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MINERS, VIGILANTES & CATTLEMEN: OVERCOMING FREE RIDER PROBLEMS IN THE PRIVATE PROVISION OF LAW

*Andrew P. Morriss**

Law is a good like food, insurance, or housing. Like other goods, it can and often should be provided by private entities. Yet law is usually regarded as the quintessential public good, so obviously public in nature that we need not even discuss its provision by anyone but the State. As Bruce Benson observed “[a]nyone who would even question the ‘fact’ that law and order are necessary functions of government is likely to be considered a ridiculous, uninformed radical by most observers.”¹ Even William Landes and Richard Posner, hardly apologists for the State, have concluded that law often must be publicly provided.²

Ultimately, the arguments for public provision of law turn on one aspect or another of the free rider problem. In essence this problem arises because it is difficult to exclude those who refuse to pay from the consumption of law. Thus, if you and I agreed to purchase “rule of law services” from a private firm, even those of our neighbors who refused to contribute a dime would reap some of the benefits of our services if only because they would

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More than the usual intellectual debts also need acknowledgment. I owe Walter Grinder and Leonard Liggio for the suggestion that I think about this area and encouragement in doing so. Randy Barnett’s lectures and writings on *Justice in a Free Society* first sparked my interest in these topics. Don Boudreaux, with whom I have discussed this topic for years and with whom I am co-writing a “theoretical” companion piece to this article (see *infra* note 7), has heavily influenced my views on this subject. Co-teaching a seminar on cooperation with Sue Helper over the past three years influenced this paper in many respects. I presented portions of this material at several years of Liberty and Society seminars sponsored by the Institute for Humane Studies, my fellow lecturers and the seminar participants have significantly influenced on my thinking, often pointing out gaps in logic which I otherwise never might have found. Particularly helpful comments at Liberty & Society seminars came from David Beito, Christine Blundell, Mark Brady, George Selgin, Loren Lomasky, Tom Palmer, Ralph Raico, Mario Rizzo, Jeremy Shearmur, and David Schmidtz. I also thank the following who suffered through various drafts and offered helpful comments: Terry L. Anderson, Bruce Benson, Don Boudreaux, Richard Epstein, Sue Helper, P.J. Hill, Jason Korosec, Robert Strassfield, Richard Stroup, Wendy Wagner, Steven Ware, Jonathan Entin, students in the CWRU Executive Doctorate in Management program, participants at the Akron/CSU/CWRU Legal Theory Workshop, and the 1997 Southern Economic Association session on private legal systems. Kathleen Mesel provided much needed research assistance. No one suffered more than Alice Hunt, who repeatedly transformed my scratchings into text.

1. BRUCE BENSON, *THE ENTERPRISE OF LAW I* (1990).

2. William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 237, 239, 241-42 (1979).

no longer need to worry about spillover violence from our less peaceful, nonlegal methods of settling disputes. Similarly, rules produced by our litigation could be used by others without payment. The net result could be too little law since many would opt to ride for free on the efforts of others.

Despite this seeming consensus on law's public nature, Americans frequently turn to private sources for law. During the development of the American West, private citizens often undertook to privately provide both rules and enforcement mechanisms where governmental systems were absent or ineffective. Some of these examples, like the placer mining districts, Montana cattlemen, and Montana vigilantes, provide positive lessons. Others, like the 1856 San Francisco vigilance committee and Wyoming cattlemen's "invasion" of Johnson County, provide negative lessons. These experiences with privately produced law answer questions about how some people overcame free rider problems in privately providing law and illustrate how to avoid substituting private for public monopolies. These lessons provide us with guidelines for shifting provision of at least some law provision functions of government to private entities.

Briefly, the Western experiences with privately produced, customary law suggest the following are important to successfully overcoming the free rider problems in private provision of law: First, customary legal systems work best when they enforce reasonably well defined rights generally recognized in the community as just. Second, private legal systems flourish spontaneously when they are given space to grow, making the ability to opt out of any State system crucial to their development. Third, removing distortions blocking private law, including pricing State legal institutions at their true costs, can significantly assist the growth of customary legal institutions. Fourth, customary law requires a set of skills and knowledge to succeed. Fostering these skills and disseminating this knowledge can enhance these skills. Finally, customary systems that reward treating others with respect are more likely to succeed.

I examine several case studies of non-state legal systems: Miners' law in California, Montana, and the Dakota Black Hills; two prominent vigilante movements in San Francisco in 1856 and Montana in 1863-64; and conflicts between cattlemen and settlers in the 1880s-1890s in Wyoming and Montana.³ I examine the lessons from Part II on how private law production can be enhanced in Part III and suggest how those principles can be applied

3. A note on sources: I have relied on a combination of secondary sources and participants and their contemporaries' accounts. This Article is not intended to be an exhaustive, definitive account of the events described. Rather I have set out to describe the events with sufficient detail to inform the theoretical analysis. Where there are disagreements among historians, I have noted those in the footnotes. More detailed source notes appear at the start of each section.

today to enable privately produced law to develop regarding the Internet, in Part IV. I also briefly examine the recent phenomenon of “common law courts” and conclude they do not meet the requirements for successful development of private law.

I. PRIVATE PRODUCTION OF LAW

Goods may be produced in many ways: Privately through market mechanisms, privately through non-market mechanisms, publicly through non-market mechanisms, or through some combination of these mechanisms. Law in the United States, and elsewhere, is produced through a similar range of methods.⁴ Public courts and legislatures operate side by side with private tribunals and trade associations. Both public courts and private tribunals decide cases and create “common law” rules. Both public legislatures and private associations create “statutory” rules. Some activities of private providers of law are highly regulated, some depend on the State legal system for enforcement, and others are entirely independent of the State. Bruce Benson classifies law into two broad categories according to its source: Authoritarian law and customary law. Authoritarian law is produced from the top down, does not require consent, and is characterized by a reliance on the threat of official force for its enforcement. Customary law, on

4. Lon Fuller argued that law should be “viewed as a direction of purposive human effort.” Under Fuller’s definition, law “consists in the enterprise of subjecting human conduct to the governance of rules.” LON L. FULLER, *THE MORALITY OF LAW* 30 (1964). (The primary alternative definition is John Austin’s: law as the command of the sovereign. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfred E. Rumble, ed. 1995). While such a definition has the virtue of simplicity, it is inadequate to describe the richness of the law.) Law thus has two primary elements: Rules of conduct and a mechanism for applying those rules. BENSON, *supra* note 1, at 11. “Law” is made up of many services: Rule production, dispute resolution, deterrence, investigation, enforcement, and punishment. Simply because these services are currently combined in a single package does not mean that they must be. Just as telephone service has been unbundled, so too could law be broken into discrete services. Individual service providers could provide some or all services or combine provision of particular services with other goods or services. For example, an auto insurance company could provide insurance, adjudication, and liability rules for its policyholders.

I want to stress that I consider law to be something defined without relation to the State—not only is law not the command of the sovereign, it need not involve the sovereign at all. In other words, the State is neither necessary or sufficient for law. This may appear at first to be a radical claim. It is not. Because Americans live in a society in which the State provides a large volume of law and because law professors work in buildings largely devoted to collections of State-provided law, it is easy to forget that most of the world’s population is neither blessed nor cursed with quite so much State-provided law. Moreover, despite the volume of State-provided law in the United States, most Americans happily conduct their lives with relatively few interactions with State-provided law. For many the norms of the workplace, neighborhood, religious community and peer group are far more influential. Thus it is important to emphasize “while it is certainly correct that rights and institutions can be enforced by a higher power, they can also evolve within the group, reflecting that group’s culture, norms, and history.” Randy T. Simmons and Peregrine Schwartz-Shea, *Method, Metaphor, and Understanding: When Is The Commons Not a Tragedy?* in *THE POLITICAL ECONOMY OF CUSTOMS AND CULTURE* 7 (Terry L. Anderson and Randy T. Simmons, eds., 1993). We thus live in a society in which law is provided by the State and through voluntary means. There are special characteristics of State-provided law, however, which require distinguishing it from law provided by voluntary means.

the other hand, develops from the bottom up, contains strong elements of consensual jurisdiction, and is less reliant on the threat of force.⁵

We can array legal systems along a continuum from a purely authoritarian system to a purely customary one. Much as economics after Coase seeks to explain where individuals allocate transactions along the continuum between firm and market, we can apply economic analysis to explaining where societies are located along this continuum. Whether law in a particular area is customary or authoritarian, and where on the continuum of possible societies various aspects of ours are located, matters a great deal. A society governed largely by customary law is likely to be quite different from one governed largely by authoritarian law.⁶

There are a number of reasons to think that a society with competing legal systems might produce law superior to that provided by a state monopoly on law. Although a full exploration of this subject is beyond the scope of this article,⁷ a brief summary will allow the reader not yet convinced, but willing to temporarily suspend disbelief, to follow the argument below. First, customary law is frequently based on actual rather than hypothetical consent. Consent is a powerful basis for jurisdiction, which can be seen from the gymnastics which State courts are willing to perform to construct implied consent. Second, customary law reduces the number of difficult social decisions. Besides the substantive rules, there are many aspects of the legal system about which there is no social consensus. Allowing individuals to choose systems that provide the bundle of such characteristics

5. "Reciprocities are the basic source both of the recognition of duty to obey law and of law enforcement in a customary legal system. That is, individuals must 'exchange' recognition of certain behavioral rules for their mutual benefit." BENSON, *supra* note 1, at 12.

6. Because customary legal systems lack a centralized authority for initiating cases, they depend upon the victims to bring actions. Not only does this tend to restrict claims to tort-like circumstances (i.e. "victimless crimes" cannot be prosecuted) but it leaves the discretionary decision about whether to prosecute a claim to the party most directly interested. Because authoritarian law relies upon a central authority to prosecute those claims which it labels "criminal," it is not constrained to pursuing tort-based crimes and the discretionary decision rests with the central authority.

Another important difference between the two types of law lies with their purposes. Customary law exists to facilitate interactions. The Law Merchant, for example, evolved to enable merchants to realize the gains from trade. Similarly, the customary legal institutions in Shasta County, California, described by Ellickson, grew to facilitate neighbors' coexistence. ROBERT ELICKSON, *ORDER WITHOUT LAW* 283 (1991) ("people often choose informal custom over law not only because custom tends to be administratively cheaper but also because the substantive content of customary rules is more likely to be welfare maximizing"). Authoritarian law may be initially sought to facilitate voluntary transactions but it inevitably develops another set of purposes: Facilitating involuntary transfers. BENSON, *supra* note 1, at 77 ("Whether the government producing law is a totalitarian king or a representative democracy, power is centralized and coercion is used to impose rules beneficial to some upon the rest of the population."). As a result the two forms of law often produce significantly different incentives for the parties governed by them.

7. See Donald Boudreaux and Andrew Morriss, *Polycentric Law & The Myth of Law as a Public Good*, manuscript in the process of creation.

they prefer will eliminate the need for consensus.⁸ Third, competition is likely to produce better service, beginning with reduction of the huge backlogs in state and federal courts. Fourth, a competitive system is also likely to produce better substantive rules.⁹ Fifth, private legal systems are also likely to produce better decision-makers than the State monopoly courts.¹⁰ Finally, cooperative solutions enhance the quality of law by making their participants partial residual owners of the institutions they create.¹¹

Private production of law is not problem free, of course. William Landes and Richard Posner argued in an influential 1976 article that law must often be provided by the State for three reasons. First, they argued law has public good aspects because individuals are unable to capture the benefit stream that follows from the production of legal rules.¹² Precedent is therefore underprovided by a private system, and since rules, or at least the efficient rules produced by the common law, lower transactions costs, there is a

8. Choice will also eliminate the periodic costly attempts to reform the public system. For example, how to properly select judges is the subject of constant debate in the United States. The experience of several recent federal Supreme Court nominations demonstrates that there is no general agreement on the appropriate criteria. Fewer social decisions means fewer interest groups and fewer public choice problems as well.

9. Rules which help discover the truth, keep legal costs low, and minimize overall transactions costs are attractive to those litigants who are unable to predict which side of a case they will be on in the future. (Once an event has occurred, of course, the "better rule" is that which enables me to win.) Production of such rules will attract customers. There are also potentially large gains available from specialization which private systems could exploit. BENSON, *supra* note 1, at 237-38. See Andrew P. Morriss, *Specialized Labor and Employment Law Institutions in New Zealand and the United States*, CAL. W. J. INT'L L.J. (forthcoming 1998) (summarizing literature on specialization). Perhaps more importantly, customary legal institutions which adopt inefficient rules that are not popularly accepted will suffer in competition with those customary institutions which do not. Customary legal institutions also tend to have smaller scope than authoritarian legal institutions, allowing greater reliance on detailed local knowledge, which enhances the quality of the rules. See, e.g., Edella Schlager and Elinor Ostrom, *Property-Rights Regimes and Coastal Fisheries: An Empirical Analysis* at 20-21 in *THE POLITICAL ECONOMY OF CUSTOMS AND CULTURE* 7 (Terry L. Anderson and Randy T. Simmons, eds., 1993) (arguing for role of local detailed knowledge in producing solutions to fisheries commons problems).

10. Existing private arbitration systems have been able to successfully obtain higher quality judges by offering more money and thorough training. Perhaps most importantly, consumers (as opposed to voters) have a significant incentive to monitor the performance of decisionmakers they employ. BENSON, *supra* note 1, at 247-48 ("Individual voters and taxpayers have little incentive to inform themselves regarding the workings of their government. . . . Producers in competitive markets, on the other hand, must provide what consumers want in order to survive and prosper."). Jobs in State courts are rarely the result of merit. Even in "merit selection systems," political connections are a significant part of selection. RICHARD NEELY, *JUDICIAL JEOPARDY* 2-3 (1986). Selection in elective systems is often the result of similar connections: Incumbents resign mid-term to allow their patrons to appoint their successors to fill the vacancy. Despite the many safeguards imposed on judicial selection under whatever system, alarming numbers of incompetents manage to reach positions of power and authority.

11. Not only does such an attitude promote voluntary compliance with the rules, it also gives each participant a feeling of ownership in the success of the institution itself. Authoritarian legal institutions can obtain some of the same benefits to the extent that patriotism or nationalism motivates compliance with the rules. The extent of such feelings is likely to diminish as their object grows more distant, their scope broader, and my "ownership" share becomes vanishingly small.

12. Landes and Posner, *supra* note 2, at 238-39. For a more detailed discussion of Landes and Posner's analysis see Boudreaux and Morriss, *supra* note 7.

social loss. Second, private legal systems would produce a confusing hodgepodge of law without a central authority to eliminate conflicts.¹³ Third, even if private production of precedent were possible, without a central enforcement authority weaker parties who won legal disputes would be unable to gain enforcement of their judgments.¹⁴ In addition to Landes and Posner's arguments, another objection is frequently raised concerning market provision of goods that is particularly important for law: How to control actors with significant market power.

These arguments are capable of being tested against the historical evidence. If we examine private legal systems, we should find too few rules, conflicting rules among competing systems, underenforcement of judgments, and private monopolies. Even if the criticisms advanced by those opposed to customary legal systems are generally true, the establishment of customary legal systems to govern areas where the criticisms are weakest is still possible. Reserving the right to disagree over how to define those areas, the reader unconvinced of the general applicability of the arguments in favor of customary law may still find something of value for specific areas.

