

CRIMINAL LAW BEYOND THE STATE:
POPULAR TRIALS ON THE FRONTIER

Andrea McDowell

ABSTRACT

Before the civil war, “lynching” signified all forms of group-inflicted punishments, including vigilantism and mob killings. By this definition, lynchings happen in every country. Only in America, however, was lynching widespread and socially accepted. Scholars say this shows that the American commitment to due process often succumbed to “vigilante values,” that is, the desire for speedy, certain and severe penalties. They contend that vigilante values triumphed on the frontier, where courts were weak and vigilance committees strong. This article demonstrates that this view must be substantially qualified because due process was of great concern to Americans on the frontier, especially with respect to members of their own communities.

The core of the article is a comprehensive study of law in the California gold rush. The thousands of publications on lynching have simply missed this critical chapter in American legal history. Hundreds of accounts of lynchings or “trials” (the miners used the terms interchangeably) indicate that most suspects were tried before a judge and an impartial jury, and some were acquitted. Lynchings or trials in the gold mines often paralleled those on the overland trail studied by John Reid; this article suggests that similar trials were common on the frontier. Scholars have failed to distinguish these rather poorly documented proceedings from the activities of vigilance committees, thereby omitting an important factor in their studies of the American legal experience. The importance of due process to Americans, even in crowds, and even beyond the reach of the courts, must now be reassessed.

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CONCLUSIONS

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Mark Twain famously called America “The United States of Lyncherdom,” and he was not joking. America’s history of popular violence against unpopular individuals is infamously long and varied.¹ It stretches from tarring and feathering in the colonial period, through antebellum mob violence against blacks and abolitionists, to vigilantism on the frontier, and finally to the kind of racist lynching that Mark Twain had in mind.²

In the 19th century, all of these forms of group violence were called “lynching.” The word itself is American. It derives from the name of Colonel Charles Lynch, who held unauthorized trials and punishments during the revolutionary period.³ Most Americans had not heard it, however, until a mob executed five gamblers in Vicksburg, Mississippi, in 1835.⁴ A local newspaper called this a lynching, and the word spread rapidly. “Lynching” put a name to all kinds of mob lawlessness that seemed especially prevalent at the time.⁵ In England, too, “lynching” sold newspapers. “The most ordinary outrage in America - if it but embody incidents sufficiently striking to make a telling paragraph - is introduced to English readers under that denomination.”⁶ Vigilantism, mob killings and assaults, and popular trials (to be discussed below), all fell under the heading “lynching.”

Modern scholars have also seen familial resemblance among these communal assaults on individuals. They suggest that all are manifestations of some American character trait. For Maxwell Brown that characteristic is the American propensity to violence⁷ and the desire of the elites to

¹ Cf. John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 NYU L. REV. 1043 (1974).

² CHRISTOPHER WALDREP, *THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA* (2002)(on the history of the word “lynch” generally); Christopher Waldrep, *War of Words: The Controversy over the Definition of Lynching, 1899-1940*, 66 J. SOUTHERN HIST. 75 (2000) (on efforts by the NAACP and others to narrow the definition of lynching to be able to compile statistics and campaign for a federal anti-lynching law).

³ JAMES ELBERT CUTLER, *LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES* 13 (1905, reprinted 1969).

⁴ WALDREP, *FACES*, *supra* n. at 34.

⁵ *Ibid* at 34 - 36 (describing the use of the word “lynching” to describe every kind of group violence in the Jacksonian period).

⁶ *Lynch Law*, THE BRITISH AND FOREIGN REVIEW 14, no. 27, at 29.

⁷ RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN*

maintain the traditional community structure and values.⁸ Franklin E. Zimring has focused on a tension between “due process values” and “vigilance values” in American culture.⁹ Similarly, Michael Pfeiffer argues that proponents of “rough justice” rejected the “sentimental” reforms of the criminal justice system. Zimring and Pfeiffer write that Americans believed justice must be seen to be done, stressing “the deterrent and morally ennobling effect of the harsh physical punishment of serious crime.”¹⁰

One might have expected, therefore, that on the frontier, vigilante values - speedy, certain, and severe punishment – would win out over due process values. And, indeed, the West is famous for its vigilance committees and posses. True, vigilance committees were not anarchic; they were composed of the most prominent local settlers and they sometimes administered trials of some sort.¹¹ But vigilantism rested on a solid populist base, and its goal was not justice but self-defense. Vigilantes organized to rout out gangs and desperados. Their standard approach was to punish a outlaw or two, sending a message to the rest that the neighborhood was too hot to hold them.¹² The vigilante warning was not aimed at individual farmers and ranchers who might otherwise be tempted to become outlaws.

Indeed, vigilance committees were hardly suitable for dealing with crime in the community because they were hierarchical and semi-secret. It is hard to imagine Americans delegating authority to a committee to seize and punish one of themselves. It also seems unlikely that a Farmer Brown or Rancher Smith suspected of theft would be hanged or whipped without

VIOLENCE AND VIGILANTISM (1975).

⁸ See Richard Maxwell Brown, *The History of Vigilantism in America* in VIGILANTE POLITICS, H. Jon Rosenbaum and Peter C. Sederberg, eds. 89 (1976)

⁹ FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 119 (2003).

¹⁰ MICHAEL PFEIFFER, ROUGH JUSTICE 15 (2004).

¹¹ At least some vigilance committees also held trials, though the vigilantes formed the jury and few suspects were acquitted. This phenomenon has not been studied, however. See Brown, *History*, *supra* n. at 86 (noting that the Illinois Regulator movement of 1841 tried their prisoners).

¹² CUTLER, *supra* n. __ at 81 (quoting from Judge James Hall, who wrote in 1828 that early settlers formed “regulating companies” to deal with horse thieves and other desperate vagabonds; a few were arrested, tried, and punished, and “their confederates took the hint and then fled”).

trial. In this article, I argue that in such circumstances American communities developed a compromise between pure lawlessness and formal law: individual local suspects were given popular trials with substantial due process. While this thesis cannot be validated generally, we have strong evidence of this phenomenon on the overland trail (which have been documented) and in the California gold mines (which have not).

The thesis of this article is that vigilantism was not the only form of criminal punishment on the American frontier. There were also what one might call “popular trials.” When a single member of the community was accused of crime, I argue, the whole settlement held a trial along common law lines, with a judge and jury, witness testimony, and, if it came to that, a general vote on the sentence. These “trials” were “lynchings” in that the participants took the law into their own hands. Observers also called them both trials and lynchings. They reflected a mix of “vigilante values” and “due process values.” Frontiersmen were generally committed to both principles – when they were dealing with members of their own community.

To establish this, I begin with a thorough study of criminal law in the California gold mines before the state had formal courts.¹³ It is the first such study in over a century.¹⁴ Earlier scholarship on extra-legal punishment of crime in California has either confined itself to San Francisco’s Committee of Vigilance¹⁵ or focused on the excesses of popular trials in the mines.¹⁶ For instance, Christopher Waldrep’s excellent book *THE MANY FACES OF JUDGE LYNCH*, includes a chapter on “California Law” describing various forms of lynching in the gold rush: mob violence, the expulsion of Mexicans, and the vigilance committees of

¹³ Gary Lawson and Guy Seidmen, *The Hobbesian Constitution: Governing without Authority*, 95 NORTHWESTERN U. L. REV. 605 (2001) (on California’s complete lack of government for more than a year).

¹⁴ CHARLES HOWARD SHINN, *MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT* (New York : Charles Scribner’s Son, 1885); JOSIAH ROYCE, *CALIFORNIA, FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANCE COMMITTEE IN SAN FRANCISCO* [1856] (Boston, New York, Houghton, Mifflin and Company, 1886); HUBERT HOWE BANCROFT, *POPULAR TRIBUNALS* (San Francisco, The History Company, 1887).

¹⁵ CUTLER, *supra* n. ___ at 130-132.

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

San Francisco.¹⁷ But he does not mention the trial and punishment of suspected criminals by the miners' courts. This is typical of published histories of vigilantism. Further, the only modern study of criminal law *in the mines*, that of David A. Johnson, incorrectly conflates vigilantism, popular trials, and mob action.¹⁸ Gordon Bakken, while noting in passing the distinction between these forms of lynching, does not investigate it.¹⁹

It is surprising that the truly vast literature on lynching²⁰ skips the California gold rush, when hundreds of “lynchings” happened in a short period of time.²¹ Moreover, these lynchings were remarkably well documented because hundreds of miners wrote letters and journals describing their experiences, including their attendance at trial and punishment by the community. Though these accounts are plentiful, however, they are scattered among the thousands published and unpublished miners' personal papers. Much of this material is gathered in Western Americana collections of three major libraries, or is available on the Library of Congress “American Memory” website.²² Yet it remains difficult of access.²³ I have trawled these waters for several years, working on a larger project on law in the gold rush.

In this article, I show that the “lynch law” of the miners at its best was a relatively formal and orderly process very much along the lines of a criminal trial at common law. The miners used the words “trial” and

¹⁷ WALDREP, *supra* n. .

¹⁸ Johnson, *Vigilance*, *supra* n. at 564 (stating that “individual identities are absent from the reports” and that lynchings were said to be carried out by “the people taken as a single sovereign”).

¹⁹ GORDON MORRIS BAKKEN, PRACTICING LAW IN FRONTIER CALIFORNIA, 104-105 (1991) (noting the distinction between vigilantism and other forms of lynching, and between lynch mobs and popular justice groups).

²⁰ NORTON H. MOSES, LYNCHING AND VIGILANTISM IN THE UNITED STATES : AN ANNOTATED BIBLIOGRAPHY (1997) (441 pages long).

²¹ Johnson, *Vigilance*, *supra* n.

²² The three libraries are the Huntington Library in San Marino, the Bancroft Library at the University of California, Berkeley, and the Beinecke Library at Yale. The Library of Congress website is “California as I Saw It”: *First-Person Narratives of California's Early Years, 1849-1900* at <http://memory.loc.gov/ammem/cbhtml/cbhome.html>

²³ MARY FLOYD WILLIAMS, HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851 : A STUDY OF SOCIAL CONTROL ON THE CALIFORNIA FRONTIER IN THE DAYS OF THE GOLD RUSH 111 (Berkeley, University of California, 1910-19) (noting that “the dearth of public records” that forms a barrier to research on early California history).

“lynching” interchangeably, as I will do in this article. Johnson argues that when miners punished criminals, they acted on an intuitive, moral sensibility and did not feel the need for of due process.²⁴ I will show that, on the contrary, early lynchings regularly involved a judge, a jury, prosecutor, and counsel for the defense. Sometimes the accused was acquitted. If the jury’s verdict was guilty, however, the question of the sentence was submitted to those in attendance. In the early days, the most common punishment was whipping, though hanging predominated in later years. This relatively orderly procedure was, naturally, the ideal of extra-legal activity. In practice, a number of popular trials were abbreviated and some were nothing more than mobbing. Californians were divided on whether the latter illustrated the evils of lynch law or was, in fact, something quite different: “mob law” (bad) as opposed to lynch law (good).

In fact, popular trials in the California gold mines were *exactly* like criminal punishment on the overland trail. John Phillip Reid, in his virtuoso study of crime, punishment and social behavior on the overland trail,²⁵ shows that the immigrants did their best to behave legally, that is, to follow the forms and ceremonies of the criminal law as they remembered them from the states. He argues that this shows the tenacity of legal beliefs and traditions among Americans who were thousands of miles away from the legal institutions that backed them up. In other words, he says, their trials were not “lynchings,” using the word in its modern sense.”²⁶ Reid suggests, tentatively, that the legal behavior on the overland trail was that of average Americans from towns and cities in the East. His work is about “how nonfrontiersmen acted on the frontier” and his conclusion is that they kept to the legal behavior of a remembered youth.²⁷ The evidence presented here shows that the gold miners in California, many of whom were frontiersmen, exhibited the same legal behavior.

I further suggest that Reid’s thesis applies even more broadly to the frontier generally. Trials similar to those held in California and on the overland trail occurred both before and after the gold rush, on the frontier that had not yet come under a territorial government. The scholarly

²⁴ Johnson, *supra* n. at 564. Johnson describes lynchings as “public ritual of punishment, expiation, and example.” He suggests that a trial was an optional element of the ritual, implying that the result of the trial was a foregone conclusion. *Ibid* at 568.

²⁵ JOHN PHILIP REID, *POLICING THE ELEPHANT: CRIME, PUNISHMENT, AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1997).

²⁶ *Ibid* at 149.

²⁷ *Ibid* at 232.

literature contains references to such trials, but lumps them together with other forms of popular violence, especially vigilantism. A closer look at the sources, however, reveals that vigilantism was almost always directed against outsiders to the community – horse thieves and other criminal gangs. The vigilantes’ goal was as much to drive away such undesirables as to punish them; and when they did inflict punishment, it was rarely in conjunction with a jury trial. When members of the community were accused of a crime, however, they were tried to a jury.

Thus for at least sixty years, if not longer, there was an alternative criminal law system on the frontier that was relatively orderly, attempted to be fair, and often resulted in acquittal. “Popular trials” in frontier settlements was *not* always a rejection of due process, but could be a more or less sincere effort to provide due process in the absence of a formal legal system. In fact, frontier “lynch law” was a bona fide criminal law system that has hitherto gone unnoticed. On the one hand, it illustrates the American talent for self-government. On the other hand, that American willingness to assume the role of the criminal justice system could go terribly wrong.

The extraordinary wealth of written material from the California gold rush not only documents the practice of popular trials but also the miners’ arguments for and against taking the law into their own hands in these circumstances. They believed that popular justice was literally “legal” because sovereignty derived from the people. The punishment of criminals, ordinarily delegated to the people’s agents, could be resumed by them at will.

This belief in popular sovereignty was uniquely American, I argue. In monarchies, the right to punish belonged exclusively to the government (the king or parliament).²⁸ The evidence shows that the Europeans in California emphatically rejected the legitimacy of lynchings by their American fellow miners. Similarly, Australians, in their own gold rush, characterized popular justice as the worst form of disorder. To the Australians and Europeans, “order” meant social stability and particularly respect for government and legal institutions. The California experience thus reveals fundamental differences between American and European ideas of order and justice as well as the source of law.

This article is structured as follows. Part I is a study of lynch law in the California gold mines, in its best and worst guises. It distinguishes

²⁸ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 35 (2004) (stating that by the mid 18th century, the standard British view located sovereignty in Parliament rather than the people out of doors).

between the three types of lynching that took place in the mines, namely popular trials, vigilantism, and mobbing. I show that the miners' idiosyncratic use of the word "lynching" almost always meant a popular trial, and that the miners distinguished lynching from mobbing. Part II discusses the Californians' own view of the legitimacy of lynch law as based in popular sovereignty; Part III treats criminal punishment on the overland trail as lynch law; and Part IV establishes that there were similar popular trials on the frontier before and after the gold rush. Part IV further suggests a distinction between frontier popular trials and their closest equivalent, vigilantism. Finally, in Part VI, I show that the American view of the legitimacy of popular trials was unique, in that it was not shared by foreign miners in California or by Australians, who faced the same problems of high crime and incompetent officials in their own gold rush.

I. POPULAR TRIALS IN THE GOLD RUSH

The first famous lynching in the California gold mines, and the one that gave Hangtown its name, occurred on January 20, 1849. The fullest account is by Edward Gould Buffum, a Quaker from a family of ardent abolitionists, who did his best to stop the proceedings.²⁹ (The facts are also reported, with some variation, in the *ALTA CALIFORNIA* for February 8, 1849.) The lynching began as a fairly typical example of American frontier justice. Five thieves broke into a Mexican gambler's room at midnight and robbed him at gunpoint. Someone gave the alarm and a group of citizens rushed in, rescued the Mexican, and arrested his attackers. On the following day, a jury chosen from among the citizens tried the robbers and sentenced them to thirty-nine lashes each, to be applied on the following morning, a Sunday.³⁰ Buffum was from New York and had never seen a punishment inflicted by lynch law. He walked over from neighboring diggings to watch. He found the prisoner being lashed with a raw cowhide whip, surrounded by a large crowd and a guard of a dozen men who covered him with rifles lest he attempt to escape. When all five robbers had been whipped and were laid on the floor of a

²⁹ E. GOULD BUFFUM, *SIX MONTHS IN THE GOLD MINES: FROM A JOURNAL OF THREE YEARS' RESIDENCE IN UPPER AND LOWER CALIFORNIA, 1847-8-9*, pp. 83-85 (Philadelphia, Lea and Blanchard, 1850). Other accounts include ANSEL JAMES MCCALL, *PICK AND PAN. TRIP TO THE DIGGING'S IN 1849*. Reprinted from the *Steuben Courier*, 22-3 (Bath, NY, 1883) (entry for October 17, 1849) (Copied from Buffum's book.) Thomas J. van Dorn, Letter (unpublished manuscript in the Beinecke library, catalogued at WA MSS S-1319) (stating that Hangtown got its name from the execution of three persons for stealing). WILLIAMS, *SAN FRANCISCO*, *supra* n. at 77 (1921) (with further primary sources); THEODORE H. HITTELL, *3 HISTORY OF CALIFORNIA* 272-309* (1898).

