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# Hayek & (and) Cowboys: Customary Law in the American West

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**HAYEK & COWBOYS: CUSTOMARY  
LAW IN THE AMERICAN WEST**

**Andrew P. Morriss\***

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**Introduction**

The settlement of the American West during the nineteenth century generated a flourishing Hayekian legal order because state-based legal systems were absent from large parts of the West for an extended period of time. Without the crowding out of private law that accompanies the state’s assertion of a monopoly over some areas of the law and creation of subsidized competition in others, individuals created dispute resolution mechanisms and rules based on custom and contract. These examples of legal systems built by not-particularly-well-educated cowboys, gold miners, and migrants suggest that Hayekian legal orders can serve as effective, complete substitutes for state-provided law.

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Consider, for example, this description of the legal situation in Denver in 1860, written by J.H. Beadle, a newspaperman traveling through the area:

The miners' courts, the people's courts, and "provisional government" (a new name for [the attempted territory of] 'Jefferson') divided jurisdiction in the mountains; while Kansas and the provisional government ran concurrent in Denver and the valley. Such as felt friendly to either jurisdiction patronized it with their business. Appeals were taken from one to the other, papers certified up or down and over, and recognized, criminals delivered and judgments accepted from one court by another, with a happy informality which it is pleasant to read of. And here we are confronted by an awkward fact: there was undoubtedly much less crime in the two years this arrangement lasted than in the two which followed the territorial organization and regular government.<sup>1</sup>

Even discounting for Beadle's somewhat florid nineteenth century style and his incentive to overdramatize to boost sales of his account (colorfully titled *Western Wilds and the Men Who Redeem Them*), he describes a remarkable occurrence. Four legal systems—the miners' courts, the people's courts, the "provisional government," and the government of Kansas—operated concurrently in the region around Denver, and three of them were self-organized entities with no official legal status.<sup>2</sup> Residents used the court appropriate to the subject matter of their dispute (e.g. the miners' courts for mining disputes) and their geographical location, or chose the forum based on whether the litigant was "friendly" to the jurisdiction. These competitive jurisdictions accepted rulings from one another "with a happy informality," and the result was "much less crime" than following the organization of "regular government."

Of course, a traveler who crosses from the eastern to the western bank of the Mississippi River today does not arrive in a Hayekian legal paradise. The customary law regimes that spontaneously developed across the West during the nineteenth century were eventually crowded out by state-provided legal institutions, although traces of them remain. This transition to state-monopolies of legal order offers an opportunity to examine the weakness of customary legal orders in the face of competition from state-sponsored institutions.

In Part I, this Article briefly describes the characteristics of Hayekian legal institutions. It then examines three of the most important customary legal institutions of the nineteenth century American West: cattlemen's associations, hard rock mining camps, and vigilance committees, and assesses them in light of Hayek's le-

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<sup>1</sup> J. H. BEADLE, *WESTERN WILDS AND THE MEN WHO REDEEM THEM* 477 (1877).

<sup>2</sup> The miners' courts, the people's courts, and the "provisional government" were all entities with no official legal status, although the latter was an attempt to secure such status. The miners' courts were made possible by the federal government's failure to legislate a national mineral rights law, leaving the issue of mineral rights to the customary legal institutions that sprang up during the California Gold Rush and then spread throughout the West. The people's courts, like many similar vigilante movements, provided order in areas lacking an official legal system. The provisional government was an attempt by the local population to shape its own government rather than leaving it to outsiders (Kansas politicians or Congress), admittedly an activity with its own rent-seeking potential.

gal theory. Part II examines their transitions from customary to state legal institutions and concludes by considering the implications of the Western experience with Hayekian legal institutions for Hayek's theory of law.

## I. Hayekian Legal Institutions in the American West

### A. Defining a Hayekian Legal Institution

Hayek's theory of law does not provide a complete definition of Hayekian legal institutions and is not free from inconsistencies, as other contributions to this symposium ably describe.<sup>3</sup> But setting these inconsistencies aside, Hayek's reliance on both custom and spontaneous order to provide significant components of the legal institutions makes it impossible for him to fully specify the details of legal institutions in a Hayekian order. Doing so would contradict his claim that market responses are based on knowledge unknowable to a single individual.<sup>4</sup> Thus, in describing what constitutes a Hayekian legal institution, one is left in the uncomfortable position of not being able to be particularly precise. Unfortunately, just as assertions that market response will solve particular social problems can seem overly vague, so might discussions of Hayekian legal systems leave some readers concerned that the institutions are underspecified. The problem is unavoidable, however, since market solutions are by their nature impossible to fully specify. We can examine existing spontaneous orders and speculate about how entrepreneurs might resolve a particular problem—one of the motivations for considering these historical examples—but we cannot fully specify the result of the interactions of customary rules, market institutions, and the facts and preferences known only to widely dispersed individuals.<sup>5</sup>

Hayek did articulate important criteria for evaluating legal institutions, however, allowing us to at least define a range of characteristics that could support a Hayekian legal order with respect to three key tasks of legal institutions: rule generation, rule content, and dispute resolution.

#### 1. Rule generation

In a Hayekian legal institution rules are (mostly) grown, not made. They are not generated by reason, but arise from experience, the resolution of disputes, and observations of what is successful.<sup>6</sup> As Hayek notes in *Law, Legislation and Liberty*, "'Learning from experience[,] among men no less than among animals, is a process not primarily of reasoning but of the observance, spreading, transmission and development of practices which have prevailed because they were successful—

<sup>3</sup> See, e.g., John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 NYU J.L. & LIBERTY 79 (2004).

<sup>4</sup> See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

<sup>5</sup> See Randy E. Barnett, *Pursuing Justice in a Free Society: Part I—Power vs. Liberty*, 4 CRIM. JUS. ETHICS 50 (1985); and *Pursuing Justice in a Free Society: Part II—Crime Prevention and the Legal Order*, 5 CRIM. JUS. ETHICS 30 (1986) (giving an example of using such speculation to examine issues in Hayekian legal analysis).

<sup>6</sup> See generally FRIEDRICH A. HAYEK, 1 LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 19 (1973) [hereinafter HAYEK, RULES AND ORDER].

often not because they conferred any recognizable benefit on the acting individual but because they increased the chances of survival of the group to which he belonged."<sup>7</sup> Trial and error teaches individuals which sets of rules are productive and which are not.<sup>8</sup> Groups following rules that lead to increases in wealth (at first this means simply increased caloric consumption) displace groups that follow rules that do not.<sup>9</sup> A successful institution may propagate rapidly, although an outsider's inability to understand how an institution functions may limit the possibility of copying it effectively.<sup>10</sup>

Hayek explicitly rejects the idea that planning has any role in rule generation, arguing that individual rules need not be "rationally demonstrated or 'made clear and demonstrative to every individual' . . . ."<sup>11</sup> He criticizes the belief that "man has achieved mastery of his surroundings mainly through his capacity for logical deduction from explicit premises," as "factually false," and contends that "any attempt to confine [man's] actions to what could thus be justified would deprive him of many of the most effective means to success that have been available to him."<sup>12</sup>

I do not believe this precludes attempts to transplant successful rules and institutions, although it does place severe limits on the chance of success. The introduction of a transplanted rule will have unintended consequences. The receiving culture may miss or misunderstand crucial features of the new rule, or interpret it in unexpected ways when it interacts with pre-existing rules. Simply copying statutes from another legal system,<sup>13</sup> therefore, is not likely to produce the intended effect, although it may be possible to transplant rules without wholesale copying. The strong evidence that former British colonies outperform former colonies of European civil law countries, for example, suggests that the institutions necessary for the rule of law can be transplanted and adapted to quite different cultural environments.<sup>14</sup>

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<sup>7</sup> *Id.* at 18.

<sup>8</sup> *See id.* at 9.

<sup>9</sup> *See id.* at 18 ("These rules of conduct have thus not developed as the recognized conditions for achievement of a known purpose, but have evolved because the groups who practiced them were more successful and displaced others. They were rules which, given the kind of environment in which man lived, secured that a greater number of the groups or individuals practicing them would survive. The problem of conducting himself successfully in a world only partially known to man was thus solved by adhering to rules which had served him well but which he did not and could not *know* to be true in the Cartesian sense.").

<sup>10</sup> *See* HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 105-52 (2000) (arguing that attempts to transplant western institutions into developing countries have failed, in part, because those doing the transplant misunderstood the reasons the transplanted institutions were originally successful).

<sup>11</sup> HAYEK, *RULES AND ORDER*, *supra* note 6, at 25.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *See, e.g.*, Rudiger Dornbusch, *Strategies and Priorities for Reform*, in 1 *THE TRANSITION TO A MARKET ECONOMY: THE BROAD ISSUES* (Paul Marer & Salvatore Zecchini, eds., 1991) (advocating wholesale adoption of existing foreign commercial codes).

<sup>14</sup> *See* E.L. Glaeser & A. Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193, 1194 (2002). Hayek argues that the development of the civil law in France and Germany produced institutions that "have since conquered

Regardless of whether transplants are kosher (or even possible) in a Hayekian system, rules are generated primarily through decentralized interactions among individuals. These interactions produce customs, although Hayek is not completely clear about how this occurs.<sup>15</sup> But Hayek is clear that rules should *not* be created through the legislative process, except under extremely limited circumstances.<sup>16</sup> Hayek allows recognition of custom through courts, although as Hasnas points out, this introduces problems into Hayek's theory.<sup>17</sup>

The Hayekian rule generation process is thus analogous to the market's production of prices.<sup>18</sup> Voluntary interactions between individuals produce information. Over time, groups of individuals observe this information, develop expectations about the results of particular interactions, and begin to plan their behavior accordingly.<sup>19</sup> The custom that develops becomes a rule, not because of a desire to produce particular consequences, but because the custom is observed to be followed, although it is subject to modification through the same process if a new distinction is identified that justifies differential treatment.<sup>20</sup> The key characteristic of a Hayekian legal institution's generation of rules therefore rests on a connection between a rule and individual expectations regarding the outcome of an interaction.

A significant ambiguity that Hayek himself highlights is the problem of "dead ends."<sup>21</sup> If a custom reduces wealth, perhaps because circumstances changed after it developed, it is difficult to change without disrupting existing expectations. Hayek concedes that this phenomenon presents one role for legislation, although he does not explain how legislatures will avoid the rent-seeking problems he condemns elsewhere, or even why a legislature could be expected to choose an efficient solution over a dead end.<sup>22</sup> Cheap exit offers an alternative means for changing customary rules. If a Hayekian legal order is "stuck" in a dead-end with an inefficient, custom-based rule, those who recognize its inefficiency can opt out of the existing order and form a new order without the inefficient rule. Indeed, such

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the world and everywhere undermined the rule of law." FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 196 (1960).

<sup>15</sup> See Hasnas, *supra* note 3, at 80 (describing Hayek's confusion of common law and custom).

<sup>16</sup> HAYEK, *RULES AND ORDER*, *supra* note 6, at 127, 133 (arguing that statutes organizing government "are called laws as a result of an attempt to claim for them the same dignity and respect which is attached to the universal rules of just conduct[,] but noting that legislatures can create law by deliberately modeling statutes after laws).