The most fundamental problem with the private production of law is that producing law outside of the State requires cooperation to overcome free rider problems. Customary legal solutions often depend upon community ties to create the basis for that cooperation. Such ties furnish a basis for repeated interactions and a reason to care about the welfare of others.¹⁵ If those ties are diminishing—if we are, in Robert Putnam's memorable phrase, increasingly "bowling alone"¹⁶—the basis for customary legal institutions may be vanishing.¹⁷ Not only can social changes undermine community ties by creating larger communities which lack the ability to enforce law through informal means, but "[t]he quality of the cultural connection may also change . . . as a function of mobility and rapid dissemination of information and images."¹⁸

In his thorough analysis of cooperation, Robert Axelrod examined the conditions under which cooperation could emerge and sustain itself through

13. Landes and Posner, *supra* note 2, at 239.

14. *Id.* at 247.

15. JAMES M. BUCHANAN, *FREEDOM IN CONSTITUTIONAL CONTRACT* 162 (1977).

16. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOC. 65, 67 (1995).

17. Putnam's conclusions and data have been disputed. See, e.g., Philip Gold, *Bound by Gossamer Webs of Trivia*, WASHINGTON TIMES, Aug. 11, 1996, at B4, available in 1996 WL 2962506 (noting rise of "small group movement" in recent decades); Nicholas Lemann, *Kicking in Groups*, THE ATLANTIC MONTHLY, April 1, 1996 (noting *Bowling Alone* contradicts Putnam's earlier work and suggesting alternative organizations provide civic capital in the U.S.).

18. Simmons and Schwartz-Shea, *supra* note 4, at 9.

a variety of means.¹⁹ One of his most striking examples of cooperation without a central authority concerned trench warfare in World War I.²⁰ Allied and German combatants on the Western Front evolved norms which allowed cooperative efforts to reduce casualties on both sides.²¹ Cooperation emerged despite the best efforts of the high commands to prevent it and the existence of severe sanctions for open cooperation. The ability to cooperate under such unpromising circumstances is powerful evidence of the force of customary law even when authoritarian law is actively seeking to repress it.

In stark contrast to the amazing feat of combatants' cooperation is Edward Banfield's depressing account of a village in southern Italy in the 1950s where the extreme poverty and backwardness is explained largely (but not entirely) by the inability of the villagers to act together for their common good or, indeed, for any end transcending the immediate material interest of the nuclear family.²²

Why were the villagers of the pseudonymous "Montegrano" unable to cooperate even on simple projects to improve their lives—to have any functioning customary legal institutions²³—while Germans and Allied soldiers attempting to kill each other could create their own? Culture plays an important role. The people involved in a customary legal institution may have skills, knowledge, and values, which enhance their ability to obtain certain payoffs. Asking two individuals from a remote region outside the United States to arrange to meet in New York City on a particular day without allowing them to communicate a time and place will likely produce two lost tourists. Ask two New Yorkers, however, and both are likely to appear under the clock in Grand Central Station at noon. Even New Yorkers, hardly the most cooperative residents of the United States, can succeed when cultural factors provide them with obvious focal points. Customary legal institutions which are embedded in a culture gain a similar advantage.

Conditions which allow individuals to make use of cooperation-enhancing values, facts, and skills may also significantly enhance customary legal institutions' chances for success. Cheap and widespread communica-

19. Although Axelrod focused specifically on overcoming the prisoner's dilemma, much of his analysis applies more generally to the problem of cooperating under conditions hostile to cooperation. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

20. AXELROD, *supra* note 19, at 73-87.

21. *Id.* at 74. Axelrod describes the evolution of a "live and let live" system in the trenches of British, French, and German soldiers which was "endemic" and "flourished despite the best efforts of senior officers to stop it, despite the passions aroused by combat, despite the military logic of kill or be killed, and despite the ease with which the high command was able to repress any local efforts to arrange a direct truce." *Id.*

22. EDWARD C. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* 10 (1958).

23. *Id.* at 16 (group of "upper class men" who formed the town's only social club never considered any projects to improve life); see *id.* at 17 (no organized voluntary charities in village).

tion, for example, is important for vigorous customary legal institutions. Communication is needed to spread the word among the participants about rules and changes in rules, about the behavior of others, and about the need for action. By contrast, in an authoritarian legal system the communication necessary is along a hub and spoke system—different enforcement units need to share information, the central authority needs to be able to disseminate rules, and so forth. Cheapening networked communication will therefore help reduce the extent of the free rider problems in the private provision of law.

The ability to maintain territoriality is a means of enhancing the success of customary legal institutions. When individuals interact mainly with their neighbors (either in physical space or in an abstract characteristic space), their success will depend more on how well they do with their neighbors than with how well they do with those farther away. Neighbors also provide role models and individuals can mimic those neighbors who do well.²⁴ Axelrod demonstrates that stability for a strategy is no harder to maintain in a territorial world than in a non-territorial world.²⁵ Some strategies may do better in a territorial system than in a non-territorial system if they are able to make occasional outstanding successes which win them converts.²⁶

Law's connection to physical territory has been one of the major impediments to development of a polycentric spontaneous legal order. While law has been linked to a physical location, monopolization by the State has often occurred (and may well be preferable to a private monopoly). Reduced communications and travel costs are eroding this linkage however. Replacing physical territoriality with an interest-based system should promote development of private legal institutions for several reasons. First, among those sharing interests, many of the incentives to free ride are reduced. Second, to the extent law is not linked to physical location, exclusion becomes easier, allowing free riders to be dumped. Third, if private production of law confers competitive advantages, those who fail to adapt will find themselves at a disadvantage in the marketplace.

Customary law's advantage in adaptability also influences its chances for success. Where an adaptable legal system confers advantages on the participants, they will have an incentive to seek customary legal solutions, including being willing to pay the costs of overcoming free rider problems. In situations of rapid change, therefore, customary law should be more suc-

24. AXELROD, *supra* note 19, at 158.

25. *Id.* at 160.

26. *Id.* at 165-67.

cessful.

Since we do not live in a world with many nightwatchmen States, customary law's success is also dependent on its ability to coexist with authoritarian law. (To the extent that a healthy set of customary legal institutions is a necessary component of a healthy society, the reverse may also be true.) Customary law is thus more likely to succeed where it can evade the State either by "flying under radar" or by governing areas which themselves are able to evade State attention. Restricting the State by a constitution or by competition among States will create room for alternatives to grow and will enhance the chances for success of customary legal institutions.

Customary law should also work better where the incentive to create conflicting State institutions is less, since there would be less to evade. Customary law's success is thus partially dependent on the opportunity cost of participating in the State itself. When the State is relatively weak, and so offers fewer rewards for those interested in using it to capture wealth or power, it will be less troublesome to customary legal institutions.

Customary law differs from authoritarian law in the incentive structure each offers. There are three important differences between the type of negative incentives available to customary and authoritarian legal institutions. First, customary legal institutions can only use sanctions which are relatively inexpensive to administer. The budget constraint for authoritarian legal institutions' sanctions is considerably looser and depends on factors outside the legal system like the overall tax burden, the political popularity of "getting tough on crime," and so on. Second, changing sanctions is generally less costly in customary systems than it is in authoritarian system. Administering a customary sanction is the product of individual behavior and a change in sanctions requires only that each of us alter our behavior. Authoritarian law sanctions must be socially determined (through the legislature, for example). Outside dictatorships, such decisions are costly to make. Third, customary law's sanctions are administered by individuals and their enforcement depends on those individuals' agreement *in each case* to the administration of the sanction. Authoritarian law, by contrast, requires only some measure of general social consensus on the rules determining sanctions. Individual applications of the general rule depend on the internal workings on the legal system and not on social acquiescence. It is far more likely, therefore, that individuals will nullify "unjust" sanctions in a customary legal regime than in an authoritarian one, where the incentives of those administering the sanction (prison guards, police, judges) are all aligned with the system of law which they are administering. Customary law should therefore function better where it can be enforced by cheap-to-

administer sanctions.²⁷ It will also function better where the behavior to be controlled is generally agreed to be in need of control; customary law is capable of restricting a much narrower range of behavior than is authoritarian law.

The positive payoffs also bear examination. Many customary legal institutions' rewards stem from future interactions. Where conditions allow future interactions to be more valuable, customary law should be more successful than where interactions look like single-play games. There are several ways in which future interactions can become more valuable. Gains in the future may be made more valuable by reducing discount rates or, as Axelrod put it, lengthening the shadow of the future. If reputations can be developed and persist, for example, not cheating in a current business transaction is more valuable. Similarly, if I plan to continue to live in a neighborhood I am more likely to pay careful attention to neighborhood norms to avoid offending my neighbors than if I intend to move in the near future. Thus, while troop assignments remained relatively static, the British and German infantry faced repeated interactions. The long shadow of the future overcame the possible severe sanctions—a firing squad—for cooperation. When the generals finally switched to more rapid rotation of troops, cooperation declined sharply.

By creating reputations, individuals can overcome some of the assurance problems connected to the private provision of law. For example, car repair establishments which are approved by the American Automobile Association carry a label which signals quality standard to consumers. Appliances which display the Underwriters' Laboratories symbol similarly signal reliability. Private legal institutions might undertake to make use of similar devices. Decision-makers might be guaranteed, for example, to have particular qualifications. Perhaps even more importantly, independent organizations might be hired to provide something similar to appellate review.

Customary law should thus work better where the future matters more, where the participants believe there are large gains possible in the near future, and where reputations can be created and maintained. Even where the future's shadow is short, increasing the potential size of future gains itself may be sufficient in some cases. For example, I may continue to cooperate in a business environment where I believe there is the potential for an enormous payoff in the next year even if I intend to retire immediately after the payoff. What matters is my estimate of the size of the payoff, not its actual

27. Such sanctions need not be "cheap" for the sanctioned, of course, since hanging is quite inexpensive for the 'hangers' without a corresponding cheapness for the 'hangee.' The vigilante groups discussed below often announced they would use only the death penalty in part because it was so cheap to administer.

size. Optimism about the future may therefore be a partial substitute for a low discount rate.

II. CUSTOMARY LAW IN THE AMERICAN WEST

The American West offers several examples of customary law, three of which I examine here: The mining camps created in the gold rushes, the vigilance committees which sprang up in communities around the West during the second half of the 19th century, and the institutions which resolved conflicts between cattlemen and settlers on the open range.²⁸ The accounts of these legal systems are not intended to serve as models of specific rules or methods of private law creation for modern society. All three suffered from the flaws of all human institutions: Racism and nativism were rampant in each of these, for example.²⁹ Miners' courts and vigilantes made mistakes: Innocent men were flogged or hanged, guilty ones sometimes released unpunished. If these mistakes disqualify these institutions as examples of successful private law they also disqualify the State legal system, which has availed itself of the far greater opportunities its monopoly provides to discriminate, punish the innocent, and free the guilty. What these examples show is the ability of free individuals to design institutions that

28. These examples offer three advantages over the other historical examples of private provision of law. First, each is an example of privately produced law during a time of great social and economic changes—changes which played a significant role in creating the opportunity for privately produced law to develop. Despite the differences, our society and the diverse societies of the 19th century West share an experience of widespread social, economic, and demographic change. Although modern Americans often speak and act as if ours were the first generation to experience change on such a scale, such changes are one of the most consistent features of American society. The experience of the frontier forced frontiersmen to be innovators in their institutions. WALTER PRESCOTT WEBB, *THE GREAT PLAINS 385* (1931). Second, these examples are from a time when extraordinarily valuable property was in need of protection. If privately produced law could protect property as valuable and easily moved as gold literally lying on the ground, it surely can protect much more. Third, whatever the cultural differences between the 19th century West and today, they are far fewer than the cultural differences between our society and other examples of private provision of law such as medieval Iceland. One caveat is necessary. The three examples discussed here were largely geographically based customary legal systems. One of the many advantages of our society over the 19th century West is that geographic constraints are much less likely to be binding today because of reduced communications and transportation costs. As will be discussed further in Part IV, by freeing ourselves from a geographic basis for jurisdiction, we can avoid some of the problems Westerners encountered.

29. Many minorities, especially the Chinese, suffered from the mining camps' restrictions on claim ownership. Miners' courts were far from the only institutions to discriminate against the Chinese, of course. Legislatures also passed discriminating taxes and bans on Chinese miners. WILLIAM S. GREEVER, *BONANZA WEST: THE STORY OF THE WESTERN MINING RUSHES 1848-1990* 269 (1963) (Idaho tax on Chinese miners). Unions in the hard rock deep mines sought to exclude Chinese miners, sometimes through economic pressure, sometimes through violence. RICHARD E. LINGENFELTER, *HARDROCK MINERS* 107-127 (1974). Federal military authorities in the California gold rush, for example, let American miners know they would not interfere in dispossession of foreigners. MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851* 126 (1921). Miners and Westerners generally had little regard for Native American rights in the land. Even when the land was technically public land, it had often been recently taken by force from others. Pressure from anxious prospectors played an important role in persuading the federal government to steal the Black Hills from the Sioux. See *infra* note 142.

enable them to live together in peace and good order without resorting to the State even under adverse circumstances. They also show how these efforts can go awry.

*A. Placer Mining Camps:*³⁰ “It’s a queer thing how well we get along without any courts or law.”³¹

Miners in the 19th century placer gold rushes wrestled with multiple “legal” problems. They needed to maintain order and to protect property and themselves, just as those living in more settled areas did. They also needed to define their property rights, however, and unlike their friends and relatives back “in the States,” they had no preexisting customary or authoritarian law solutions because they were developing new forms of property rights: Privately held mineral rights and transferable water rights in arid lands. Miners consistently chose contract based property rights over the alternative of violence. As John Umbeck concludes in his comprehensive review of California mining districts, they did so “not once but 500 times. And the length of time in which this took place was not centuries, but days.”³² Their solutions are interesting not only for what they reveal about the type of law people choose when they have the opportunity to write on a virtually blank slate, but also for what the process of inventing the solutions

30. Source note: I relied heavily on several sources for this section: JOHN R. UMBECK, A THEORY OF PROPERTY RIGHTS (1981); CHARLES R. SHINN, LAND LAWS OF MINING DISTRICTS (1884) (hereafter “SHINN, LAND LAWS”) and MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT (1885) (hereafter “SHINN, MINING CAMPS”), and the many works of Rodman Paul (cited throughout) are the preeminent secondary sources on the subject. I supplemented these with some of the wealth of published primary source material. The major such sources I used were J.S. HOLLIDAY, THE WORLD RUSHED IN (1981); RICHARD B. HUGHES, PIONEER YEARS IN THE BLACK HILLS (Agnus Wright Spring, ed., 1957); and THE DIARY OF A FORTY-NINER (Chauncey L. Canfield, ed., 1906); THE SHIRLEY LETTERS FROM THE CALIFORNIA MINES, 1851-52 (Carl I. Wheat, ed., 1970) [hereinafter THE SHIRLEY LETTERS]; EDWIN A. BEILHARZ AND CARLOS U. LÓPEZ, WE WERE 49ERS! (1976); BAYARD TAYLOR, ELDORADO OR ADVENTURES IN THE PATH OF EMPIRE (1850) [1988 reprint]; JEAN-NICOLAS PERLOT, GOLD SEEKER (Helen Harding Bretnor trans., Howard R. Lamar, ed., 1985). Holliday’s book is a thorough synthesis of thousands of letters, diaries, and other primary source documents describing the California Gold Rush, including many quotations. Where I rely on his quotations, I have indicated it in the footnote. Hughes’ work is a memoir written late in life by a Black Hills pioneer miner, newspaper man, and legislator, with the aid of his contemporaneous diary. Canfield’s is the diary of ‘49er Alfred Jackson with some additional editorial notes. Citations are to Jackson’s diary entries unless otherwise noted. THE SHIRLEY LETTERS are twenty-three letters written by Louise Amelia Smith Clappe to her sister which California historian Josiah Royce called “the best account of an early mining camp that is known to me.” THE SHIRLEY LETTERS, *supra* at xvi. Beilharz and López provide selections from Chileans’ first hand accounts of their experiences in California. Taylor, “one of the most popular and prolific writers of his generation,” was dispatched to California by Horace Greeley to report on the gold rush for the *New York Tribune*. When he left he wrote *Eldorado*, which Robert Cleland termed “a book of immediate popularity and lasting value.” Perlot’s memoir is the story of a Belgian miner in California seeing the events from a different perspective than American accounts. JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987) is my primary source for details of the federal mining law which partially replaced miners’ law starting in 1866.