³⁰ The *ALTA CALIFORNIA* reports that the citizens elected three judges, and that twelve jurymen were drawn by ballot. February 8, 1849.

neighboring house, since they were too weak to stand, new charges were brought against three of them, namely, that they had committed robbery and attempted murder in the southern digging in the fall of 1848.³¹ And here, as Buffum tells the story, the events got out of hand.

The charges against them were well substantiated, but amounted to nothing more than an attempt at robbery and murder; no overt act being even alleged. They were known to be bad men, however, and a general sentiment seemed to prevail in the crowd that they ought to be got rid of. At the close of the trial, which lasted some thirty minutes, the Judge put to vote the question whether they had been proved guilty. A universal affirmative was the response; and then the question, "What punishment shall be inflicted?" was asked. A brutal-looking fellow in the crowd, cried out, "Hang them." The proposition was seconded, and met with almost universal approbation. I mounted a stump, and in the name of God, humanity, and law, protested against such a course of proceeding; but the crowd, by this time excited by frequent and deep potations of liquor from a neighbouring groggery, would listen to nothing contrary to their brutal desires, and even threatened to hang me if I did not immediately desist from any further remarks.³²

The prisoners spoke no English and called for interpreters but their voices were drowned out by the mob's shouts. They were hanged on the spot. Buffum concludes, "This was the first execution I ever witnessed – God grant that it may be the last!"³³

This was really the story of two lynchings. The first was a relatively orderly jury trial on the day after the robbery, even though the accused were caught in the act and thus clearly guilty. Thirty-nine lashes was the usual punishment for theft under "lynch law," although, as is clear from Buffum's account, it was nearly fatal.³⁴ This sort of lynching was a

³¹ According to the ALTA CALIFORNIA, February 8, 1849, the robbers escaped after their whipping. The ALTA of February 15, 1849, reports that the robbers were recaptured "somewhere between the 21st and 25th of January," and were then hung by the citizens. The very short newspaper account does not mention Buffum's role.

³² BUFFUM, SIX MONTHS, *supra* n. ___ at 83-85.

³³ *Ibid.*

³⁴ See also REID, *supra* n. at 159 (stating that the bylaws of the Oregon Society, an emigrant company, provided that adultery and larceny should be punished with thirty-

feature of the American frontier from the earliest days, although never so ordinary as it became in California.

The pattern of events in the second lynching would also become familiar in the gold mines. The trial was very short; the charges did not amount to a criminal offence at common law, let alone a capital one; the accused had no counsel and could not present a defense - were not even present and unable to follow the proceedings because they did not speak English -- and the question of guilt was put not to a jury but to the crowd. The motion to "Hang him!" came from an anonymous brutal looking miner and met with "nearly universal" acclaim from the others.

Buffum's account illustrates the two extremes of lynch law in the California gold mines, from a relatively orderly trial with the procedural safeguards of the common law to a rushed execution.

The use of the terms "lynching," "lynch law" and "Judge Lynch" varied, due partly to personal practice and partly to changes over time." They applied to any kind of criminal trial or punishment carried out by the mining community without regard for, and later in opposition to, the legal authorities.³⁵ Many miners, however, called the same events, "trials" or "miner's meetings" rather than "lynchings."³⁶ The ALTA CALIFORNIA was thoroughly inconsistent in its opinion about whether the term "lynch law" connoted a good thing or a bad.³⁷ For the great majority of miners, the

nine lashes on the bare back; although, in fact, the penalty of flogging was almost never applied on the overland trail, by the Oregon Society or any other company).

³⁵ David C. Ferson Correspondence, letter dated Shaws Flats Cal July 10th 1851 (unpublished manuscript in the Beinecke library, catalogued at WA MSS S -1315) (stating that the sheriff tried to stop a hanging because, "that was lynching him the sevel laws of the stat had nothing to dew with him it was the minus tht ws hanging him"). See *infra*, section __ on the history of lynch law before the gold rush, for a discussion of the different categories of community violence in American history.

³⁶ *Murders in the Mines*, ALTA CALIFORNIA Sept. 16, 1850 (stating that in 1849, the "miners were a law unto themselves" and if a felony was committed, "a trial followed as soon as the suspected criminal could be apprehended, and while all witnesses could be found").

³⁷ In August 1849, for example, the ALTA CALIFORNIA approved of a trial by jury and execution in Stockton, an event which would later be called a "lynching." Yet condemned shaving the head, cutting off the ears, "and other disgraceful mutilations of the person" as "the barbarous forms of Judge Lynch," *Arrests, Trial and Execution*, PLACER TIMES August 18, 1849 (reprinting an article from the ALTA CALIFORNIA). In *Judge Lynch* ALTA CALIFORNIA, Oct. 13, 1850, the newspaper approves of lynching, adding that it "suffers more from his counterfeit rival Mob Law than from any act of his own." In *Judge Lynch* ALTA CALIFORNIA, Oct. 18, 1850, the editors again defend lynch law, commenting that the *Times* "does 'Judge-Lynch' wrong" in an article about the

term “lynch law” carried no negative connotations; it was simply the operative criminal law of the diggings just as the local mining code was the basis of property law. In fact, one miner used the term “lynch law” to encompass the whole of law in the mines, both criminal and civil.³⁸

At the time of Buffum’s two lynchings there was no other law. California was a political and legal vacuum when gold was discovered.³⁹ The United States acquired California under the terms of the Treaty of Guadalupe Hidalgo, signed Feb. 2, 1848, shortly after the, but California did not become a state until September 9, 1850.⁴⁰ The Constitution provides that Congress shall make all rules and regulations concerning U.S. territories.⁴¹ Congress never managed to create a government for California, however, because it could not agree on whether to allow slavery in the new territory.⁴² When the people of California learned in June 1849 that Congress had once again adjourned without creating a territorial government, they set about organizing one on their own authority.⁴³ The first legislature convened on December 15, 1849.⁴⁴

Thus there was no government presence from 1848 through 1849 except what individual communities provided for themselves.⁴⁵ The legal

summary punishment of a suspected thief, since “[h]is Honor never proceeds to punishment without some evidence of guilt.” But on December 16, 1850, the editors write, “we cannot commend Lynch Law”).

³⁸ *Rocky-Bar Mining Company, California Circular, Articles of Association, Resolutions etc.* 1850 (stating that in forming the company, all of the requisitions of the “Lynch Code” were met, including meetings, and committee reports).

³⁹ An enthusiastic report in the *CALIFORNIAN*, May 12, 1848, sparked the gold rush within California.

⁴⁰ LAWSON & SEIDMAN, *supra* n. __ at 605 (“The treaty was signed on February 2, 1848 and ratifications were exchanged on May 30, 1848”).

⁴¹ U.S. CONST. art. IV, § 3.

⁴² Andrea McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*. 14 *YALE J. L. & HUM.* 1, 2 (2000).

⁴³ CARDINAL GOODWIN, *THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA, 1846 - 1850*, 77 (1914).

⁴⁴ *Ibid* at 328.

⁴⁵ LAWSON & SEIDMAN, *supra* n. at 581, offer a detailed study of the interregnum and suggest that no one except the U.S. Congress had the authority to form a government for California and that the so-called *de facto* government of the military governors was unconstitutional once the war was over.

void extended at least into April 1850, when the legislature enacted criminal laws and statutes governing criminal procedure.⁴⁶ Then it took months to get up the courts up and running. On August 16, 1850, a week before the first Court of Sessions was to sit in Marysville, it had not yet received a volume of the laws defining its powers and duties.⁴⁷ Practically speaking, therefore, there were no state courts until late the end of August 1850. For the first two years of the gold rush, the only courts in the mining camps were those that the miners ran themselves. This is the period I discuss in section A, below.

After August 1850, the miners and the legal officials clashed repeatedly. The original criminal statutes were not suited to conditions in California. “It is generally understood,” wrote the MARYSVILLE HERALD on Jan. 21, 1851, “that the present legislature will repeal many of the acts passed at the last winter’s session, they having been found, after a few months experience, quite impracticable.”⁴⁸ One big problem was that the lowest courts with criminal jurisdiction, the Courts of Sessions, met only six times a year in the various county seats.⁴⁹ The District Courts, which had jurisdiction over cases of murder and arson, had a similar schedule and served even larger areas.⁵⁰ The few jails that existed were insecure⁵¹ and there were no police except in San Francisco.⁵² Finally, many sheriffs and judges were corrupt.⁵³ The struggle between the courts and those miners who felt the only way to punish criminals was to do it themselves, is the subject of section B.

A. POPULAR TRIALS IN FULL SWING

David Johnson, in his article on *Vigilance and the Law* in California, suggests that popular trials were “public ritual[s] of punishment, atonement, and example.”⁵⁴ There was no examination or

⁴⁶ *Ibid* at 289 (acts to organize the courts were passed in March and April, 1850).

⁴⁷ *Judicial Matters - The State Laws*, MARYSVILLE HERALD Aug. 16, 1850, p. 2

⁴⁸ *Repeal of Statutes – Juries*, MARYSVILLE HERALD, Jan. 21, 1851, p. 2.

⁴⁹ GOODWIN, *supra* n. ___ at 290-291.

⁵⁰ GOODWIN, *supra* n. ___ at 289.

⁵¹ *Judicial Matters - The State Laws*, MARYSVILLE HERALD, Jan. 21, 1851, p. 2.

⁵² *Crime in California*, MARYSVILLE HERALD, Oct. 25, 1850, p. 2.

⁵³ *See infra* at ___.

⁵⁴ Johnson, *supra* n. ___ at 564.

deliberation in any meaningful sense, he argues. Although the events sometimes “took the form of a trial, he says,” in fact the guilt of the accused was apparent from “an inherent, natural understanding of justice, unreachable the rough the procedures of due process.”⁵⁵ In Johnson’s interpretation, the ritual villain was of naturally the accused, playing the part of the irredeemable enemy of society. On the other side was “the crowd” or “the people” acting as a single entity; accounts of lynchings do not mention individuals, Johnson says. The climax of the drama was the execution, which represented the triumph of the people’s moral authority over evil.⁵⁶

Popular trials, however, were far less mechanical than Johnson suggests. In the early days, a trial by Judge Lynch in the gold mines usually followed common law procedure. The defendant was tried by a judge and jury. The evidence for and against him was considered, and quite often he was acquitted. The crowd decided the sentence, but it was not always of one mind; in fact, there were often heated arguments about the appropriate penalty. Punishments were less likely to be hangings than lashes, sometimes combined with cutting off the ears and branding, and always with banishment from the mines.⁵⁷ In fact, after the wild lynching described by Buffum in January of 1849, the next identifiable hanging in the mines did not occur until October 25, 1850.

The one common feature of all lynchings was that the whole community attended, and miners might also be summoned from neighboring camps.⁵⁸ The crowd is said on various occasions to have elected the judge and selected the jury. It also affirmed the jury verdict or reduced the sentence recommended by the jurors. This was in some ways the most interesting stage of the proceedings because there were sometimes heated disputes about the proper punishment, which the proponents of moderation or delay often won. The administration of the punishment itself was a public event, and members of the crowd sometimes participated in that too.⁵⁹

⁵⁵ Johnson, *supra* n. __ at 564.

⁵⁶ Johnson, *supra* n. __ at 568 and 572

⁵⁷ Johnson, *supra*, n. — at 569 notes that fewer than half of the punishments meted out by popular trials were hanging, but does not discuss how the sentence was decided.

⁵⁸ Daniel W. Kleinhaus 13, *Memoirs* (unpublished transcript in the Bancroft Library, catalogued at C-D 5056) (stating that when he was mining near Fiddletown in 1850, a man came by and told him to come to a lynch court that same night. Kleinhaus and his companions did not in fact attend.).

⁵⁹ Johnson drew mainly on newspaper articles, mainly from the ALTA CALIFORNIA. The

Apart from the crowd, the participants in a lynching varied. At best, they included a sheriff, a judge, a 12-man jury, a prosecutor, defense counsel, and witnesses;⁶⁰ at worst, there were none of these and the crowd itself acted as judge and jury. This worst case was not a trial at all but a mobbing, on which more below.) The length of the trial varied, of course. One hearing took two hours;⁶¹ another took only three hours from the time the accused was caught to the time he was hanged.⁶²

An example of an orderly trial is one that took place at Spanish Bar in July or August of 1849, “under a tree,”⁶³ as our witness says. The miners in the neighborhood were “asked to attend,” and, when they had gathered, they elected an *alcalde* and a sheriff and selected a jury. The charge against the accused was that he had stolen a bag of gold from his partner, which he denied. “Before proceeding with the trial the sheriff (a rough Oregon Man) said he had some experience both in Oregon and in California in certain lynch cases where the accused were condemned and hung,” we are told. “Of course this was high authority. One point was that a juror was a competent witness, and the other rulings I have forgotten.”

There was no positive evidence for the court to consider, however. The miners even examined the gold found on the accused to see whether it could be identified but with no success. (Gold nuggets were sometimes recognizable by their owners, though gold dust was not.) Although the jury had no basis on which it could convict, it believed the man to be guilty and sentenced him to pay the costs of the court and jury, about \$75, and to leave the diggings before night. This compromise was not sound law but it was lenient under the circumstances, perhaps because the accused was a fellow miner, one of their own.

In most jury trials, as in the Spanish Bar case, the assembled

ALTA supported lynch law in the early gold rush and its reports of incidents in the mines may have washed out the individual and emphasized the universal.

⁶⁰ Joseph Warren Wood, indeed, stated that in all cases of lynch law or mob law that he witnessed, “[t]he form of a court most dear to Americans has always been adopted, and the prisoners have been allowed the widest construction of the privileges usual on such occasions” (Wood, *supra* n. at entry for June 25, 1852).

⁶¹ A.A. ENOS, ACROSS THE PLAINS IN 1850 (Stanton, Neb.?: A.F. Enos, 1905).

⁶² Delano, *supra* n. , Letter to Wife, June 12, 1851.

⁶³ Kleinhaus, *supra* n. at 5.

miners elected the judge and selected a jury of 12 men.⁶⁴ The qualities looked for in a judge are not stated, though in one case, at least, he was a lawyer.⁶⁵ We read on several occasions that the defendant was allowed counsel, but it is not clear that this was the norm.⁶⁶

The trial of a group of Chileans accused of murder at Iowa Log Cabins furnishes a particularly elaborate example of jury selection and appointment of counsel. Here, there was an inquest regarding the murder victims. The miners “empaneled a jury to set on the bodies, and returned a verdict accordingly that they came to their Death, by the hands of the Chileans, to us unknown.”⁶⁷ When the suspects were caught, they were tried twice. First, a jury of twelve men from the group that had arrested them found all the suspects guilty of murder in the first degree. The sentencing was put off to the next day. Forty men from the next river over, the Moquelumne, came over before the sentencing. Thus augmented, the crowd voted not to sentence the accused, but instead “to empanel a jury and give them a fair trial, from Disinterested persons, and capable men from the other River.” It would seem that the outsiders had their doubts about the objectivity of the first jury. The denizens of the Moquelumne also supplied the defendants with “a young and smart Lawyer from the City of Boston, by the name of Mellvilve.” Two of the Chileans were discharged before the trial, including one who had “turned State Evidence.” Nine of the remainder were found to be peons whose masters had forced them against their will to participate in the murders. These nine

⁶⁴ George W. Allen, *Diary*, entry Feb 27th [1851] (unpublished manuscript in the Beinecke Library, catalogued at WA MSS S-262 (stating that “They [the miners] selected two Judges + twelve men for A Jury”); Kleinhaus, *supra* n. at 5 (stating “[t]he miners collected and elected an alcalde (or justice) and sheriff. A jury was then selected). Even at the infamous Downieville lynching, the jury was selected from the crowd. DAVID PIERCE BARSTOW, RECOLLECTIONS OF 1849-1850. WITH ADDITIONAL RECOLLECTIONS BY HIS BROTHER, ALFRED BARSTOW, AS TOLD TO H.H. BANCROFT FOR THE BANCROFT LIBRARY 22 (Calif. 1979); “[A] lawyer by the name of William Spear ... acted as public prosecutor, and a jury of twelve men was selected from the crowd”).