<sup>17</sup> See Hasnas, *supra* note 3, at 80 (noting that Hayek "conflate[s] customary and common law").

<sup>18</sup> HAYEK, *RULES AND ORDER*, *supra* note 6, at 49 (noting that "by guiding the actions of individuals by rules rather than specific commands it is possible to make use of knowledge which nobody possesses as a whole").

<sup>19</sup> *Id.* at 12 ("Or, to put it differently, our adaptation to our environment does not consist only, and perhaps not even chiefly, in an insight into the relations between cause and effect, but also in our actions being governed by rules adapted to the kind of world in which we live, that is, to circumstances which we are not aware of and which yet determine the pattern of our successful actions.").

<sup>20</sup> *Id.* at 19 ("Although such rules come to be generally accepted because their observation produces certain consequences, they are not observed with the intention of producing those consequences—consequences which the acting person need not know.").

<sup>21</sup> *Id.* at 100.

<sup>22</sup> *Id.* at 141-42 (discussing influence of special interests in shaping legislation).

exits occur in competitive areas of state-provided law. In the early twentieth century, many corporations legally domiciled in New Jersey fled to Delaware, which in 1899 had adopted the statutory corporate law and in 1900 the prior judicial interpretations of New Jersey's courts, less a recent innovation that was perceived as harmful to shareholders.<sup>23</sup> Exit from New Jersey was inexpensive (primarily the costs of reincorporation in Delaware), so competition among jurisdictions limited New Jersey's ability to maintain an inefficient rule (of course, New Jersey's rule was not customary, but enacted by the New Jersey legislature).

## 2. Rule content

Hayek's legal theory says almost nothing about the content of the legal rules generated by a Hayekian legal institution. Indeed, Hayekian judges appear to have little discretion when choosing among competing rules and so there is little for them to say about the appropriateness of rules according to criteria such as efficiency. They are to reach decisions that implement the parties' *ex ante* expectations, not any external standard.<sup>24</sup> Judge Richard Posner has criticized Hayek's legal theory on this ground, noting that Hayek leaves little room for a judge to adopt an efficient rule over an inefficient alternative.<sup>25</sup> Posner's criticism points to a key difference between law and economics' prescriptions for rules and the Hayekian view. The difference arises not because of a disagreement over the value of efficiency but because Hayek assumes that judges cannot know enough to do what Posner expects them to do. Hayekian judges cannot choose among rules based on efficiency characteristics because they cannot predict outcomes under various rules.<sup>26</sup> All they can do is attempt to ensure that rules meet expectations. Therefore, a judge cannot say whether contributory or comparative negligence is the better rule in torts cases.<sup>27</sup> Indeed, Hayek's theory prevents judges from instantiating any set of values they may hold.

Despite the lack of substantive constraints on the rules produced by Hayekian legal institutions, process constraints place some limits on the substance of rules.<sup>28</sup> In particular, if a Hayekian legal institution is part of a social order that allows relatively cheap exit, the voluntary nature of the interactions that produce

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<sup>23</sup> See *Wilmington City Ry. Co. v. People's Ry. Co.*, 47 A. 245, 251-54 (1900) (describing adoption of New Jersey rules); Andrew G.T. Moore II, *A Brief History of the General Corporation Law of the State of Delaware and the Amendatory Process*, in 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* H-1 (3d ed. 1999) (describing adoption of New Jersey corporate laws).

<sup>24</sup> HAYEK, *RULES AND ORDER*, *supra* note 6, at 87 ("The question for the judge here can never be whether the action in fact taken was expedient from some higher point of view, or served a particular result desired by authority, but only whether the conduct under dispute conformed to recognized rules.").

<sup>25</sup> Richard A. Posner, *Kelsen, Hayek, and the Economic Analysis of Law*, J. AUS. ECON. (forthcoming); Andrew P. Morriss, *In Praise of Hayekian Judges*, J. AUS. ECON. (forthcoming).

<sup>26</sup> HAYEK, *RULES AND ORDER*, *supra* note 6, at 17-18.

<sup>27</sup> My choice of contributory and comparative negligence is deliberate – law and economics scholars have shifted between the two several times, indirectly making Hayek's point that even experts may have trouble determining the efficient rule. See Andrew P. Morriss et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALBANY L. REV. 667, 675 (1998).

customs will limit the ability of interest groups to entrench their preferences for either moral or economic rent-seeking in legal rules. Thus, a Hayekian legal order is unlikely to produce rules against voluntary behavior involving consenting adults (e.g. bans on sodomy) or rules that involuntarily transfer wealth from some individuals to others (e.g. cross-subsidization through regulated utility rates), since those disadvantaged by the rules would simply exit the legal order. Therefore, a Hayekian legal order is likely to produce rules that increase wealth and unlikely to produce rules that reduce wealth, despite its lack of space for Posnerian judges engaged in explicit choice of efficient legal rules.

### 3. Dispute resolution

Because its rules are based on custom, a Hayekian dispute resolution process is focused on discovering the relevant custom and understanding the *ex ante* expectations of the parties to the dispute.<sup>29</sup> Hayek describes how a judge is

best understood if we remember that he is called in to correct disturbances of an order that has not been made by anyone and does not rest on the individuals having been told what they must do. In most instances no authority will even have known at the time the disputed action took place what the individuals did or why they did it. The judge is in this sense an institution of a spontaneous order. He will always find such an order in existence as an attribute of an ongoing process in which individuals are able successfully to pursue their plans because they can form expectations about the actions of their fellows which have a good chance of being met.<sup>30</sup>

The Hayekian judge “serves, or tries to maintain and improve, a going order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody, and that is not based on the individuals doing anybody’s will, but on their expectations becoming mutually adjusted.”<sup>31</sup> Thus, dispute resolution in a Hayekian legal order focuses on the *ex ante* expectations of parties to the dispute, and does not allow social considerations to influence decisions.

We would also expect Hayekian dispute resolution to rely primarily on a competitive market for decision makers, not only among individuals but also among jurisdictions, as in the historical English examples on which Hayek relies. Where competition is not present, the institution needs a substitute means of guaranteeing an unbiased decision maker.<sup>32</sup> A Hayekian institution must also solve the problem of *ex post* refusals to submit to jurisdiction as a tactic to block a judgment.

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<sup>28</sup> HAYEK, RULES AND ORDER, *supra* note 6, at 107.

<sup>29</sup> *Id.* at 96-97.

<sup>30</sup> *Id.* at 94-95.

<sup>31</sup> *Id.* at 18-19.

<sup>32</sup> See Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Richard A. Epstein, *The Independence of Judges: The Uses and Limitation of Public Choice Theory*, 1990 B.Y.U. L. REV. 827 (1990) (explaining institutional features of federal judiciary to prevent bias).



State legal systems are able to solve this problem by asserting jurisdiction over all physically within their borders; systems that rely on consent need an effective substitute.

#### 4. Summary

A Hayekian legal order thus has three important characteristics. First, its rules are the product of a spontaneous order, built on the results of individual interactions not themselves intended to produce rules of conduct. Second, its rules focus on making “it possible at each moment to ascertain the boundary of the protected domain of each and thus to distinguish between the *meum* and the *tuum*” because rules that go beyond that limit will prompt exit.<sup>33</sup> Third, it resolves disputes according to the *ex ante* expectations of the parties to a dispute, not according to politically-defined goals.

We now turn to whether such legal orders existed in the nineteenth century American West. The institutions described below were unofficial and operated without state sanction. In *Law, Legislation and Liberty*, of course, Hayek described his vision of state legal institutions. Nonetheless, I contend that these Western legal institutions can be evaluated in Hayekian terms because they arose to fill the vacuum created by the absence of a state. Under such conditions, westerners organized institutions that acted as substitutes for a state. Although they did not explicitly claim state status, westerners at least implicitly asserted the right to articulate and enforce rules governing contract, property, tort, and criminal law, and to enforce those rules against all individuals within their “jurisdiction.” Thus, their institutions were effectively, if not nominally, substitutes for official legal institutions.

#### B. Cattlemen

Following the Civil War, a vast cattle industry sprang up on the Great Plains, a region that runs from the Texas Panhandle into the Canadian west.<sup>34</sup> As in other areas of the American West, settlement of the Great Plains preceded the arrival of effective government. The early settlers had to rely on institutions they developed on their own to provide order until the federal government arrived in sufficient force. Cattle herds soon replaced buffalo across the plains and by the 1870s vast cattle empires had appeared.<sup>35</sup>

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<sup>33</sup> HAYEK, *RULES AND ORDER*, *supra* note 6, at 107.

<sup>34</sup> I have given more extensive accounts of the Great Plains cattlemen and their legal institutions in Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 *LAND & WATER L. REV.* 581, 650-78 (1998) [hereinafter Morriss, *Miners, Vigilantes, & Cattlemen*] and Andrew P. Morriss, *Returning Justice to Its Private Roots*, 68 *U. CHI. L. REV.* 551, 565-75 (2001) [hereinafter Morriss, *Returning*]. In the interests of space, I provide only a summary highlighting the most important details here. See also TERRY L. ANDERSON & PETER J. HILL, *THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* 138-76 (2004) (discussing cattlemen’s provision of law).

<sup>35</sup> See generally Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 652-55. To refer to these cattle operations as “empires” is no exaggeration: the Great Plains cattle industry attracted millions of dollars of foreign investment and shipped tens of thousands of cattle to the stockyards and butcher shops of

The cattlemen developed many methods of providing order, responding to different constraints in different areas. In Texas, where the Panhandle lands were initially owned by a state government anxious to convert land to cash and goods, cattlemen bought land and created large scale private holdings.<sup>36</sup> Within the ranches the cattlemen established their own rules, investing in technology that helped them keep order and maximize the value of their land. For example, Texas ranchers hired private guards and provided them with advanced, accurate rifles that allowed them to shoot from farther away than the average rustler.<sup>37</sup> These measures enabled the Texas ranches to effectively defend themselves against rustlers despite the lack of public law enforcement.<sup>38</sup> Privatization and the ability to exclude also allowed investment in improvements. Texas ranches built fence and wells, installed windmills, and developed pasture rotation systems.<sup>39</sup>

Outside Texas, however, federal land policies prevented privatization of public lands in parcels sufficient to support ranching, and the cattlemen created substitutes for land ownership.<sup>40</sup> In both Montana and Wyoming, cattlemen's associations created private systems of rules that governed most aspects of the business, including when roundups would occur, allocation of unbranded calves, ranchers' obligations to stock the range with quality bulls, cowboys' ability to own their own cattle, and disease control measures. However, in Montana the cattlemen were unable to gain sufficient political power to convert most of these voluntary association rules into statutes, while in Wyoming the cattlemen held firm control of the territorial and state government into the 1890s and so were able to legislate with almost no constraints.

The range cattlemen had four main problems to solve. First, they had to allocate access to the range in order to prevent overgrazing, the "tragedy of the commons." Second, they sought to reduce operating costs through joint efforts. Roundups, for example, were cheaper to conduct cooperatively than individually. Third, they had to establish ownership of the cattle and allocate the mavericks, or unbranded young cattle.<sup>41</sup> Fourth, they had to protect themselves against theft.

