, jury, and executioner—acknowledged no limit to its power: “One can, unfortunately, compare the multitude exercising the *Lynch Law* to a ferocious beast.”²⁹⁷ It was, in fact, the tyranny of the many, which might be preferable to the tyranny of a single man in “that it [was] exercised only at rare intervals instead of being incessant,” but it was “no less a deplorable anachronism in the 19th Century and a stain on the coat of arms of American liberty.”²⁹⁸ To Holinski, American “popular sovereignty” in the form of Judge Lynch was the tyranny of the multitude.²⁹⁹

Insiders and outsiders also had different views of the effect of lynch law on the participants. The Americans described lynch law as an unfortunate necessity brought on by the failures of the courts. At the same time, however, they viewed it as a just and effective system that exemplified the American genius of self-government and the superiority of common sense to the technicalities and legal jargon of trials run by lawyers. Foreigners, on the other hand, believed that lynch law was wrong in itself and that it debased the participants. For example, Carl Meyer, a Swiss who traveled to California in 1849, deplored mob mentality. Describing the crowd of 15,000 to 20,000 who lynched a suspected arsonist after the San Francisco fire, he stated,

Many a person who has never felt the least desire for revenge has involuntarily joined in the Lynch cry “hang ‘im”. An observer of such a California mob hanging can recognize the primitive urge in every man to see that which is rare and exciting even if

297. HOLINSKI, *supra* note 119.

298. *Id.* at 232.

299. *Id.*

revolting. . . . What makes this hangman's procedure so terrible and barbarous is the rare phenomenon of the individual joining and assuming the attitude of the feverishly excited mob which is about to torture a victim without exact information concerning his deed.
300

Americans witnessing the same events were not disgusted, but rather awed by the power of the people. "They talk about the strong arm of law but in this country it is a mere [sic] farce compared to the might of the sovereign people," said one American who saw a Sacramento crowd of four to five thousand men demanding the immediate trial and execution of an accused thief.³⁰¹

There is a fictional story that illustrates how a German author *hoped* Frenchmen would have behaved if they had been tempted to take vengeance on a criminal.³⁰² The French miners, in this story, had actually tied the hands of the accused and were about to string him up when from the midst of the crowd stepped a Frenchman—a large, fine looking young man with a black beard. He stretched his left hand toward the prisoner and said in a voice full of emotion:

My friends, let this man go; the poor devil has had a sufficient scare as it is; after all he did not, I believe, have any intention evil enough to deserve death. So let him go; in the future he will be more prudent; besides, his death will not help matters at all.³⁰³

After some initial protests, the crowd did release the culprit, because "kindness, hastily stifled, must, in those ardent natures, soon reappear, and in the end win the victory."³⁰⁴ Although this was all wishful thinking, it illustrates at least that the author, Gerstäcker, would like to believe that Europeans would not actually lynch one of their own.³⁰⁵

300. CARL MEYER, BOUND FOR SACRAMENTO 141 (Ruth Frey Axe trans., 1938).

301. Henry Sturdivant, Journal 52 (entry for July 7, 1851) (unpublished manuscript, on file with the Huntington Library).

302. FRIEDRICH GERSTÄCKER, SCENES OF LIFE IN CALIFORNIA 64–66 (George Cosgrave trans., John Howell 1942) (1856), available at <http://memory.loc.gov/ammem/cbhtml/cbhome.html>. Gerstäcker's book is identified as a work of fiction in GARY F. KURUTZ, CALIFORNIA GOLD RUSH: A DESCRIPTIVE BIBLIOGRAPHY OF BOOKS AND PAMPHLETS COVERING THE YEARS 1848–1853, at 278 (1997).

303. GERSTÄCKER, *supra* note 302, at 64.

304. *Id.* at 65.

305. A less flattering account of French criminal law appears in CORNELIUS COLE, MEMOIRS OF CORNELIUS COLE: EX-SENATOR OF THE UNITED STATES FROM CALIFORNIA 87–91 (1908). Cole records an incident in which Americans did not allow French miners to try

These foreign miners in California were exposed to exactly the same conditions as the Americans, yet they rejected the American assessment that lynch law was necessary or desirable. We already knew that the American view of extra-legal punishment was unique, because only in America was lynch law so widespread. The observations of the French and German miners provide further evidence, if it was needed, that the American attitude towards communal violence was not just a reaction to circumstances on the frontier, but was part of American culture generally.