⁶⁵ BARSTOW, *supra* n. at 22.

⁶⁶ Hero Eugene Rensch, Columbia, A Gold Camp of Old Tuolumne 38 (mimeograph, Berkeley, Works Progress Administration, 1936) (quoting an account in the DAILY ALTA CALIFORNIA November 14, 1853, of a lynching at Colubia, where “Counsel was allowed the accused, and the usual forms were observed”); Letter from Alexander Barrington to his brother William, dated Rio Alto Ranch, Feb. 29, 1856. In GRABHORN, 44 (individual tried for murder and apparently acquitted, but his lawyer’s fees wiped him out).

⁶⁷ John Hovey, *Journal of a Voyage ... Commencing Jan. 23, 1849, and ending July 23, 1849* 79 (unpublished manuscript in the Huntington Library, catalogued at HM 322) (describing the trial of Chileans accused of murdering Americans at Iowa Log Cabins on the night of December 27-28, 1849).

were sentenced to 100 lashes and to have their heads shaved, and one also to have his ears cut off. Only three men, the masters, were sentenced to be shot. In short, the original lynch crowd was persuaded to place the matter in the hands of outsiders, and accepted their verdict.

This last case had an interesting follow up. The people of Stockton held a special meeting to pass a resolution of sympathy with the miners who punished the Chileans. John Hovey, who reported the whole story, explained that this signified that the citizens of Stockton “were willing to go heart and hand with us, in bringing the Criminals to justice.”⁶⁸ This seems to mean that the people of Stockton were ready to share responsibility for the executions.

In all cases, the jury pronounced the verdict. If they acquitted, that was the end of the matter. For example, on October 27, 1849, a certain Turnball from Virginia was suspected of stealing \$2,000 and a valuable watch from miners of the Union Canal Mining Claim. His victims caught him, but although they had no doubt of his guilt, they found no evidence on him that would convict him and allowed him to proceed.⁶⁹

A lynch court also acquitted a miner who shot his partner, mistaking him in the night for a thief. After the jury returned a verdict of accidental homicide, the miners present passed a resolution of sympathy with the victim’s family and with the killer himself, adding that they concurred fully with the jury’s decision.⁷⁰ Similarly, a quarrel on Carson’s Creek between two former members of the First New York Regiment resulted in the shooting death of one of them. The killer was tried for murder but acquitted on the ground of “justifiable homicide,” specifically, acting in self-defense.⁷¹

⁶⁸ Hovey, *supra* n. at 83 (describing events of January 4, 1850).

⁶⁹ Diary, E.A. Upton (Oct. 27-29, 1849 (unpublished manuscript in the Bancroft Library, catalogued at Mss 78 48 C); *see also* JOHN W. CAUGHEY, *THEIR MAJESTIES THE MOB* 42 () (quoting from *AUTOBIOGRAPHY OF ISAAC J. WISTAR*, 1827 [Philadelphia, Wistar Institute of Anatomy and Biology, 1905], a report of a jury examination of a murder suspect “Oregon Jim”, stating, “but with the total defect of actual proof, though all suspected him, a majority voted for his discharge and even voted down the proposition to banish him from the creek”).

⁷⁰ *A Most Melancholy Death*, *PLACER TIMES*, November 10, 1849. Another acquittal in a murder case is reported in THEODORE TAYLOR JOHNSON, *CALIFORNIA AND OREGON; OR, SIGHTS IN THE GOLD REGION, AND SCENES BY THE WAY*, 185.

⁷¹ *Fatal Affray*, *ALTA CALIFORNIA* May 3, 1849 (but page says May 9, 1849) (describing the incident and naming the victim as Rodrick M. Morrison and the killer as Henry J. Freund). *See also* ENOS LEWIS CHRISTMAN, *ONE MAN’S GOLD: THE LETTERS AND JOURNAL OF A FORTY-NINER*, Florence M. Christman, ed. 192 (New York, McGraw Hill,

When the jury found the defendant guilty, however, it was the crowd that determined the sentence. Most often, it either accepted the jury's recommended sentence or reduced it. (In one case, there was a motion to increase the sentence, but this was voted down.⁷²) And this is where things get interesting. Insofar as the crowd *could* alter the sentence, it became responsible for it. Certainly crowds had some spirited debate about punishments, showing that some miners had strong feelings on the subject. A single individual might not be able to persuade a mob to have mercy, but, then again, some individuals did manage to do so.

The trial of Jim Hill at Camp Seco is a case in which the jury rendered a unanimous verdict of guilty, and "it was then voted" to hang the prisoner.⁷³ The same Jim Hill sentenced to hang by the miners of Camp Seco pleaded for mercy. From that moment, the lynching disintegrated. The question was put to the people, "Shall he be hung?" The vote was split. "Immediately some hundreds of pistols were drawn and a universal stampede occurred. Horsemen plunged through the crowd and over them, and the people ran in every direction."⁷⁴ The follow-up to this incident is discussed below in the section "Lynch Law's Last Stand.

In a more orderly example -- a stabbing case in which the victim was still alive -- the jury "advised" that he be handed over to the authorities. "A majority of the meeting sustaining the decision of the jury it was carried into execution."⁷⁵

1930) (a man acquitted because the only evidence against him was the testimony of a condemned criminal); DAME SHIRLEY (MRS. LOUISE AMELIA KNAPP SMITH CLAPPE), THE SHIRLEY LETTERS FROM CALIFORNIA MINES IN 1851-52, Thomas C. Russell ed. 152 (date) (stating that two men accused of stealing \$1,800 from their partners were tried before a meeting of the miners and acquitted. Later, further evidence against one of them was uncovered and he was retried and executed.); (stating that a crowd prepared to lynch a Mr. Middleton suspected of stealing \$1,250 but since there was no positive evidence against him, they released him).

⁷² ROYCE, *supra* n. at 262 (citing to a San Francisco Herald article of March 22, 1852, describing a case where the defendant was sentenced to 39 lashes and banishment; a motion to add cutting off the ears to the punishment was voted down).

⁷³ CHRISTMAN, *supra* n. at 190 (entry for June 28, 1851, describing the trial of Hill for stealing a safe from a store); the same incident is described by David C. Ferson Correspondence, letter dated July 10, 1851 (unpublished manuscript in the Beinecke Library, catalogued at WA MSS S-1315).

⁷⁴ CHRISTMAN, *supra* n. at 192.

⁷⁵ Rensch, *supra* n. at 38.

In a number of cases, one person or a group persuaded the crowd to reduce the sentence or even to let their prisoner go. A striking example is that of three Indians and a Mexican who had been tried, convicted, and sentenced for killing and attempting to burn the bodies of two Americans. When the ropes were already around their necks, a county judge and some other citizens interfered. They “begged the people not to assume so great a responsibility but to let the law take its own course and justice would be done.”⁷⁶ In fact, at the coroner’s inquest, it emerged that the suspects had found the decomposing bodies of the Americans and were preparing to cremate them according to Indian custom. Similarly, in the Iowa Log Cabins incident, discussed above, the jury found all the defendants guilty of murder and proposed to sentence them to death. But miners from another camp retried the defendants and sentenced nine to 100 lashes and only three to death.⁷⁷

Sometimes a portion of the crowd objected to a harsh sentence and got it reduced, as in the case of a sailor caught in the act of stealing \$3,000, tried, convicted and sentenced to hang by a jury. There was “some opposition to taking his life” and the sentence was reduced to a “milder punishment,” whipping, cutting off his ears, shaving his head, and banishing him from the diggings.⁷⁸ In another case, a little delay in getting the rope for a hanging gave the by-standers time to object and to persuade the lynchers to hand the accused over to the officers of the law.⁷⁹ And in yet another, “some were for hanging and some were for whipping & branding,” and not being able to reach a decision, the miners elected a committee to decide the punishment (the committee recommended the lesser penalty).⁸⁰ It also happened, of course, that appeals for mercy fell on

⁷⁶ CHRISTMAN, *supra* n. at 174-5 (describing events of July 10, 1850). *See also* STEPHEN CHAPIN DAVID, CALIFORNIA GOLD RUSH MERCHANT. Benjamin B. Richards ed. Part 77 entry for March 8, 1851 (date) (stating that a Mr. Stone addressed a crowd preparing to lynch a certain Mr. Middleton, suspected of stealing \$1,250. Mr. Stone prevailed on them to release the suspect, as there was no positive evidence against him.)

⁷⁷ *Supra* at n. .

⁷⁸ DAVID AUGUSTUS SHAW, ELDORADO; OR, CALIFORNIA AS SEEN BY A PIONEER, 1850-1900, at 143 (1900)

⁷⁹ HUNTLEY, *supra* n. at 212-213 (bystanders persuaded the lynchers that their prisoner, a certain Doyle accused of homicide, should be handed over to the authorities. Grass Valley, November, 1852); *see also* David C. Ferson Correspondence, letter dated Shaw’s Flat, July 10, 1851 (unpublished manuscript in the Beinecke Library, catalogued at WA MSS S-1315) (stating that part of the crowd wanted to hang a prisoner and part wanted to let him go - the latter managed to hand him over to the sheriff).

⁸⁰ Jacob H. Engle, *Letters*, 35-6 (unpublished manuscript in the Huntington Library,

deaf ears.⁸¹

In a less dignified example, the crowd disputed whether a condemned man should be hung at once or in ten days' time: "High words ensued. Pistols were drawn and I thought for sometime that half a dozen more lives would be lost in discussing this point."⁸² The majority, who favored delay, won the day.⁸³ In other cases, the friends of the prisoner begged for mercy and he was released.⁸⁴

Possibly the many commuted sentences led jurors and others to think that a sentence of death would not, in fact, be carried out. This was the case at the hanging of a Swede named William Brown. "[M]any, with their hands on the cord, did not believe even then that it would be carried into effect, but thought that at the last moment the jury would release the prisoner and substitute a milder punishment."⁸⁵ After the fact, almost no one approved of the affair, and blamed the more reckless members of the crowd.⁸⁶ The local alcalde had protested the whole proceeding, but this had not galvanized others in time to save Brown.

In fact, relatively few lynchings actually resulted in a hanging. I know of only three hangings in the mines in 1849, another two hangings and one firing squad in 1850, and about 20 hangings in 1851; versus 4, 10, and 16 whippings in those years respectively (*see infra*, "Sources.")⁸⁷ Both

catalogued at HM 19091-19098) (letter to the writer's brother, dated Rough and Ready, June 3, 1852). *See also* WILLIAM REDMOND RYAN, 2 PERSONAL ADVENTURES IN UPPER AND LOWER CALIFORNIA IN 1848-9 pt. 3, chapter 18 (London, 1850) (describing a case in which a jury sentenced a thief to death, but the onlookers objected to this as too harsh, and the punishment was reduced to lashing, having ears cropped and head shaved, and banishment); William Miller, *supra* n. at 75 (friends of the accused got the sentenced reduced from hanging to whipping, cutting off his ears, and banishment).

⁸¹ WILLIAM SHAW, GOLDEN DREAMS AND WAKING REALITIES 59 (London, 1851).

⁸² FRANKLIN A. BUCK, A YANKEE TRADER IN THE GOLD RUSH, Katherine A. White, ed. 110 (1930).

⁸³ *See also* SHIRLEY, *supra* n. at 155 (stating that the jury sentenced William Brown to be hung in one hour, but this was extended to three "by the persuasions of some men more mildly disposed").

⁸⁴ E.g. William W. Miller, Voyage to California, 175* (unpublished manuscript in the Beinecke Library, catalogued at WA MSS 1-199).

⁸⁵ SHIRLEY, *supra* n. at 156.

⁸⁶ *Id.* at

⁸⁷ Editors: I would be glad to provide a table of trials and lynchings discussed in this

the ALTA CALIFORNIA in the PLACER TIMES wrote that they did not report all of the punishments in the mines.⁸⁸

I do not mean to suggest that whipping was a civilized alternative.⁸⁹ Spectators appear to have found it more gruesome than hanging. David Shaw, admittedly writing long after the event, stated that some men convicted of stealing horses and mules were sentenced to have their heads shaved, be branded on the right cheek with the letter “R,” to receive 100 lashes on the bare back, and to be banished from the mines. But “[a]fter administering 50 lashes the committee decided to remit the balance, as the men were unable to bear the torture,” Shaw wrote. “It looked cruel and inhuman, and not all eyes among the spectators were tearless.”⁹⁰ Kimball Dimmick, as judge, sentenced two thieves to be 50 and 25 lashes respectively. He wrote his wife, “I never saw men so severely whipped before, and never wish to again.”⁹¹ As we saw at the beginning of this article, the 39 lashes Buffum saw administered left the recipients too weak to stand or to be present at their subsequent lynch trial.⁹² When whipping was combined with branding and cutting off the ears, the spectacle must have been ghastly.⁹³

Who applied these punishments? The sources are not often explicit on this point. We hear of a sheriff⁹⁴ and a marshal⁹⁵ doing the whipping,

article.

⁸⁸ PLACER TIMES September 15, 1849 (stating that it would not punish particulars of whippings to spare the punished men further embarrassment); ALTA CALIFORNIA, June 15, 1852 (listing some crimes and lynchings in the mines but declaring “that, were [the editor] to give all the particulars to be gathered from his mining exchanges of one day, he could fill a number of his own daily edition”).

⁸⁹ On movements to abolish flogging as a punishment during this period, see Myra C. Glenn *The Naval Reform Campaign Against Flogging: A Case Study in Changing Attitudes Toward Corporal Punishment, 1830-1850* 35 AMERICAN QUARTERLY 408 (1983); on flogging as a harsh and degrading punishment, see JAMES Q. WHITMAN, HARSH JUSTICE 175 (2003).

⁹⁰ SHAW, ELDORADO, *supra* n. at 141-142.

⁹¹ Dimmick, *supra* n. .

⁹² *Supra* at n. .

⁹³ Field wrote that, with such penalties, banishment “was supererogatory; for there was something so degrading in a public whipping, that I have never known a man thus whipped who would stay longer than he could help, or ever desire to return” (FIELD, *supra* n. at 34).

⁹⁴ Allen Varner, Letter to David Varner, March 5, 1850 (unpublished manuscript in the

and one miner reported that a doctor cut off the ears of a convicted thief.⁹⁶ In another case, a thief was sentenced to fifty lashes, but “[n]obody would volunteer to do the whipping, so we drew lots.”⁹⁷ The miners did not have the heart to apply more than six lashes, however, because the prisoner “made such a howl ... although there was not a red mark on his back.”

Hanging appears to have been carried out sometimes by driving a wagon out from under the condemned man, leaving him hanging.⁹⁸ At other times, a group of men pulled the rope that strung up the prisoner. A certain William Brown, for instance, was hanged by the jury with the assistance of “all who felt disposed to engage in so revolting a task.”⁹⁹ Being inexperienced, miners often botched the job, which the onlookers found distressing.¹⁰⁰ When a certain Jose Sevaras was executed, for instance, he hung gurgling and quivering for some time and “the people began to turn away + leave the horable + painful sight.” Sevaras was only put out of his misery “when a rough looking customer drew his revolver stepped up + shot the swinging Man through the body.”¹⁰¹

I know of only one firing squad. In the Iowa Log Cabins incident, discussed above, the three men sentenced to death were executed at their campground by a line of twenty men.¹⁰² Ten of them had blank cartridges and ten had bullets.

Huntington Library, catalogued at HM 39980).

⁹⁵ FIELD, *supra* n. at 34 (stating that “the marshal marched the prisoner out to a tree, made him hug the tree, and in the presence of the crowd that followed, began inflicting the lashes”).

⁹⁶ SHAW, ELDORADO, *supra* n. at 143-144 (stating that “a doctor cut off his ears, from the stumps of which he bled freely while receiving his flogging”).

⁹⁷ CHAUNCEY L. CANFIELD, ED. DIARY OF A FORTY-NINER 36 (1906) (diary of Alfred Jackson; I owe this reference to Andrew P. Morris, *supra* n. at note 115).*

⁹⁸ FRANKLIN BUCK A YANKEE TRADER IN THE GOLD RUSH, Katherine A. White, ed., 111 (stating that “a wagon on which [the condemned man] was standing was driven out from under which caused his death by strangulation”).