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Chicago and the Midwest. See HELENA HUNTINGTON SMITH, *THE WAR ON POWDER RIVER: THE HISTORY OF AN INSURRECTION* 11 (1966).

<sup>36</sup> See Morriss, *Returning*, *supra* note 34, at 568-69 (summarizing Texas land policies).

<sup>37</sup> DULCIE SULLIVAN, *THE LS BRAND: THE STORY OF A TEXAS PANHANDLE RANCH* 87-88, 151 (1968) (ranch purchased powerful Austrian rifles, "the most powerful guns of their kind then in existence" and instructed cowboys "anytime you see a stranger riding or walking in an LS pasture, take a shot at him."). The ranchers sought and received official status for the guards, but the men remained privately paid. See *id.* at 87-88 (noting that the governor gave permission for hiring of "Home Rangers" to be paid for by cattlemen). The cattlemen probably sought official status for their guards in order to avoid potential criminal proceedings. See J. EVETTS HALEY, *THE XIT RANCH OF TEXAS AND THE EARLY DAYS OF THE LLANO ESTACADO* 112 (1953) ("Once each day a rider, armed with six-shooter and Winchester, rode the fences from these camps, and it became extremely hazardous to be found along one without evident legitimate business.").

<sup>38</sup> See HALEY, *THE XIT RANCH*, *supra* note 37, at 104 ("[T]he law was so distant as to be impotent.").

<sup>39</sup> See, e.g., *id.* at 289 (describing investments by XIT in fencing).

<sup>40</sup> See Morriss, *Returning*, *supra* note 34, at 567-68; Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 656-57 (summarizing federal land policies).

<sup>41</sup> See SMITH, *supra* note 35, at 51-89 (describing maverick problems).

Texas provided a cheap and easy solution to the access problem: it willingly sold large tracts of land in the plains to anyone able to pay for it. This enabled the creation of large ranches like the "XIT" (or "10 in Texas") ranch, which covered parts of ten counties. Private ranchers resolved the access problem by fencing their land, excluding others' cattle. Clear private property boundaries also allowed Texas ranchers to solve rustling by enabling them to exclude non-employees (by force, if necessary) from their lands.<sup>42</sup> Private property also solved the maverick problem. Because a ranch owned all of the cattle within its fence, all unbranded calves were also its property. Therefore, by allowing the creation of economically viable units, private property resolved the problems of joint production. In the case of roundups, wells, and grazing policies, private property ensured that the benefits of investment accrued to ranch owners.

Building on a simple rule, partially publicly provided—private land ownership—Texas ranchers developed rules that maximized the value of their land, just as they developed the physical infrastructure that did the same.<sup>43</sup> The Hayekian aspect of ranching law in Texas lay in the internal rules ranches adopted to govern cowboy conduct, in the ranches' policies toward farming (since the ranch profited from selling land to farmers, the Texas ranches welcomed farming), and in the customary rules governing ranch-to-ranch relations (covering topics such as fence repair and the return of lost animals).<sup>44</sup>

Things were quite different north of the Red River. The northern Great Plains were governed by federal land policies that favored farming over ranching, because the federal homestead laws only allowed privatization of small tracts. This prevented ranchers from privatizing economically viable ranches. Instead, cattle roamed the open range, or unclaimed land. Over time the open range gradually diminished as the government granted portions to railroads, and homesteaders claimed scattered small portions.<sup>45</sup> The classic western movie *Shane* illustrates the problems this created for open range ranchers. The movie's villain, Rufus Ryker, confronted the leader of the intruding homesteaders, Joe Starrett, and tried to buy him out. Starrett rejected the offer, claiming that he and his fellow homesteaders had the right to homestead. Ryker responded:

Right? You in the right! Look, Starrett. When I come to this country, you weren't much older than your boy there. And we had rough times, me and other men that are mostly dead now. I got a bad shoulder yet from a Cheyenne arrowhead. We *made* this country. Found it and we made it,

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<sup>42</sup> Where boundaries were not clear, Texas ranches were able to resolve the dispute by trading land and privately creating clear boundaries. See SULLIVAN, *supra* note 37, at 96 (describing resolution of boundary dispute between XIT and LS ranches).

<sup>43</sup> The remoteness of the Panhandle ranches meant that the public provision of private property was not complete. Because the state could not guarantee boundaries, significant degrees of self-help were required.

<sup>44</sup> See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (discussing modern equivalent rules in California's Shasta County).

<sup>45</sup> Because railroads were typically granted alternating sections along the sides of their lines, they did not acquire enough contiguous land to sell economically viable tracts to the ranchers.

with blood and empty bellies. The cattle we brought in were hazed off by Indians and rustlers. They don't bother you much anymore because *we* handled 'em. We made a safe range out of this. Some of us died doin' it. We made it. And then people move in who've never had to rawhide it through the old days. They fence off my range, and fence me off from water. Some of 'em like you plow ditches, take out irrigation water. And so the creek runs dry sometimes. I've got to move my stock because of it. And you say we have no right to the range. The men that did the work and ran the risks have no rights? I take you for a fair man, Starrett.<sup>46</sup>

*Shane's* villain is unusual for a film character in having a Lockean justification for his position, but Ryker's complaint was undoubtedly common among open range ranchers on the northern Great Plains. As in *Shane*, the real life open range ranchers found themselves cut off from water by homesteaders' fences, losing cattle to rustlers who they could not exclude, and with numerous problems related to the open access nature of the land on which their cattle grazed.<sup>47</sup> Open range ranchers turned to three solutions: cattlemen's associations, capture of governments, and violence.

The cattlemen's associations provided a means to solve coordination problems among members, by setting joint round-up dates, mandating disease control measures, establishing rules governing hiring practices, inspecting cattle being shipped off the range to ensure they were not stolen, hiring stock detectives to stop rustling, mandating the contribution of quality bulls to maintain and improve herd quality, and allocating mavericks. In Montana Territory, where the cattlemen never achieved political dominance, the range associations also helped mediate conflicts between homesteaders and ranchers. These associations created rules that solved coordination and free-rider problems, created effective substitutes (up to a point) for the property rights to the range denied them by federal land policy, and resolved disputes among members. The most significant failing of the cattlemen's associations was their inability to manage conflicts between association members and non-members.

The problem with non-members' competing uses of the range was that there was no means of allocating the decision-making authority. Because federal land policy prevented the accumulation of viable range, the northern Plains cattlemen could not exclude others from the range. So long as the range was being used only by cattlemen, the associations' reputational sanctions were sufficient, because non-member cattlemen could not compete against members, who benefited from the coordination of joint roundups and other activities. Once homesteaders arrived, however, these sanctions broke down. Not needing to roundup, for exam-

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<sup>46</sup> SHANE (Paramount Pictures 1953).

<sup>47</sup> See Morriss, *Returning*, *supra* note 34, at 568 (describing problems homesteaders caused for open range cattlemen).

ple, the homesteaders were indifferent to their participation in cattlemen's associations' roundups.<sup>48</sup>

Unable to control the range through the associations, the Wyoming open range ranchers used their political power to convert voluntary association rules into statutory law, extending their control beyond members of the associations to everyone in the territory. Using government power, the Wyoming cattlemen seized rivals' cattle and restructured the government to serve their interests.<sup>49</sup> When even this proved insufficient to drive out competing claims for the range, they launched a violent "invasion" of Johnson County in north central Wyoming, aimed at suppressing what the cattlemen viewed as a rustler stronghold.<sup>50</sup> Due largely to their own incompetence, the invasion failed; its failure helped break the cattlemen's hold on Wyoming politics.<sup>51</sup>

How well do the legal orders produced by the cattlemen fit the Hayekian model? The Texas cattlemen, admittedly building on an at least nominal foundation of state recognition of property rights, created private legal orders that share the three characteristics defined above. The rules they imposed stemmed from individual ranchers' assessments of how to maximize the value of their property or pursue other ends. By making the property lines clear and unambiguous, and investing in private enforcement of property rights, the Texas range cattlemen were able to secure for themselves the benefits of creating order on their ranches. The result was a competitive environment in which different ranches imposed different codes of conduct on cowboys, made different investments in range improvements, and took different approaches toward the introduction of farming into the range. To the extent that codes of conduct went beyond the simple definition of property rights to define permissible moral behavior, they were limited by the ability of cowboys to exit.<sup>52</sup> The resulting rules thus had to produce sufficient value to both the cowboys and ranches to justify the restrictions.<sup>53</sup> Finally, the property rights solution prevented most of the disputes that wracked the northern plains from arising in the first place.

In the north, range law was more problematic. The *Shane* problem was serious, as federal land policies prevented reliance on private property as a basis for private ordering. The Wyoming cattlemen and, briefly, the Montana cattlemen, adopted rules aimed at restricting competition by prohibiting their cowboys from

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<sup>48</sup> Anderson and Hill point to this same explanation as the real cause of the traditional "cattlemen and sheepmen" conflicts. ANDERSON & HILL, *supra* note 34, at 167 ("[T]he cattlemen warred with the sheepman not because of any natural dissonance between cattle and sheep but rather because of the institutional incompatibility of the two modes of operation.").

<sup>49</sup> Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 666-70.

<sup>50</sup> *Id.* at 669-76.

<sup>51</sup> *Id.* at 676 n.654.

<sup>52</sup> The 1888 XIT code of conduct, for example, prohibited cowboys from gambling, carrying six-shooters, keeping private horses, running game with XIT horses, drinking, and stealing cattle from other ranches. HALEY, *supra* note 37, at 116. The Matador ranch had a similar set of rules. See WILLIAM M. PEARCE, *THE MATADOR LAND AND CATTLE COMPANY* 39-40 (1964).

<sup>53</sup> These restrictions might actually benefit some cowboys. For example, some cowboys might welcome a "no gambling" restriction as a screening device for undesirable coworkers.

owning cattle, rules which they could only enforce by increasingly repressive measures to prevent the cowboys from exiting the customary legal regime. The Montana ranchers quickly reversed course on this issue, deciding that the incentive to the cowboy from looking after a herd that included his own cows outweighed the gains from denying the cowboys a share of the mavericks.<sup>54</sup> The Wyoming cattlemen also confiscated property from non-members and, ultimately, attempted to eliminate competing claims to the range through mass murder. Importantly, however, the Wyoming cattlemen were able to take such oppressive measures only when they stepped outside the private, Hayekian legal order of voluntary associations and took control of the territorial and state governments. Significantly, just across the border in Montana, where the cattlemen lacked political control of the territorial and state governments, relations between members and non-members of cattlemen's associations were much more harmonious.

Perhaps most importantly, because of federal land policies, the northern Plains cattlemen confronted a problem insoluble within a Hayekian legal order. If they maintained their private legal institutions, they could not control the incoming homesteaders, who could claim the range under the federal homestead laws. Without the ability to exclude homesteaders, the cattlemen would soon find themselves, like Ryker, cut off from water and without a remedy. The reputational constraints that existed within the cattlemen's association were ineffective against those who did not care to belong. Only by seizing the state apparatus or through extra-legal violence could the cattlemen control the homesteaders. It is unsurprising then that, when the opportunity for both appeared in Wyoming, the cattlemen took advantage of it. The demise of the Hayekian institutions is thus linked to the frustration of private ordering by the homestead laws.