31. CANFIELD, *supra* note 30, at 51 (quoting Alfred Packer).

32. UMBECK, *supra* note 30, at 132.

demonstrates about our capacity to create solutions to new problems.

1. Conditions in the Diggings

The placer gold rushes³³ of the nineteenth century produced instant communities, created in a matter of months from virtually empty land and thousands of strangers. The major western gold rushes occurred in areas with little population, economic infrastructure, or agriculture. "Never, perhaps," Bayard Taylor concluded in 1850, "was there a community formed of more unpropitious elements; yet from all this seeming chaos grew a harmony beyond what the most sanguine apostle of progress could have expected."³⁴

Gold rushes were usually sparked by unsystematic discovery of the resources. For example, gold in California was discovered by a carpenter building a mill who found a particle "about half the size and the shape of a

33. The first mining in most rushes was of placer deposits. OTIS E. YOUNG, JR., *WESTERN MINING*, 108 (1970). In these, gold which had washed out of the mountains collected in stream beds where, because of its weight and high specific gravity, it sank toward the bedrock. All portions of a stream bed were not equally likely to produce gold, however, and miners quickly learned which were the more likely spots. *Id.* (describing spots likely to hold gold: Places where current slowed, where grade decreased, where channel widened, deepened, or jointed another stream; sandbars). Nevertheless, "a lucky man might in a week take out a fortune in gold dust, while his neighbor a few yards distant on the same stream might encounter only the paltriest show of color for his pains. The sole difference between them has been incalculable, statistical chance." *Id.* at 107; HUGHES, *supra* note 30, at 102-03 (prospectors had "constant hope" because of "men he has known who were lifted from poverty to affluence by the last lucky stroke of the pick"). Miners lacked scientific knowledge about gold deposits. Granville Stuart, for example, later recounted how the miners he knew in California in 1850-51 believed the gold came from volcanic eruptions. A report of a crater lake in the Sierra Nevadas whose shores "were covered with gold so plentiful that there was little sand or gravel" prompted several hundred men to abandon rich claims to search for it. I GRANVILLE STUART, *FORTY YEARS ON THE FRONTIER* 61-62 (Paul C. Phillips ed., 1925). Dame Shirley reports a miner telling her

I maintain that science is the blindest guide that one could have on a gold-finding expedition. Those men, who judge by the appearance of the soil, and depend upon geological calculations, are invariably disappointed, while the ignorant adventurer, who digs just for the sake of digging, is almost sure to be successful.

THE SHIRLEY LETTERS, *supra* note 30, at 130.

The technology used to first exploit placer deposits was simple and labor-intensive. The first method of exploiting the placer deposits was panning, a labor intensive and low capital method. YOUNG, *supra* at 109. To pan one "takes pan in hand, fills it with two inches of sand, and hunkers down ungracefully in a foot or so of water. The pan is shaken, hand picked of pebbles, and swirled with its top edge, while the operator restrains errant gold colors from departing in the same manner. At the end a few drops of silty water, some black magnetic sand, and a thin tail of golden specks are—presumably—left in the drag of the pan." Miners typically did 50 pans a day. *Id.* Miners soon introduced more efficient methods. They dug out the stream bed to find the gold bearing layer in a process "which resembled small scale open-pit or strip mining" and produced large amounts of over-burden which had to be disposed of. *Id.* at 110. These features gave the distribution of wealth a significant element of randomness. As '49er Alfred Jackson summed it up, "Mining is not a complicated process, and, as far as I can see, is more a question of luck than anything else." CANFIELD, *supra* note 30, at 168.

34. TAYLOR, *supra* note 30, at 78.

pea” and exclaimed “Boys, I believe I have found a gold mine” on January 24, 1848.³⁵ This first discovery was quickly followed by others: “It seemed at first as if the prospector had but to sink his pick into the ground at random, wherever there was cañon or a stream, to find gold.”³⁶ As news spread, California’s mining population grew from 2,000 in July 1848 to 8,000-10,000 by the end of the year,³⁷ with the total population growing from 14,000 to 20,000.³⁸ Gold fever quickly spread beyond California: By the spring of 1849, 50,000 people were heading for California.³⁹ In all, 89,000 gold seekers arrived in California by the end of 1849,⁴⁰ creating mining camps which covered two hundred miles along the rivers.⁴¹

In one astonishing year [California] would be transformed from obscurity to world prominence, from an agricultural frontier that attracted 400 settlers in 1848 to a mining frontier that lured 90,000 impatient men in 1849; from a society of neighbors and families to one of strangers and transients; from an ox-cart economy based on hides and tallow to a complex economy based on gold mining; from Catholic to Protestant, from Latin to Anglo-Saxon.⁴²

The growth continued and by 1850 “California had, as it were by magic, become a State of great wealth and power.”⁴³ California’s population grew to more than 100,000 by the end of 1849⁴⁴ and over 220,000 by the end of 1852.⁴⁵

The placer mining communities which grew up wherever gold was found developed⁴⁶ and decayed⁴⁷ rapidly in areas where State-provided law

35. HOLLIDAY, *supra* note 30, at 33; T. H. WATKINS, *GOLD AND SILVER IN THE WEST* 26 (1971). Gold production in the U.S. soared from 43,000 ounces in 1847 to 1,935,000 ounces in 1849, an increase of over 4500 percent. YOUNG, *supra* note 33, at 102; George Frederic Parsons, *The Life and Adventures of James W. Marshall*, in *FROM MEXICAN DAYS TO THE GOLD RUSH 89-90* (Doyce B. Nunis, Jr., ed., 1993). The find was likely not a complete accident. Parson’s biography of James Marshall, the man who found the gold, claims Marshall believed the area contained minerals and was in the habit of inspecting the mill race for signs of them. *Id.* at 89.

36. Parsons, *supra* note 35, at 99.

37. HOLLIDAY, *supra* note 30, at 42-43. WATKINS, *supra* note 35, at 27 (estimating 13,000); UMBECK, *supra* note 30, at 83 (10,000).

38. Doyce B. Nunis, Jr., *Historical Introduction in Parsons*, *supra* note 35, at xlvii.

39. YOUNG, *supra* note 33, at 103. Almost seven hundred ships came to San Francisco in 1849, bringing more than 41,000 people. HOLLIDAY, *supra* note 30, at 287. Most ships were abandoned by their crews. *Id.* at 287.

40. HOLLIDAY, *supra* note 30, at 292.

41. YOUNG, *supra* note 33, at 108.

42. HOLLIDAY, *supra* note 30, at 26.

43. T. BUTLER KING, *REPORT TO SECRETARY OF STATE JOHN M. CLAYTON*, March 22, 1850, reprinted in TAYLOR, *supra* note 30, at 335.

44. Nunis, *supra* note 38, at xlviii.

45. WATKINS, *supra* note 35, at 40.

46. For example, Nevada City, California grew from nothing to more than 17,000 in a few months in 1850. HOLLIDAY, *supra* note 30, at 372 (quoting miner’s letter).

was either entirely absent or unavailable to the miners. Miners were often prevented from relying on State legal institutions by competing demands on those institutions and confused formal law.⁴⁷ As a result, the miners were

47. Mining camps were also subject to equally rapid declines as word of new discoveries reached them. See JAMES McCLELLAN HAMILTON, FROM WILDERNESS TO STATEHOOD: A HISTORY OF MONTANA, 1805-1900 211 (1957) ("a worked-out gulch was deserted as quickly as it had been occupied").

48. Federal law did not recognize miners' claims during the early rushes. UMBECK, *supra* note 30, at 69 ("rights to mineral lands were reserved for the government and not subject to private appropriation"). LESHY, *supra* note 30, at 9-10 (describing pre-1866 mining law). The miners flooding into California could hardly be expected to seek assistance from a potential rival for the gold. Moreover, even when California was finally admitted as a state in 1850, all public land belonged to the federal government and the state had no authority over it. UMBECK, *supra* note 30, at 70. As the United States was the successor to the Mexican government under the Treaty of Guadalupe Hidalgo, the federal government also technically owned the mineral rights previously held by the Mexican government and the reversionary rights to mineral rights conditionally granted land owners. KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 354-55. *Id.* at 142 (gold district belongs to the United States).

The only representatives of formal legal authority, the military posts established by the Americans, were uninterested in hearing about miners' disputes over claims. "Unfortunately, the military government proved unequal to the task of establishing, let alone enforcing, law and order. It simply did not have the manpower." Nunis, *supra* note 38, at lii. Not only had the peace treaty ended the war, making the military authorities' civil jurisdiction questionable at best, HOLLIDAY, *supra* note 30, at 36. (peace deprived military governor of jurisdiction) but the military's primary mission was to secure the new territorial acquisition. UMBECK, *supra* note 30, at 73. Commanders worried about their troops deserting for the gold fields, sought to minimize contact with the miners. *Id.* at 73 ("I have been unable to find any evidence that federal troops interfered with the miners from 1848 to 1866"). U.S. law was not officially extended to California until September 28, 1850. *Id.* at 69. Even when it was, the lack of any generic policy toward mineral lands before 1866 also meant that there was no framework for allocating mineral rights. LESHY, *supra* note 30, at 10-11.

Moreover, the transfer of California from Mexico to the United States created a muddled legal situation with respect to property rights. The Treaty of Guadalupe Hidalgo, signed February 2, 1848, provided that the United States would recognize legitimate Mexican land grants. KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 332-333. On February 12, 1848, the U.S. military governor of California proclaimed that Mexican mining laws were "abolished" without offering any alternative system. UMBECK, *supra* note 30, at 69. American lawyers and judges' ability to cope (even if they had wanted to do so) with an alien civil law system was minimal. Mexican law's documents were written in Spanish, generally unavailable in California, KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 333 ("there was not a single volume containing [Mexican] laws, as far as I know or believe, in the whole Territory, except, perhaps, in the Governor's office at Monterey"); WILLIAMS, *supra* note 29, at 47 (alcaldes installed by U.S. military administration would turn "to American statutes in the absence of books of Mexican law, and they were quite content if any stray volume could give a hint of precedent in the cases that came before them"). and riddled with vague, confusing, and often invalid documentary evidence. KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 332. U.S. law was also often physically unavailable. WILLIAMS, *supra* note 29, at 43 ("as late as April, 1849, the senior military officer on the Court was unable to procure in California a copy of the laws of the United States").

Miners in Montana and the Black Hills faced similar problems. The authoritarian legal institutions that existed in mining camps were not located in places easily reachable from the mining camps. Travel out of the mining camps, often located in difficult to reach gulches, had a high opportunity cost in foregone gold mining. For example, even in 1889 there was no direct rail line between the Black Hills and the Missouri River, requiring Black Hills residents to travel 1000 miles to reach the South Dakota capital of Pierre. HUGHES, *supra* note 30, at 276. Miners in Montana and Dakota also faced additional dangers from road agents and Indians if they left the comparative safety of the mining camps. ESTELLINE BENNETT, OLD DEADWOOD DAYS 60-64 (1928) [1982 reprint] (describing Black Hills' road agents); see *infra* Part II.B.3. (describing Montana road agents).

The existing institutions also often lacked quality. Greever describes the Idaho-Montana territorial bar by saying "[t]he majority of lawyers did not understand the elementary rules of practice and had almost no books to guide them." GREEVER, *supra* note 29, at 273. Duane Smith summarizes the early

forced to develop their own legal institutions to protect the valuable gold and gold claims they sought to appropriate.

Rapid growth limited not only the legal infrastructure but all the social infrastructure needed to support the burgeoning mining districts. Placer mining required relatively little equipment,⁴⁹ but the prices of mining equipment and food were high as a result of limited supply⁵⁰ and rapidly increasing demand. Even as increased infrastructure and competition reduced prices, “a staggering inflation” forced them up.⁵¹ Even more than high prices, the provisions market on the California frontier—and on other mining frontiers to follow—was characterized by “a crazy instability.”⁵²

The sudden population booms which characterized mining communities meant that the miners could not rely on kinship or preexisting community relationships as a basis for mining norms.⁵³

In a world of strangers, in a place without evidence of government, religion or law, goldseekers felt free to grasp for fortune. Like soldiers in a foreign land, it would be easy for many of them to slough off the social codes and moral precepts that had been enforced by family, friends and the influence of the church.⁵⁴

Mining camps drew men who enjoyed the risk and excitement of possible riches, not the type inclined to community building.⁵⁵ Thus, even where a

Montana and Colorado territorial benches by noting they were “[o]bstructed by limited funds, unfamiliarity with mining law, judges who were sometimes too inflexible to act effectively, and antagonism toward ‘foreign’ officials.” DUANE A. SMITH, *ROCKY MOUNTAIN WEST* 72 (1992) [hereinafter SMITH, *ROCKY MOUNTAIN*]. Even had they wished to do so, therefore, the miners could not have relied on the State for the provision of law, resolution of disputes, definition of property rights, or deterrence and punishment of crime.

49. HAMILTON, *supra* note 47, at 211 (pick, shovel, pan, ax, and whip saw all that was needed).

50. *Id.* at 354. Supply was limited both by the lack of existing agriculture and manufacturing but also by newcomers’ lack of interest in entering those fields.

Farming seemed too slow a route to wealth in 1850 and for several years thereafter. Besides, it required settling down, staying in California. If they were ever to take up farming again, it would be back home, not in the Sacramento Valley where it never rained from April or May until October or November. As a consequence, the growing demand in the cities, towns and mining camps for all kinds of foodstuffs was largely supplied by imports—flour from Chile, oranges from Mexico, vegetables from Hawaii, cheese from Europe.

HOLLIDAY, *supra* note 30, at 354.

51. HOLLIDAY, *supra* note 30, at 354. JOSEPH R. CONLIN, *BACON, BEANS, AND GALATINES* 90 (1986); KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 359.

52. CONLIN, *supra* note 51, at 95.

53. SMITH, *ROCKY MOUNTAIN*, *supra* note 48, at 30 (“the bonds that usually stabilized a community were weak” in mining camps).

54. HOLLIDAY, *supra* note 30, at 300.

55. California miner Alfred Jackson compared mining to his work on his father’s New England farm:

camp had existed for a time, community ties were rarely strong. '49er Alfred Jackson, for example, wrote in his diary that his neighbor was "the only one on the creek I care much about."⁵⁶ The mining camps contained a wide range of nationalities: Chileans, Mexicans, English, Irish, Germans, French, Australians, and Chinese were all present in significant numbers in addition to the Californios and Americans.⁵⁷ For a time in 1849 foreigners outnumbered Americans.⁵⁸ This diversity made new institutions even more necessary. While individual groups might have traveled together and built up a stock of social capital enroute, few of these groups survived long in California.⁵⁹ The ethnically, linguistically, and socially heterogeneous society their members then found themselves in bore little resemblance to their previous communities. In addition, miners often did not expect to settle permanently in the mining districts—the goal was rapid accumulation of wealth followed by departure back to "the States."⁶⁰ The future, therefore, cast an extraordinarily short shadow for many: "There is nothing permanent in the life of a gold miner,—and beyond the moment, nothing strong or abiding in his associations."⁶¹ Just as importantly there was a relatively certain end to each mining season dictated by the weather. This certainty created an incentive for end game effects and an unraveling of cooperative solutions, problems which the miners largely avoided.