⁹⁹ SHIRLEY, *supra* n. at 20.

¹⁰⁰ *Ibid* (“[L]ife was only crushed out of him by hauling the writhing body up and down, several times in succession”). See also SHAW, ELDORADO, *supra* n. at

¹⁰¹ John Clark, The California Guide (unpublished typescript in the Beinecke Library, catalogued at WA MSS 63), entry for August 1, 1853.

¹⁰² Hovey, *supra* n. at 82 (describing the execution on January 3, 1850).

In short, lynchings at their best replicated at least some of the ordinary, common law procedures, including trial by judge and jury. That a number of suspects were acquitted and that others were released for lack of evidence, although the assembly believed them to be guilty, show that the miners aimed at justice. Further, there were often arguments about the proper punishment, which usually resulted in a reduced sentence. It is also interesting to see that the crowd as a whole, and not the jury, determined the final sentence. On the negative side is the harshness of the punishments, even when they were “reduced” from the death penalty to lashes, branding, cutting off the ears and shaving the head. The method of execution, namely strangulation rather than a clean drop that broke the neck, was also harsh. On the whole, however, these orderly lynchings were remarkably similar to the trials and punishments carried out on the overland trail.¹⁰³

Of course, lynch trials were susceptible to many errors and abuses. Although many chroniclers claimed that Judge Lynch never executed an innocent person, others say what one must have supposed in any case - that once a lynch crowd became thoroughly excited, “however innocent you may be, you stand no chance.”¹⁰⁴ In Buffum’s description of the lynching at Hangtown in January of 1849, quoted at length above, the accused, two Frenchmen and a Chileno, were not present at their trial their request for an interpreter was never granted.¹⁰⁵ Moreover, the charges against them were attempted murder and robbery, not any completed act, but as “they were known to be bad men,” the miners agreed that they “ought to be got rid of.”¹⁰⁶ Buffum was convinced that they were executed unjustly.

A case of near injustice involved three Indians and a Mexican who were discovered burning the bodies of two Americans were sentenced to be hanged. One was already dangling in the air when the county judge and some others persuaded the crowd to hand them over. At a coroner’s

¹⁰³ *Infra* at n. ____.

¹⁰⁴ BUCK, *supra* n. at 111, FIELD *supra* n. at 56, also said that “there was seldom any escape for a person tried by a Lynch jury” even if he was innocent.

¹⁰⁵ There were disturbing near-misses. A group of miners who discovered that a shovel was missing blamed a Chilean and nearly executed him before they were persuaded to release him. Vicente Pérez Rosales in EDWIN A. BEILHARZ AND CARLOS U. LÓPEZ, eds. WE WERE 49ERS! CHILEAN ACCOUNTS OF THE CALIFORNIA GOLD RUSH 63-64 (Pasadena, Ward Ritchie Press, 1976).

¹⁰⁶ BUFFUM, *supra* n. at 84.

inquest the next day, it was discovered that the American bodies had already been partially decomposed and that the accused burned them in accordance with their religious custom.¹⁰⁷ Here the lynchers had definitely made a mistake.¹⁰⁸

As disturbing as wrong verdicts were breakdowns of procedure, as when an excited crowd whipped or hanged the accused on paltry evidence or without allowing the defendant to speak. This might happen because the crowd was drinking and got wilder as the day went on.¹⁰⁹ Trials were often held near a store on the miners' free day (often a Sunday), and men who had worked hard all week took advantage of the opportunity to drink.¹¹⁰ At the lynching described by Buffum,¹¹¹ the first trial was relatively orderly, but by the time of the second, the crowd was intoxicated and beyond reason.¹¹² In a very similar case,¹¹³ the miners caught a thief, who confessed to the act and promised to hand over the money in return for his liberty. He kept his end of the bargain, but the crowd split over the question of whether to hang him. In the end, those in favor of hanging won the day. Then their blood was up. The hanging took place near a jail where two Australians accused of theft were awaiting their trial. "Let's hang the Sydney Convicts!" someone shouted. "The excited crowd rushed over to the jail, pushed in the door, brought the men out and hanged them on the same tree."

¹⁰⁷ CHRISTMAN, *supra* n. at 174-175.

¹⁰⁸ See also ALTA CALIFORNIA October 18, 1850 (stating that two American cooks who had been given 100 lashes for theft were now thought to have been innocent).

¹⁰⁹ David Johnson, *supra* n. at 564, notes that in the early days of the gold rush, the rage is attributed to "the people," suggesting that it was a reaction to the violation of shared moral sensibilities.

¹¹⁰ SHIRLEY, *supra* n. at 119 (a civil suit for debt was heard in the barroom of the Empire Hotel and the justice of the peace stopped the court twice to treat the jury); *id.* at 122 (stating that at whichever establishment the trial took place, the owner would make a large profit from the sale of dinners and drinks to the crowd). Wood, *Diaries*, *supra* n. at entry for December 1, 1849 (the Jacksonville election for *alcalde* and sheriff was held on the same day as an auction at which liquor was sold and by night the town was full of drunken men); FIELD, *supra* n. at 62 (stating that in a case in which he was not the judge, he treated the jurors to drinks and then gently persuaded them to be merciful).

¹¹¹ See *supra* n. and accompanying text.

¹¹² In this case, the crowd of about 200 men "organized themselves into a jury, and appointed a pro tempore judge" (BUFFUM, *supra* n. at 84).

¹¹³ Ezra Bourne, *Diary of an Overland Journey to California in 1850*, 33 (unpublished transcript in the Bancroft Library, catalogued at C-F 142) (describing events in Spanish Flat and Coloma, in 1850 or 1851).

The famous Downieville lynching of a young Mexican woman also appears to have been a travesty of justice.¹¹⁴ A group of drunken men had pushed down her door in the night, and she stabbed one of them. After a jury trial that lasted a full day, she was hung “with the hungriest, craziest, wildest mob standing about that ever I saw anywhere,” wrote David Barstow.¹¹⁵ After they hanged her, they drove some of her friends out of town, and also “turned on” a Dr. Aiken, because he tried to defend her. Barstow said the young woman was acting in self-defense and that the hanging was murder. From the time he witnessed it, he said, he had “no sympathy with, nor confidence in mobs.”¹¹⁶

Still, before there were state courts, the overwhelming majority of accused criminals were given a jury trial of some sort. The exceptions fell into two categories. First, it was open season on Indians. Individuals often killed Indians without sanction, and Indians suspected of crime might or might not receive a trial before being executed.¹¹⁷ And second, the American community often punished persons of non-European dissent without a trial. For instance, relatively few Blacks were punished - eight in the material I collected. But one of these was given 40 lashes for stealing a mackerel, without a trial.¹¹⁸ Another was whipped until he confessed that he had stolen \$2000 and then, after some debate, was handed over to the authorities.¹¹⁹ And a third Black, who had taken \$3000, surrendered the money in return for his freedom but was hanged nevertheless.¹²⁰ Similarly, a “Hindoo” was summarily whipped because he falsely accused some

¹¹⁴ See WILLIAM B. SECREST, *JUANITA* (1967); BARSTOW, *supra* n. at 21; ALEXANDRE JEAN JOACHIM HOLINSKI, *LA CALIFORNIE ET LES ROUTES INTEROCÉANIQUES* 232 (Leipzig, 1853).

¹¹⁵ Barstow, *supra* n. at 23.

¹¹⁶ *Id.*

¹¹⁷ See Parker, *supra* n. ___ at entry for Nov. 15, 1851: After Indians killed two Americans, the miners seized an Indian whom they suspected. “A few of those present thought it unworthy of Americans to kill a prisoner without a trial, but a majority were in favor of shooting him....”; John Clark, *The California Guide*, entry for 30 April 1854 (unpublished transcript in the Beinecke Library, cataloged at WA MSS 83), stating that two Indians were hung on suspicion of murder; “the[y] were first cleared by the jury then the mob dissatisfied with the decision caught & hung them.”

¹¹⁸ *Judge Lynch’s Court*, *MARYSVILLE HERALD* 1/21/1851.

¹¹⁹ *Sacramento*, *ALTA CALIFORNIA* March 17, 1850.

¹²⁰ Bourne, *supra* n. at 32.

Indians of theft.¹²¹

The status of Mexicans was unique. On the one hand, there was a large population of Mexican miners, which was in direct competition with the Americans. On the other, there were many Mexican laborers and packers in American camps. The latter were both suspected of crimes, particularly homicide, and victims of crime. Oddly, the murder suspects usually escaped, or perhaps unidentified murderers were assumed to have been Mexicans.¹²² The victims were either few or did not seek justice, or did not concern the Americans. In any case, few crimes against Mexicans were dealt with by lynch law.¹²³

B. POPULAR TRIAL'S LAST STAND

After 1850, lynching became more frequent and more cases ended in hanging. The numbers were up because of increased crime, which many miners attributed to a growing population and especially an influx of lowlife. They ascribed the greater number of hangings to the miners' frustration, or even desperation, as mining became less lucrative.

The really striking development of 1851 and later years, however, was the creation of a state legal system and its clash with the popular tribunals. The problem was that the system was impracticable and its officers were corrupt. Frustrated by authorities' inability to bring criminals to justice, the crowd repeatedly seized prisoners and punished them outside the law. As Peter Burnett, California's first governor, wrote in his memoirs, "[i]t was the extremely defective administration of criminal justice in California for some years that led to the organization of so many vigilance committees, and filled the courts of Judge Lynch with so many cases."¹²⁴

The deficiencies of the legal system in the early 1850s were conveniently summarized by Mary Floyd Williams.¹²⁵ In short, they fell

¹²¹ SENTER, *supra* n. at entry for July 7, 1850.

¹²² An exception was the notorious Downieville lynching of a Mexican woman, which many considered a travesty of justice.

¹²³ Exceptions include

¹²⁴ PETER H. BURNETT, RECOLLECTIONS AND OPINIONS OF AN OLD PIONEER 390 (New York, D. Appleton & company, 1880) (available on the Library of Congress American Memory website).

¹²⁵ WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 142 (describing the problems of the legal system in the 1850s). *See also* Burnett, *supra* n. at 390.

under four headings: first, California's lack of jails and prisons. Second, the difficulty of transporting suspects to the place of trial and compelling witnesses to attend. Third, incompetent and corrupt office holders. And fourth, impracticable laws.

For a long time, there were no jails, not only in the mining camps, but in the towns. In August of 1850, Marysville had no jails, "nor the law defining the manner we shall have one."¹²⁶ Prisoners had to be sent to Sacramento, where they were kept on brigs in the river.¹²⁷ The Marysville county jail was finally completed in January 1851.¹²⁸ Jailbreaks were frequent, however, in June 5, 1851, for instance ten prisoners escaped when their guard was away from his post.¹²⁹ It was believed that prisoners often bribed guards and sheriffs to give them an opportunity to get away.¹³⁰

Getting suspects from remote mining camps to the county seat was difficult and expensive. It involved a journey of several days on horseback, which afforded the prisoner many chances for escape.¹³¹ It might then be months before the court met. Witnesses were bound to appear at trial, but they did not receive a fee for attending, though they had to travel great distances and be available for days at a time.¹³² And then

¹²⁶ "Gosling," "Judicial Matters - The State Laws", MARYSVILLE HERALD Aug. 16, 1850.

¹²⁷ *Ibid.*

¹²⁸ "The County Jail," MARYSVILLE HERALD, Jan. 7, 1851 (reporting on the new jail built at Marysville, of timbers 12" thick lined with heavy sheet iron).

¹²⁹ "General Jail Delivery" MARYSVILLE HERALD, June 5, 1851 (the ten escaped prisoners included 2 Englishmen, 1 Irishman, 2 Spanish speakers, 1 French Canadian, and presumably 4 Americans, illustrating the diversity of the criminal population). *See also* "Re-Arrest," MARYSVILLE HERALD May 1, 1851 (reporting that two men who broke jail had been retaken).

¹³⁰ Henry Veel Huntley, California, *supra* n. at 136-7 (stating that in the cases of bailable offenses, the accused gives \$1,000 in cash to the recorder and his personal security for another \$1,000; "then, if his chances are not good, he "slopes"""); "Murderers of Smith and Foster," ALTA CALIFORNIA, September 14, 1850 (an accused murderer, Marianna Hernandez, escaped from captivity in San Jose when, on the order of some unnamed person, his manacles were taken off and he was taken in the night (!) to give a "deposition.")

¹³¹ WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 145?.

¹³² "Experiences of Witnesses in Criminal Cases," DAILY ALTA CALIFORNIA October 15, 1851.

there was a probability that the case would be postponed.¹³³ It is no wonder, therefore, that when the trial finally did take place, key witnesses were absent.

Finally, judges and sheriffs were notoriously incompetent and corrupt.¹³⁴ The Grand Jury of Tuolumne County made a Presentment on the disrespect for the laws. It blamed this, in part, on "failures, neglects, and incompetency of public officers of law."¹³⁵ This sorry state of affairs was due in large part to the Californians' own failure to elect decent office-holders,¹³⁶ but that did not make the miners less angry about the courts' failure to convict criminals. As one miner wrote, the chances of escape afforded by the slow process of law, "created a disposition to inflict summary punishment on the offender rather than allow him the chances of escape afforded by the slow process of the law."¹³⁷ Many other miners made comments along the same lines.¹³⁸

¹³³ *Ibid.*

¹³⁴ See BANCROFT, POPULAR TRIBUNALS 130-131 (quoting from the *Evening Picayune*, August, 1850 (no date): there is scarce a political office holder "who has not entered upon his duties and responsibilities as the means of making money enough to carry him home"). See also MARYSVILLE HERALD, Aug. 6, 1850, on Judge a and his incapacities. MARYSVILLE HERALD Aug 9, 1850 "magistrates and judges are tainted with scoundrelism and corruption ... successful crime or whatever character goes unpunished." MARYSVILLE HERALD 8/27/50 (incompetent legislature has enacted useless laws).

¹³⁵ "Presentment of the Grand Jury of Tuolumne County," SONORA HERALD August 3, 1850, p. 1 col. 2-3.

¹³⁶ *Ibid.* See also FIELD, PERSONAL REMINISCENCES at 64 (stating that "[i]t was difficult to interest the miners in [the election]; most of them had come to the country in the hope of improving their fortunes in one or two years, and then returning to "the States; see also "What does California Need," MARYSVILLE HERALD Oct. 4, 1850 (anonymous contributor states that Californians need to elect good officers, among other things).

¹³⁷ DAILY ALTA CALIFORNIA, November 14, 1853, quoted by Rensch, Columbia, *supra* n. at 38; see also Wood, *Diaries*, *supra* note at entry for June 25, 1852 ("[m]any of the worst criminals escape from the law on account of its delays and this makes men anxious to execute it while they can"); "Sam" *supra* n. (stating that "the citizens were compelled to take the execution of justice into their own hands" because "the law has not punished one man").

¹³⁸ See e.g. Letter to the Editors dated San Jose, Sept. 13, 1850, MARYSVILLE HERALD Sept. 22, 1850 (stating with respect to horse thieves recently imprisoned, that "so little confidence is placed in the authorities ... that it was suggested last night, by one of the best citizens of the place, to take the thieves out and call on Judge Lynch to preside"); MARYSVILLE HERALD, Feb. 28, 1851 "Tremendous Excitement in San Francisco." During trial of Stewart and Wildred for murder of Janson on Feb. 19, handbill was circulated stating that the Law appears to be a nonentity and no redress is to be had but by the code of Judge Lynch. Hung jury).