### C. Miners

The discovery of gold in California in 1848, days before the territory passed from Mexican to U.S. sovereignty, created unprecedented challenges for the U.S. legal system. The new territory was not yet legally organized, and the small military force present was unable to provide law for the massive influx of people.<sup>55</sup> Moreover, American law on mineral rights in public land was unclear and the status of most of California's land under the new regime was unsettled because of uncertainty about the validity of claims based on Mexican land grants.<sup>56</sup> As California's population grew from a few thousand, mostly living on cattle ranches and

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<sup>54</sup> See SMITH, *supra* note 35, at 28-29 (noting difference in rules and concluding, "Funny how much less trouble with rustling they had in Montana.").

<sup>55</sup> Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 595 n.48 (summarizing confused legal situation following Mexico's cession of California).

<sup>56</sup> See *id.* (noting that U.S. authorities declared Mexican mining laws "abolished" without providing alternative); Andrew P. Morriss, *The Reception of Mexican Land Law in the United States and the California Mexican Land Grant Cases*, in *LAW IN THE WESTERN UNITED STATES* (Gordon Morris Bakken ed., 2000) (describing problems with interpretation of Mexican land grants after acquisition of new territories in the West by the United States).

in mission settlements, to more than 100,000 between 1848 and 1849, the new arrivals were forced to secure law and order themselves.<sup>57</sup>

The miners developed a legal institution, the mining district, which solved these problems.<sup>58</sup> Miners in a newly discovered gold field agreed among themselves on a constitution for the district, defining its borders, allocating claims, limiting claim size (generally to the amount of land which could be worked in a single season), setting the rules on transfers, and establishing a recording system for claims.<sup>59</sup> The miners also created a dispute resolution system to handle disputes among members and punish assaults, thefts, and murders.<sup>60</sup> As the mineral rushes spread westward, miners took the institution of the mining district with them. Mining districts developed throughout the American West.<sup>61</sup>

Three characteristics of mining districts are noteworthy. First, many early mining districts banned transfers of claims, out of a desire to prevent speculation.<sup>62</sup> But miners quickly discovered that transferable claims benefited everyone, and the rules evolved to allow transfer.<sup>63</sup> Second, as mining technology improved and the optimal size of a claim grew, mining district rules defining claim sizes also changed in response to the changes in technology.<sup>64</sup> Third, exit was a viable option for miners. Not only could individual miners exit a district by simply leaving, but also groups of miners could, and did, secede from existing districts and form new ones.<sup>65</sup>

Most impressively, mining districts worked. That is, they substituted the rule of law for violence. As John Umbeck summarized the results of his exhaustive study of mining camp rules, miners chose contract over violence “not once but 500 times. And the length of time in which this took place was not centuries, but days.”<sup>66</sup> That they did so in a population largely consisting of armed men, far from the usual institutions that restrain them from violence, is all the more impressive.

The mining district had all the key characteristics of a Hayekian legal institution. Its rules developed out of contracts between its initial members. New entrants agreed to the rules as part of the price of acquiring a claim from an existing member. These contracts had as their goal the facilitation of each signatory’s individual plan to acquire gold, not some politically agreed upon goals. Second, given the high opportunity cost of participating in governance, the mining districts adopted minimal sets of rules barring violence against members and securing

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<sup>57</sup> Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 594 (summarizing population growth).

<sup>58</sup> This section draws on Morriss, *Miners, Vigilantes, & Cattlemen*, *id.*, at 592-625, and sources cited therein.

<sup>59</sup> *Id.* at 599-616 (describing district operations).

<sup>60</sup> *Id.* at 607-08 (describing dispute resolution mechanisms).

<sup>61</sup> See RODMAN W. PAUL, *MINING FRONTIERS OF THE FAR WEST, 1848-1880*, at 42 (1963) (describing how “Old Californians’ were consulted and copied in matters of mining technique, mining law, and mining-camp life.”).

<sup>62</sup> Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 601-02, and sources cited therein.

<sup>63</sup> *Id.* at 602.

<sup>64</sup> *Id.* at 603-04.

<sup>65</sup> *Id.* at 600 n.72.

<sup>66</sup> JOHN R. UMBECK, *A THEORY OF PROPERTY RIGHTS* 132 (1981).

property rights to allow trade. Third, dispute resolution focused on a limited set of claims, primarily theft and murder, where the parties' expectations were clear.

#### D. Vigilantes

The third western legal institution I will evaluate in light of Hayek's theory is the vigilance committee. Formed in numerous communities across the west, vigilance committees were responses to the lack of state-provided legal services. Where the state was absent, vigilance committees overcame free rider problems in the private provision of legal services by enabling community members to band together against threats to the community and take steps to defend themselves.<sup>67</sup> For example, in Montana in the winter of 1863-64, a criminal gang led by the unofficial "sheriff" of the territorial capitol of Bannack robbed and murdered at least 102 men.<sup>68</sup> A vigilance committee captured and hanged many members of the gang, including the "sheriff," and chased others from the territory.<sup>69</sup> Despite the highly charged political atmosphere in Montana at the time, the committee is generally thought to have focused on the criminal gang and not used its power to attack political enemies.<sup>70</sup> Not all western vigilance committees were either so well-intentioned or able to refrain from wholesale rights violations, of course. The San Francisco vigilantes of 1856, for example, staged an effective *coup d'état*, creating an armed force that seized control of the city and entrenched the committee in political power for more than a decade.<sup>71</sup>

It is important to be clear about exactly what we are discussing here. "Vigilance committee" is a label applied by participants and historians alike to both informal, private efforts at law enforcement (as I have argued occurred in Montana) and to everything from mob violence to organized insurrections against official government bodies (as I have argued occurred in San Francisco in 1856).<sup>72</sup> Here I am using the term to describe the private provision of law by organized groups of individuals, which assert the right to directly enforce legal rules the content of which would be criminal law if provided by an official body. Since there is no parallel problem in discussing the state legal system (i.e. we rarely see groups of individuals asserting that they are a "legislature," for example, and so have no trouble identifying the class of entities being analyzed if we are discussing a legislature's behavior), some caution is necessary.

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<sup>67</sup> See Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 625-49; Andrew P. Morriss, *Private Actors and Structural Balance: Militia and the Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV. 115 (1997) (discussing Montana vigilance committee) [hereinafter Morriss, *Private Actors*].

<sup>68</sup> Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 639.

<sup>69</sup> Statutes of the members of this vigilance committee adorn the Montana state capital building today. See Morriss, *Private Actors*, *supra* note 67, at 115; see also Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 647-48 (concluding Montana committee was successful). *But see* RUTH E. MATHER & FRED E. BOSWELL, *VIGILANTE VICTIMS* (1991) and RUTH E. MATHER & FRED E. BOSWELL, *HANGING THE SHERIFF: A BIOGRAPHY OF HENRY PLUMMER* (1987) (arguing that the vigilantes hanged the wrong men).

<sup>70</sup> Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 648.

<sup>71</sup> *Id.* at 634.

<sup>72</sup> *Id.* at 627-35.



By avoiding reliance on state institutions, vigilance committees also avoided institutional checks on the exercise of state power. Evidentiary and procedural protections, for example, are largely absent from vigilance committee proceedings. Indeed, some vigilance committees appeared in reaction to the delays and perceived injustices caused by the protection of defendants' rights. The ideology, if not the practice, of both the 1851 and 1856 San Francisco committees was harshly critical of the ability of the official legal system to respond to crime.

Having described the Montana 1863-1864 and San Francisco 1856 committees in detail elsewhere, in this section I will explore the record of the San Francisco Vigilance Committee of 1851. While it was more successful (in Hayekian terms) effort than the problematic 1856 committee, it still falls short of the standard set by the Montana committee.

Between June 1851 and 1853, a Committee of Vigilance operated throughout San Francisco.<sup>73</sup> At the height of its powers the Committee successfully challenged the authority of state and city officials. It operated openly, although at some risk to its members. Although subsequent analyses have differed in their assessment of its methods, the 1851 Committee is generally acknowledged to have neither

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<sup>73</sup> The primary sources used for this section are: (1) HUBERT HOWE BANCROFT, *POPULAR TRIBUNALS* (1887), reprinted in *THE WORKS OF HUBERT HOWE BANCROFT* 36-37 (McGraw-Hill, 1967); (2) GEORGE R. STEWART, *COMMITTEE OF VIGILANCE* (1964); (3) JOSIAH ROYCE, *CALIFORNIA FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANTE COMMITTEE IN SAN FRANCISCO* (1886); (4) MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851* (1921); (5) ROGER W. LOTCHIN, *SAN FRANCISCO: 1846-1856 FROM HAMLET TO CITY* (1974); and (6) ROBERT M. SENKEWICZ, *VIGILANTES IN GOLD RUSH CALIFORNIA* (1985).

Bancroft covers the 1851 Committee in great detail, having interviewed many of its members and accessed its papers. His book includes material which must be treated with caution either because no authority is cited or because it appears to be a record of a conversation constructed by Bancroft. Bancroft was also an unabashed partisan of both the 1851 and 1856 committees. Stewart's book is less "academic" in style than some of the others, which may make it the preferred source for readers seeking more detail. His source notes partially compensate for the absence of footnotes, however, and he presents a careful chronology of the Committee's actions. Williams's book began as an introduction to the Bancroft collection of the 1851 Committee's papers she was editing, and expanded as she worked with the material. While more aware of the Committee's flaws than Bancroft, she is still a generally sympathetic historian. However, her chronology of events is careful, and I have relied on her account of the Committee's actions. Royce, who grew up in California in the 1850s and 1860s, wrote his book while on the faculty at Harvard and is widely held to be one of the best authorities on early California. Robert G. Cleland, *Introduction*, in ROYCE, *supra*, at xxix. Lotchin's history focuses on San Francisco as an example of urban problems. As Richard Wade's foreword puts it, Lotchin "provides the movement with an urban context . . . . He sees it not so much as a bout between 'good guys' and 'bad guys' (which side was which varies with the author's interpretation), but rather the outgrowth of a search for community." LOTCHIN, *supra*, at ix. Lotchin draws heavily on the *Bulletin*, a newspaper closely associated with the 1856 Vigilantes. LOTCHIN, *supra*, at 383 n.1. Senkewicz draws together the early writers' focus on the centrality of vigilantism to San Francisco in the 1850s and the later historians' analysis which placed the two committees in a political and economic context. See SENKEWICZ, *supra*, at 203-31, for a historiographic discussion of the major works on the committees.