Almost no better example of conditions under which free rider problems ought to arise can be imagined. Tens of thousands of strangers thrown together for short periods of time, with virtually no social institutions, facing a choice between participating in customary legal institutions or picking

I don't know as the work was any harder than what we do here, but there is a difference. There all we got was just about a bare living, at best a few hundred dollars put away for a year's work, but here we don't know what the next stroke of the pick, or the next rocker full of dirt, may bring forth—an ounce or twenty ounces it may be. That is the excitement and fascination that makes me endure the hardships.

CANFIELD, *supra* note 30, at 12. Similarly Dame Shirley terms miners "the most discontented of mortals" and notes they would abandon paying claims in search of the "big strike." THE SHIRLEY LETTERS, *supra* note 30, at 131.

56. CANFIELD, *supra* note 30, at 13. Some miners did belong to fraternal orders, which provided some connection to the strangers who they met, but fraternal orders do not appear to have been a major factor in the mining communities until the communities became more settled.

57. Nunis, *supra* note 38, at xlvii-li. Although miners continued to represent diverse backgrounds in later rushes, California's population seems to have been the most ethnically heterogeneous, perhaps because of the relative ease of ocean transport from the Pacific Rim.

58. TAYLOR, *supra* note 30, at 77.

59. UMBECK, *supra* note 30, at 88.

60. SMITH, ROCKY MOUNTAIN, *supra* note 48, at 29 ("since mining people planned to stay only until they made their 'pile,' they did not consider it worthwhile to strive for or support improvements such as schools, water systems, and municipal government, with their corresponding taxes").

61. NATHANIEL P. LANGFORD, VIGILANTE DAYS AND WAYS 42 (1890) [1996 reprint]; HOLLIDAY, *supra* note 30, at 356 (for miners "the return home was the pressing purpose of all their work").

up gold off the ground ought to have been a recipe for disaster. Yet this amazing polyglot of men seeking rapid wealth, and with virtually no intentions of building a lasting society, created a set of customary legal institutions which not only flourished in California but successfully adapted to conditions across the West.

2. The Miners' Problems

Miners had several problems which required a system of law to solve. Many of these related to basic protection of life and property. Not only did they have their gold dust, a valuable, fungible, and portable commodity, but they had hard-to-replace tools, scarce food, and unprocessed ore. They also had valuable claims on mining sites which they needed to protect by more than their physical presence.⁶² Obviously, the miners were concerned that they not be killed by someone attempting to take their property. Losing one's gold was bad enough, but there was always more if the miner remained alive. The miners had valuable property which they could not physically guard at all times. One purpose of a mining district was thus forming a mutual defense pact with other miners in the same area.⁶³

The miners also needed a legal system with sufficient flexibility to adapt to the short half-life of mining technology. Many mining claims were initially worked with simple methods like panning, easily done by one individual. Quite quickly, however, miners switched to more advanced techniques which required greater capital and resource inputs and more than one person's labor.⁶⁴ Technological change meant that property rights had to be flexible since a claim efficiently panned by a single individual was far too small to support a hydraulic placer operation. New property rights to timber and water, unnecessary at the early panning stage but critical to more advanced mining techniques,⁶⁵ also had to be incorporated into the law. As mining techniques evolved, claims also evolved from simple sections of streams to more complex notions of subsurface property rights.

Thus, the miners needed a legal system which could deter theft and murder, establish and protect property rights in mining claims, and adapt to

62. Claims were worth considerable sums. California '49er Jackson, for example, noted being offered (and declining) \$10,000 for one claim in 1851. CANFIELD, *supra* note 30, at 40.

63. HOLLIDAY, *supra* note 30, at 317 (quoting miner's letter).

64. For example, the long tom, an 8-14 foot wooden chute with perforated sheet iron to remove large rocks and riffle bars to separate the heavier gold from other material, required two or three workers to operate and a steady supply of water. See *infra* note 100. Sluice mining, which involved wooden sluices up to a thousand feet long, took a concerted effort by five or more men and even more wood and water. *Id.* Hydraulic placering, in which hillsides were blasted with high pressure water to expose gold, was extremely capital and labor intensive. *Id.*

65. Demand for water "increased tremendously as the technology grew more advanced. UMBECK, *supra* note 30, at 76.

rapidly changing conditions. The system needed to be sufficiently fair that newcomers would allow early arrivals to retain their claims, often the best in the area.⁶⁶ Because the opportunity costs of participating in the legal system were high, the system also needed to be efficient in its demands on miners' time.⁶⁷ In particular, it needed to be flexible enough to allow division to prevent unmanageable growth.⁶⁸ Finally, the system needed to recognize the rapid turnover in mining districts' population. For some, there was always a better claim to be found, a new rumor of a big strike to follow. As camp populations grew, some miners yearned for less populated areas. These miners wanted to be able to sell out and move on, especially if a less experienced newcomer was willing to pay top dollar for a mediocre claim.

3. The Miners' Solutions

The central "theory" of miners' law is simply stated: "You may drive your stake where you darned please; only if you try to jump my claim, I'll go for you, sure."⁶⁹ Implementing this principle produced a mechanism for solving the free rider problem: The mining district.⁷⁰ When enough miners had arrived in an area to require a means of rights creation and dispute settlement, they would gather for a meeting to set general rules.⁷¹ The solutions the miners devised shared some common features across districts. These rules established the size and shape of the claims, the procedures necessary

66. Miners who discovered new sources of gold frequently notified their friends first, so that they might secure the best claims. LANGFORD, *supra* note 61, at 265. This practice helped ensure a sympathetic group in the area to defend claims but was not enough to overcome the problems of being overwhelmed by newcomers.

67. HOLLIDAY, *supra* note 30, at 297-300 ("justice was inflicted quickly so as not to delay those called upon to pass judgment"); HOFFMAN BIRNEY, VIGILANTES 95-96 (1929) (when Alder Gulch was booming, "every man was certain he had a fortune in sight, and none would be willing to assume the duties of deputy sheriff").

68. Larger groups take longer to decide issues, and every moment away from their claim represented the potential loss of a big strike.

69. THOMAS DIMSDALE, THE VIGILANTES OF MONTANA 73 (1866) [1953 reprint].

70. The historical antecedents of "miners' law" is hotly debated. Nineteenth century enthusiasts like Charles Shinn and Hubert Howe Bancroft saw an almost mystical connection with Anglo-Saxon roots and German "folk moots," mingled with the frontier experience to produce a uniquely American institution. SHINN, MINING CAMPS, *supra* note 30, at 20-21 (claiming that "Germanic sources" provided "most important principles" of mining law); *id.* at 22-23 ("whenever and wherever men of our Germanic race found minerals, they developed a satisfactory system of local government"). Other authors have seen more recent sources for the miners' actions—the experience of Iowa and Wisconsin lead miners and Midwestern claim associations. *See, e.g.* JOSEPH SHAFER, WISCONSIN DOMESDAY BOOK: THE WISCONSIN LEAD REGION (1932); Jesse Macy, *Institutional Beginnings of a Western State*, 3 JOHNS HOPKINS STUDIES (1884). The ultimate source of these institutions, while a fascinating historical question, is not relevant here and so is not discussed further.

71. TAYLOR, *supra* note 30, at 78 ("[w]hen a new placer or gulch was discovered, the first thing done was to elect officers and extend the area of order"). The first few miners in California in 1848 did not rely on exclusive territorial property rights. UMBECK, *supra* note 30, at 87. As the mining population grew, however, miners switched from sharing contracts to ones based on exclusive rights to particular pieces of land. *Id.* at 90. By the end of 1849 the basic structure of miners' law was formed and changed little after that. *Id.* at 94.

to establish and maintain a claim, the boundaries of the district, and a dispute resolution mechanism.⁷² Perhaps the most important function of the miners' law was the creation of property rights. Without property rights, miners would have faced a Hobbesian war of all against all.⁷³ With property rights, miners were able to peacefully divide valuable land and gold.

California miners quickly decided that mineral rights did not belong to the few real property owners (whose claims were far from clear)⁷⁴ or the State (as it had under Mexican law),⁷⁵ an unsurprising decision since these alternatives would have shut them out of the mines. For the most part this meant the miners were rejecting the State's claim on the gold, since there were relatively few other claimants to the gold fields.⁷⁶ The absence of the formal State institutions and the alien and confused nature of California's Mexican based real property law made the miners' appropriation of mineral rights practicable. Miners also believed (correctly as it turned out) that they were free to legislate on this and other issues:

The common law also held that in a land otherwise devoid of appropriate law or a lawgiving body (as California practically was), the free citizenry might legislate for its own needs and that, as long as this legislation was reasonable and equitable, subsequent formal sovereigns must recognize this prior legislation as valid. Being instructed to this effect by the many lawyers among them (each of whom had virtually memorized Blackstone or Coke), the argonauts proceeded to organize folk moots, or "miners' meetings", in which placer law was debated and ratified by vote of all adult males present.⁷⁷

Miners probably gave little thought to the validity of their legal theories; most miners were hoping to get rich quickly and return home. Anticipating a brief period of unorganized placer mining, they were concerned only with securing possession for a few months.⁷⁸

72. As districts grew, they frequently divided. Although some divisions were caused by population growth or new discoveries in an area, others occurred because of disagreements over rules. Secession was peaceful—a dissatisfied group could simply call a meeting to form a new district. Permission from the old group was unnecessary; the new district simply notified the area of its existence. Decision-makers who were unacceptable were just ignored—when the city of Custer, South Dakota attempted to assert jurisdiction over all matters in the Black Hills through its "Provisional Black Hills Superior Court" it failed because miners refused to participate. GREEVER, *supra* note 29, at 16.

73. In early 1848 some miners did use a form of nonexclusive land rights. This form of contract disappeared by the end of 1848. UMBECK, *supra* note 30, at 85.

74. YOUNG, *supra* note 33, at 111-12.

75. KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 354.

76. LESHY, *supra* note 30, at 13.

77. YOUNG, *supra* note 33, at 112.

78. HOLLIDAY, *supra* note 30, at 297 ("[m]iners shared an indifference toward California and its

The property rights rules they created were sufficiently resilient and flexible to spread from California throughout the mining West.⁷⁹ In California, for example, mining claims were defined by a length (typically fifty to one hundred feet) through the center of a stream back along the banks in a distance "sufficient for working purposes."⁸⁰ Claims were marked by stakes or notices and recorded with an elected recorder for a small fee. Miners were often limited to a single claim and required to work it to hold the claim.⁸¹ A miner could often hold his claim for a short period by leaving his tools on the claim.⁸²

Districts often limited the number of claims a single man could hold or locate⁸³ and restricted ownership by aliens, particularly in California where this enabled dispossession of Mexican, Chilean, and Chinese miners from rich claims.⁸⁴ Restricting ownership of multiple claims was often irrelevant since claims were typically the size an individual could effectively work. Even where such restrictions existed, they could easily be evaded—Dame Shirley reports how claim owners on Rich Bar would hire men to represent them on claims by performing the required labor as well as "many" other ways to outwit the rule.⁸⁵

Many districts started with rules prohibiting transfers of claims. While miners quickly realized the advantages to being able to sell to newcomers and to being able to cooperate in accumulating claims,⁸⁶ they also recog-

future").

79. These rules establishing property rights typically included:

- (1) Establishing a maximum claim size, usually driven by the amount of a claim which could be worked with the current technology by an individual in a single season;
- (2) defining requirements for establishing a claim, typically requiring posting and recording;
- (3) choosing a registrar to maintain a record of claims and setting a schedule of fees for his work;
- (4) providing for protection of claims during periods of short absences, often by allowing a miner to protect his claim for five days by leaving his tools on the site; and
- (5) requiring regular work on a claim.

UMBECK, *supra* note 30, at 95-96. *See also* LESHY, *supra* note 30, at 379-80 (outline of typical rules).

80. YOUNG, *supra* note 33, at 112.

81. *Id.*

82. *Id.*; TAYLOR, *supra* note 30, at 78.

83. Miners quickly learned to circumvent the location restrictions through cooperation. *See infra* note 86.

84. *See, e.g.*, CANFIELD, *supra* note 30, at 40-1.

85. THE SHIRLEY LETTERS, *supra* note 30, at 132; *see also* PERLOT, *supra* note 30, at 112 (describing proposal to hire laborers so as to be able to claim larger area).

86. Jackson, for example, recounts how a group of neighbors worked together to locate claims and then sell them to one member, repeating the process until the six held over a mile of contiguous claims built out of 300 foot individual claims. CANFIELD, *supra* note 30, at 115. They were able to exploit these large claims through new techniques. *Id.* at 114. *See also* UMBECK, *supra* note 30, at 118-19 (sluice and hydraulic mining raised the value of contracting to consolidate claims). Similar techniques have been

nized the need to keep a large enough population in the area to defend their claims.⁸⁷ When these restrictions were lifted, sales were often allowed only to those with no land in the district.⁸⁸ Once claims became transferable, they often sold for large sums.⁸⁹ Contracts of sale ranged from simple to complex.⁹⁰ Caveat emptor was the rule for rumors and sale of claims. There were few labor related issues early in rushes because miners preferred to work for themselves or in partnerships rather than for wages.⁹¹ The common practice of immediate payment from the day's production also reduced the potential for conflicts.⁹²

The miners' law developed in California is of particular interest because California was the first gold rush in the American West⁹³ and it was dominated longer by placer mining than any of the later rushes.⁹⁴ 500 mining districts grew up in an area 300 miles long and 150 miles wide along the western foothills of the Sierra Nevada mountains.⁹⁵ California's experience helped in the later rushes, by creating what Rodman Paul called "a new frontier type," the "Old Californian," "a nomadic, resourceful, hardy, and experienced species that could be counted upon to do some of the first prospecting, mining, and organizing in any district." Particularly important was that "Old Californians" knew how to organize a mining camp to provide rules and dispute resolution mechanisms.⁹⁶ California also produced the technology used throughout the mining regions—"California was the great testing ground, and techniques forged in its experience were broadcast throughout the entire mining West."⁹⁷

used to circumvent the federal mining laws' restrictions on the number of claims any individual could locate. LESHY, *supra* note 30, at 169-73.

87. UMBECK, *supra* note 30, at 117-18.

88. *Id.* at 118.

89. HOLLIDAY, *supra* note 30, at 374 (claim sold for \$30,000 in 1850); *id.* at 393 (9 men sold their shares in a claim for \$12,000 each in 1850); *id.* (quoting miner's letter stating that penalty for theft flogging for first offense, ear cropping for second, hanging for third).

90. For example, miner William Swain describes his sale of his portion of a claim as follows: "I have sold all my share but one-sixth, for which I have realized \$650 down and a note for \$225 due in one month, or the share is forfeited and comes back to my possession. The sixth I let out to be worked for one-half and the man supplies himself." Contract law was simple because contracts were simple—most were oral, simultaneous exchanges. This simplicity did not prevent more complex transactions from taking place when needed, however. When Alfred Jackson's mining district needed a ditch dug to bring water, a joint effort "on shares" was organized. CANFIELD, *supra* note 30, at 30.

91. *See, e.g., id.* at 35 ("very few men will have out").

92. Those who attempted to leave an area without paying their debts could be pursued and brought back to settle debts. *See, e.g.,* THE SHIRLEY LETTERS, *supra* note 30, at 112 (5 men brought back).