Sometimes this meant execution without trial. A jealous husband shot a man with whom his wife was too friendly. “He was put into jail, and the crowd took him out and hung him forthwith.”¹³⁹ The most dramatic such scenes took place when the crowd and the legal officers battled over the prisoner’s person, the officers attempting to get him safely in jail, or keep him in jail, and the mob fighting to get its hands on him and hang him on the spot. In a typical example, the author went to Hangtown to see a man tried for murder. In fact, the suspect was not tried but was merely examined before the judge and the sheriff and, presumably, remanded for trial. But at that point “the mob raised the cry “Bring him out! hang him!”” and made a rush for the prisoner. He “ was seized by the hair and dragged a short distance to an oak tree -- a rope was put around his neck and over the limb of the tree - some men took hold of the end and hoisted him up as they would a hog to be dressed where he hung until he was dead.”¹⁴⁰ In another case, a crowd that had hung one man for theft decided to keep going. Two other prisoners, both from Sydney, were in the jail. Once the “mob” had hanged the thief, someone shouted, “Let’s hang the Sydney Convicts.” The excited crowd rushed over to the jail, pushed in the door, brought the men out and hanged them on the same tree as the thief.¹⁴¹

Mary Floyd Williams, the great expert on the San Francisco Vigilance Committee, suggested that the mining population abandoned its commitment to due process after 1850. Before the California constitution was enacted, the miners believed that their lynch-courts were the law’s legitimate enforcers and felt the responsibility of their position. But after the creation of the courts, Williams wrote, the miners’ tribunals “lost their dignity and their ideals of deliberate justice. ... Inevitably, they degenerated into angry mobs, that hastened to whip or to hang the accused before the sheriff could intervene ... to forestall punishment or acquittal by

¹³⁹ Chamberlain, *supra* n. at

¹⁴⁰ Family Papers, Shubael Wescott Stowell, Oct. 25, [1850] (unpublished manuscript in the Beinecke Library, catalogued at WA MSS S*); *see also* DELANO, *supra* note Letter to wife dated Turnerville, January 19, 1852 (stating that a man was hung for robbing a cabin; “the authorities tried to get him but no use since the people has taken the law in their own hands”).

¹⁴¹ Bourne, *supra* n. at 32 (the execution of the thief with which this story begins is discussed above at note). *See also* Diary, George W. Allen (Mar. 15, [1851]) (unpublished manuscript in the Beinecke Library, catalogued at WA MSS S-202) (stating that after Judge Frank acquitted a suspect, the miners arrested him and sentenced him to 200 lashes unless he produced the gold – which he did after 30 lashes)

the courts.”¹⁴² In other words, good faith popular trials lasted only from 1848 to 1850.

Williams’ description of lynch law before and after 1850 is too simple, however, probably because it was just a minor section of a much broader project. First, orderly lynchings continued to be held long after 1850. New mining camps continued to spring up beyond the reach of the authorities and they continued to deal with crime in their own way.¹⁴³ Second, even when the miners did seize criminal defendants from the officers of the law, they often granted them some form of trial.

Long after 1850, new mining communities confronted the problems of law in the wilderness and used the methods of the lynch trial. Jacob Engle wrote a letter to his brother dated Rough & Ready, June 3, 1852, in which he reported a theft of \$200 from a miner upstream.¹⁴⁴ A suspect seized and the stolen money was found in his possession, “so the miners gathered together and appointed a jury which found him guilty.” Since the crowd could not decide between the options of hanging the thief or whipping and branding him, a committee was formed to make that decision. It recommended that the thief be given fifty lashes, branded on the cheek and banished from the region on pain of hanging. These proceedings were indistinguishable from those commonly followed in 1849. Similarly, when a certain Peter Nichols was tried for stabbing a man in November of 1853, “[c]onsul was allowed the accused, and the usual forms were observed.” The jury advised that the accused should be handed over to the authorities and a majority of those present sustained the decision.¹⁴⁵

¹⁴² WILLIAMS, SAN FRANCISCO, *supra* n. at 151 (stating that when the miners’ tribunals found themselves pitted against the dilatory courts, they “lost their dignity and their ideals of deliberate justice in conducting a struggle for the possession of a prisoner, and in making a hurried disposition of his fate”). *See also The Course of Empire*, edited by Valeska Bari 23 (1931) (stating that after 1850, when a state criminal justice system was established, lynching was no longer legal).*

¹⁴³ For an orderly lynching as late as November 1853, see Rensch, *supra* n. at 38 (Quoting from the DAILY ALTA CALIFORNIA, article dated Columbia, November 14, 1853, regarding the lynch trial of Peter Nichols for stabbing a man. “Consul was allowed the accused, and the usual forms were observed.” The jury advised that the accused should be handed over to the authorities and a majority of those present sustained the decision.).

¹⁴⁴ Letter from Jacob H. Engle in GRABHORN, A CALIFORNIA GOLD RUSH MISCELLANY 35.

¹⁴⁵ Rensch, *supra* n. at 38 (Quoting from the DAILY ALTA CALIFORNIA, article dated Columbia, November 14, 1853, regarding the lynch trial of Peter Nichols for stabbing). *See also* FREDERICK MARRYAT, MOUNTAINS AND MOLEHILLS 291(a lengthy encomium

The miners who took back suspects from the authorities sometimes punished them without a trial, but sometimes they held a jury trial of some sort. This may have been perfunctory. In a letter to his sister, William Binur wrote, “[t]he Officers have got a way of letting Criminals off and the people wont stand it so they take them from the Shireff choose a Jury try them and have them strung up in an hour or two which is the only way to do it in these parts.” Binur makes the outcome seem like a foregone conclusion, although he may have been swaggering.¹⁴⁶ There were also trials of prisoners taken from the authorities, however, which were as elaborate as any reported from the mines. For instance, Jesus Sevaras, also known as Charley the Bullfighter, was alleged to have been involved in the gruesome murder of Jacob Mincer.¹⁴⁷ He was in the courtroom being tried by the civil authorities when the “five or six hundred miners standing round” decided to try him themselves. They wrested him from the sheriff and took him to the edge of town. There they selected twelve jurymen and a justice. A string of witnesses identified the knife found at the scene as Charley’s, and also a bloody handkerchief. The jury retired briefly, returned a verdict of guilty, and asked he people to pass sentence. “Several hundred rose to their feet + declared he should be hung in one hour,” which he was. Other descriptions of such trials are less detailed but follow the same pattern.¹⁴⁸

What finally put an end to lynching was the growth of stable communities with a long-term interest in the state.¹⁴⁹ Order and

of a locally elected judge in Tuttle-town in November, 1851, almost two years after the law required criminal cases to be submitted to the District Courts); Shaw, *supra* n. (describing the miners’ trial of an accused murderer, with judge and jury, on the Consumnes River in 1854).

¹⁴⁶ WILLIAN BINUR, WOODDED UP IN LOG TOWN. A LETTER FROM THE GOLD FIELDS. 12 (1851) (letter to Sarah, March 8, 1851).

¹⁴⁷ John Clark, *The California Guide*, entry for August 5, 1853 (unpublished manuscript in the, Coe Collection, Beinecke Library, catalogued at ____).

¹⁴⁸ CHRISTMAN, *supra* n. at 174 (Mexican suspects “were taken before the magistrate but before the hearing was gone through with, the excited people seized the prisoners, took them to the top of an adjacent hill, selected a jury under a tree, tried and found them guilty, and sentenced them to be hung.” The county judge persuaded them to give up the prisoners, and they were tried and acquitted.); Allen, *supra* n. at entry for March 15 [1851] (stating that the miners “followed and arrested [a man acquitted by the judge], tried and found him guilty and sentenced him to 200 Lashes,” and that the accused then confessed and surrendered the stolen gold); David C. Ferson Correspondence, letter July 10, 1851 (unpublished manuscript in the Beinecke Library, catalogued at WA MSS S-1315).

¹⁴⁹ Johnson, *supra* n. ____ 584 (noting that, after 1850s, lynching came to be seen as a crime in itself). Lynching did not die out entirely in California or in any of the Western

respectability were strengthened Bancroft says, “by the appearance of woman, when she came, as well as of churches, schools, lyceums and piano-fortes.”¹⁵⁰ Whether lynching petered out or was actively stopped varied from place to place. Colonel Norton reports that at Placerville in 1853, “some eighty in number [organized] in the interest of law and order, and determined that promiscuous hanging should be stopped, and that the laws of the country should be enforced in all cases, criminal as well as civil.”¹⁵¹ Soon afterwards, one man killed another in a drunken brawl. The civil authorities arrested the accused and, predictably, a mob of several thousand demanded that he be surrendered to them. Norton and his compatriots managed with great difficulty to hold onto the prisoner and bring him to Coloma, the county seat, where he was in due course tried, convicted, and hanged. According to Norton, this marked the end of lynching in El Dorado County. “The old Hangtown Oak was cut down and principally manufactured into canes, which are carefully kept in remembrance of the days of gold excitement, riot, and blood-shed.”

C. POPULAR TRIALS VERSUS MOB LAW AND VIGILANTISM

The legitimacy (or otherwise) of popular trials as a form of *law* as opposed to self-help was reflected in its perceived difference from mob law. Most miners distinguished popular trials from mob law. To them, the former was legitimate, or at least justifiable, while the latter was morally wrong. Indeed, the defining characteristic of the miners’ meeting was that it was *not* the mob but by “the people assembled.” The supporters of “lynch law” insisted that punishment without a jury trial was not lynch law at all, but mob law. Opponents, however, said popular trials were no better than mob law, which was a condemnation of both.¹⁵² In effect, both sides were arguing about the difference between law and self-help. (There was also a minority who used the terms lynch law and mob law interchangeably and without disapproval; these were evidently less bothered by the issue of vindication.¹⁵³)

and Southern states.

¹⁵⁰ Bancroft, *supra* n. at 124.

¹⁵¹ LEWIS ADELBERT NORTON, LIFE AND ADVENTURES OF COL. L. A. NORTON 291 (Oakland, Cal : Pacific Press publishing house, 1887).

¹⁵² There was also a small minority of miners who used the words "people", "miners," and "mob" interchangeably and for whom "mob law" was not a bad thing. This group has the least to say about the legitimacy of lynch law.

¹⁵³ Shaw, *supra* n. at 139-40 (using both Judge Lynch and mob law in describing the trial and punishment of a thief and of a murderer).

Proponents of lynch law distanced themselves from the worst outrages in the mines.¹⁵⁴ For instance, under the heading "Judge Lynch" the ALTA CALIFORNIA of Oct. 13, 1850, wrote, "We are really becoming the friend of this much abused old gentleman [Judge Lynch]. He has done some things badly in his day, but suffers more from his counterfeit rival Mob Law, than from any act of his own." Shortly thereafter, the ALTA reprinted an article about a lynching from the Sacramento PLACER TIMES with the following introductory words: "The Times does "Judge Lynch" wrong by the heading of the following article. It was Mob Law, not Lynch Law. His Honor never proceeds to punishment without some evidence of guilt."¹⁵⁵ The ALTA here neatly condemns the particular event it reported while affirming its sympathy towards lynching. The PLACER TIMES took the less popular position that some lynchings were patently unjust.¹⁵⁶ On the whole, however, the miners preferred not to hear criticism of an institution in which they had all participated. The PLACER TIMES, later SACRAMENTO TRANSCRIPT, was an old and well-established newspaper and could afford to be blunt from time to time.¹⁵⁷ The Sacramento INDEX, however, which was first published on December 23, 1850, was forced to fold because of its unpopular condemnations of lynch law.¹⁵⁸

Individuals who condoned popular trials preferred, like the ALTA,

¹⁵⁴ See e.g. Bancroft, *supra* n. at 142, Chapter 10 "Mobocracy in the Mines". Also 515, Chapter 30 "Infelicities and Alleviations" in which Bancroft writes, "'To the outward observer the lines between vigilance and the mob spirit were not in every instance clearly apparent."

¹⁵⁵ ALTA CALIFORNIA of October 18, 1850. See also Willaims *supra* n. at 435 (stating that "'It seems almost an injustice to associate even remotely the self-restrained members of the Committee of Vigilance with a blood-crazed mob that reverts to the vengeance of savages" (referring to the lynchings of blacks n the Southern U.S.).

¹⁵⁶ PLACER TIMES, August 18, 1849 (printing a description of the lynching of Mickey, alias Bill Lyon, and others for burglary and theft, which the called a "mockery of law and outrage of humanity."). The MARYSVILLE HERALD took the same position when it reported that a black man caught stealing a mackerel from a store was "staked out" and given 40 lashes. The newspaper states it has nothing to say about the justice of this kind of punishment, but title's the article "Judge Lynch's Court." MARYSVILLE HERALD, Jan. 21, 1851.

¹⁵⁷ EDWARD C. KEMBLE, A HISTORY OF CALIFORNIA NEWSPAPERS, 1846-1858 Reprinted from the Supplement to the Sacramento Union of Dec. 25, 1858, Helen Harding Bretnor, ed. (Talisman Press, Los Gatos, 1962) (at 137, PLACER TIMES founded on April 28, 1849; at 143, becomes TRANSCRIPT, April 1, 1850).

¹⁵⁸ *Id.* at 145 (stating that the INDEX's severity on the subject of mob violence eventually led to its failure).

to deplore summary punishment as something other than lynch law, namely, “mob law.” William Lewis Manly, for instance, described the notorious Downieville lynching of Juanita as the work of a mob. “She was given a mock trial ... it was a foregone conclusion that the poor woman was to be hanged, and the leaders of the mob would brook no interference.”¹⁵⁹ Both cases described earlier in which prisoners were taken from the authorities and hanged without trial were said to be the work of “the mob.”¹⁶⁰ On the one hand, this distinction could make the justice of lynch law tautological, by asserting that anything that was “unjust” was “not lynch law.”¹⁶¹ On the other hand, it set up a continuum between lynch law (orderly and legal) and mob law (disorderly and illegal) that more or less corresponds to the range of cases we see in the mines.

Critics of lynch law, in contrast, described even typical miners’ trial and punishment as “mob law.” Henry Veel Huntley, an Englishman, whose descriptions of lynch law were always disapproving, used “mob” frequently, as in, “the mob would have Judge Lynch to try him.”¹⁶² A certain Charles Doriot wrote to his brother in 1851, “[t]his country is in a Reched Condition.” Among the problems he listed was that the miners do not respect the laws; “they make their own laws; thieves and murderers, they generally mob them.”¹⁶³ “Dame Shirley” (Louise Clappe), whose letters from Indian Bar are the most detailed accounts we have of life in any mining camp, also deplored lynchings. The incidents she described were particularly egregious, however, and would have been denounced as

¹⁵⁹William Lewis Manly, Death Valley in ‘49 249 (date) (available on LC); *see also* Barstow, *supra* n. at 23 (stating of the same incident at Downieville, “[s]ince that time, I have no sympathy with, nor confidence in mobs; I prefer the law for redress of grievances”); William Reed Buffum, *supra* n. at 84-85 (describing the hanging of two Frenchmen and a Chilean at Hangtown in 1849 as a “horrible tragedy” and the work of an “infuriated mob”).

¹⁶⁰ Bourne, *supra* at n. ; *see also* Enos, *supra* n. at 16th letter (no page numbers) (saying of a miners trial he witnessed, “[t]he men who conducted te proceedings of the trial and execution cold not be classed as a mob” because they were “as quiet and orderly as is any tribunal of justice anywhere”).

¹⁶¹ *Judge Lynch* ALTA CALIFORNIA, Oct. 13, 1850

¹⁶² Huntley, *supra* n. at 136. *See also* ERNEST DE MASSEY, A FRENCHMAN IN THE GOLD RUSH Trans. Marguaerite Eyer Wilbur 172 (San Francisco, 1850-1851) LC (describing the hanging of Frederick Roe in Sacramento on February 25, 1851, as lynch law and the work of the mob).

¹⁶³ Charles Henri Doriot, Letters to Family, 1849-1851, Letter to Victor Doriot dated July 12, 1851 (unpublished manuscript in the Bancroft Library, catalogued at Mss 85 70 C) (punctuation added).

“mob law” even by supporters of lynch law. “The mob were for hanging one poor Vattel without judge or jury,” she wrote, “and it was only through the most strenuous exertions of his friends that [his] life ... was saved.”¹⁶⁴ The ironic phrase, “their majesties the mob,” was one of her favorites. “Their majesties the mob ... insisted upon shooting poor Harry,” for instance, because he attempted suicide, and almost mobbed F. for bandaging Harry afterwards.¹⁶⁵

In short, everyone condemned mob law or mob action, by which was meant the punishment of an individual without a jury trial. (Assuming, of course, that the individual was an American of European descent.) The judge, jury, counsel, separation of verdict and sentencing, and the delay before the execution of the sentence, made lynching “legal” in the eyes of its supporters, at least until there were proper courts. They were safeguards for all members of the community accused of crime. (Outsiders, as we have seen, were not afforded the same protection.)

The most familiar form of organized crime control on the frontier is, of course, vigilantism. Vigilantes (also known as Regulators, Rangers, or Volunteers) were a group of prominent citizens (“the respectable people”¹⁶⁶) who organized themselves to deal with a crime wave or a gang of bandits. Vigilantism was aimed at horse thieves and others who preyed on frontier communities. The vigilantes’ goal was to rid the neighborhood of these predators rather than to bring them to justice. Sometimes this required killing one or several members of the gang, but if this sufficed to drive the others away, the vigilantes were satisfied.¹⁶⁷ They did not seek to punish all of the members of the gang.