With respect to the dates of operation, Williams finds the Committee operated from June 1851 to "sometime subsequent to January, 1853." WILLIAMS, *supra*, at 227. Bancroft, who also had access to the Committee files, found no record of activities other than collecting money and paying debts after mid-1852. BANCROFT, *supra*, at 406.

punished the innocent nor acted without providing those it accused the opportunity to defend themselves.<sup>74</sup>

San Francisco grew up in the boom of the Gold Rush. This gave it a character different from other American cities.<sup>75</sup> The massive influx took the city from 200 buildings and 800 inhabitants in 1847 to 15,000 people in 1849.<sup>76</sup> San Francisco's rapid growth had three important consequences. First, land and even crude buildings were extremely valuable.<sup>77</sup> Bayard Taylor, for example, recounts how in July 1849 a fifteen by twenty-five foot canvas tent used as a gambling establishment was renting for \$40,000 a year.<sup>78</sup> Second, the city was so new that most buildings were constructed from flammable materials, and thus it was extremely vulnerable to fire.<sup>79</sup> The combination of valuable property and vulnerability to fire understandably made property owners particularly sensitive to the prevention of arson. Finally, early San Francisco lacked most of the social capital one could expect in older cities of equivalent size.<sup>80</sup>

Even amidst all this rapid growth, a Chilean visitor in February 1849 still found that "[t]he people behave remarkably well. This is more than anyone had a right to hope for, considering that we have three thousand people following no law but their own will."<sup>81</sup> Bayard Taylor further noted "the punctuality with which debts were paid, and the general confidence which men were obliged to place, perforce, in each other's honesty."<sup>82</sup> Taylor speculated that this was partly due "to the impossibility of protecting wealth" which made it necessary to have "an honorable regard for the rights of others."<sup>83</sup>

Things were not going so well by the summer of 1849, however. A group of discharged soldiers formed a gang known as the "Hounds."

They often paraded the streets with music and banners, and their commissary was provisioned by raids upon stores and restaurants, which were

<sup>74</sup> See, e.g., STEWART, *supra* note 73, at 288 ("the record . . . speaks of moderation and of the attempt to render justice. . . . To be arrested did not mean that a man was already condemned, but only that he stood trial, with a half-and-half chance of being cleanly acquitted.").

<sup>75</sup> Bayard Taylor summarized its rapid growth. "Of all the marvellous phases of the history of the Present, the growth of San Francisco is the one which will most tax the belief of the Future. Its parallel was never known, and shall never be beheld again." BAYARD TAYLOR, *ELDORADO OR ADVENTURES IN THE PATH OF EMPIRE* 226 (Alfred A. Knopf 1949) (1850).

<sup>76</sup> J.S. HOLLIDAY, *THE WORLD RUSHED IN: THE CALIFORNIA GOLD RUSH EXPERIENCE* 32 (1981); see also LOTCHIN, *supra* note 73, at 8 (population in 1848 850-1,000); SENKEWICZ, *supra* note 73, at 14 (2,000 in February 1849, 5,000 by December 1849); TAYLOR, *supra* note 75, at 153 (15,000 in 1849).

<sup>77</sup> ROYCE, *supra* note 73, at 298.

<sup>78</sup> TAYLOR, *supra* note 75, at 44; ROYCE, *supra* note 73, at 299 (claiming \$60,000 per year).

<sup>79</sup> San Francisco also suffered from a series of devastating fires between December 1849 and September 1850. WILLIAMS, *supra* note 73, at 164; ROYCE, *supra* note 73, at 301, 306 (major fires in December 1849, May 1850, June 1850, September 1850, May 1851, and June 1851); see also LOTCHIN, *supra* note 73, at 55 ("Until 1851 fires were a great threat, compounded by the absence of fire insurance.").

<sup>80</sup> "[T]he speed of expansions made the planting of cultural roots precarious and the establishment of congenial social routines difficult." Richard C. Wade, *Foreword*, in LOTCHIN, *supra* note 73, at viii.

<sup>81</sup> Letter (February 16, 1849), reprinted in BEILHARZ & LÓPEZ, *WE WERE 49ERS!: CHILEAN ACCOUNTS OF THE CALIFORNIA GOLD RUSH* 209 (1976).

<sup>82</sup> TAYLOR, *supra* note 75, at 46.

<sup>83</sup> *Id.*

forced to supply their demands and “charge it to the Hounds,” as the marauders marched away with insolent laughter.<sup>84</sup>

After a particularly violent Sunday of raids by the Hounds, a group of San Franciscans organized to arrest and try the gang. An informal court convicted eight members of the gang, and banished them with a warning that they would hang if they returned.<sup>85</sup> There were regular efforts to organize a police force after the experience with the Hounds, but the city government, as Lotchin notes, “never had a very clear commitment . . . and the people had even less.”<sup>86</sup>

The Hounds were not the only problem. San Francisco also attracted significant numbers of former convicts from the British penal colony in Australia.<sup>87</sup> These “Sydney Ducks” shared common experiences both in Australia and en route to San Francisco that provided a natural basis for organization, and soon organized into gangs.<sup>88</sup> Very early then, San Francisco was experiencing organized criminal activity.

By 1851 San Francisco was a city of 23,000.<sup>89</sup> Social capital was beginning to accumulate: it had six churches, eight daily newspapers, 75 policemen, and several volunteer fire companies, which also served as political and social organizations.<sup>90</sup> On the other hand, salaries for public officials were low and opportunities in business and mining beckoned, limiting public resources.<sup>91</sup> Most San Franciscans were “young men, and homeless.”<sup>92</sup> Even Lotchin, a historian sympathetic to San Francisco’s efforts to govern itself, concedes that “government compiled a mediocre record” at solving civic problems.<sup>93</sup> This record was not the result of a lack of effort. Starting in late 1849, San Francisco’s government underwent constant re-

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<sup>84</sup> WILLIAMS, *supra* note 73, at 105.

<sup>85</sup> *Id.* at 106-07; *see also* LOTCHIN, *supra* note 73, at 190-91 (describing Hounds and community efforts to combat them). At least eleven of the men involved in this action went on to become members of the 1851 Vigilance Committee. WILLIAMS, *supra* note 73, at 108.

<sup>86</sup> LOTCHIN, *supra* note 73, at 202.

<sup>87</sup> WILLIAMS, *supra* note 73, at 121-22. Many non-convict Australians immigrated as well. SENKEWICZ, *supra* note 73, at 77-79.

<sup>88</sup> *See* WILLIAMS, *supra* note 73, at 123-24; SENKEWICZ, *supra* note 73, at 73 (An 1851 letter captures the city’s mood: “We live in such a cauldron of excitement in this town that it is impossible to collect our ideas to write a letter: thefts, robberies, murders, and fires follow each other in such rapid succession that we hardly recover from the effects of one horrible tragedy before another piece of unmitigated villainy demands our attention.”).

<sup>89</sup> WILLIAMS, *supra* note 73, at 167; SENKEWICZ, *supra* note 73, at 14.

<sup>90</sup> WILLIAMS, *supra* note 73, at 168-69; LOTCHIN, *supra* note 73, at 5 (the “entire culture became much more complex and mature” between 1848 and 1860). Royce attributes special significance to the churches because of “the characteristic American feeling prevalent that churches were a good and sober element in the social order, and that one wanted them to prosper, whether one took a private and personal interest in any of them or not.” ROYCE, *supra* note 73, at 316.

<sup>91</sup> WILLIAMS, *supra* note 73, at 145.

<sup>92</sup> ROYCE, *supra* note 73, at 308; *see also* SENKEWICZ, *supra* note 73, at 12 (“[P]opulation . . . was extraordinarily one-dimensional. The city was overwhelmingly populated by young, adult, white males. . . . the typical San Franciscan never lived in a family group” in San Francisco.).

<sup>93</sup> LOTCHIN, *supra* note 73, at 136, 163.

organization.<sup>94</sup> But politics remained unstable even after the political structure stabilized, because “many of those arriving in San Francisco spent only half the year in the city and the other half at the diggings.”<sup>95</sup>

The rapid growth of San Francisco exceeded the ability of the fledgling state and local governments to provide law, perhaps in part because miners drove many undesirables out of the mining camps to San Francisco.<sup>96</sup> There was a “total lack of secure jails” for those the legal system did manage to capture and convict.<sup>97</sup> According to Bancroft, a defender of the 1851 Committee,

Criminals themselves regarded law-courts with favor, because they were their shield, their protector from popular fury, their father-confessor and absolver. To the moneyed murderer the courts offered absolute immunity from punishment. Not only this, but trial was equivalent to amnesty; the jury’s verdict was the general pardon that consigned to oblivion past offenses. . . . Petty and poor offenders only were punished. Able counsel was secured by money, false witnesses were suborned, and judges and jailers made lenient. . . . Looseness and generality characterized law proceedings. Money would impanel a jury favorable to the accused; if not at the first, then the case could be postponed from time to time, until characters suited to the emergency of the case could be installed as jurors.<sup>98</sup>

Even observers less sympathetic to the vigilance committee concede that San Francisco’s legal system in 1851 left much to be desired, although the actual extent of the crime problem is hard to determine.<sup>99</sup>

The problems in the public provision of law and order led to private efforts to bring about change. Dissatisfaction with the handling of a high profile criminal case in 1851 led to mass meetings and public disgust with the official legal system. Several citizens involved in these meetings went on to play significant roles in the Committee.<sup>100</sup> A major fire, on the anniversary of an earlier particularly devastating fire, destroyed millions of dollars of property, further provoking public discontent and leading to the formation of volunteer night patrols, again involving many future vigilantes.<sup>101</sup> Newspapers began to carry proposals for extra-legal action in early June 1851.<sup>102</sup>

At least partly motivated by the widespread concerns over rising crime, a group of citizens met in early June 1851 to organize to remedy the deficiencies of

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<sup>94</sup> SENKEWICZ, *supra* note 73, at 16. Not all State institutions were lacking. Incorporation in April 1850 and various reforms had produced three city elections within ten months and constant turnover of city officials. WILLIAMS, *supra* note 73, at 163-64.

<sup>95</sup> SENKEWICZ, *supra* note 73, at 16.

<sup>96</sup> WILLIAMS, *supra* note 73, at 130.

<sup>97</sup> *Id.* at 145.

<sup>98</sup> BANCROFT, *supra* note 73, at 316-17.

<sup>99</sup> SENKEWICZ, *supra* note 73, at 75-77 (describing crime statistics and suggesting it was a change in perceptions rather than change in crime rates which caused problems).

<sup>100</sup> WILLIAMS, *supra* note 73, at 171-75; ROYCE, *supra* note 73, at 322-28.

<sup>101</sup> See ROYCE, *supra* note 73, at 303; WILLIAMS, *supra* note 73, at 179-81.