B. The Australian Gold Rush

American lynch law also contrasted with responses to crime in other gold rushes. The Australian gold rush resembled the California rush in many ways. It occurred at approximately the same time, beginning in 1851, and even involved some of the same miners—men who had worked in America but crossed the Pacific when this new opportunity arose.³⁰⁶ Additionally, the mining rules adopted in Australia were virtually the same as those developed in California,³⁰⁷ and the mines were equally rich.³⁰⁸

Australians were categorically opposed to lynch law, and government officials, private citizens, and newspapers frequently reported that there was no lynching in their mining camps. As explained below, however, when the miners caught a thief, they

a Mexican suspect (who had merely lived with an executed murderer) because they thought the French crowd was too excited to be impartial. *See id.* at 88. The Americans, instead, tried the suspect and determined that there was insufficient evidence for an immediate execution. *See id.* at 88–89. However, the French miners hung one of the suspects anyway. *Id.* at 89–90. Cole notes that the Americans did little to stop the French miners and some even egged them on. *Id.* at 88–90. As Cole’s account was written fifty years after the event, however, the details may not be accurate.

306. Rodman W. Paul, “Old Californians” in *British Gold Fields*, 17 HUNTINGTON LIBR. Q. 161, 161–72 (1954).

307. GEORGE FRANCIS TRAIN, *A YANKEE MERCHANT IN GOLDRUSH AUSTRALIA: THE LETTERS OF GEORGE FRANCIS TRAIN 1853–55*, at 75 (E. Daniel & Annette Potts eds., 1970) (explaining regulations listed on miner’s license dated 1853, which states that the maximum claim size was 144 square feet per miner). The maximum claim size of eight foot square in some places suggests greater efficiency than the Americans attained; one foot partitions between the holes were used as walk ways to carry away the dirt for washing elsewhere.

308. GEOFFREY SERLE, *THE GOLDEN AGE: A HISTORY OF THE COLONY OF VICTORIA, 1851–61*, at 36 (1963) (stating that at Eaglehawk in Victoria, where miners were making up to ten ounces per day, miners threw themselves on the ground and claimed as much land as their body could cover).

often whipped him or roughed him up in some other way. What distinguished Australians from the Californians is that they did not claim to be acting under color of law and they did not hang anyone. Australians believed these differences were crucial and, in a way, they were.

From the moment gold was discovered in Australia in 1851, the government worried about what it meant for law and order in the colony. As David Goodman has shown, law and order to the Australian officials meant social stability and, especially, respect for law, institutions, and class distinctions.³⁰⁹ Disorder could be summed up in one word: California. More specifically, the Australians hoped to avoid the supposed American conditions of republicanism, turbulence, violence, and, above all, lynch law.³¹⁰ The newspapers wrote endlessly about the barbarity of Californians and lynch law, and also about the good order and respect for law among Australian miners.³¹¹

The different attitudes towards lynch law are illustrated in an account, quoted by Goodman, about an incident in Victoria.³¹² In the writer's story, a crowd caught a robber but did not know what to do with him because there were no police in the area.³¹³ "A voice came out of the crowd which unmistakably from its nasal drawl proclaimed itself to be Yankee, 'do as we do in California. Lynch him.'"³¹⁴ The crowd was silent.

Then a man, a noble earnest looking fellow he was, enquired, "Where is the man who spoke last?" Then a tall lean looking fellow stepped forward . . . "Hiram Jones, late of Californy and California born." The previous speaker said in a quiet earnest way, "Look here, Hiram Jones late of California, California born. We are law abiding subjects of the British Queen Victoria, if a man is accused of breaking the laws of the Realm, if caught, he is handed over to proper judicial authorities to have a fair trial, if found guilty, he has

309. DAVID GOODMAN, *GOLD SEEKING: VICTORIA AND CALIFORNIA IN THE 1850s*, at 66 (1994).

310. E. DANIEL POTTS & ANNETTE POTTS, *YOUNG AMERICA AND AUSTRALIAN GOLD* 160-61 (1974).

311. Some modern authors echo this impression. See, e.g., Paul, *supra* note 306, at 169-70 (stating that in Australia "there was no attempt to enforce criminal law through miners' juries and lynchings").

312. GOODMAN, *supra* note 309, at 69.

313. See *id.*

314. *Id.*

to suffer the penalty. We have no sympathy with mob law in the Queen's dominions nor do we, Hiram Jones, tolerate California ruffianism in this land."³¹⁵

As Goodman suggests, this story had no doubt improved by much retelling in the years before it was written down. Nonetheless, it sums up what the Australians wanted to believe about themselves.

The Australians must not have understood California lynch law because when they themselves caught a thief, they inflicted on him any kind of corporal punishments short of hanging. Many sources agree that there were no lynchings in the Australian mines,³¹⁶ but by this they mean no extra-legal *executions*. There were "many summary punishments" of thieves, including flogging, branding, and holding over a fire,³¹⁷ all of which were also penalties inflicted by lynch law. In other words, the Australian miners took their revenge on thieves, but did not pretend to be sitting as a court or to recognize lynching as a semi-permanent institution.