This practice of vigilantism as far back as 1763, when settlers in Pennsylvania formed a company of Rangers to protect them against Indian attacks.¹⁶⁸ A company or committee formed to deal with a particular threat

¹⁶⁴ SHIRLEY, *supra* n. at 274:

¹⁶⁵ *Id.* at _____. See also CHAUNCEY L. CANFIELD, THE DIARY OF A FORTY-NINER 105 (entry for August 24, 1851, using the case of a mob that hung an innocent man as an illustration of his point that the miners, “swayed by their passions, inflict penalties, even to sentences of death, on insufficient evidence.”)

¹⁶⁶ CUTLER, *supra* n. at 57 quoting from a letter published in the South Carolina Gazette, September 2, 1768 (stating the respectable people of the remote part of the province met and adopt a Plan of Regulation).

¹⁶⁷ See Brown, *History*, *supra* n. at 87 (stating that vigilante movements often obtained their ends by executing only one or two persons).

¹⁶⁸ CUTLER, *supra* n. at 41.

is characteristic of vigilantism. The members sometimes drew up a written agreement of the terms and purposes of their organization, which lasted for some weeks or months until it completed its self-appointed task and then disbanded.

The modern view is that vigilantism cannot be distinguished from lynching, that vigilantes were simply lynch parties.¹⁶⁹ Whether or not that is right depends in part on what is meant by lynch parties. Certainly vigilantism was a form of lynching in its broadest sense of extralegal punishment, but it was more organized and more formal than other kinds of lynching.¹⁷⁰

California also had its vigilance committees. The three big San Francisco Vigilance Committees (1849, 1851, and 1856) generated voluminous records and was the subject of many newspaper accounts and later scholarship.¹⁷¹ All three were formed to deal with gangs of one sort or another. They have come to stand for gold rush law in general.

The San Francisco Committee of Vigilance of 1851 was the first ever of that name; it invented the term “vigilance committee.”¹⁷² Other towns followed its example.¹⁷³ Stockton, Marysville, Sacramento, Sonora had their own committees before the end of the month; Nevada City followed suit in July.¹⁷⁴ The most notable activities of these “branches” appear to have been assisting the San Francisco Committee by sharing information and hunting down the criminals who had escaped the metropolis.¹⁷⁵ Other than this, they left little trace in the record.¹⁷⁶ These

¹⁶⁹ Johnson, *supra* n. at 560 (stating that Bancroft and Richard Maxwell Brown distinguished between vigilantes and lynch parties, but that this distinction is not evident in the primary sources).

¹⁷⁰ Brown, *History, supra* n. at 86 (stating that vigilante movements were generally “organized in hierarchical command fashion and usually had a constitution, articles, or a declaration to which the members would subscribe”).

¹⁷¹ See WILLIAMS, SAN FRANCISCO, *supra* n. ___ for the most detailed history of the Committees of 1849 and 1851.

¹⁷² John Joseph Stanley, Vigilance Movements in Early California, in *Law in the Western United States*, Gordon Morris Bakken, ed. 70 ().

¹⁷³ WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 374-75 (noting that the San Francisco Committee of Vigilance encouraged other communities to organize similarly and that by December Vigilance Committees existed in nearly every county).

¹⁷⁴ WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 376-378.

¹⁷⁵ *Ibid.* See also MARYSVILLE HERALD, Dec. 20, 1851 as quoted in WILLIAMS, SAN

branch committees were short lived, like their model in San Francisco.¹⁷⁷

Several of the vigilante committees adopted constitutions modeled on that of San Francisco.¹⁷⁸ One glance at the resolutions passed at the first meeting of the Sonora Vigilance Committee shows how different its organization was from that of a miners' meeting.¹⁷⁹

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

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

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

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

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

Where miners' meetings wanted to be inclusive,¹⁸⁰ only men who had been "unanimously elected" could join the Sonora Committee. (Christman

FRANCISCO at 375 n. 51 (stating that "[o]ther cities in the interior have imitated the example of San Francisco and have instituted Branch Vigilance Committees who act in concert with the parent body").

¹⁷⁶ The Sonora Committee punished some criminals with floggings, but the details are sketchy. WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 378-379 (noting inconsistencies in the secondary sources about whether the Committee's punishments were excessive or restrained); CHRISTMAN, *supra* n. at 203 (reporting that report that under the auspices of Sonora's Vigilance Committee's tenure, all suspects (unnamed) were tried to a jury, and that the Committee hung at least one horse-thief and whipped and banished a number of others).

¹⁷⁷ WALDREP, *supra* n. ___ at 52 (stating that the San Francisco Committee of Vigilance of 1851 was founded on June 9 and had stopped operating by October, although the executive committee continued to meet until May, 1852). The Vigilance Committee of Marysville handed over its affairs to a standing committee of ten in October, 1851 (WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 376).

¹⁷⁸ WILLIAMS, SAN FRANCISCO, *supra* n. ___ at 376 (Marysville) and 379 (Nevada City).

¹⁷⁹ CHRISTMAN, *supra* n. at 191 (these resolutions were passed on or around June 28, 1851).

¹⁸⁰ See Kleinhaus, *supra* n.

calls the committee “a full police of our best citizens.”) Where miners’ meetings met spontaneously and dispersed when their work was done, the committee created a standing police force. Where miners’ meetings were open, the committee was committed to secrecy.

Another distinguishing feature of Vigilance Committees in California is that the active ones were all based in towns.¹⁸¹ Although we are told that many mining camps also formed Committees of Vigilance in 1851,¹⁸² there are almost no records of such committees in action, either in 1851 or in later years. As WILLIAMS says, the references to these committees are “so brief and so disconnected” that it is impossible to say anything about them.¹⁸³ The miners did not need to delegate policing and criminal prosecutions to a committee, since they did everything themselves. When a suspected murderer or thief had to be hunted down, there were almost always volunteers to do so. (Only once or twice did they send a vigilance committee to make an arrest, as at Indian Bar in 1852.¹⁸⁴) When gamblers became too troublesome, the miners passed resolutions to expel them, and they themselves backed those resolutions with force. There is no reason to believe that the miners disapproved of the vigilance committees of the city, but they were probably no more likely to defer to a vigilance committee than to legal authorities in the mines.

In short, the proponents of popular trials argued that the miners’

¹⁸¹ Sonora, for instance, was incorporated on May 1, 1851, and was the county seat of Tuolumne. See www.sonora.com

¹⁸² CHRISTMAN, *supra* n. __ at 190 (“[i]n almost every camp and city in the country, the most respectable portion of the community have formed what are called “Vigilance Committees” which appoint officers, organize courts, catch rascals, try them and, when found guilty, punish them by whipping, banishing or hanging”); DELANO at 126 (“Vigilance Committees were formed even in the mountains, at nearly every extensive digging”). MRS. JOSEPHINE ROSANA LECOUVREUR, FROM EAST PRUSSIA TO THE GOLDEN GATE, BY FRANK LECOUVREUR; LETTERS AND DIARY OF THE CALIFORNIA PIONEER, ed. and trans. by Julius C. Behnke (“branch committees of the vigilance organization were established throughout the state and many a criminal fugitive from justice was caught in a far away hiding place of the mining districts in the Sierras”). See also WILLIAMS, SAN FRANCISCO, *supra* n. at 383 n. 77 on references to vigilance committees in mining camps.

¹⁸³ WILLIAMS, SAN FRANCISCO, *supra* n. at 383 (stating that it is impossible to say whether these committees were permanent or temporary).

¹⁸⁴ SHIRLEY, *supra* n. at 267-274. See also BORTHWICK, *supra* n. at 317-318 (reporting that two members of the vigilance committee of Moquelumne Hill came to the author’s camp to __); HUNTLEY, *supra* n. at 251-254 (reporting the miners of Columbia appointed a twelve man vigilance committee to organize the expulsion of Asiatics and South Sea Islanders from their district and to correspond with other camps).

courts were not mobs, because the miners gave the suspect a jury trial and the right to make a defense. Distinguishing lynching from mob action was another way of saying that lynch law was indeed *law*, though of an unorthodox kind.

Lynch trial also differed from vigilance committees in many respects; the former were less formal, less secretive, and less likely to be infiltrated by the very wrongdoers they were meant to combat.¹⁸⁵ This relative openness was appropriate for the trial and punishment of members of the community. The vigilance committees of San Francisco and of the frontier before and after the gold rush were formed to deal with a single threat and then disband, whereas Judge Lynch was always open for business.

II. POPULAR TRIALS JUSTIFIED

Lynchings and vigilantisms everywhere in America were justified in terms of popular sovereignty and the right to revolution, and this was true in California as well.¹⁸⁶ James Cutler wrote in his study of lynch law, that “[i]n a monarchy or highly centralized government ... the law is made for the people and enforced against them by officials who are in no sense responsible to them.” But “[i]n a democracy with a republican form of government ... the people consider themselves a law unto themselves.” The people in America were sovereign and therefore they *were* the law. “To execute a criminal deserving of death is to act merely in their sovereign capacity, temporarily dispensing with their agents, the legal administrators of the law.”¹⁸⁷ Nowhere was this principle taken so literally or expressed so formally, however, as in California.

Every time a new mining camp formed, the miners held a meeting to enact a mining code. This was implicitly an assertion of popular sovereignty and a number of codes made the claim explicit by opening with what may well have been a reference to the opening words of the U.S. Constitution, “we, the miners of Such-and-such District, do ordain and establish the following rules and regulations.”¹⁸⁸ One code of a

¹⁸⁵ The vigilance committee of Indian Bar, for instance, included some of the rowdies who terrorized the camp. See Shirley, *supra* n. at ___.

¹⁸⁶ See Brown, *History*, *supra* n. at 103 (stating that vigilantes frequently claimed the justification of popular sovereignty and the inalienable right of revolution); Johnson, *Vigilance and the Law*, *supra* n. at 566 (same).

¹⁸⁷ CUTLER, *supra* n. at 269

¹⁸⁸ E.g. “We the citizens of Rich Gulch..... in Convention assembled do hereby enact the

somewhat later date, March 5, 1864, went further and echoed the preamble to the Constitution in full:

We the miners and citizens of Warren Hill, in order to form a more perfect and correct understanding among ourselves and all others that may come among us, respecting our rules of mining our claims of ground, the condition of becoming peaceable and permanent possession therein, to establish Justice and secure harmony, do enact and draft the Laws as follows.¹⁸⁹

Here the miners viewed themselves as a convention or an assembly of the people, a venerable institution in American history. Far from regard the practice as extra-legal, one young miner wrote in 1852, It “show[s] how firmly republican principles are engrafted upon the national manners.” At the miners’ meetings, he said, “Every man was a legislator yes! more than a congress man for he had a vote & what was better made more than 8 dol[lars] a day.” True, the laws they enacted sometimes conflicted with those of the United States, “but the sovereigns claimed the privilege of doing that inasmuch as congress in making laws had never anticipated the peculiar circumstances under which Californians labored and consequently had never made laws adapted to the country.”¹⁹⁰ This sort of panegyric to the miners ability to organize and govern themselves is ubiquitous in the mining literature, and indeed it was a remarkable accomplishment. It was an facet of the American character that even the foreigners admired.¹⁹¹

Two mining codes included sections to criminal law, indicating that the miners believed they had the power to pass criminal laws as well as mining regulations.¹⁹² The Jacksonville Code enacted at a miners

following laws to govern us in regard to Quartz Mining." By Laws of the Quartz Convention Held at Rich Gulch, Nov. 15, 1851 in Clarence King, Tenth Census of the United States, 1880. Volume 14, The United States Mining Laws and Regulations Thereunder 273 (1885); “[W]e the miners of Dry Creek in mass meeting assembled do resolve as follows" Dry Creek Rules and Regulations, April 7, 1860, *Id.* 300. “we the miners of this district do ordain and establish the following Rules By-laws and Regulations ...” Plymouth Miners’ Laws, February 11, 1863. *Id.* 308.

¹⁸⁹ *Id.* at 314.

¹⁹⁰ Wood, Diaries *supra* note . Letter dated June 25, 1852(NEED permission to publish)

¹⁹¹ HOLINSKI, *supra* n. at 158-69.* BORTHWICK, *supra* n. at 369 (stating that Americans are "certainly of all people in the world the most prompt to organize and combine to carry out a common object").

¹⁹² The Mariposa Law Code of March 1, 1851, signed by 215 individuals, extracts of which are published in JEAN-NICOLAS PERLOT, GOLD SEEKER: ADVENTURES OF A

meeting held for the purpose on January 20, 1850 is particularly detailed for such an early date.¹⁹³ Its section on criminal procedure reads as follows:

ARTICLE IV.

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

ARTICLE V.

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

The penalty section provides that the penalty for “willfully, maliciously, and premeditatedly take the life of another” is to be death by hanging. Penalties for the theft of a beast of burden or theft of \$100 or more from a tent or dwelling is punishable by death by hanging, while any person convicted of theft of property worth less than \$100 “shall be punished and disgraced by having his head and eye-brows close shaved, and shall leave the encampment within twenty-four hours.”¹⁹⁴ That the miners of Jacksonville adopted a such a code at all indicates that they felt they had the same authority in criminal as in civil matters, and is clear from Article V, that they planned to conform as closely as possible to the procedures of the common law courts.

James Cutler was thus repeating an old idea when he wrote in the conclusion of his study of lynch law, that “[i]n a monarchy or highly centralized government ... the law is made for the people and enforced against them by officials who are in no sense responsible to them.” But “[i]n a democracy with a republican form of government ... the people consider themselves a law unto themselves.” The people in America were sovereign and therefore they *were* the law. “To execute a criminal

BELGIAN ARGONAUT DURING THE GOLD RUSH YEARS (Helen Harding Bretnor, trans. Howard R. Lamar ed.) 104-105 (1985) (stating also that the code was passed to "replace the missing laws of the United States [that is, not yet promulgated in California]"); and the Jacksonville Code of January 20, 1850 *Reproduced in* DANIEL B. WOODS, SIXTEEN MONTHS AT THE GOLD DIGGINGS 125 (New York, 1851; reprinted New York, 1973). Also in LC collection

¹⁹³ *Supra* n. ____.

¹⁹⁴ Articles XII-XIV, pp. 128-129.

deserving of death is to act merely in their sovereign capacity, temporarily dispensing with their agents, the legal administrators of the law.”¹⁹⁵

The miners also saw the jury as the most fundamental procedural safeguard for the accused. Walter Colton, who as *alcalde* of Monterey empaneled the first jury in California, wrote in 1846 “If there is any thing on earth besides religion for which I would die, it is the right of trial by jury.”¹⁹⁶ Confidence in jury verdicts was high; as the *Californian* newspaper said in its report of one of the first lynchings, “the second sober thought of the people is always right and never wrong.”¹⁹⁷

In practice, the line between a jury and self-help, on the one hand, and trial by the crowd, on the other, was not so clear. A trial was virtually indistinguishable from self-help when in a group of gamblers sought revenge for the killing of one of their own. They pursued the killer, a man named Kelly, and “took him & tried him & was to hang him the next day.”¹⁹⁸ The miners rescued Kelly from the gamblers, however, and planned to hand him over to the authorities. Another possible example occurred when a group of Americans and one Chilean were traveling together. A shovel went missing, and the Americans suspected the only foreigner among them. “Without any further ado the barbarians became the jury,” wrote Vincente Pérez Rosales.¹⁹⁹ The Americans were in the process of hanging the Chilean when Rosales came by and managed to talk them out of it. If Rosales’s version of events is correct, then the victims were trying their own case. At the other end of the spectrum, suspects are sometimes said to have been tried by the miners’ meeting.²⁰⁰ This may be shorthand for “a jury selected by a miners’ meeting. There is at least one example of the crowd *en masse* serving as a jury, however, namely the second trial described by Buffum, above.²⁰¹ Here the “jury”

¹⁹⁵ CUTLER, *supra* n. at 269

¹⁹⁶ WALTER COLTON, *THREE YEARS IN CALIFORNIA* 53 (New York, A.S. Barnes & Co.; Cincinnati, H.W. Derby & Co., 1850).

¹⁹⁷ *The Gold Fever Abroad*, *CALIFORNIAN* September 9, 1848.

¹⁹⁸ Richard Brown Cowley, *Richd B. Cowleys Log 80 vs.* (unpublished manuscript in the Huntington Library, catalogued at HM 26652).

¹⁹⁹ Rosales, *supra* n. at 64.