<sup>102</sup> WILLIAMS, *supra* note 73, at 183-85; ROYCE, *supra* note 73, at 329-30; SENKEWICZ, *supra* note 73, at 82.

the official legal institutions.<sup>103</sup> The initial group compiled a list of “various reliable men” invited to attend (and who were themselves to invite others) a meeting in the California Fire House.<sup>104</sup> Although no minutes of that meeting survive, it led to a written “constitution” which declared that there was “no security for life and property” in San Francisco and set out the group’s intent to see that the law was upheld “when faithfully and properly administered.” However, the constitution also stated that the Committee was “determined that no thief burglar incendiary or assassin shall escape punishment, either by the quibbles of the law the insecurity of prisons the carelessness or corruption of the Police or a laxity of those who pretend to administer justice.” The constitution also required establishment of a headquarters open continuously to receive reports, majority rule in decision-making, officers, and action to aid in either “the execution of the laws or the prompt and summary punishment of the offender.”<sup>105</sup>

The Vigilance Committee was “fully launched” by the end of the first week after its formation,<sup>106</sup> growing rapidly from fewer than 100 members on June 11, 1851, to more than 500 a short time later after it conducted its first execution.<sup>107</sup> The Executive Committee met almost daily from June 26 to August 20.<sup>108</sup> Approximately twenty people participated in the actions of the Executive Committee,<sup>109</sup> thousands more eventually participated in the “General Committee,” and even more attended executions and banishments.<sup>110</sup> Prospective members applied to join the Committee based on the recommendation of an existing member.<sup>111</sup> Their applications were reviewed by a qualification committee.<sup>112</sup> Some members were expelled “as injurious to the Committee.”<sup>113</sup> Although there was widespread membership in the General Committee, the Executive Committee made the decisions, using the general membership for ratification and implementation of sentences.<sup>114</sup> The Committee, and particularly its Executive Committee, was made up of “the most respectable and influential in the city,” something the Committee’s supporters saw as ensuring just outcomes.<sup>115</sup> The identifiable members of both the Executive and General Committees were overwhelmingly businessmen.<sup>116</sup>

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<sup>103</sup> WILLIAMS, *supra* note 73, at 203-04 (meetings held on June 8<sup>th</sup> and 9<sup>th</sup>).

<sup>104</sup> *Id.* at 203.

<sup>105</sup> *Id.* at 205 (reprinting Constitution).

<sup>106</sup> *Id.* at 220.

<sup>107</sup> BANCROFT, *supra* note 73, at 257; WILLIAMS, *supra* note 73, at 222.

<sup>108</sup> WILLIAMS, *supra* note 73, at 222.

<sup>109</sup> *Id.*

<sup>110</sup> *See, e.g.*, BANCROFT, *supra* note 73, at 296 (recounting an execution that involved 400 “judges” sentencing the defendant, a 200 member guard unit for execution, and a crowd at the site).

<sup>111</sup> *Id.* at 219.

<sup>112</sup> WILLIAMS, *supra* note 73, at 223; BANCROFT, *supra* note 73, at 219.

<sup>113</sup> BANCROFT, *supra* note 73, at 225.

<sup>114</sup> *Id.* at 218.

<sup>115</sup> BANCROFT, *supra* note 73, at 238 (quoting the HERALD (San Francisco)).

<sup>116</sup> SENKEWICZ, *supra* note 73, at 85-86.

The 1851 Committee of Vigilance operated openly. Although members used numbers as aliases,<sup>117</sup> they signed their constitution,<sup>118</sup> freely published their constitution and by-laws,<sup>119</sup> issued resolutions,<sup>120</sup> and engaged in debates in print with opponents.<sup>121</sup> Not every member was publicly known, but enough were that coroner's juries could name individuals involved in executions.<sup>122</sup> Indeed, the Committee responded to the first coroner's jury report by itself naming additional members the jury had left out.<sup>123</sup> It kept minutes, reports, and records of evidence in trials.<sup>124</sup> The Committee announced at least some meetings by the ringing of fire bells<sup>125</sup> and operated out of permanent quarters, where it maintained equipment, furniture, and records.<sup>126</sup> Separate subcommittees were formed to patrol the waterfront and investigate criminal conditions.<sup>127</sup> By-laws were adopted in late July to impose greater discipline and structure on the members' activities.<sup>128</sup>

The Committee was well funded, charging its members dues<sup>129</sup> and special assessments, including one to fund completion of the city's jail.<sup>130</sup> Between July 1851 and May 1852, the Committee's books show it received \$7,791.80,<sup>131</sup> approxi-

<sup>117</sup> Since entry into the Committee's rooms required providing the doorkeeper with both your name and number, it is unclear how useful the alias system was for keeping the members' identities a secret. BANCROFT, *supra* note 73, at 219.

<sup>118</sup> WILLIAMS, *supra* note 73, at 206-07.

<sup>119</sup> BANCROFT, *supra* note 73, at 211-12 (reprinting both and noting that the documents "were then given to the public journals for publication"); *see also* WILLIAMS, *supra* note 73, at 205-06 (reprinting Constitution).

<sup>120</sup> BANCROFT, *supra* note 73, at 309 (reprinting public resolution authorizing the Committee to search homes).

<sup>121</sup> *Id.* at 352 (reprinting response to gubernatorial proclamation), 397 (reprinting response to article in newspaper which had claimed committee had ceased to operate).

<sup>122</sup> *See, e.g., id.* at 239 (reprinting both a coroner's jury's report on an execution and the Committee's public reply, which added additional names to those included in the report); WILLIAMS, *supra* note 73, at 215-16 (noting public reply of Committee to coroner's inquest in first execution); ROYCE, *supra* note 73, at 331 (reply); SENKEWICZ, *supra* note 73, at 83-84.

<sup>123</sup> *See, e.g.,* BANCROFT, *supra* note 73, at 239 (reprinting both a coroner's jury's report on an execution and the Committee's public reply, which added additional names to those included in the report); WILLIAMS, *supra* note 73, at 215-16 (noting public reply of Committee to coroner's inquest in first execution); ROYCE, *supra* note 73, at 331 (reply); SENKEWICZ, *supra* note 73, at 84.

<sup>124</sup> BANCROFT, *supra* note 73, at 224.

<sup>125</sup> *Id.* at 229.

<sup>126</sup> WILLIAMS, *supra* note 73, at 225. Bancroft describes the "new and less expensive quarters" used after September 1851 as follows:

These rooms were carpeted and handsomely furnished. At one end of the executive chamber was a rostrum where stood the president's chair, and in front of a desk hung the banner presented by the ladies of Trinity parish. Behind the president's chair was an elegant mirror, and in the centre of the room a large table containing books and writing materials. The windows were neatly curtained, and the walls adorned with maps and pictures. In an adjoining room were stored the paraphernalia of the police, arms, chains, ropes, handcuffs, and the like.

BANCROFT, *supra* note 73, at 395-96 (describing material sold when Committee moved to new quarters).

<sup>127</sup> WILLIAMS, *supra* note 73, at 223.

<sup>128</sup> *Id.* at 226.

<sup>129</sup> Members paid a five dollar subscription fee to join the Committee, and merchants also donated money. BANCROFT, *supra* note 73, at 220.

<sup>130</sup> *See* WILLIAMS, *supra* note 73, at 246-49; BANCROFT, *supra* note 73, at 258. The Committee supervised work on the jail and paid over money "as the work progressed." BANCROFT, *supra* note 73, at 306.

<sup>131</sup> BANCROFT, *supra* note 73, at 221.

mately \$165,000 in current dollars.<sup>132</sup> It also spent freely, not just on furnishings for its quarters, but on boats, carriages, transport of exiles, and brandy and cigars.<sup>133</sup>

Generally, prisoners were arrested by members of the General Committee and examined by a subcommittee of the Executive Committee, which gathered evidence. The subcommittee then made a recommendation to the Executive Committee, which submitted its own decisions to the General Committee for approval.<sup>134</sup> Notices to quit were, however, often issued without a formal trial by subcommittees of three or more.<sup>135</sup>

Supporters of the Committee claimed that it acted only when it had more or less the same level of evidence needed for a court to convict, "setting aside legal technicalities and court clap-trap."<sup>136</sup> Among the "technicalities" dispensed with was the right to exclude others from private property: the Committee announced its claim of "the right to enter any person's or persons' premises where we have good reason to believe that we shall find evidence to substantiate and carry out the object of this body."<sup>137</sup> Such entries produced evidence when "houses of questionable reputation" were searched one by one.<sup>138</sup> But after a Committee member led a party into a respectable citizen's house in search of property he alleged had been taken from the house of a "lady," the Committee issued instructions limiting its use of this claimed right.<sup>139</sup>

The Committee first acted on June 10, 1851, when an Australian immigrant named John Jenkins was apprehended by private citizens while stealing a merchant's safe.<sup>140</sup> Jenkins was quickly marched off to the Committee's offices. "Two or three policemen made their appearance after the man was taken, and suggested that they had a safe and proper place for him; but they were told not to disturb their sleep by looking after other people's prisoners."<sup>141</sup> The Committee was summoned, testimony was taken, and deliberations began. Bancroft notes "some faltering on the part of the judges" which ended when one spoke up and said, "Gentle-

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<sup>132</sup> Calculated using The Inflation Calculator, at <http://www.westegg.com/inflation/>.

<sup>133</sup> BANCROFT, *supra* note 73, at 219-20 (summarizing expenses); WILLIAMS, *supra* note 73, at 225 (describing Committee headquarters and costs of furnishings).

<sup>134</sup> WILLIAMS, *supra* note 73, at 222; BANCROFT, *supra* note 73, at 241.

<sup>135</sup> BANCROFT, *supra* note 73, at 261.

<sup>136</sup> *Id.* at 240. An additional problem appeared because of the informality of the procedures: forged banishment orders were delivered to some people, including several lawyers. "The Committee was first of all in its endeavor to ferret these forgers." *Id.* at 261; *see also* WILLIAMS, *supra* note 73, at 232.

<sup>137</sup> ORDER OF THE COMMITTEE OF VIGILANCE, JULY 5, 1851, *reprinted in* BANCROFT, *supra* note 73, at 309; *see also* WILLIAMS, *supra* note 73, at 244.

<sup>138</sup> WILLIAMS, *supra* note 73, at 228.

<sup>139</sup> *Id.* at 243-45.

<sup>140</sup> According to Bancroft, Jenkins snuck into the merchant's wharf office, carried the safe out to his row-boat, and began to row across the Bay. Unfortunately for him, the merchant soon returned, noticed the safe was missing, and raised the alarm. Several men had seen the thief rowing with the safe, and a posse set off in hot pursuit. The thief was quickly surrounded, although not before he dropped the safe overboard (it was later recovered), and captured. *See* BANCROFT, *supra* note 73, at 226-29. Williams and Royce give abbreviated but similar accounts. *See* WILLIAMS, *supra* note 73, at 208; ROYCE, *supra* note 73, at 331; *see also* LOTCHIN, *supra* note 73, at 193; SENKEWICZ, *supra* note 73, at 4-5, 83-84.