93. YOUNG, *supra* note 33, at 102. Placer mining continued to dominate California mining through the 1870s, although some lode mining developed in a few areas. LINGENFELTER, *supra* note 29, at 81.

94. SMITH, ROCKY MOUNTAIN, *supra* note 48, at 10-11.

95. UMBECK, *supra* note 30, at 67.

96. RODMAN W. PAUL, THE FAR WEST AND THE GREAT PLAINS IN TRANSITION 1859-1900 28 (1988).

97. WATKINS, *supra* note 35, at 187.

Property rights in water and timber became increasingly well specified over time as these factors of production became more valuable. Rules governing water rights developed differently than in eastern states;⁹⁸ mining camps generally gave priority to older uses, prohibited waste, and required return of the water to the channel, a system which ensured everyone got more or less enough to mine. Because the availability of water differed, water rights did as well.⁹⁹

Mining techniques quickly advanced beyond panning as the miners gained experience and the easy finds were exhausted.¹⁰⁰ As miners learned

98. See ROBERT G. DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* 73-85 (1983) (describing development of western water law and its relation to mining industry and miners' law). Since there was no state-supplied law regulating water rights, miners supplied their own. Alfred Jackson's diary describes how water rights developed in his district as miners discovered new techniques that required water:

We had a meeting of the miners at our place yesterday afternoon to decide in regard to ditch and water rights, and it was a hot one. Some of them claimed that water was as free as air and no one had a right to monopolize it, and they would have carried the day, but Anderson proposed as a compromise that all interested should pitch in and build a ditch on shares. As there were only a dozen or so who had any use for the water outside of the creek bed, this was agreed to. . . . I don't see what good it will do, but Anderson says common consent makes law and the action will establish our rights.

CANFIELD, *supra* note 30, at 30.

The resulting ditch was over a mile long and the company shared the water by the day. Another miner began a ditch upstream from theirs "but we have notified him that he must not interfere with the amount we want in our ditch." *Id.* at 40. Elaborate and expensive water systems were not unusual and neither were complex water contracts. See, e.g., THE SHIRLEY LETTERS, *supra* note 30, at 135 (reporting company building three mile ditch, costing more than \$5,000, selling water for 10% royalty to first user, 7% to second, 4% to third). Compliance was aided by the threat of destruction of violators' ditches. Mixing protection of prior appropriation with anti-Chinese prejudice, miners in one California district responded severely to an attempt by some Chinese miners to appropriate water "without asking leave" (by cutting a dam). The Americans "ran the Chinese out of the district, broke up their pumps and boxes, tore out their dams, destroyed their ditches, burned up their cabins and warned them not to come back under penalty of being shot if they made a reappearance." CANFIELD, *supra* note 30, at 211. These actions were "generally endorsed." *Id.*

99. Water availability differed between the northern and southern mining areas. The northern districts (the area around the Feather, Yuba, Bear, and American rivers and their tributaries) had year-round water from rain and melting snow. HOLLIDAY, *supra* note 30, at 304. The southern districts (the area around the Consumnes, Mokelumne, Calaveras, Stanislaus, Tuolumne, Merced, and Mariposa rivers) "was often described as 'the dry diggings,' meaning that gold had to be dug some distance from water during the summer because many smaller streams were dry." *Id.*

100. Once the "pay streak" had been excavated, "a man with a shovel could remove [the dirt] faster than two or three men could pan." YOUNG, *supra* note 33, at 113; UMBECK, *supra* note 30, at 74-75. River mining was an important innovation in late 1849. HOLLIDAY, *supra* note 30, at 307. By diverting rivers, miners could exploit gold deposits in river beds but this required both capital and months of labor and cooperation among participants. *Id.* River mining produced "an unlooked for difficulty"—dams interfered with claims upstream. *Id.* at 379 (quoting miner's letter). In one district the oldest claim was given priority, a decision one miner denounced as "grossly unjust." *Id.* (quoting miner's letter). At another the flooded claimants physically attacked the offending dam, which was defended by its builders. *Id.* (quoting miner's letter). With the need to dam rivers, different characteristics of the land became important thereby changing the value of mining parcels.

The rediscovery of the Roman technique of hydraulicking in March 1853 reinvigorated the placer mining industry. In a hydraulicking operation, water was sprayed onto a site through a high pres-

new techniques for more efficiently exploiting claims, they developed an interest in longer-lived property rights in their claims. As the efficient claim size increased, mining district rules limiting claim size were changed as well.

The property rights created by miner's law worked; they were stable and generally recognized. Umbeck concludes that "the miner's contract did in fact constrain behavior in a manner similar to the theoretical property rights constraint" based on six facts: 1) miners followed their contracts, punishing violators; 2) miners "devoted hundreds of thousands of dollars in developing their claims . . . In other words, miners believed *as if* they had some expectation of continued use rights;" 3) claims were sold for thousands of dollars and "[h]ad exclusive rights to the claims not existed, no one would have paid for them;" 4) few claims were patented under the 1866 federal mining law (four in 1867, and two more by 1870); 5) 1866 law's recognition of exclusive use rights did not materially affect gold production, which remained virtually constant at between \$17 and \$18 million per year; and 6) detailed 1868 government report on mining operations showed "no systematic change in resource allocation after 1866."¹⁰¹

The rules generally maximized the wealth of those miners holding

sure hose, washing out tons of sand and gravel per hour. The water was then channeled into a primary sluice with riffles made of boulders, then through a massive grid to remove larger rocks, and then through a system of catch plates and blankets. YOUNG, *supra* note 33, at 127-129. Hydraulicking required "considerable" investment, but it was a low-cost method of handling large volumes of low grade material. *Id.* at 125. "Given water, ground, drainage and the proper equipment, one man could do in a day what dozens could hardly do in weeks." ROBERT L. KELLEY, *GOLD VS. GRAIN: THE HYDRAULIC MINING CONTROVERSY IN CALIFORNIA'S SACRAMENTO VALLEY* 27 (1959). It demanded significant amounts of water and produced enormous amounts of waste tailings, whose disposal was a serious problem. Hydraulicking's demand for water produced a new industry to supply water. *Id.* at 28-29. Sometimes conflicts over waste disposal were resolved simply by notifying the miners causing the problems of the effects of their actions. For example, when '49er Alfred Jackson and his partner began using water to "sluice out" an area,

a delegation of miners from below us on the creek came to the claim and notified us we must quit. The mud we were sending down the stream buried them under slumgullion, and the water was so thick they could not use it in their rockers.

Because Jackson and his partner saw the downstream users' claims as "reasonable," they stopped sluicing. CANFIELD, *supra* note 30, at 27. Conflicts with those outside the mining community were not so easily settled however. YOUNG, *supra* note 33, at 131. Disposal of tailings in rivers caused flooding and led agricultural interests to organize to oppose hydraulick mining. KELLY, *supra* at 57-84. After many delays and partial defeats, farmers finally succeeded in getting an injunction to stop the deposit of debris into the rivers in 1884. *Id.* at 239-42. See also LESHY, *supra* note 30, at 184-86. Not only did tailings cause problems for downstream land owners, they required coordination in exploiting claims: An upstream claim's tailings could quickly cover up a downstream claim. Miners frequently appear to have been willing to coordinate the efforts—thus Granville Stuart reports waiting to work a hydraulick claim in 1853 while those in front worked their claims. STUART, *supra* note 33, at 71-82. It also brought an increasing "industrialization" of the mining process, ending the era dominated by individuals and small groups. LINGENFELTER, *supra* note 29, at 121.

101. UMBECK, *supra* note 30, at 96-97.

claims, simplified proof and procedural issues,¹⁰² and limited the subject matter of disputes, both of which economized on miners' time¹⁰³ spent away from the claims. Rules aimed at discouraging absentee ownership, like the requirement of a day's labor each week many districts imposed, had the additional benefit of keeping more people in the area to defend it.¹⁰⁴

Crime was tort based and prosecution required a complaint by the victim to the camp.¹⁰⁵ Sanctions were few but severe: Fines, flogging, ear cropping, branding, head shaving, banishment, and hanging.¹⁰⁶ Bayard Taylor speculated that the severity was because "the slightest license given to crime or trespass of any kind must inevitably have led to terrible disorders."¹⁰⁷ Hanging obviously solved the recidivism problem; flogging, head shaving, and ear cropping marked potential recidivists for application of a "three (or two) strikes and you're out" rule.¹⁰⁸ Notably absent was prison, probably because no one could be persuaded to leave his claim to guard a prisoner.¹⁰⁹ Punishments were sometimes reduced if the convicted men were popular.¹¹⁰ Capital crimes were a large proportion of actionable offenses: Horse theft,¹¹¹ both because a thief on horseback was more likely to escape and could carry

102. For example, Langford recounts how a miners' court judge dealt with a request for a nonsuit on grounds of improper service: "Unless the defendant could show that he had suffered by reason of the informed service, the case must proceed." LANGFORD, *supra* note 61, at 129. Procedural problems in the California courts prevented downstream landowners from enjoining hydraulic operations for years. The California Supreme Court dismissed an early suit seeking injunctive relief on grounds of misjoinder of parties since no one could provide which mining operation had contributed particular debris. KELLY, *supra* note 100, at 121-22.

103. Some miners' courts redirected all but the most urgent claims to Sundays when miners generally rested. LANGFORD, *supra* note 61, at 86, 137. Miners also cut short overly long proceedings. *Id.* at 86; HOLLIDAY, *supra* note 30, at 316 (quoting miner's letter stating trials were quick because "[t]he miners are anxious to get back to their work").

104. WATSON PARKER, *GOLD IN THE BLACK HILLS* 62 (1966). Miners jealously guarded their jurisdiction against interlopers. For example, when a fight between California miners in 1850 left one dead, the survivor was "taken over to town and tried before a fellow who sets himself up for an alcalde." CANFIELD, *supra* note 30, at 26. Even though the "defendant" was freed on a self-defense claim, the miners held a meeting and, after one declared that trial in town "was an unwarranted usurpation and an invasion of our rights," the group "resolved that we would not permit it to happen again." *Id.*

105. Actions which elsewhere were crimes were not only tolerated but respected. A miner wrote home in 1850 that prostitution "is looked on as a honorable business." HOLLIDAY, *supra* note 30, at 355.

106. HAMILTON, *supra* note 47, at 221 (flogging, banishment, and death); TAYLOR, *supra* note 30, at 71 (whipping, hanging, ear cropping, head shaving); PERLOT, *supra* note 30, at 105 (describing Mariposa criminal rules).

107. TAYLOR, *supra* note 30, at 77.

108. HOLLIDAY, *supra* note 30, at 317; PERLOT, *supra* note 30, at 105 (second offense punishable by death in Mariposa diggings).

109. TAYLOR, *supra* note 30, at 77.

110. THE SHIRLEY LETTERS, *supra* note 30, at 77.

111. Langford relates an anecdote of two miners tearfully recalling a favorite camp preacher—"such a good man, so charitable and so kind." One miner "added sorrowfully, 'Jim, do you know I never did quite forgive Sam Jones for shooting the parson for stealing that sorrel mare.'" Langford then adds "It must have been a warm affection which would fail to approve of an act so just as shooting or hanging for 'cribbing' a horse in a mining camp." LANGFORD, *supra* note 61, at 118.

off more gold and because loss of a horse could leave a man helpless;¹¹² second offenses generally; large thefts;¹¹³ and murder. Death sentences were frequently commuted to banishment,¹¹⁴ however, and in some cases individuals were given a grub stake by the camp to speed them on their way.¹¹⁵

Forty-niner William Swain reported that the most important characteristic of 'miners' criminal law was that it worked. "We found the most extraordinary state of morals in the mines. Everything in this country is left where the owner wished to leave it, in any place no matter where, as such a thing as stealing is not known."¹¹⁶ Alfred Jackson's California diary records only one death during his two years in the mines, and that was a case of self-defense.¹¹⁷ Crime was also kept low by the heavily armed nature of the population. Most miners owned at least one gun, giving all roughly equal abilities to use violence.¹¹⁸ Crime in the gold producing regions was far more likely outside the mining camps. Accounts of both California¹¹⁹ and Montana¹²⁰ mining camps, for example, rarely mention murders or thefts within camps but describe frequent occurrences of both on trails and roads outside the camps.

Miners knew why their legal system worked—it was fast.¹²¹

112. BENNETT, *supra* note 48, at 36 ("[h]orse stealing was the worst sort of murder because it left a man at the mercy of every enemy from an Indian down to hunger and cold").

113. THE SHIRLEY LETTERS, *supra* note 30, at 93-96 (describing hanging of man who stole \$1,800).

114. Two men tried in a Montana miners' court for murder, for example, were released after being sentenced to hang after a letter one had written to his mother was read aloud. "It was filled with expressions of love for the aged mother, regret for the crime, repentance, acknowledgments of misspent life, and strong promises of amendment if only life could be spared a little longer." LANGFORD, *supra* note 61, at 133. Langford suggests there was multiple voting by the friends of the accused. *Id.* at 134.

115. PAULA MITCHELL MARKS, *PRECIOUS DUST* 260 (1994). Miners were not the bloodthirsty, vengeful group they are sometimes depicted to be. Jackson, for example, recounts that when a thief caught red-handed stealing from a rifle-box and sentenced to fifty lashes "[n]obody would volunteer to do the whipping, so we drew lots." The miners turned the thief loose after six strokes, however, because he "made such a howl . . . although there was not a red mark on his back." CANFIELD, *supra* note 30, at 36.

116. HOLLIDAY, *supra* note 30, at 316 (quoting William Swain). See also TAYLOR, *supra* note 30, at 91 (thefts, other than petty larceny, "rare" and tents "held inviolate"). See also HOLLIDAY, *supra* note 30, at 316 (quoting miner's letter, "December 26. The people here refrain from—from I hardly know what, unless it is common, vulgar stealing. I think there is less of what is ordinarily called stealing here than any place I was ever in; and yet there can be little difficulty in stealing to almost any extent. A vast amount of property, easily movable, is daily and nightly exposed without a watch, or even a lock"). See also CANFIELD, *supra* note 30, at 51 (Alfred Jackson's diary "It is a queer thing how well we got along without any courts or law. . . . Outside of a few cutting and shooting scrapes among the gamblers there have been no serious crimes, and it is a fact that we are more orderly and better behaved as a rule than the eastern towns from which we came").

117. CANFIELD, *supra* note 30, at 26.

118. UMBECK, *supra* note 30, at 100.

119. See, e.g., CANFIELD, *supra* note 30, at 169 ("numerous hold-ups and murders on the trails").

120. See, e.g., LANGFORD, *supra* note 61.

121. Speed, of course, also had its disadvantages. Jackson tells of a Chilean hung for horse theft "and the next day the horse he was accused of stealing was found in the hills above French Corral."

The general honesty . . . is usually attributed to the prompt and severe punishment always ready for offenders. . . . Arrest, trial and punishment rarely occupy more than a few hours. . . . No warrant, indictments, or appeals delay proceedings. . . . The miners are anxious to get back to their work and the prisoner is not long kept in suspense.¹²²

Disputes were generally resolved either by a meeting of the entire district or by an elected jury or alcalde.¹²³ Langford gives a good general description of these meetings:

It is now the general custom among the property holders of a mining camp, as a first step towards organization, to elect a president or judge, who is to act as the judicial officer of the district. He has both civil and criminal jurisdiction. All questions affecting the rights of property, and all infractions of the peace, are tried before him. When complaint is made to him, it is his duty to appoint the time and place of trial in written notices which contain a brief statement of the matter in controversy, and are posted in conspicuous places throughout the camp. The miners assemble in force to attend the trial. The witnesses are examined, either by attorneys or by the parties interested, and when the evidence is closed the judge states the question at issue, desiring all in favor of the plaintiff to separate from the crowd in attendance until they can be counted, or to signify by a vote of "aye" their approval of his claim. The same forms are observed in the decision of a criminal case. . . . The court is composed of the entire population. To guard against mistakes, the party in defect, in all cases, has the right to demand a second vote.¹²⁴

When an alcalde was used, he retained authority only so long as his decisions met the approval of the majority of miners. When they disagreed, he was replaced.¹²⁵ When juries were used, selection was often straightforward, even in hotly contested cases.¹²⁶ Perhaps the most important thing about dispute resolution was the infrequency of disputes to resolve.¹²⁷

CANFIELD, *supra* note 30, at 96.