²⁰⁰ *E.g.* DAVID, *GOLD RUSH MERCHANT*, *supra* n. at pt. 77 (man accused of stealing a pick was tried at a miners’ meeting and banished); *ALTA CALIFORNIA* July 7, 1851 (John Nelson, accused of homicide, tried by the miners and sentenced to death).

²⁰¹ BUFFUM, *supra* n. .

was the entire crowd of 200 men. The line between mob action and jury trial becomes blurred.

There were, of course, also people in the mines who condemned lynching from the start, like Buffum himself.²⁰² Franklin Buck thought the young man he had seen hung was guilty and deserved his fate, but that lynch law as an institution was too dangerous. "Heaven preserve me from falling into the hands of an excited people," he wrote. "It is a hard tribunal and if circumstances are against you, however innocent you may be, you stand no chance. Give me a dungeon in the Tombs and all the police of New York first."²⁰³ David Pierce Barstow was similarly converted when he witnessed the infamous Downieville lynching "Since that time, I have no sympathy with, nor confidence in mobs, he wrote, "I prefer the law for redress of grievances."²⁰⁴ The PLACER TIMES newspaper condemned lynching²⁰⁵ as did the short-lived Sacramento *Index*, which, however, had to close as a result.²⁰⁶ And finally, the miners themselves, in their letters home, knew that their friends and families in the East would disapprove. As Josiah Royce noted, there is more than a hint of defensiveness in their descriptions lynching, which were addressed largely to family and friends back home.²⁰⁷

III. POPULAR TRIALS ON THE OVERLAND TRAIL AS LYNCH LAW

The orderly and sober punishment of crime by laymen on the overland trail from Missouri was related to criminal law in the mines, and like the earliest lynchings in the mines, represents the ideal to which proponents of lynch law aspired. Many of the emigrants made their way to the diggings and become the miners who participated in the lynchings there. The earliest trains set off for Oregon and California before the gold rush, so they clearly did not draw on the California experience; rather, some of these overland immigrants were among the first Americans to

²⁰² See *supra* n. and accompanying text. See also SHIRLEY, *supra* n. at 151-162.

²⁰³ BUCK *supra* n. at 111.

²⁰⁴ BARSTOW, *supra* n.

²⁰⁵ PLACER TIMES Aug, 18, 1849.

²⁰⁶ EDWARD C. KEMBLE, A HISTORY OF CALIFORNIA NEWSPAPERS, 1846-1858, Reprinted from the Supplement to the Sacramento Union of Dec. 25, 1858, Helen Harding Bretnor, ed. 145 (Talisman Press, Los Gatos, 1962) (stating that the *Index*'s severity on the subject of mob violence eventually caused its failure).

²⁰⁷ ROYCE, *supra* n. at 249.

arrive in the gold mines, bringing with them their experience of popular justice.²⁰⁸ Among them, perhaps, was the Oregon man who served as sheriff at the early California lynching described above, to whom his fellow miners turned for information about proper procedure.²⁰⁹ As late as August of 1850, another miner attributed the good order in California to the Oregon men in California, who gave “a character & tone to society and things here.” He said that they had gone after a man who had stolen \$3,000 in gold, “caught him, tried him, & sentenced him to be hung.” Through the desperate efforts of his friends, the sentence was reduced to 50 lashes, having his ears cut off, and banishment from the mines.²¹⁰

Many of the later emigrant companies were bound straight for the mines, with names like “The California Banner Company,”²¹¹ and their members also brought to the mines their experience of law and order on the overland trail.

Information and influence also flowed the other way; the emigrants who set out in 1849 and later had heard accounts of lynch law from their acquaintances in California or through published accounts. They described the overland trail itself as “in California,”²¹² and as soon as they left Missouri, they said, “California laws” prevailed.²¹³ Whether the emigrants would have considered their punishment of wrongdoers “lynching,” either at the time or in hindsight, will be discussed shortly.

John Phillip Reid has studied every aspect of law on the overland trail and demonstrated that the settlers “carried with them their traditions, their customs, and their laws.”²¹⁴ With respect to criminal law, this faithfulness to American legal traditions manifested itself in an attempt to reproduce as closely as possible the forms and procedural safeguards of a common law trial. In murder cases, the emigrants went to great lengths to

²⁰⁸ See e.g. Bryant, *Journal*, 60-62, discussed by REID, *supra* n. at 110-111.

²⁰⁹ Kleinhaus, *supra* n. .

²¹⁰ William W. Miller, *Voyage to California*, 175* (unpublished manuscript in the Beinecke Library, catalogued at WA MSS 1-199).

²¹¹ REID, *supra* n. at 113.

²¹² REID, *supra* n. at 47 (quoting Swan, *Letters*).

²¹³ REID *supra* n. at 195 (emigrants punishing a thief tell him that “he was a California emigrant & must submit to California laws.)

²¹⁴ REID, *supra* n. at 230; see also JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980).

assemble jurors from other companies who were strangers to the parties involved and had not witnessed the events in question; and, conversely, emigrants from other companies were willingly served as jurors.²¹⁵ The defendant's own train, and the one, two or more trains who provided jurors, stopped for trials that could last a whole day, at an enormous cost to themselves in time and resources. If there was a lawyer or judge present, he was asked to take a lead in the proceedings (unlike in the mines where lawyers were regarded as impediments to justice), and they always allowed the defendant to hire counsel.²¹⁶ Many of the forms of a proper trial were observed; the judges instructed the jurors, the jurors retired for deliberation, the jurors submitted a written verdict to the court, and they used the phrases and vocabulary of American courts.²¹⁷ A number of defendants were acquitted on the grounds that they acted in self-defense or had been provoked.²¹⁸ In short, everything possible was done to assure the legitimacy and fairness of the trial; the offenders did their best to deal with offenders "not by vengeance but by applying the remembered trappings of a partly understood legal process."²¹⁹

Reid states that the emigrants followed ordinary American criminal procedure as closely as possible in part because many were from settled parts of the United States and were not used to extra-legal punishment. Their attitude towards law was that of Americans generally, rather than of pioneers in particular. "One small lesson they teach us is how nonfrontiersmen acted on the frontier," Reid writes. "The broader historical lesson they teach is of Americans who consciously strove to carry beyond the line of forward settlement a mode of social behavior and legal conduct which they had learned during a remembered youth in the towns and cities they left behind in body but not in spirit."²²⁰ Reid in fact suggests that criminal trials on the overland trail were not lynchings but a rare instance of Americans carrying regular common law institutions with them to the best of their ability. He finds the strongest evidence of this is the number of acquittals.²²¹

²¹⁵ REID, POLICING THE ELEPHANT, *supra* n. at 119-121.

²¹⁶ *Id.* at 117-8.

²¹⁷ *Id.* at 126-127.

²¹⁸ *Id.* at 141.

²¹⁹ *Id.* at 233.

²²⁰ *Id.* at 232.

²²¹ *Id.* at 141.

There is at least some evidence, however, that what happened on the trail was in fact considered “lynching,” beginning with the references to the trail as being in California and subject to California law. Reid notes, for instance, that “[w]hen an emigrant used the expression “lynch law” it seldom meant condemnation.” As an example, he quotes an emigrant who wrote, “[s]ome of the men on the plains seemed to think there was no law on the frontier and that they could do as they pleased, but that is not a country for that way of doing things, for Judge Lynch invariably gave justice.”²²²

Similarly, a fairly typical trial, at which all of the emigrants present served as jurors, resulted in an acquittal. Our source commented, “The emigrant would have been cleared by a regularly organized court. Lynch law metes out justice under such circumstances. But many a man has been lynched whose provocation was as great as in this instances.”²²³ This appears to mean that in this case lynch law reached the same result as an ordinary court would have done, but that the defendant was lucky nonetheless because the case could easily have come out the other way.

“A third emigrant wrote, “Judge Lynch is a hard faced old fellow, but I guess his judgment is generally good and I would rather trust him than any Judge, sitting in any Civil Court.”²²⁴

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

IV. POPULAR TRIALS ELSEWHERE ON THE FRONTIER

One would expect that popular trials like those in California and on the overland trail were also held elsewhere on the frontier. There must, after all, have been some means of punishing crime on the frontier, as

²²² REID, *supra* n. at 197.

²²³ *Id* at 147.

²²⁴ *Id* at 138-139. Reid calls the trial in question a “miscarriage of justice,” in part because it took place in Iowa, which had a government. It is at least clear that the writer approved of lynch law.

there was on the overland trail. The institution that immediately springs to mind is the vigilance committee. But, in general, vigilantism is described as being directed against outsiders - cattle rustlers, brigands, and gangs who preyed on the pioneer settlers. The aim of vigilantes was to drive off these predators rather than to punish them, although the “driving off” might involve a hanging or two. Vigilantes are sometimes said to have tried outlaws before banishing, whipping, or hanging them,²²⁵ but often they did not.

What is missing from the picture is what the frontier population did when one of their own did commit murder or assault or theft. The regulators do not seem to have dealt with crimes internal to the local community, nor does “the mob” appear to have dragged suspects from their homes and hanged them. I think it probable that popular trials, like those on the overland trail and in the California gold mines, were used to try crimes within the community.

Testing this hypothesis is rather difficult. One cannot search databases and indexes for the word “lynching,” because the word was not in common use before 1835 and it was applied indiscriminately to every kind of group violence after 1835. Moreover, since each community improvised the process, it must have varied from one place to the next. Nevertheless there is evidence that members of the community who were accused of crime were given some of the benefits of a common law trial - most notably, a jury.

The lead mines of Iowa provide some examples because they, like the California gold mines, attracted a considerable population before Iowa had an adequate criminal justice system.²²⁶ “For a time “Lynch Law” was the only one recognized,” wrote John Barber. In 1834, a miner named Patrick O’Connor shot and killed his partner. The people of Dubuque asked the authorities in Michigan, on the other side of the river, to take on the trial and punishment of the suspect. Their request was refused, however, because Iowa was beyond the jurisdiction of the Michigan courts. The people “consequently met, selected among themselves a judge and a jury, tried the man and, upon their own responsibility, hanged

²²⁵ See e.g. JOHN WARNER BARBER, *OUR WHOLE COUNTRY; OR, THE PAST AND PRESENT OF THE UNITED STATES, HISTORICAL AND DESCRIPTIVE* (Cincinnati, H. Howe, 1861) (also available on LC) (stating that the regulators “generally proceeded with some of the formalities commonly used in administering justice, the accused being allowed to make a defense, and witnesses examined both for and against him”).

²²⁶ See Paul Walton Black, *Lynchings in Iowa*, 10 *IOWA J. OF HISTORY & POLITICS* 151-254 (1912).

him.²²⁷ In its account of the case, *Niles Register* stated the proposition that would be invoked in California, namely that “the people are the basis of law, even where no written law can be applied.”²²⁸ Patrick O’Connor’s trial and punishment was only one of a number of such incidents in Iowa at about that time.²²⁹

Compare this to what I would call a vigilante action, six years later when half of the population of Belleville consisted of murderers, horse-thieves, and counterfeiters. The law-abiding citizens fought an intense battle to capture the criminals. The question of their punishment was put to a vote; 42 voted for whipping and 38 for hanging. The prisoners were given 25 to 75 lashes each and were put into boats and set adrift on the river. “Animated by the example of Bellevue, the citizens of Rock River, Ill., Linn, Johnson, and other counties in Iowa ... expelled the gangs of robbers from their midst, with much bloodshed.”²³⁰

Another frontier trial took place near Balsam Lake, Minnesota in 1848. A feud arose between two rival whiskey sellers, Tornell and Miller, which eventually resulted in the murder of Tornell and a visitor. An Indian was suspected and was tried by a procedure very like that used in California at about the same time. A certain H.H. Perkins acted as judge, a jury was impaneled, and “a prosecuting attorney and counsel for the accused were appointed.” The suspect confessed to the murder and said that Miller had hired him. The jury brought in a verdict of guilty and “[b]y unanimous consent” the murderer was hanged the next day.²³¹ Miller was given 15 lashes and was put on a steamboat and told not to come back, an unexpectedly lenient sentence.²³²

²²⁷ FREDERICK MARRYAT, *DIARY IN AMERICA* Chapter 46 (1839). This incident was also described by Barber, *supra* n. at 1236 (“a court was organized, jury impaneled, trial had, criminal found guilty, and he was executed”); CHARLES AUGUSTUS MURRAY, *TRAVELS IN NORTH AMERICA DURING THE YEARS 1834, 1835 & 1836*, 106-107 (London, R. Bentley, 1839) (similar). *See also* WILLIAMS, *SAN FRANCISCO*, *supra* n. at 15 (stating that the miners appealed to the governor of Missouri and even President Jackson, both of whom replied that the matter was beyond their authority).

²²⁸ WILLIAMS, *SAN FRANCISCO*, *supra* n. at 16 (quoting 46 *NILES REGISTER* 352 [1834]).

²²⁹ Black, *Lynchings in Iowa*, *supra* n. .

²³⁰ *Ibid* at .

²³¹ WILLIAM HENRY CARMAN FOLSOM, *FIFTY YEARS IN THE NORTHWEST* 89 ([St. Paul], Pioneer Press Co., 1888). The same incident is described in E.S. SEYMOUR, *SKETCHES OF MINNESOTA, THE NEW ENGLAND OF THE WEST* 206 (New York, Harper & Brothers, 1850).

²³² Folsom, *supra* n. at 89.

Both the Dubuque and the Minnesota incidents were called the work of Judge Lynch by those writing shortly after the event.²³³ Frederick Marryat used the 1834 Dubuque case to illustrate his point that “Lynch law” in its original state different from the lynchings of his own day (1839) in that it was “based on necessity” and was “regulated by strict justice.”²³⁴

One of the best-documented popular trials on the frontier was that of George Ives in Nevada City, Montana, beginning on December 19, 1863.²³⁵ It lasted three days. A crowd of several hundred first voted on the procedure to be followed in this case. After some debate, it was agreed that Ives would be tried before two twelve-person juries (one each from Nevada City and Junction, the nearest settlements), but the crowd itself would have the final say. A proposal to add a third jury representing Virginia City was voted down. Over a thousand men attended the trial itself. Ives had engaged four lawyers. They did their best, objecting forcefully to the admission of hearsay and irrelevant evidence, but the crowd overruled the objections. Ultimately, the juries split, 23 guilty to one not guilty, and the miners voted to hang Ives. It had not been a model trial, but it was certainly not a summary punishment.²³⁶

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

²³³ See also STEPHEN J. LEONARD, *LYNCHING IN COLORADO, 1859-1919*, 18 (2002) (describing relatively orderly lynchings, some ending in acquittal, in the 1820s).

²³⁴ MARRYAT, *supra* n. at _____. At the time he was writing in 1839, however, Marryat believed lynch law had become an abomination and “a violation of all law whatever.”

²³⁵ FREDERICK ALLEN, *A DECENT, ORDERLY LYNCHING* (2004*); HELEN FITZGERALD SANDERS AND WILLIAM H. BERTSCHE, JR. EDS., *X. BEIDLER: VIGILANTE* (1957) (account of the affair by Wilbur Sanders, the lawyer for the prosecution of Ives).

²³⁶ R.E. Mather and F.E. Boswell, *Gold Cam Desperadoes* 147 stress the flaws in the trial. They point to the procedural flaws, an “atmosphere of predetermined guilt,” and the heightened emotion of the crowd. Sanders, the prosecutor, however, doubted seriously whether he could get a conviction from which we must conclude that this was more than a show trial (SANDERS & BERTSCHE, *supra* n. ____).

purpos of arresting thieves & murderers & recovering stollen property” and swore to reveal no secrets and never to desert one another. Thus the most famous Montana Vigilante Committee was formed. Here the difference between a popular trial and vigilantes is explicit; the vigilance committee’s members were a small fraction of the population, their purpose was set out in writing, they took an oath of secrecy, and their trials would be more efficient than those of the people’s court.

Finally, we know that immigrants to Oregon held similar popular trials before the gold rush in California.²³⁷

There is, then, solid evidence of popular trials on the frontier that were significantly different from vigilantism. Naturally, there are many more references to lynch law as summary punishment without judge or jury.²³⁸ I would be surprised, however, if further study does not uncover more examples of popular trials by communities beyond the reach of the official courts.