There were sometimes calls for hanging from a minority, although they were not heeded.³¹⁸ In one account of a demand from the crowd to hang the thief, a man reproached the mob, reminding them that "whatever we do, there is a moral responsibility which, in our singular situation, ought to be considered as far more sacred than any legal one."³¹⁹ The miners were persuaded not to hang the thief, but they bound him to a tree and gave him a flogging that he would remember for the rest of his life.³²⁰

Australians would have argued that their punishments were not lynching because there were no bodies hanging from trees, but Californians would have considered them lynchings or, worse, mob law, because the punishment was administered without any procedure, delay, or publicity. At the same time, however, the Australian miners' unwillingness to see themselves as agents of the law averted the worst disasters of lynch law. What is interesting for the purposes of this Article is that, in the absence of government, the Californians believed it was their right and their duty to *become* the

315. *Id.* (citation omitted).

316. SERLE, *supra* note 308, at 83.

317. *Id.*

318. *Id.*

319. JOHN SHERER, *THE GOLD-FINDER OF AUSTRALIA* 66–68 (London, Charles C. Clark 1853).

320. *Id.* at 68.

law, whereas the Australians believed their special virtue lay in not claiming that right.

VI. CONCLUSIONS

Modern scholarship tends to gloss over references to fair trials in descriptions of lynchings. This is entirely understandable, since similar claims with respect to racist lynchings after the Civil War were at best delusional. Moreover, modern scholars have focused on not on evidence of procedural safeguards, but on correcting the glorified picture of frontier justice painted by uncritical, late nineteenth century writers.

This article suggests, however, that the reaction against the older scholarship has gone too far. John Reid has shown that there were substantially fair trials on the overland trail, and it is now clear that similar trials were held in the California goldmines. This means that passing references to judges and jury trials elsewhere on the frontier should not be dismissed out of hand. At least some of the participants in those lynchings aspired to due process. That miners recognized summary punishment when they saw it, condemned it, and did not believe that their lynchings fell under that heading, is further evidence of sincerity.

The evidence from California also serves as a reminder that vigilante values and due process values were not necessarily advocated by different interest groups. Frontier communities of the early nineteenth century could be committed to both. The frontiersmen's notion of due process, however, was not shared by miners of other nationalities. Foreign miners and the Australians in their own gold rush regarded extra-legal punishment as improper, no matter how many procedural safeguards the community might provide. The idea that frontier communities could hold fair trials is almost as distinctively American as vigilantism.

At the same time, popular trials in California and on the frontier quickly degenerated into mob law, especially when they came into conflict with proper authorities. The very fact that some trials offered due process legitimated lynch law in ways that America would come to regret bitterly.³²¹

321. Waldrep, *supra* note 3 (noting that because Americans had accepted the legitimacy of some lynchings that it took so long for them to see the lynchings of the Jim Crow era for what they really were).

VII. APPENDIX ON SOURCES

It is surprising that the truly vast literature on lynching³²² skips the California gold rush, where hundreds of “lynchings” happened in a short period of time.³²³ Moreover, these lynchings were remarkably well documented; the sources of information about crime and punishment in the California gold mines range from letters, diaries, and books written by the miners who were there, to local newspapers, including the *Alta California*, the *Placer Times*, the *Stockton Times*, and the *Marysville Herald*. This is a huge body of material. Gary Kurutz’s descriptive bibliography of published accounts by the forty-niners and their successors is 700 pages long and the volume of the unpublished material is similar. Much of this material is gathered in Western Americana collections of three major libraries or is available on the Library of Congress “American Memory” website.³²⁴ Accounts of crimes and criminal proceedings are thinly scattered throughout this corpus.³²⁵ I have trawled these waters for several years, working on a larger project on law in the gold rush.

In principle, it is possible to read all of these first hand accounts. Reid did the equivalent for his book on crime and punishment on the Overland Trail; he cites over 350 different sources and must have read many more.³²⁶ I have not, however, managed this feat. I spent a month in each of the main depositories of Western Americana—the Hunterian, Bancroft, and Beinecke libraries—reading as many manuscripts as I could in that time. I began with the earliest and moved on from there. Similarly, I consulted the published books that seemed most relevant, namely, those written at an early date. The collection of gold rush memoirs on the Library of Congress website is invaluable because it makes rare books both accessible and searchable. I believe that I have seen most of the important accounts from 1849–1852, but I have also had to skip over a great many.

322. NORTON H. MOSES, *LYNCHING AND VIGILANTISM IN THE UNITED STATES: AN ANNOTATED BIBLIOGRAPHY* (1997).

323. See Johnson, *supra* note 16, at 561.

324. The three libraries are the Huntington Library in San Marino, the Bancroft Library at the University of California, Berkeley, and the Beinecke Library at Yale. The Library of Congress website is <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.