122. HOLLIDAY, *supra* note 30, at 316 (quoting miner's letter).

123. Miners borrowed little from Mexican law but they did adapt the Spanish word alcalde for an all purpose decision-maker.

124. LANGFORD, *supra* note 61, at 85. See also HAMILTON, *supra* note 47, at 221.

125. UMBECK, *supra* note 30, at 115.

126. Hughes, for example, recounts how a trial where the crowd was sharply divided nonetheless quickly filled the jury panel without incident and unanimously selected the judge. "[T]here was no desire on the part of anyone to delay proceedings or quibble over technicalities, as is usual in proceedings of the regular courts of the country." HUGHES, *supra* note 30, at 156.

127. TAYLOR, *supra* note 30, at 78 (disputes "not frequent").

Decisions made by an entire camp had several significant advantages. First, they were not as susceptible to packing as juries, although an accused's friends could still try to flood the camp. More importantly, however, they were less susceptible to intimidation because individuals could escape retaliation if the community acted as a group.¹²⁸ The procedures in such courts were simple and straightforward:

The progress of a trial in one of these courts is entirely practical. Often the miners announce at the commencement that the court must close at a certain hour. Cross-examinations are generally prohibited, and if lawyers are employed, it is with the understanding that they shall make no long arguments. Each party and their respective witnesses give their evidence in a plain, straight-forward manner and if any of the listeners desire information on a given point in the testimony they request the person acting as attorney to ask such questions as are necessary to obtain it.¹²⁹

Such courts were, of course, only as good as the men who comprised them and when the miners were a poor lot, so were their courts.¹³⁰ Finally, requiring the full camp's commitment to decisions may have allowed some wrongdoers to escape punishment by emotional appeals and the like, but it also meant that the underlying process had broad support and allowed new entrants to affirm it by their participation.

If California typified the early rushes, the Black Hills exemplified the later rushes. The Black Hills are an area roughly 125 miles long (north to south) and 60 miles wide (east to west) in what is today southwestern South Dakota. Prior to the gold rush they were largely unoccupied.¹³¹ Between 1874 and 1879¹³² more than 16,000 miners entered the Black Hills,¹³³ more than Dakota Territory's population in 1870.¹³⁴ The Black Hills rush pro-

128. LANGFORD, *supra* note 61, at 86.

129. *Id.* at 85-86.

130. "The trouble is that most of the men are too ready to set themselves up as judges and, swayed by their passions, inflict penalties, even to sentences of death, on insufficient evidence." CANFIELD, *supra* note 30, at 96. Dame Shirley, for example, complained that a man was hung for stealing \$1,800: "I have heard no one approve of this affair. It seems to have been carried on entirely by the more reckless part of the community." THE SHIRLEY LETTERS, *supra* note 30, at 97.

131. The Sioux used them as a sacred region but did not live there. GREEVER, *supra* note 29, at 286.

132. PARKER, *supra* note 104, at 38.

133. EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE 106 (1991).

134. LAMAR, *supra* note 48, at 148, 150. Unlike many other rushes, the rush into the Black Hills was not sparked by the sudden discovery of gold; reports of gold there date at least to 1850s and probably much earlier. GREEVER, *supra* note 29, at 288 (gold found by 1859 military expeditions); LAZARUS, *supra* note 133, at 73 ("hills reputed to be goldbearing" in 1804, contemporaneously with Lewis and Clark expedition); GEORGE W. KINGSBURY, 1 HISTORY OF DAKOTA TERRITORY 861-62 (1915) (Father DeSmet, who worked with the Sioux from 1840-1870 knew of gold); DONALD JACKSON, CUSTER'S GOLD THE UNITED STATES CALVARY EXPEDITION OF 1874 4 (1972) (first citizens group advocating

duced "a narrow clamoring hive of humanity that vigorously perpetuated all the grandiloquent traditions of western mining camps" and which produced multiple camps squeezed closer together than in previous rushes.¹³⁵ Deadwood, the largest, grew to more than 10,000 between spring 1876 and spring 1877.¹³⁶ The Black Hills proved a rich gold mining area, producing at least \$11,000,000 in gold between 1876 and 1880.¹³⁷

The Black Hills rush differed from the earlier rushes in several important ways. First, the rush was complicated by the presence of opposing interests simultaneously promoting and hindering it. Second, geological conditions were significantly different, with quartz deposits much more prevalent. Third, the United States in 1875 was a strikingly different country than it had been in 1849, particularly with respect to gold mining. There was now not only an experienced core of miners but also a significant gold mining industry equipped with capital, new technology, and political skills. Finally, the State (and those interested in "mining" the State) had learned from the earlier rushes just as the miners had, and so was better prepared to quickly extend authoritarian legal institutions over the mines.

Unlike in California, Black Hills miners had to contend with actively hostile forces attempting to stop their activities. Not only did the Sioux hold legal title to the Black Hills under the Treaty of 1868,¹³⁸ they had the military ability to enforce their title to prevent outsiders from exploiting the Black Hills gold. The U.S. Army also attempted, at least through the winter of 1875, to keep miners out.¹³⁹ Federal law included fines of up to \$1,000 for unauthorized entry onto Indian lands¹⁴⁰ and the Army threatened to destroy the equipment of any miner found in the Black Hills.¹⁴¹ If the future had cast a short shadow in California in 1849, it cast none at all in the Black Hills while miners mined only between evading the Army and the Sioux.

mining in the Hills formed in January 1861); BENNETT, *supra* note 48, at 167-68; FIELDER, *supra* note 47, at 7-9 (reports of gold as early as 1833).

135. WATKINS, *supra* note 35, at 113.

136. *Id.* at 114.

137. PARKER, *supra* note 104, at 201 (citing South Dakota School of Mines estimates from *Gold Production of the Black Hills*, 18 BLACK HILLS ENGINEER 77 (1930)). Other estimates were as much as twice this amount. *Id.* at 201. The Homestake mine alone was estimated to have produced almost \$60 million by June 1, 1900. GREEVER, *supra* note 29, at 308.

138. Treaty of April 29, 1868, Article II, 15 Stat. 635-36.

139. "Several times in the 1860s, the military had to restrain armed parties from marching headlong into Sioux country." LAZARUS, *supra* note 133, at 67. It continued to discourage several major civilian expeditions through the 1870s. *Id.* at 73. See also LAMAR, *supra* note 48, at 149-150.

140. 30 U.S.C. § 108, ch. 4 (1872).

141. LAZARUS, *supra* note 133, at 79. The Army rarely did more than expel any miner it caught and often did not even do that. *Id.* at 78-79. Laura Ingalls Wilder, for example, recounts how her uncle was captured by soldiers while prospecting in the Black Hills in 1874. The soldiers burned all he had, leaving he and his companions only their weapons. LAURA INGALLS WILDER, THESE HAPPY GOLDEN YEARS 105-110 (2nd ed. 1953)

Despite these hostile forces, miners also had important allies seeking to allow access to the Hills.¹⁴² The same Army which harassed miners also conducted scientific surveys of the Hills. Not only did these surveys greatly increase public interest in “opening” the Hills—the discovery of gold by the Custer expedition in 1874 “gave to the country a new mining sensation, the like of which had not been experienced since the days of ’49”¹⁴³—they also introduced a large number of men to the Hills’ terrain and created trails and maps. Promoters in communities which saw themselves as “gateways” to the Hills also pressured the federal government to dispossess the Sioux and “open” the Hills. These allies’ interests differed from the miners in important ways, however. As Professor Donald Jackson concludes

It is difficult to avoid a suspicion that to some men on the frontier, the truth of the [Custer] gold reports was not important; the important thing was the popular belief that the gold was there. A rush of hopeful miners to the frontier would stimulate trade, strengthen the position of the territories, and force a showdown with the Indians.¹⁴⁴

These interests would hasten the arrival of the State and authoritarian law in the Hills. Nevertheless, miners’ law played an important role in the Black Hills rush, starting with the Army’s recognition of it during the 1875 campaign to remove the miners.¹⁴⁵

Mining conditions in the Black Hills were also different from California.¹⁴⁶ Gold in the Hills was largely in deep deposits requiring elaborate

142. Towns surrounding the Black Hills and railroads eagerly promoted the rush, hoping to profit from outfitting, supplying, and transporting the miners. PARKER, *supra* note 104, at 106-122 (describing efforts of various towns and railroads to attract miners to the Black Hills); KINGSBURY, *supra* note 134, at 866 (describing interest of Yankton businessmen in opening the Hills “because of their proximity, which seemed to give them a favorable advantage as the outfitting and starting point for emigration”); JACKSON, *supra* note 134, at 2 (“The discovery of gold—even on land legally held by the Sioux—could be expected to relieve some of the economic pressures created a year earlier by the Panic of 1873.”).

143. OSGOOD, *infra* note 423, at 75.

144. JACKSON, *supra* note 134, at 111. Although there had been guidebooks published during earlier rushes—thirty during the winter of 1848-49 alone—those guidebooks had been written by those seeking to profit from the sale of the books, not from luring prospective miners west. ROBERT E. LEVINSON, *THE JEWS IN THE CALIFORNIA GOLD RUSH 1* (1978).

145. General George Crook, ordered to remove miners in July 1875, called them to a meeting and suggested they “take such steps as may seem best to them by organization and the drafting of proper resolutions to secure to each, when the country shall have been opened, the benefit of his discovery and the labor he has already expended.” Proclamation of July 29, 1875, quoted in JACKSON, *supra* note 134, at 115. Crook’s reliance on miners’ law was popular with the miners. *Id.*

146. Placer gold in gravel bars was discovered first, as it had been in earlier rushes, but it was neither as extensive nor as productive as in the earlier rushes. GREEVER, *supra* note 29, at 302. Deadwood, which Estelline Bennett, daughter of Territorial Judge Granville Bennett, described as the mining camp which “flared the highest and brightest,” BENNETT, *supra* note 48, at 4, was already “growing out of its placer gold youth in the spring of 1877,” *id.* at 35, less than a year after widespread mining had begun. No placer claims led to a large fortune as they had in California. GREEVER, *supra* note 29, at 302. The shift from placer mining to hard rock mining was rapid and had occurred by 1877, just a year after the

mining techniques. Deep shafts, sometimes thirty feet, were needed, resulting in the need for drainage, tunnels, and shoring. Blasting was often required to break up boulders. Material from these mines was then panned or processed in rockers and sluices.¹⁴⁷ Hard rock claims were harder to settle with the California model of miners' law. While quartz claims could be located with relatively little equipment,¹⁴⁸ enforcing boundaries was not nearly so straightforward.

The placer mines that yielded the gold of '76 were above ground in the sunlight. It was not easy to trifle with them. But when men began running tunnels and sinking shafts and doing their mining by dim candle-light underground, it seemed to be more difficult to distinguish their own gold from their neighbors' and sometimes even honest men forgot or mislaid their boundaries.¹⁴⁹

Although some work was done early on quartz claims, and districts wrote rules governing them from the beginning,¹⁵⁰ it was not until the easier-to-mine placer claims began to produce less that there was much interest in seriously developing the more capital and labor intensive hard rock claims.¹⁵¹ The extensive investments needed to recover gold from the hard rock claims meant that investors were unwilling to put up the money until after the Sioux' title had been extinguished.¹⁵² Once formal legal titles were available, investors poured in money. Hard rock mines were producing at the rate of \$1,500,000 per year compared to the placer claims' \$1,000,000 per year by the end of 1877.¹⁵³ The evolution of the Homestake mine from a claim staked by Fred and Moses Manuel in April 1876 into North America's largest gold mine was merely the most dramatic illustrations of these

Hills were opened. WATKINS, *supra* note 35, at 113. This shift changed the character of the mining camps quickly.

147. PARKER, *supra* note 104, at 55-57.

148. R.V. Hunkins, *The Black Hills—A Storehouse of Mineral Treasures* in *THE BLACK HILLS* 260 (Roderick Peattie, ed., 1952) (“[w]ith pick and shovel a prospector would dig at a promising point deep enough to reach pay rock if it were there, and examine samples for “color” . . . when a prospect hold did reveal satisfactory color, a small mining establishment was established at the point. If hopes materialized, the equipment was quickly enlarged and improved. Most such ventures, however, were short-lived.”). Hard rock claims were recorded almost as soon as the rush began. KINGSBURY, *supra* note 134, at 925. Assessing the value of many quartz claims required more elaborate measures than were available at first. HUGHES, *supra* note 30, at 128-29. (“[s]oon we learned to prospect the free milling ores . . . while the advent of competent assayers a little later made it possible to have the values of the more refractory ores properly tested”). The early quartz mining was conducted much like the placer period, with miners prospecting, staking claims, and beginning to exploit them with relatively primitive technology. WATKINS, *supra* note 35, at 112-13.

149. BENNETT, *supra* note 48, at 36.

150. *See, e.g.*, KINGSBURY *supra* note 134, at 909, 930 (quartz claims located as early as January 1876).

151. PARKER, *supra* note 104, at 89, 185.

152. *Id.* at 185.

153. *Id.*

changes.¹⁵⁴ Processing was more developed than in earlier rushes by the time the Hills were mined. The increasing capital intensity of these processes had an important impact on the demand for authoritarian law.¹⁵⁵ Thus the mining community of the Black Hills was both physically and temporally compressed, packing the pre-industrial mining experience into two or three years.

Political conditions were different as well. While the Black Hills were almost as remote as the California mines had been,¹⁵⁶ they were politically connected to an established center of power: the Dakota Territorial government, a week's stage ride east in Yankton. The Territorial government in Yankton had no intention of missing the opportunity to profit from the Black Hills rush. Territorial Governor John L. Pennington, who "found himself besieged by applicants for office" in the Hills, appointed "Yankton men," provoking a storm of controversy over the "Yankton Ring" and its plans to profit from the sale of townsites, county seats, and various offices.¹⁵⁷ Political organization in the Black Hills was therefore necessary to protect the miners' interests and they responded quickly. As early as the fall of 1876, "delegates" were sent to the Territorial Assembly (with no legal authority) "to secure county organization for the mining districts and prevent the 'greedy capitalists' from securing legislation in Yankton which would establish a monopoly over the water rights in the Hills."¹⁵⁸ There was also agitation for creation of a new Territory in the Hills.¹⁵⁹ Government courts arrived more quickly than in earlier rushes as well. Territorial Judge Granville G. Bennett opened the first official court on June 5, 1877 less than two years after the rush began.¹⁶⁰ Most of Bennett's cases involved disputes over mining property.¹⁶¹

154. WATKINS, *supra* note 35, at 112-13. By June 1877, George Hearst had purchased the Homestake (for \$70,000), *id.* at 39, and by November the Homestake Mining Company was incorporated with a capitalization of \$10,000,000. WATKINS, *supra* note 35, at 117. Hearst quickly purchased surrounding and overlapping claims to get a clear title.