V. FOREIGN VIEWS OF POPULAR TRIALS AND THE AUSTRALIAN GOLD RUSH

The necessity of lynch law and the right of the people to protect themselves may have been obvious to most American miners, but the rest of the world disagreed. The miners were right when they said that people in the East would not understand and would think the lynchers no better than their victim. As we will see below, the Australians were also horrified by the stories coming from the California gold mines and made it their first priority to prevent similar incidents in their own gold mines. Closer to hand, foreign miners in California roundly condemned the practice of lynch law, although they were as vulnerable to theft and murder as the Americans. Alexandre Holinski put his finger on the most glaring problem with lynch law as a system of law enforcement, namely, that the crowd,

²³⁷ Kleinhaus, *supra* n. at 5 ("Before proceeding with the trial the sheriff (a rough Oregon Man) said he had some experience both in Oregon and in California in certain lynch cases where the accused were condemned and hung"). *See also* FREDERICK ALLEN, *A DECENT, ORDERLY LYNCHING: THE MONTANA VIGILANTES* (2004) (describing a system of orderly trials that turned into a campaign of terror); Waldrep, *supra* n. (on popular trials at Bannack, Montana).

²³⁸ *See e.g.* the definitions of “lynch law” in the writings of visitors to the United States: TODD HENRY COOK, *NOTES UPON CANADA AND THE UNTIED STATES: FROM 1832 TO 1840* (Toronto, 1840) "Lynch law, or the union of judge and accuser in the same person, is a practice but too common in republics." JAMES LOGAN, *NOTES OF A JOURNEY THROUGH CANADA, THE UNITED STATES OF AMERICA, AND THE WEST INDIES* (Edinburgh, 1838) (lynch law authorizes rioters to hang up any one to whom they have a dislike").

which was lawmaker, judge, jury and executioner, acknowledged no limit to its power: “One can, unfortunately, compare the multitude exercising the *Lynch Law* to a ferocious beast,” he wrote. It was, in fact, the tyranny of the many, which might be preferable to the tyranny of a single man, in “that it is exercised only at rare intervals instead of being incessant,” but it was “no less a deplorable anachronism in the 19th Century and a stain on the coat of arms of American liberty.”²³⁹ American “popular sovereignty” was to Holinski the tyranny of the multitude.

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

Many a person who has never felt the least desire for revenge has involuntarily joined in the Lynch cry "hang 'im". An observer of such a California mob hanging can recognize the primitive urge in every man to see that which is rare and exciting even if revolting. What makes this hangman's procedure so terrible and barbarous is the rare phenomenon of the individual joining and assuming the attitude of the feverishly excited mob which is about to torture a victim without exact information concerning his deed.²⁴⁰

Americans witnessing the same events were not disgusted but awed by the power of the people. “They talk about the strong arm of law but in this country it is a mere farce compared to the might of the sovereign people,” said one who saw a Sacramento crowd of four to five thousand men demanding the immediate trial and execution of an accused thief.”²⁴¹

There is a fictional story that illustrates how a German author *hoped* Frenchmen would have behaved if they had been tempted to take

²³⁹ HOLINSKI, *supra* n. at 232 (Leipzig, 1853).

²⁴⁰ CARL MEYER, *BOUND FOR SACRAMENTO*, trans. Ruth Frey Axe, 141 (Claremont, Calif., Saunders studio press, 1938).

²⁴¹ Journal, Henry Sturdivant, (July 7, 1851) (unpublished manuscript in the Huntington Library, catalogued at HM 261).

vengeance on a criminal.²⁴² The French miners, in this story, had actually tied the hands of the accused and were about to string him up when, “from the midst of the crowd stepped a Frenchman, a large, fine looking young man with a black beard. He stretched his left hand toward the prisoner, and said in a voice full of emotion: “My friends, let this man go; the poor devil has had a sufficient scare as it is; after all he did not, I believe, have any intention evil enough to deserve death. So let him go; in the future he will be more prudent; besides, his death will not help matters at all.” After some initial protests, the crowd did release the culprit, because “kindliness, hastily stifled, must, in those ardent natures, soon reappear, and in the end win the victory.” Although this was all wishful thinking, it illustrates at least that the author, Gerstäcker, would like to believe that Europeans would not actually lynch one of their own.²⁴³

V. THE AUSTRALIAN GOLD RUSH

American attitude to lynch law is clearer when it is compared with responses to crime in other gold rushes. The Australian gold rush resembled the California rush in many ways; it occurred at the same time, beginning in 1851, and even involved some of the same miners - men who had worked in America but crossed the Pacific when this new opportunity arose.²⁴⁴ The mining rules adopted in Australia were virtually the same as those developed in California²⁴⁵ and the mines were equally rich.²⁴⁶

²⁴² FRIEDRICH GERSTÄCKER, *SCENES OF LIFE IN CALIFORNIA*, trans. George Cosgrave (San Francisco, J. Howell [1942]) First published in German in 1856; published in French translation in 1859. The English language version was translated from the French. It is also available on line in the Library of Congress American Memory Project at <http://memory.loc.gov/ammem/cbhtml/cbhome.html>. Gerstäcker’s book is identified as a work of fiction in GARY F. KURUTZ, *CALIFORNIA GOLD RUSH: A DESCRIPTIVE BIBLIOGRAPHY OF BOOKS AND PAMPHLETS COVERING THE YEARS 1848-1853* (1997).

²⁴³ See CORNELIUS COLE, *MEMOIRS* (NY 1908), who records an incident in which Americans took a suspect away from French miners because they thought the French crowd was too excited to be impartial; they tried this suspect before an American jury instead. The author suggests that the Americans were largely to blame for the whole incident.

²⁴⁴ Main primary sources include JOHN SHERER, *GOLD-FINDER OF AUSTRALIA* (London, Charles H. Clarke, [1853?]); EDWARD HAMMOND HARGRAVES, *AUSTRALIA AND ITS GOLD FIELDS* (London, H. Ingram and Co., 1855). Important secondary sources are DAVID GOODMAN, *GOLD SEEKING: VICTORIA AND CALIFORNIA IN THE 1850S* (1994); RODMAN W. PAUL, “*Old Californians*” in *British Gold Fields*, 17 HUNTINGTON LIBR. Q. 161 (1954); G.R. QUAIFFE, *GOLD AND COLONIAL SOCIETY, 1851-1870* (1975); and POTTS & POTTS, *supra* n. .

²⁴⁵ TRAIN, *supra* n. at 75 (regulations listed on miner’s license dated 1853 state that the maximum claim size was 144 square feet per miner). The maximum claim size in some places of eight foot square suggests greater efficiency than the Americans attained; one

Australians were categorically opposed to lynch law and government officials, private citizens, and newspapers frequently reported that there was no lynching in their mining camps. As explained below, however, when the miners caught a thief, they often whipped him or roughed him up in some other way. What distinguished Australians from the Californians is that they did not claim to be acting under color of law and they did not hang anyone. The Australians believed these differences were crucial and in a way they were.

From the moment gold was discovered in Australia in 1851, the government worried about what it meant for law and order in the colony. As David Goodman has shown, law and order to the Australian officials meant social stability, especially respect for law, institutions and class distinctions.²⁴⁷ Disorder could be summed up in one word: “California.” More specifically, the Australians hoped to avoid the supposed American conditions of republicanism, turbulence, violence, and, above all, lynch law.²⁴⁸ The newspapers wrote endlessly about barbarity of Californians and lynch law, and also about the good order and respect for law among Australian mines.²⁴⁹

The different attitudes towards lynch law are illustrated in an account, quoted by David Goodman, about an incident in Victoria.²⁵⁰ In the writer’s story, a crowd caught a robber but did not know what to do with him, since there were no police at the spot. “A voice came out of the crowd which unmistakably from its nasal drawl proclaimed itself to be Yankee, ‘do as we do in California. Lynch him.’” The crowd was silent.

Then a man, a noble earnest looking fellow he was, enquired,

foot partitions between the holes were used as walk-ways to carry away the dirt for washing elsewhere.

²⁴⁶ SERLE, *supra* n. at 36 (stating that at Eaglehawk in Victoria, where miners were making up to 10 oz per day, miners threw themselves on the ground and claimed as much land as their body could cover).

²⁴⁷ GOODMAN, *supra* n. at 66.

²⁴⁸ E. DANIEL POTTS AND ANNETTE POTTS, *YOUNG AMERICA AND AUSTRALIAN GOLD* 160-161.

²⁴⁹ Some modern authors echo this impression, e.g. Rodman W. Paul, *Old Californians* in 17 *BRITISH GOLD FIELDS*, HUNTINGTON LIBRARY Q. 170 (1954) (stating that in Australia “there was no attempt to enforce criminal law through miners’ juries and lynchings”).

²⁵⁰ GOODMAN, *supra* n. at 69.

“Where is the man who spoke last?” Then a tall lean looking fellow stepped forward ... “Hiram Jones, late of Californy and California born.” The previous speaker said in a quiet earnest way, “Look here, Hiram Jones late of California, California born. We are law abiding subjects of the British Queen Victoria, if a man is accused of breaking the laws of the Realm, if caught, he is handed over to proper judicial authorities to have a fair trial, if found guilty, he has to suffer the penalty. We have no sympathy with mob law in the Queen’s dominions nor do we, Hiram Jones, tolerate California ruffianism in this land.”

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

The Australians must not have understood California lynch law because, when they themselves caught a thief, they inflicted on him any kind of corporal punishments short of hanging. Our sources agree that there were no lynchings in the Australian mines,²⁵¹ but by this they mean no extra-legal *executions*. There were said to have been “many summary punishments” of thieves, including flogging, branding, and holding over a fire,²⁵² all of which were also penalties inflicted by lynch law. In other words, the Australian miners took their revenge on thieves, but did not pretend to be sitting as a court or to recognize lynching as a semi-permanent institution.

There were sometimes calls for hanging from a minority, although they were not heeded.²⁵³ In one account of a demand from the crowd to hang the thief, an honest man reproached the mob, reminding them that “whatever we do, there is a moral responsibility which, in our singular situation, ought to be considered as far more sacred than any legal one.”²⁵⁴ The miners were persuaded not to execute the thief, but they flogged with a half inch rope so that he could hardly walk. How is this not lynching? Of course, death is different. But also, the miners were in a community with no law, and killing a man unlawfully is murder; whereas whipping a thief is teaching him a lesson. The Australians did not pretend to be acting under color of law.

²⁵¹ *Id.* at 83.

²⁵² *Id.* at 83-84.

²⁵³ *Id.* at 83.

²⁵⁴ SHERER, *supra* n. at 67-68.

On the one hand, this was more high-handed than lynch law because groups took revenge on their own initiative, without any procedure, without delay, and without publicity. On the other, the Australian miners' unwillingness to see themselves as agents of the law averted the worst disasters of lynch law. What is interesting for our purposes is that, in the absence of government, the Californians believed it was their right and their duty to *become* the law, whereas the Australians believed their special virtue lay in not claiming that right.

CONCLUSIONS

Whether popular trials in California were surprisingly legitimate or surprisingly lawless depends on one's preconceptions. They were, at any rate, different from either lynchings or vigilantism in their familiar forms of summary punishment. Most notably, the accuser, judge, and jury were not one and the same; the verdict was sometimes "not guilty"; and the sentence was regularly reduced from hanging to whipping.

Once we know about these trials, they seem an obvious solution to the problem of dealing with crime in the wilderness. Indeed, the punishment of crime on the overland trail followed the same pattern, and there were at least some examples of similar trials on the frontier in earlier years. Yet this arrangement was unique to America. The Australians, in their gold rush, rejected such an arrogation of legal authority to themselves, though they indulged in self-help to a degree that would have been unacceptable in California.

Finally, it is striking that Americans from every part of the country approved of and participated in the popular trials in the gold mines. John Reid has suggested that the emigrants on the overland trail were faithful to American ideas of property and criminal justice because they took with them the values of the Eastern states. In other words, they were not frontiersmen. But it appears from the California sources that trial by Judge Lynch was a frontier phenomenon, not remembered law. Men from Oregon, Missouri, and Massachusetts all joined in the process.²⁵⁵ But, as Waldrep, has pointed out, it was because of this shared experience that it

²⁵⁵ It is conceivable that gold miners from the east had a civilizing influence, but this would be difficult to verify given the nature of our sources. See however WILLIAMS, *SAN FRANCISCO*, 157-8 n. 32, quoting BORTHWICK, *supra* n. at 149-150, who said that on the voyage home from California, miners from the eastern states were more orderly and considerate than those from states in the interior of the country. See also the bad behavior of Texans throughout.

took so long for the people of the North to see the lynchings of the Jim Crow era for what they really were.

SOURCES

The sources of information about crime and punishment in the California gold mines are, on the one hand, letters, diaries, and books written by the miners who were there; and, on the other hand, local newspapers, including ALTA CALIFORNIA, the PLACER TIMES, the *Stockton Times*, and the MARYSVILLE HERALD. This is a huge body of material. Gary Kurutz's descriptive bibliography of published accounts by the forty-niners and their successors is 700 pages long and the volume of the unpublished material is similar. The descriptions of crime and lynchings, however, are thinly distributed through these accounts like raisins in a poor family's pudding.

In principle, it is possible to read all of these first hand accounts. Reid did the equivalent for his book on crime and punishment on the Overland Trail; he cites over 350 different sources and must have read many more.²⁵⁶ I have not managed this feat, however. I spent a month in each of the main depositories of Western Americana: the Hunterian, Bancroft, and Beinecke libraries, reading as many manuscripts as I could in that time. I began with the earliest and moved on from there. Similarly, I consulted the published books that seemed most relevant, namely those written at an early date. The collection of gold rush memoirs on the Library of Congress website is invaluable because it makes rare books both accessible and searchable. I believe that I have seen most of the important accounts from 1849-1852, but I have also had to skip over a great many.

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

Of course, most punishments in the mines went unrecorded. The hundreds of men and women who kept diaries represented only a tiny fraction of the gold miners. They were not even truly representative of the mining population, since they were, by definition, literate and in touch with their families in the East. We never get the impressions of the roughnecks. Even the accounts we have are not entirely candid, in that

²⁵⁶ REID, *supra* n. at 245-289 (Short Title List).

they were edited for parents and sweethearts. On the other hand, the miners who kept diaries were at pains to explain and justify their actions, and thus particularly useful for a study like this one.

As for the newspapers, the PLACER TIMES said explicitly that it did not report all of the lynchings that were brought to its attention. "If a man has committed a crime been found guilty and received forty or fifty lashes, and then sent away not to return under penalty of death, we think the punishment quite sufficient," the editors wrote, "and it is useless to mortify innocent relatives and friends, both here and in the States, by the publication of such proceedings."²⁵⁷ It will never be possible to know how much crime was committed in the mines or how many lynchings took place.

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

For this reason, too, I have not used BANCROFT'S POPULAR TRIBUNALS.²⁵⁸ His footnotes are incomplete, so there is no control on the reliability of his sources. He also relied on interviews with miners in the 1870s, raising all of the problems of memory, faded and embellished. The same is true of Shinn,²⁵⁹ who also wrote to celebrate the achievements of the goldminers and downplayed their failings.²⁶⁰ Royce, on the other hand, wrote in reaction to Shinn and stressed the negative outcomes. Royce, unfortunately, relied rather heavily on the work of J. Tyrwhitt Brooks, now known to have been an invented account of someone who had never been to California.

Reliability of individual miners also varies considerably. Clear when one reads a diary stretching over years whether the author is an optimist, who sees everything around him in a positive light; a braggart, who exaggerates his own successes and his part in major events; or a pessimist or paranoid personality who believes most of the people around him are thieves. I have my doubts about the reliability of Carson²⁶¹; Ansel

²⁵⁷ PLACER TIMES September 15, 1849.

²⁵⁸ *Supra* n. .

²⁵⁹ *Supra* n. .

²⁶⁰ On the shortcomings of Shinn and Royce, *see also* WILLIAMS, SAN FRANCISCO, *supra* n. at 72, 155.

²⁶¹ *Supra* n. .

James McCall borrows several pages from E. Gould Buffum²⁶² and may, therefore, have plagiarized other passages. Newspapers had political leanings.²⁶³ I have put less weight on the authors whose work I believe to be least reliable. Kurutz is a good source for published accounts of the mines. He points out, for instance, that both Gerstäcker's and Tyrwitt Brook's books were works of fiction.²⁶⁴ The Library of Congress American Memory website also provides useful information about the individual authors reproduced.

²⁶² *Supra* n. .

²⁶³ KEMBLE, *supra* n. .

²⁶⁴ KURUTZ, *supra* n. at (re Gerstäcker) and at (J. TYRWHITT BROOKS, FOUR MONTHS AMONG THE GOLD MINERS IN ALTA CALIFORNIA.(1849))