325. See WILLIAMS, *supra* note 23, at 111 (noting that “[t]he dearth of public records” forms a barrier to research of early California history).

326. REID, *supra* note 20, at 245–89.

From this reading, I gleaned some 260 instances of crime, punished and unpunished, from 1849–1851. I focused on incidents in the mines, not in the cities. Lynchings in the cities are better documented and I compare them to those in the mines in this Article.

Of course, most punishments in the mines went unrecorded. The hundreds of men and women who kept diaries represented only a tiny fraction of the gold miners. They were not truly representative of the mining population, since they were literate and in touch with their families in the East. Even the accounts we have are not entirely candid, in that they were edited for parents and sweethearts. On the other hand, the miners who kept diaries were at pains to explain and justify their actions, and are thus particularly useful for a study like this one.

As for the newspapers, the *Placer Times* said explicitly that it did not report all of the lynchings that were brought to its attention. “If a man has committed a crime[,] been found guilty and received forty or fifty lashes, and then sent away not to return under penalty of death, we think the punishment quite sufficient,” the editors wrote, “and it is useless to mortify innocent relatives and friends, both here and in the States, by the publication of such proceedings.”³²⁷ It will never be possible to know how much crime was committed in the mines or how many lynchings took place.

Not all sources are equally reliable. I have used only contemporary sources, or later publications of diaries, because accounts written long after the events they describe are too likely to be polished, made more exciting or, conversely, made more palatable.

For this reason, too, I have not used Bancroft’s *Popular Tribunals*.³²⁸ His footnotes are incomplete, so there is no control on the reliability of his sources. He also relied on interviews with miners in the 1870s, raising the problem of memory, faded and embellished.³²⁹ The same is true of Shinn,³³⁰ who also wrote to

327. Editorial, PLACER TIMES (Sacramento, Cal.), Sept. 15, 1849.

328. BANCROFT, *supra* note 12.

329. See ROYCE, *supra* note 14, at 272 (unreliability of miners’ memories); I THE NEW ENCYCLOPAEDIA BRITANNICA 857–58 (15th ed., 1993) (entry for Hubert Howe Bancroft, describing his work as valuable, but noting that it is “marred by a general lack of careful scholarship and editing”).

330. SHINN, *supra* note 14.

celebrate the achievements of the goldminers and downplayed their failings.³³¹ Royce, on the other hand, wrote in reaction to Shinn and stressed the negative outcomes. Royce, unfortunately, relied rather heavily on the work of J. Tyrwhitt Brooks, now known to have been an account invented by someone who had never been to California.³³²

Reliability of individual miners also varies considerably. It is clear when one reads a diary stretching over years whether the author is an optimist, who sees everything around him in a positive light; a braggart, who exaggerates his own successes and his part in major events; or a pessimist or paranoid personality who believes most of the people around him are thieves. I have my doubts about the reliability of James Carson, for instance,³³³ and also of Ansel James McCall, who borrows several pages from E. Gould Buffum³³⁴ and may, therefore, have plagiarized other passages. Newspapers had political leanings.³³⁵ I have put less weight on the authors whose work I believe to be least reliable. Kurutz is a good source for published accounts of the mines; he points out, for instance, that both Gerstäcker's and Tyrwhitt Brooks's books were works of fiction.³³⁶ The Library of Congress American Memory website³³⁷ also provides useful information about the individual authors reproduced.

331. For a discussion on the shortcomings of Shinn and Royce, see WILLIAMS, *supra* note 23, at 72, 155.

332. J. TYRWHITT BROOKS, *FOUR MONTHS AMONG THE GOLD-FINDERS IN CALIFORNIA: BEING THE DIARY OF AN EXPEDITION FROM SAN FRANCISCO TO THE GOLD DISTRICTS* (New York, D. Appleton & Co. 1849).

333. JAMES H. CARSON, *RECOLLECTIONS OF THE CALIFORNIA MINES* (Joseph A. Sullivan ed., Biobooks 1950) (1852).

334. BUFFUM, *supra* note 23; A.J. MCCALL, *PICK AND PAN* (Bath, New York, Steuben Courier Prtg. 1883).

335. KEMBLE, *supra* note 181.

336. KURUTZ, *supra* note 302, at 278–79, 675–79 (reviewing Gerstäcker and J. Tyrwhitt Brooks); ADA B. NISBET, ASA (FRW) BRIGGS & ELLIOT J. KANTER, *BRITISH COMMENT ON THE UNITED STATES: A CHRONOLOGICAL BIBLIOGRAPHY, 1832–1899*, at 87 (2001).

337. See <http://memory.loc.gov/ammem/cbhtml/cbhome.html>.