<sup>141</sup> BANCROFT, *supra* note 73, at 229; WILLIAMS, *supra* note 73, at 208-09; ROYCE, *supra* note 73, at 331.

men, as I understand it, we are here to hang somebody!"<sup>142</sup> Jenkins was promptly sentenced to hang accordingly.<sup>143</sup> The Executive Committee presented the proposed sentence to the assembled crowd for its approval. Since the "'ays' were largely in the majority," the sentence was put into effect immediately.<sup>144</sup> Jenkins was marched off to the plaza, where he was hanged from the porch of an adobe building.<sup>145</sup>

Although an official inquest found several Committee members responsible for Jenkins's death, there was considerable public support for the Committee's actions, since Jenkins was caught in the act and clearly guilty as charged.<sup>146</sup> The same flaws in the State legal system that frustrated prosecutions of thieves delayed any official response to the Committee.<sup>147</sup>

In all, the Committee arrested ninety-one people, of whom it hanged four, whipped one, deported fourteen to Australia, ordered fourteen to leave the state, turned fifteen over to the official courts and discharged at least forty-one.<sup>148</sup> Williams divides the Committee's activities into three periods: (1) from June 11 to July 1, 1851, "an interval devoted to the investigation and apprehension of various suspicious characters" in the general criminal community during which there were numerous orders to depart and forcible deportations; (2) July 1 to September 16, 1851, a period focused on James Stuart and his gang; and (3) September 17, 1851, to 1853, in which the Committee was less active.<sup>149</sup>

The Committee focused on two problems. First, using a combination of a system of "popular espionage, the most extensive and complete a liberal government has ever seen," and investigative teams, the Committee tracked suspected criminals in the San Francisco area.<sup>150</sup> Second, to prevent an influx of new crimi-

<sup>142</sup> WILLIAMS, *supra* note 73, at 210. According to Bancroft, Jenkins did not take the proceedings seriously and acted "defiant and insulting." BANCROFT, *supra* note 73, at 232. Williams says he was so "defiant" and "surlly" that even those who opposed a quick execution agreed to it. WILLIAMS, *supra* note 73, at 211.

<sup>143</sup> Grand larceny was punishable by death under California law at the time, and so the Committee's action, if hasty, was not out of line with the state legal system's penalties. WILLIAMS, *supra* note 73, at 210.

<sup>144</sup> BANCROFT, *supra* note 73, at 234; WILLIAMS, *supra* note 73, at 212-13.

<sup>145</sup> En route, the chief of police made an attempt to seize Jenkins, but was easily rebuffed. Bancroft describes the attempt as "more a feint made under color of duty than a real attempt at rescue." A group of "desperadoes" also tried to rescue Jenkins, but "were beaten back without too much difficulty." BANCROFT, *supra* note 73, at 236.

<sup>146</sup> ROYCE, *supra* note 73, at 331.

<sup>147</sup> WILLIAMS, *supra* note 73, at 217-18 (noting previous decision by court disbanding the grand jury prevented bringing the matter "promptly to the attention of the higher courts" and public support in press).

<sup>148</sup> STEWART, *supra* note 73, at 319. What happened to two of the ninety-one is unknown. Stewart suggests they were discharged. *Id.*; see also SENKEWICZ, *supra* note 73, at 84-85. Its actions also spurred an unknown number of residents to leave San Francisco either temporarily or permanently. *Id.*

<sup>149</sup> WILLIAMS, *supra* note 73, at 227. The Committee was busiest from June to September 1851, when "[i]nformation concerning crimes and criminals came pouring in on them from every quarter." BANCROFT, *supra* note 73, at 243.

<sup>150</sup> BANCROFT, *supra* note 73, at 224. Like the Montana Vigilantes of 1862, the Committee benefited from the confessions of some of those it executed. A confession, the Committee advised those sentenced to hang, "can be no loss to you, while it may be a gain to society." *Id.* at 282. Surprisingly, men took advantage of the offer, perhaps to gain revenge. Jim Stuart, for example, agreed to confess, saying "Well, I will do it, damn 'em; there are some of them I will get even with anyway!" *Id.*



nals, the Committee inspected arriving ships from Australia, interviewing passengers and investigating to determine whether there were undesirables aboard.<sup>151</sup> These were sent back to Australia, or at least to somewhere else, by purchasing them tickets and denying them landing rights.<sup>152</sup>

Both criminals and those who opposed extra-legal force objected to the Committee, and the Committee suppressed dissent from its methods at least occasionally.<sup>153</sup> Supporters of the official legal system focused on the dangers of mob rule.<sup>154</sup>

The Committee's relationship to the official legal system was complex. Formed at least in part in response to the government's inability to control crime, but itself engaged in illegal activity, the Committee and parts of the state legal system were able to cooperate on a number of instances, such as completing the county jail.<sup>155</sup>

Government legal system agents acquiesced in Committee actions. "The governor of the state, the mayor or the city, the sheriff, police and most of the lawyers and judges, were silent as to the proceedings of the Committee of 1851."<sup>156</sup> Police often did not interfere with Committee arrests, and the federal revenue au-

<sup>151</sup> WILLIAMS, *supra* note 73, at 233-36.

<sup>152</sup> If the undesirable had sufficient funds, he was forced to buy his own ticket. If not, but he had possessions which could be sold, these were sold and the proceeds used to buy his ticket. If he had neither cash nor possessions, the Committee paid his fare. BANCROFT, *supra* note 73, at 261.

<sup>153</sup> BANCROFT, *supra* note 73, at 318-20; WILLIAMS, *supra* note 73, at 218-20 (noting opposition of David Broderick, a leading San Francisco politician); SENKEWICZ, *supra* note 73, at 86 (law and order group directed by Broderick). Bancroft, a sympathetic historian, records an incident in which "a wealthy, influential man," well known to a Committee member, was speaking in a hotel bar with some others "somewhat too loudly and vehemently against the 'stranglers.'" The Committee member promptly took the man aside and summoned him to meet with the Committee to answer for his comments, saying [t]hese men are staking their lives and fortunes for the general good, and they shall not be vilified in my hearing against their backs. If you have any charges to make, and will substantiate them, they will listen to your accusation against themselves, or any one of their number, as dispassionately as they will listen to my accusation against you.

BANCROFT, *supra* note 73, at 225. After the accused gentleman promised "respectful prudence for the future" and begged "in the most piteous terms" to do so, the Committee member rescinded the arrest. *Id.* What is remarkable about this incident is that Bancroft sees nothing amiss and uses it to illustrate his approving conclusion that the Committee's members were everywhere and so it was unsafe for any "bad man" to "speak his mind." *Id.* at 224.

<sup>154</sup> Judge Alexander Campbell's charge to the grand jury summarizes these arguments:

The question has now arisen whether the laws made by the constituted authorities of the state are to be obeyed and executed or whether secret societies are to frame and execute laws for the government of this country, and to exercise supreme power over the lives, liberty, and property of our citizens; whether we are now to abandon all those principles which lie at the foundation of American law, and are the birthright of every citizen. . . . Are the people willing to throw away the safeguards which the experience of the ages has proved necessary, to trample the laws and constitution underfoot, to declare that law is inconsistent with liberty, and to place life, liberty, property, and reputation at the mercy of a secret society?

ALEXANDER CAMPBELL, CHARGE TO THE GRAND JURY, JULY 1851, *reprinted in* BANCROFT, *supra* note 73, at 327.

<sup>155</sup> WILLIAMS, *supra* note 73, at 246-49. The Committee supervised work on the jail and provided money "as the work progressed." BANCROFT, *supra* note 73, at 258, 306.

<sup>156</sup> BANCROFT, *supra* note 73, at 316.

thorities helped the Committee vet immigrants arriving on ships.<sup>157</sup> Courts provided the Committee with information on criminal cases.<sup>158</sup> Sometimes government agents allowed the delivery of prisoners to the Committee.<sup>159</sup>

Similarly, the government did little to stop the public executions. The San Francisco police, for example, made only a half-hearted and unsuccessful attempt to stop the Committee's first execution.<sup>160</sup> The coroner allowed the Committee to display the bodies of those it executed.<sup>161</sup> The Committee, in turn, cooperated with the government by defending civil suits brought against its members,<sup>162</sup> abjuring civil jurisdiction,<sup>163</sup> and employing strategies to evade writs of habeas corpus without formally defying the courts.<sup>164</sup> In addition, the Committee sometimes turned captured suspects over to the courts.<sup>165</sup>

Not all interactions between the Committee and the government were cooperative, however. Judges and law enforcement personnel were special targets of Committee attention.<sup>166</sup> The Committee pressured attorneys participating in suits for damages and habeas relief against Committee members to withdraw.<sup>167</sup> Even as the Committee was turning prisoners over to the courts in the summer of 1851, those courts "still regarded [the Committee] members more in the light of outlaws than good citizens."<sup>168</sup> The governor in particular continued to pardon people ultimately convicted in official courts, and both the Mayor of San Francisco and a state district court judge condemned the Committee in published statements.<sup>169</sup>

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<sup>157</sup> WILLIAMS, *supra* note 73, at 234.

<sup>158</sup> *Id.* at 237.

<sup>159</sup> The sheriff of Santa Barbara was bringing a prisoner to the San Francisco sheriff by boat. While the Santa Barbara sheriff was looking for the San Francisco sheriff, the Committee took the prisoner into custody. The Santa Barbara sheriff

was neither offended nor chagrined . . . [and] seemed only concerned about pay for expenses incurred in bringing up the criminal; and when [the Committee's representative] told him if he would execute a writing formally delivering the prisoner into the hands of the Vigilance Committee he would pay the amount, [the Santa Barbara sheriff] unhesitatingly did so.

BANCROFT, *supra* note 73, at 337.

<sup>160</sup> *Id.* at 236.

<sup>161</sup> *Id.* at 365-66.

<sup>162</sup> WILLIAMS, *supra* note 73, at 244 (noting suit brought over search); BANCROFT, *supra* note 73, at 253.

<sup>163</sup> BANCROFT, *supra* note 73, at 253.

<sup>164</sup> In one case, the Committee arranged to shift custody of a suspect from group to group, with each group keeping its location a secret until time to arrange a transfer, so that any members asked the suspect's whereabouts by the court could truthfully claim ignorance. *Id.* at 284-85. The account suggests the Committee had some inside information from the sheriff about which members were likely to be named in each successive habeas petition.

<sup>165</sup> WILLIAMS, *supra* note 73, at 242-43 (explaining that the Committee refused jurisdiction over crimes of passion and left those to "regular" authorities); BANCROFT, *supra* note 73, at 339 (suggesting that the committee did so once the courts began to function more to its liking).

<sup>166</sup> BANCROFT, *supra* note 73, at 244.

<sup>167</sup> *See, e.g., id.* at 252-53, 308 (reprinting resolution requesting counsel to withdraw from a case).

<sup>168</sup> *Id.* at 340.

<sup>169</sup> *Id.* at 340 (pardon of Charles Duane); *see also* MAYOR C.J. BRENHAM, STATEMENT OF JULY 11, 1851, reprinted in BANCROFT, *supra* note 73, at 323-24; ALEXANDER CAMPBELL, CHARGE TO THE GRAND JURY, JULY 1851, reprinted in BANCROFT, *supra* note 73, at 325-28.