155. Hard-rock mining brought with it enormous capital investments. Parker estimates that California capitalists invested over \$1,000,000 in the Black Hills mining properties by 1878. PARKER, *supra* note 104, at 196. By the 1880s and 1890s, mining in the Black Hills required extensive capital investment in equipment to process the hard-rock ore. *See, e.g.*, JOEL K. WATERLAND, GOLD & SILVER OR SWEAT & TEARS 11 (1988) (describing in detail the equipment used in the 1880s).

156. "Thickly wooded, its red soil sliced into a thousand tangled ravines, gulches, canyons, and creek beds by the erosion of several millennia, it is a dark wilderness country where the sun is an intrusion that comes late and leaves early." WATKINS, *supra* note 35, at 107. Deadwood Creek, which became the center of mining activity, "coursed down the middle of a deep, narrow gulch whose walls were nearly vertical tangles of rock and brush." *Id.* at 112. The canyon was 240 miles from the nearest railroad. *Id.* at 113.

157. LAMAR, *supra* note 48, at 161.

158. *Id.* at 161.

159. *Id.*

160. GREEVER, *supra* note 29, at 327; KINGSBURY, *supra* note 134, at 981.

161. GREEVER, *supra* note 29 at 327.

Despite these differences, however, the Black Hills rush shared important characteristics with the earlier rushes. As before, the formal legal institutions of the State were absent at first—largely because of the political maneuvering that surrounded the “opening” of the Hills to non-Indians. After years of forbidding entry to non-Indians, in November 1875 the government policy was changed.¹⁶²

The miners . . . were still forbidden to enter the Sioux reservation. The soldiers, however, would be taken out of the Hills, and no further military opposition would be offered to the miners. This policy, which was not publicly announced, might for a time remain concealed from Indian sympathizers in the East, while the absence of the troops would be noted immediately in the West.¹⁶³

This method of changing the policy satisfied the miners¹⁶⁴ but created an institutional vacuum, since it prevented the comparatively well-organized federal troops or territorial authorities from creating effective authoritarian law institutions for the area.¹⁶⁵ Even after the policy changed, however, it was not until February 1877 that the treaty ceding the Black Hills to the United States was finally ratified by the Senate.¹⁶⁶

The combination of the speed of the population rush and the smaller geographic range of the mining region meant that there were not enough claims to go around. Deadwood Gulch, for example, was completely

162. The change in policy was at least partially caused by the failure of negotiation with the Sioux to purchase the Hills. LAMAR, *supra* note 48, at 150. Another factor in encouraging miners was U.S. Attorney General Edward Pierrepont's May 1875 decision that the federal law prohibiting white trespassers from entering Sioux lands did not apply to U.S. citizens. GREEVER, *supra* note 29, at 294-95. Pierrepont's brief letter, which only stated his conclusion, is reprinted in KINGSBURY, *supra* note 134, at 919.

163. PARKER, *supra* note 104, at 71. See also KINGSBURY, *supra* note 134, at 895 (in fall 1875 Dakotans discovered “that the vigilance of the military had been relaxed”); see *id.* at 920 (describing decision to “let matters drift”); HUGHES, *supra* note 30, at 44-45 (recounting encounter with troops in May 1876 who told Hughes' party that military had stopped enforcing ban on mines in Hills). The government combined this change of policy with an order that all Sioux return to the permanent reservations by January 31, 1876 or be declared hostile. LAZARUS, *supra* note 133, at 84; WATKINS, *supra* note 35, at 110. Since compliance was physically impossible, this guaranteed a military solution to the Sioux “problem.” LAZARUS, *supra* note 133, at 85. The policy had the intended effect in the east. “By the time the government started its military preparations for the late winter campaign, fifteen thousand miners had begun prospecting in the Black Hills.” *Id.*

164. HUGHES, *supra* note 30, at 22.

165. Even before the treaty with the Sioux was ratified, the Dakota Territorial Legislature passed a bill establishing counties in the Black Hills and organizing them into a new judicial district. KINGSBURY, *supra* note 134, at 975. See REV. CODES OF THE TERRITORY OF DAKOTA, POLITICAL CODES, ch. 12 at 3 (1877) (providing for organization “if the congress of the United States shall ratify the agreement with the Sioux Indians ceding the Black Hills, then and immediately after” a new district was created). Dakota's haste was not motivated solely by concern for the welfare of the inhabitants—California Congressman William Piper had introduced a bill in February 1877 to sever the Black Hills from Dakota to form a new territory. KINGSBURY, *supra* note 134, at 975.

166. KINGSBURY, *supra* note 134, at 975. 19 Stat. 254 (1877).

claimed by the second week in January 1876.¹⁶⁷ By the end of the spring, claims were selling for \$15,000.¹⁶⁸ A shortage of claims and a large population produced a labor market, although jobs were still relatively scarce because the initial placer mining had limited use for labor.¹⁶⁹

Despite the differences between the Black Hills and other mining areas, the first placer miners followed the lead of the earlier mining areas and framed mining rules similar to those of the districts in which many had participated elsewhere.¹⁷⁰ As in other areas, disputes were mostly settled by miners' meetings.¹⁷¹ The presence of mining veterans in the Hills, men with "a distinct understanding of the nature of society in a mining region . . . [who] were well versed in organizing a provisional government and adopting a code of mining law," speeded the process.¹⁷² Miners in Dakota knew they were creating temporary structures not only because they all expected to hit a big strike (as in California) but because they knew that once non-miners or "corporate groups" appeared, miners' law would be displaced.¹⁷³

Claims in the Black Hills tended to be larger than in California, up to three hundred feet along the stream and completely crossing the narrow valleys through which the streams ran. This increased size led to trouble in Deadwood when latecomers demanded halving of existing claims to provide more.¹⁷⁴ The original claimants prevailed, apparently without actual violence.¹⁷⁵ Mining claims also trumped surface claims, as those attempting to

167. PARKER, *supra* note 104, at 91. The scarcity of claims in prime locations also spread miners throughout the Hills. WATERLAND, *supra* note 155, at 11.

168. PARKER, *supra* note 104, at 93.

169. *Id.* at 149. Skilled miners were able to earn \$4 to \$7 per day. *Id.* On the biggest strike in the Gulch, sixteen to thirty men worked in two shifts and produced \$140,000 in gold in four months. *Id.* at 94. When the owners took their gold to Cheyenne, they hired fifteen armed guards to accompany it. *Id.*

170. *Id.* at 60.

171. *Id.* at 62; GREEVER, *supra* note 29, at 327. Minor matters "such as assault, petty thievery, and disturbing the peace" were handled by a "provisional court" organized in Deadwood which held no legal authority. *Id.* at 326-27. A vigilance committee was briefly organized but took no action. *Id.* at 327.

172. LAMAR, *supra* note 48, at 160.

173. *Id.* at 160. Indeed, the Black Hills miners, whose experiences elsewhere made them "much more sophisticated about the process of political evolution in a camp" than earlier miners

knew that the appearance of any corporate group, such as the quartz miners usually were, or the arrival of non-mining settlers, traders, lawyers, and saloon-keepers, meant that their system was immediately rendered inadequate and obsolete and would be replaced by a more general form of local government. Thus every miner was aware that his political creation was of the most temporary and expedient sort. The code might stand six months, or at the longest a year.

Id.

174. PARKER, *supra* note 104, at 61; GREEVER, *supra* note 29, at 303.

175. Parker notes only that "[a]rmed opposition ended the discussion." PARKER, *supra* note 104, at 61. Greever, however, notes that the newcomers numbered only 100 and 500 current claim holders organized to resist the demand for division. GREEVER, *supra* note 29, at 303. Hughes claims the latecomers gave up when they realized smaller holdings would be uneconomical. HUGHES, *supra* note 30, at 106.

build in Deadwood discovered.¹⁷⁶ Recorders charged one to two dollars for registering claims.¹⁷⁷ Miners preferred these to government land patents, available after the Sioux title had been ended and the Hills formally opened for white settlement. The government land patents cost about \$1,000 and took longer to prepare than many miners believed the claims would be worth working.¹⁷⁸ Miners also routinely ignored the federal mining law's requirement of publication of claim notices, frustrating the hopes of newspaper proprietors who had hoped to gain a share of the mining wealth.¹⁷⁹

The Black Hills rushers were quickly joined by non-miners and significant centers of population grew up near the mines faster than in the more remote California rushes. This produced demand for dispute resolution mechanisms outside the mining districts¹⁸⁰ and speeded the arrival of authoritarian law courts. Deadwood Gulch, for example, was the major center of mining activity in the northern Hills and became a city of thousands within a few months of the discovery of major deposits.¹⁸¹

The shift to hard rock mining, where "the hired miners came to the Hills, not to dig gold for themselves in the streambeds, but to work for others deep in the hard-rock mines"¹⁸² also played a role in the decline of the miners' courts. As Parker notes, "[i]t made a difference in the way [the miners] looked at things."¹⁸³ The opportunity cost of the State also declined significantly once hard-rock mining began. Without the opportunity to mine

176. As Hughes puts it, "[t]he claim owners had the better part of the argument, as they had the undoubted right to enter upon any part of their claims, and a statement that it was intended to sink a shaft in the center of a house being erected by a squatter usually brought the latter to terms." HUGHES, *supra* note 30, at 108.

177. PARKER, *supra* note 104, at 61. Some individuals were not above promoting a "stampede" to collect recorder fees. See, e.g., HUGHES, *supra* note 30, at 130-31.

178. PARKER, *supra* note 104, at 62.

179. *Id.* at 158.

180. *Id.* at 74 (describing how in Custer a "provisional government" was created by the community because the federal government still refused to recognize the settlers' presence in the Hills).

181. *Id.* at 91-92, 95. In August 1876, a miners meeting created a "provisional government" in Deadwood with responsibilities for building a house to quarantine small pox victims, clearing streets, and acting as fire warden. *Id.* at 94. Parker interprets this as due to the increased value of property: "Properties this valuable needed more than the protection of an ordinary mining district." *Id.* The miners' solution to the inadequacy of their usual form of governance, however, was to expand it to include the non-mining population of the Gulch. Although labeled a "provisional government," the functions which Parker describes are simply those of a mining district together with those needed by the conditions in the Gulch where a city "three miles long and fifty feet wide" crowded "thousands of dollars' worth of goods," "two hundred frame buildings, dozens of log cabins, and innumerable tents" filled "the narrow, windy canyon." *Id.* at 91, 94-95.

182. *Id.* at 183.

183. *Id.* The San Diego *Union and Bee* expressed a similar sentiment. While welcoming placer mines as "the people's mines," it deemed the hard rock mines where "[t]he great attendant expenses of such mines convert the individual into a factor in the corporation and degrades the sturdy miner into a drudge in the drift, toiling at so much per day, while his bosses—his owners in fact—reap the great profit of his endeavor." San Diego *Union and Bee*, March 1, 1889 quoted in LINGENFELTER, *supra* note 29, at 3-4.

for themselves and in the presence of the enormous wealth created by the hard-rock mines, government became an attractive source of plunder rather than simply a potential plunderer.

4. The Arrival of the State

Miners' law lasted for years in some areas, but eventually succumbed to the authoritarian legal systems. While it lasted, many residents preferred miners' law to the State alternative. As historian Duane Smith summed it up "[j]ails and courts seemed unnecessary when there also existed miner's districts, with rudimentary laws and low costs."¹⁸⁴ It is neither surprising nor a reflection on the long term viability of the miners' courts that they were ultimately suppressed by the federal, state, and territorial governments whose authority they challenged; mining camps were, after all, within the territorial boundaries of the United States. Nonetheless it is worth briefly considering the factors which led to the crowding out of the customary legal institutions by authoritarian legal institutions. Three factors played significant roles in attracting authoritarian legal institutions: (a) opportunities for revenue; (b) opportunities for personal gain; and (c) interests which required a different forum.

Extension of authoritarian legal authority was inevitable but the great wealth of the mining districts hastened interest in the extension of the State legal apparatus. The potential for revenue from these areas was enormous: Mining in California in 1870 (after the boom but the first reliable numbers) involved over \$20 million in capital, almost \$4 million annually in wages, and produced over \$8 million in annual output, respectively approximately 10, 5, and 5 percent of the 1870 totals in U.S. mining.¹⁸⁵

Government interest was attracted to this wealth almost immediately. In 1850 T. Butler King, sent to report on newly acquired California to the U.S. Secretary of State, recommended charging Americans \$16 each for a year's license to mine, which he estimated would produce \$1.6 million in 1851, adding "If revenue is an object, there can be little doubt that, by the adoption of [King's proposed] system, the amount collected in a few years will be larger than the entire district would command in ready money, if offered for sale."¹⁸⁶ The Collector of Customs in San Francisco even unsuccessfully argued that American made goods on ships which had stopped at South American ports were subject to duty as imports because of the stop-

184. SMITH, *ROCKY MOUNTAIN*, *supra* note 48, at 29.

185. The U.S. totals include all forms of mining and so the percentages understate the contribution to total gold mining. Pennsylvania's coal mines were the major other source of mining wealth.

186. KING, *supra* note 43, *reprinted in* TAYLOR, *supra* note 30, at 371.

ver.¹⁸⁷ The government was not slow in tapping this wealth. California ranked 10th of the 35 states in tax revenues only ten years after statehood and climbed to 9th of the 47 states and territories by 1870.

Not all mining is equally attractive to tax authorities, of course, and early placer mining, with its relatively short periods of activity, highly mobile population, and easily concealed product, would have been a difficult target even if it had not taken place in such isolated spots. As the capital intensity of mining rose, however, mines became easier targets for tax revenue production. Customary legal institutions are thus likely to have an increased chance of survival where they regulate activities less subject to capture by revenue-seeking tax authorities. While this includes activities which do not require significant capital, modern technological innovation makes it possible for capital to evade capture as well.¹⁸⁸

Opportunities for personal gain through control of the authoritarian legal apparatus were also an incentive to its speedy creation. The areas surrounding mining districts also drew those men who “saw in the rush and hurry a different opportunity, not wealth but advancement to influence and power in what would soon become the thirty-first state.”¹⁸⁹ This class of “entrepreneurs” saw opportunity in “prospecting” in government. When the Sioux cession of the Black Hills made them part of the Dakota Territory, for example, the “first local elections were of special interest to the professional politicians who had come in with the miners in the hope that they would find their bonanza in the new governmental structure.”¹⁹⁰ Individuals could also “prospect” as a justice of the peace or other official. Dame Shirley describes a local J.P. who, in Carl Wheat’s words, found “that the scales of justice were usually heavily weighted on the side of him best able to defray the ‘costs’ of the court.”¹⁹¹ More generally, Mary Floyd Williams noted that replacing the miner’s meetings’ choice of alcaldes with official justices of the peace brought a major change.

187. ROBERT M. SENKEWICZ, *VIGILANTES IN GOLD RUSH CALIFORNIA* 63 (1985).

188. Evidence of this can be seen in New York’s recent decision to exempt Internet access service from state taxation as part of a deliberate attempt to encourage location of such businesses in New York. Shannon Henry, *New York Takes Tax Burden Off Internet Firms*, WASHINGTON TECHNOLOGY, March 6, 1997, at 48.

189. HOLLIDAY, *supra* note 30, at 398.

190. GREEVER, *supra* note 29, at 328. One man, who Greever terms “the classic example of a man seeking political advantage in a new mining area” had served or sought office in Nebraska, Montana, Colorado, Dakota, and Idaho. *Id.* at 328-29. The election turned on personalities, not issues, and candidates went so far as to bribe soldiers from a nearby military post to vote in civilian clothes. *Id.* at 239. See also LAMAR, *supra* note 48, at 165. Miners, however, were much less interested in State sponsored elections. Taylor, for example, described the first election in California: “The choosing of candidates from lists, nearly all of whom were entirely unknown, was very amusing. Names, in many instances, were made to stand for principles; accordingly a Mr. Fair got many votes.” TAYLOR, *supra* note 30, at 189.