The most difficult conflict between the Committee and the government occurred in August 1851, when the Governor and Mayor brought the Sheriff a writ ordering him to obtain custody of two of the Committee's prisoners.<sup>170</sup> Due to either infiltration of the Committee or negligence on the part of the Committee's guards, the Sheriff successfully took custody the two men from the Committee.<sup>171</sup> The Committee ultimately regained control of the two men a few days later and immediately executed them.<sup>172</sup> Royce argued that this incident spurred San Franciscans to invest in government to avoid similar conflicts in the future.<sup>173</sup>

The Committee justified its actions by contending that the government failed to provide "security for life and property."<sup>174</sup> A number of contemporary observers cheered the Committee's actions.<sup>175</sup> "Dame Shirley," whose letters from the mines were printed in the popular magazine, *The Pioneer*, was critical of the miners' courts, but hastened to distinguish them from "the noble Vigilance Committee of San Francisco." The Committee, she assured her sister,

had become absolutely necessary for the protection of society. It was composed of the best and wisest men in the city. They used their powers with a moderation unexampled in history, and they laid it down with a calm and quiet readiness which was absolutely sublime, when they found that legal justice had again resumed that course of stern, unflinching duty which should always be its characteristic. They took ample time for a thorough investigation of all the circumstances relating to the criminals who fell into their hands; and in *no* case have they hanged a man who had not been proved beyond the shadow of a doubt, to have committed at least *one* robbery in which life had been endangered, if not absolutely taken.<sup>176</sup>

Royce, although not quite a contemporary by the time he wrote on the subject, took a view similar to Dame Shirley's, praising the 1851 Committee while criticizing the miners' courts.<sup>177</sup> He concluded that the Committee was "a necessity" and "a good beginning . . . in righteousness" not only because "it frightened the rogues, sent many of them away, and hanged three more besides Jenkins." These acts were "the least of its merits. More important was the manifest sobriety and justice of the methods."<sup>178</sup>

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<sup>170</sup> BANCROFT, *supra* note 73, at 350; SENKEWICZ, *supra* note 73, at 87-88.

<sup>171</sup> Both Bancroft and Royce lean toward the negligence explanation. See BANCROFT, *supra* note 73, at 350-57; ROYCE, *supra* note 73, at 332.

<sup>172</sup> BANCROFT, *supra* note 73, at 359-64; ROYCE, *supra* note 73, at 332; SENKEWICZ, *supra* note 73, at 87-88.

<sup>173</sup> ROYCE, *supra* note 73, at 332.

<sup>174</sup> CONSTITUTION, 9TH JUNE 1851, reprinted in BANCROFT, *supra* note 73, at 211-12.

<sup>175</sup> See, e.g., Ramon Jil Navarro, reprinted in BEILHARZ & LÓPEZ, *WE WERE 49ERS!*, *supra* note 81, at 122 ("[O]ne of the wisest and most effective steps a people can take when they are being wronged and deceived by the authorities.").

<sup>176</sup> DAME SHIRLEY [LOUISE AMELIA KNAPP SMITH CLAPPE], *THE SHIRLEY LETTERS FROM THE CALIFORNIA MINES, 1851-52*, at 98 (Carl I. Wheat ed., 1970).

<sup>177</sup> ROYCE, *supra* note 73, at 331-32. For a discussion of Royce's critique of miners' law, see Morriss, *Miners, Vigilantes, & Cattlemen*, *supra* note 34, at 621-22.

<sup>178</sup> ROYCE, *supra* note 73, at 332-33.

More recent historians have treated the Committee less gently. Early twentieth-century historians like Mary Floyd Williams, a sympathetic but worried analyst, argued that the 1851 vigilantes decided to act extra-legally, and were partially justified in doing so because of their history of “resolute self-determination” in obtaining statehood and a representative state government.<sup>179</sup> More recently, Roger Lotchin concluded that the Committee had widespread support, although he noted it did not “constitute anything close to the American ideal of moderation and fairness.”<sup>180</sup>

From the standpoint of private provision of law the 1851 Vigilance Committee’s record is mixed. Its main virtue was its avoidance of the Leviathan: in general the Committee remained true to its limited aims and did not tyrannize San Franciscans (with the possible exception of some Australian would-be immigrants.) But avoiding the Leviathan is only half the problem, and the Committee’s claim to have stopped crime is shaky at best.<sup>181</sup> With respect to the free rider problem, the Committee is better evidence of the problem’s existence than of its solution. Actions like the public admission of criminal acts in response to the coroner’s jury report undoubtedly contributed to Committee solidarity, but the active phase of the Committee was quite short precisely because many of its members had private affairs to tend to as well. Of course, there is little reason to expect any good to be provided for free by fellow citizens for an indefinite period of time, and the volunteer nature of the Committee distinguishes it from compensated market responses. It is also important to keep the Committee’s crime fighting efforts in perspective. San Francisco’s growth was a unique event in world history. Never before had a city grown so quickly in size and wealth. Neither customary law nor government law proved successful at controlling crime, but neither should have been expected to do so. Even the limited success of a customary legal institution in those circumstances is cause for some optimism about the potential for such institutions. Creating the 1851 Committee from the small amount of social capital then available in San Francisco was itself an accomplishment of some note.

Does the San Francisco Vigilance Committee of 1851 deserve to be considered a Hayekian legal institution? Its case is closer than that of the Montana Committee of 1863-64, which I have argued elsewhere clearly qualifies, or the San Francisco Committee of 1856, which I have argued elsewhere does not. In its favor, the 1851 Committee focused on ending the crime problem. At least its initial efforts aimed at preventing criminals from invading the rights of San Franciscans. The rapid appearance of an organized government does not, by itself, disqualify the committee. Legal systems, like markets, may develop organized structures that reduce transaction costs through spontaneous order. The committee’s organization, however, went well beyond transaction cost reducing measures.

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<sup>179</sup> WILLIAMS, *supra* note 73, at 186.

<sup>180</sup> LOTCHIN, *supra* note 73, at 193, 197.

<sup>181</sup> See, e.g., LOTCHIN, *supra* note 73, at 194 (“large scale lawlessness” appeared again in November 1852; widespread complaints about crime in 1854, 1855, 1856); 196 (a new murder committed in broad daylight the day after 1851 Committee hanged a murderer); 197 (Committee was unable to stop arson).

Notably, the committee's rules did not go far beyond protecting existing rights to life and property. Although the committee asserted the power to invade private property in pursuit of criminals, the rules it enforced were aimed at protecting property and persons from a crime wave the government was incapable of controlling. Because of its extensive organizational structure, the 1851 committee provided more procedural safeguards than generally associated with extra-legal action, which led it to release almost half of those it arrested. Finally, although the committee evolved into a political movement that competed for control of the official state government, in its initial form the committee limited itself to reducing crime. The committee thus qualifies as at least a "quasi-Hayekian" legal institution.

## II. Spontaneous Orders & Crowding Out: Implications for Hayekian Legal Theory

None of the institutions described above survive today, but all left their mark on United States legal systems. Cattlemen's associations continue to influence policy through lobbying, although they have long since ceded most of their authority (and shifted most of their expenses) to public authorities. The mining districts shaped the General Mining Law of 1872 (and its predecessors in the late 1860s), a statute which continues to govern mining on public land in the United States today.<sup>182</sup> The Western vigilance committees are gone, but traces of them linger in the statutes in the Montana state capital building and the shoulder patches of Montana state troopers.<sup>183</sup> What happened?

In part, the decline of non-state Western legal institutions was an inevitable result of the settling of the frontier. These institutions developed in the vacuum caused by the slow arrival of effective government in the West. The vast distances, sparse population, and high cost of communication limited the ability of the federal government to project its power into the new Western territories. Moreover, until Westerners developed their resources sufficiently to create wealth worthy of plunder, there was little reason for rent-seekers in the government to do so. But once there was wealth in the West, government's arrival was inevitable.

With the arrival of the state came two forces that contained, and then eviscerated spontaneous legal orders. First, the state had a competitive advantage in providing law, derived from its ability to cross-subsidize the production of services in the West, which it exploited to suppress competition. The national government subsidized state legal institutions in the West by paying for military outposts, territorial judges, and territorial law enforcement.<sup>184</sup> Moreover, it could pay for law in the West with mandatory contributions, like taxes, while the Hayekian institutions depended upon voluntary payments of time or money. Once it chose to do so, the

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<sup>182</sup> See Andrew P. Morriss et al., *Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872*, ENVTL. L. (forthcoming) (tracing history of free access principle to miners' law).

<sup>183</sup> Morriss, *Private Actors*, *supra* note 67, at 115.

<sup>184</sup> See ANDERSON & HILL, *supra* note 34, at 53-76.

government was able to both provide cross-subsidized law and coercively collect payments, and thereby undercut the spontaneous legal institutions.

Second, the Hayekian institutions did not serve the interest of rent-seekers. Once substantial wealth appeared in the West, interest groups seeking to expropriate a share of those rents were quick to appear. A trivial example is the vigorous competition for federal positions in the territories, jobs that were important patronage appointments for the national government.<sup>185</sup> More importantly, the West quickly became a place of substantial wealth, initially from exploitation of mineral resources but soon from other sources as well. There is evidence, for example, that the Mexican land grant land claims in California held by the politically connected were treated differently than claims held by those without connections.<sup>186</sup>

The displacement of the Hayekian legal institutions, while not quite inevitable, is nonetheless unsurprising when we consider the costs of providing law without the state. Without the state one must devise a mechanism to pay for the production of law. Those who do not pay can often free ride on the efforts of others, particularly where the state itself restricts private efforts to exclude free riders through its influence over property rights institutions, as in the northern Great Plains. By shifting the costs of providing law to others, the state can underprice privately provided law. Moreover, the relative attractiveness of the state as a means of plunder creates a demand for state-provided law by potential plunderers.

The Western experience suggests three lessons for locating or reviving Hayekian legal institutions. First, steps that reduce the state's attractiveness as a means of plunder will diminish interest group demands for the state to crowd out private legal institutions. The Takings Clause, for example, limits plunder by requiring the state to pay the market price of resources it takes.<sup>187</sup> Thus, interpreting restrictions on takings broadly can reduce the lure of plunder and provide more space for the development and survival of Hayekian legal institutions. Second, refusal to subsidize state provided legal services (e.g. the minimal charge for filing a law suit) prevents the crowding out of private efforts to provide the same services. Third, the examples given flourished on the frontier. The frontier is a difficult place. Conditions are harsh, social capital is spread thin, and many of the institutions we take for granted are missing or scarce. Yet Hayekian legal institutions flourished on the frontier, and were lost as civilization advanced. This suggests that current frontiers are likely to foster Hayekian legal institutions.

And we can indeed see new Hayekian legal institutions on the frontier today. For example, card based payment systems like Visa, Mastercard, American Express, and Discover operate extensive dispute resolution systems outside the

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<sup>185</sup> See, e.g., HOWARD ROBERTS LAMAR, DAKOTA TERRITORY 1861-1889, at 69 (1956) (describing territorial positions in Dakota as "merely a stepping stone to a more important office or, as was often the case, a base from which a recently defeated politician might operate to recoup his political fortunes.").

<sup>186</sup> See sources cited *supra* note 67.

<sup>187</sup> See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

formal legal system.<sup>188</sup> Cardholders and merchants agree to submit their disputes to these extralegal dispute resolution systems as a condition of using the card networks. These systems provide an alternative to the state legal system for a wide range of disputes.

The larger conclusion is that the Western experience confirms some important aspects of Hayek's legal theory. Spontaneous legal orders are possible in societies of great wealth, with cultures not terribly dissimilar from today's, not only in medieval Iceland or Anglo-Saxon England. Despite the real problems with Hayekian legal theory, it accurately describes real institutions, not just utopias.

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<sup>188</sup> See Andrew P. Morriss & Jason Korosec, *Automating Dispute Resolution: Credit Cards, Debit Cards, and Private Law*, J.L. ECON. & POL'Y (forthcoming in 2005).