191. THE SHIRLEY LETTERS, *supra* note 30, at 82.

The old alcalde had usually been a fellow-worker among his constituents, with personal interests identical with theirs. The new [state] justice [of the peace] often belonged to the class of political loafers. He had, moreover, an assurance in office that had not existed under a system that swiftly recalled unpopular alcaldes as soon as a majority of the camp might vote to do so.¹⁹²

The mining districts' wealth also attracted many who hoped to get rich off the miners. Some of these new arrivals were dishonest swindlers who required a corruptible judicial forum.¹⁹³ These interests also sought rapid extension of the State to the mining areas because miners' courts were difficult to corrupt and even harder to keep bought—dissatisfied miners simply switched their allegiance to another court.¹⁹⁴

Increasing capital intensity¹⁹⁵ also brought a demand for government law. Areas like the Comstock Lode in Nevada that switched quickly to industrialized mining techniques¹⁹⁶ also experienced early demands for government law. Outsiders who provided the capital for the mines wanted government courts to protect them against local swindlers.¹⁹⁷ Since miners' courts lacked some of the usual incentives to cooperate when one party was an outsider, and since eastern capital could expect more than a level playing

192. WILLIAMS, *supra* note 29, at 148.

193. In Nevada, for example, the territorial court was renowned for its corruption, with one judge receiving \$25,000 for stepping aside in a case, and another charging \$10,000 for a favorable decision. GREEVER, *supra* note 29, at 102-03. "While it would be considerably too much to say that Nevadans wanted statehood just to escape the territorial court, certainly after [statehood] the fierce excitement of the mining suits greatly abated." *Id.* at 103.

194. For example, the story of a corrupt California camp alcalde is notable mostly because of its rarity. Even there, where a miner bribed the alcalde to decide in his favor, the alcalde's decision was overturned and he was removed from office peacefully by a general camp meeting.

Harwood Hinton describes a more sophisticated effort by a group of Arizona prospectors in the 1860s, who "had made every effort to control the district voting so as to protect and enhance the value of their holdings." Hinton concludes they were able to do so for "nearly a year" before "new prospectors and a new governmental organization swept their influence from the diggings." Harwood Hinton, *Frontier Speculation: A study of the Walker Mining District*, 29 PAC. HISTORICAL REV 245, 255 (1960). The group Hinton describes seems exceptional, however, and its success was at least partly due to the small numbers of miners who participated in the central Arizona placer rushes in 1863-65. Such a scheme would not have worked in the larger rushes where a group of twenty-five could not have maintained control for more than a few days.

195. The switch to deep lode mining required additional capital. LINGENFELTER, *supra* note 29, at 3. Placer mining also evolved into more capital-intensive methods, such as hydraulicking. Investors were not the only ones to benefit from capturing the apparatus of the state. In the Comstock, the miners' unions controlled the local law enforcement apparatus and this control "significantly strengthened the unions' position and tended to counterbalance the control that the large mining companies exerted over state government and militias." *Id.* at 56.

196. *Id.* at 31.

197. Eastern investors, for example, were often cheated by clever schemes. GREEVER, *supra* note 29, at 305 (noting two representative schemes. In one, some miners selling a claim managed to substitute an identical ore sample bag which had been salted with additional gold; in another a drunk staggered up to a mine and dropped his liquor bottle, which actually contained gold chloride, onto the ore samples). HUGHES, *supra* note 30, at 298-99 (recounting assorted swindles in the Black Hills).

field from territorial courts manned by eastern politicians, outsiders had every reason to prefer State-provided law.¹⁹⁸

5. Assessing Miners' Law

How well did miners' law work? It was successful in a number of areas: Miners' law provided an efficient means of protecting miners' lives and valuable property, created property rights, and fostered cooperation in communities which lacked most of the social structures which facilitate cooperation. Contemporary observers like Charles R. Shinn praised miners' law as an example of the American capacity for self-rule. It is thus a clear example of successful solution to the free rider problems in private provision of law.

It did less well in other areas: Discrimination against minorities was often tolerated or institutionalized, too many *guilty* men escaped justice, it lacked graduated responses, and it proved inadequate at dealing with externalities caused by technological changes. However these faults were to a large extent also the faults of the contemporaneous authoritarian legal institutions.

One important counterfactual is what might have happened if miners had not chosen contract over violence. Banfield's account of Montegrano offers an alternative organizing principle, which he termed "amoral familism."¹⁹⁹ Simply put, an amoral familist behaves as if he were following the rule: "Maximize the material, short-run advantage of the nuclear family; assume that all others do likewise."²⁰⁰ Had miners followed such a rule, the Western placer camps might have justified their Hollywood image as places of unending violence. That they did not is a testament to the power of cus-

198. Perhaps more importantly, the outside investors were prepared to take actions which the miners' courts would not countenance but which the more easily corrupted authoritarian law courts might. A young man who refused to sell land to the Homestake Mining Company in the late 1870s (which it wished to use for a mill) was killed by company gunmen.

The murderers were promptly arrested. While they were lodged in jail, a deputy sheriff reported that he was offered five thousand dollars to open the jail door for them. At their long and sensational trial, the jury brought in a verdict of not guilty. The astounded judge, Gideon C. Moody, immediately declared that the decision was not in accord with the evidence and plainly told the jury that he held no doubts about their having received Homestake money. Nobody made a reply and nothing could be proved, but it was a well-known fact that several of the jurors had plenty of cash after the trial.

GREEVER, *supra* note 29, at 310. A similar example occurred in Nevada where a foreman and several of his men killed a striking miner and wounded two others and were acquitted by what miners termed a "judicial farce." The miners' union voted to order the men banished. LINGENFELTER, *supra* note 29, at 138-39. Unlike a miners' court, however, there was no way to undo the purchased verdict.

199. BANFIELD, *supra* note 22, at 85.

200. *Id.*

tomary legal institutions.

Miners' law also produced an important innovation in mineral law; the notion that unclaimed mineral rights could be removed from the public domain.²⁰¹ Even when the federal government finally did move to create statutes to govern mining on public lands between 1866 and 1872, "there was universal agreement that mineral exploration and development on federal lands was unqualifiedly beneficial."²⁰² Miners' law was thus attuned to the contemporary view of the appropriate use of mineral lands. Miners managed to develop relatively fair institutions for dividing the placer deposits they located. In this they did better than the government courts did in the hard rock litigation (which admittedly posed more difficult technical problems).

Miners' law also embodied a view of a minimalist state. In the mining districts the term law meant a pure, disinterested power, an interpreter, an organ not functioning until, like an oracle, it was called upon to do so. A claim would be violated; the miners would hear the case, render justice, and then disband. The police powers of this code operated in the same way, and since wealth through gold was the aim of every person, government then supposedly had little economic attraction; it had no executive; and in its early stages its officials received little or no pay.²⁰³

Despite the inevitability of the extension of the authoritarian legal apparatus to the mining camps, miners' courts often coexisted with official courts, suggesting the authoritarian law courts were an imperfect substitute for the miners' courts.²⁰⁴ The authoritarian law courts²⁰⁵ could not move too quickly or reject the property rights of the miners' courts, without risking popular rejection. Just as the King's courts absorbed much of the medieval Law Merchant in England,²⁰⁶ part of the success of the authoritarian law courts was undoubtedly due to their willingness to accept the substance of the miners' law with respect to property rights.²⁰⁷

201. LAMAR, *supra* note 48, at 159 (footnote omitted).

202. LESHY, *supra* note 30, at 17.

203. LAMAR, *supra* note 48, at 159 (footnote omitted).

204. Dame Shirley, for example, reports that the appointment of a justice of the peace for Rich Bar was rejected by the miners. THE SHIRLEY LETTERS, *supra* note 30, at 70. When he attempted to preside at a criminal trial, the miners elected their own president and jury, although they allowed the official Justice of the Peace to sit alongside the president. *Id.* At 76.

205. Congress too was hesitant to interfere. Between 1848 and 1866, a time when \$1 billion was mined, there was no federal mining legislation. HOLLIDAY, *supra* note 30, at 400.

206. BENSON, *supra* note 1, at 60 ("[o]ne reason why the Law Merchant was absorbed into common law appears to be that governments demonstrated a willingness to enforce merchant law").

207. King's 1850 report on California noted that it would be impossible to change the system the miners had devised—troops sent to do so would desert, and "[t]he people would unite with them in producing anarchy and confusion." KING, *supra* note 43, reprinted in TAYLOR, *supra* note 30, at 368-69.

Not all commentators have looked favorably upon “miners’ law.” Perhaps the most authoritative critic is Josiah Royce, whose 1886 book *California From the Conquest in 1846 to the Second Vigilance Committee in San Francisco* directly challenged Charles R. Shinn’s contemporaneous and more optimistic analysis. Royce found that each mining district was “well able to keep its own simple order temporarily intact” and to exhibit “general peacefulness.”²⁰⁸ He also conceded that gold was “left in plain sight, unguarded and unmolested, for days altogether,” and that “grave disputes, involving vast wealth [were] decided by calm arbitration.”²⁰⁹ Despite these successes, Royce argued miners’ law was flawed because “it had not been won as a prize of social devotion, but only attained by a sudden feat of instructive cleverness.”²¹⁰ Royce marshaled evidence against mining camps, particularly with respect to xenophobic prejudice²¹¹ and lynchings,²¹² but his fundamental critique of miners’ law rests not on this evidence, which he saw as symptoms, but on an underlying moral flaw. Robert Cleland notes that a “cardinal belief” of Royce’s was that “a lawless community was the product of the indifference and irresponsibility of decent citizens.”²¹³ Royce saw the development of more capital intensive forms of mining as a positive change because it led “many mining towns” to become “almost as conservative as much older manufacturing towns have been in other states.”²¹⁴ It was the growth of State power to restrain the “irresponsible freedom”²¹⁵ of the mining communities that was California’s saving grace. The lesson Royce drew from the mining camps was not their success at keeping order, which he conceded,

but that the moral elasticity of our people is so great, their social vitality so marvelous, that a community of Americans could sin as

Similarly a major problem in the Black Hills was that mining claims before the extinguishment of Sioux title to the Black Hills were hard to reconcile with the federal mining law. Federal mining law dealt with distribution of property of the United States and the Black Hills belonged to the Sioux before 1877. Territorial Judge Granville G. Bennett found that although the miners were clearly trespassers and so could not claim title based on claims established before the land belonged to the United States, trespassers with earlier claims trumped trespassers with later claims. PARKER, *supra* note 104, at 188.

Local, state and federal governments all ratified the most significant portions of the miners’ laws. For example, the Dakota Territorial Legislature ratified the 300 foot claim width, declining an opportunity to redistribute in favor of the majority. GREEVER, *supra* note 29, at 304. After obtaining statehood, Nevada dispatched its new senators to secure changes in federal law ensuring the enforceability of local mining customs and regulations and preventing federal courts from refusing to hear title disputes over public land mineral rights, requiring instead a decision based on “possessory mining rights.” *Id.* at 106.

208. JOSIAH ROYCE, CALIFORNIA FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANTE COMMITTEE IN SAN FRANCISCO 221 (1886).

209. *Id.*

210. *Id.*

211. *Id.* at 281-90.

212. *Id.* at 290-95.

213. Robert Cleland, *Introduction*, in ROYCE, *supra* note 208, at xxii.

214. ROYCE, *supra* note 208, at 295-96.

215. *Id.* at 295.

fearfully as, in the early years, the mining community did sin, and could yet live to purify itself within so short a time, not be a revolution, but by a simple progress from social foolishness to social steadfastness.²¹⁶

Royce's criticism is substantially undercut by his philosophy of civic virtue. Royce, as a child of '49ers and a philosopher, sought to "help the reader towards an understanding of two things: Namely, the modern American State of California, and our national character as displayed in that land."²¹⁷ Since Royce defined success as creation of a State infused with civic virtues, it is little wonder that he found the mining camps wanting. Since his history was imbued with his notion that "[m]an's chief end was to serve his own soul by serving the community, the State, [and] the social order,"²¹⁸ Royce could not help but condemn societies built around contract in pursuit of mere material wealth and individuals' self-fulfillment.

What might have happened had the State been present from the start? The Canadian experience suggests some answers. The British Columbia gold rush of 1858-59 brought 15,000-31,000 mostly American miners into Canadian territory,²¹⁹ and they brought their version of miners' law with them.²²⁰ British authorities were so concerned about the potential for chaos that the Governor of Vancouver Island, who had no jurisdiction over the mainland, issued regulations requiring payment of a license fee of 21 shillings in 1857 and a bond of £2,000 with a royalty of ten percent in 1858.²²¹ Although miners in B.C. relied on their own institutions to a greater extent than in later Canadian rushes, David Ricardo Williams sums up the experience as "[t]here was no frontier justice but British justice administered on the frontier, adapted to emergency conditions by legislation and judicial rulings."²²² When gold was discovered in the Klondike however, the Canadian authorities lost little time in instituting restrictions. While some were aimed at protecting miners from the harsh weather,²²³ others were simply designed to gain revenue. Within two weeks of the discovery of gold in 1896, mining regulations were altered to restrict miners to a single claim, rather than one per creek in the district.²²⁴ As the scope of the discovery be-

216. *Id.* at 296.

217. *Id.* at 3.

218. Robert Cleland, *Introduction*, in TAYLOR, *supra* note 30, at xxvi.

219. David Ricardo Williams, *The Administration of Criminal & Civil Justice in the Mining Camps and Frontier Communities of British Columbia* in LAW AND JUSTICE IN A NEW LAND: ESSAYS IN WESTERN CANADIAN LEGAL HISTORY 215, 217 (Louis A. Knafka, ed., 1986).

220. *Id.* at 217-22.

221. *Id.* at 219-20.

222. *Id.* at 232.

223. MELODY WEBB, YUKON: THE LAST FRONTIER 128 (1985). In February 1898, Canadian government began requiring newcomers to bring a year's supply of food and equipment. *Id.*

224. GREEVER, *supra* note 29, at 359.

came known in Ottawa, further restrictions were imposed, including requiring a royalty of 10% of gross output over \$2,500 per year, reducing claim sizes to 250 feet, and reserving alternate blocks of claims for the Crown.²²⁵ Miners were required to purchase a "Free Miners Certificate" at \$15 per year.²²⁶ "The tax . . . was a major factor in the exodus to Nome, Alaska, when discoveries there gave promise."²²⁷

The registry services provided by the Canadian government were less satisfactory than those provided by the private registrars in the American districts. While technically anyone had the right to examine the books, the understaffed office would not allow inspection because of a claimed lack of resources.²²⁸

Quickly the clerks started to capitalize on the situation by privately selling desired information to any person who would pay them cash or give them an interest in the claim. The clerks made some intentional mistakes in the records. They were also bribed to make other changes, such as running a line through names and dates, erasing, scratching out, or even literally cutting out information and pasting in a substitute. Occasionally, they rejected a claim and somehow another person, immediately informed, would appear to take it as his own.²²⁹

The head of the office, who Greever says was "not a crook himself,"²³⁰ issued passes to "favored individuals" allowing them to jump to the head of the line ahead of men waiting for three days in forty below zero weather.²³¹ The government authorities also closed one area for resurveying, promising to reopen it as of July 11 for those with special permits. On July 9, however, they posted a notice, dated July 8, opening it to all and abandoning the permits.²³² A group favored with this knowledge got a head start, having left town July 8.²³³ Such practices would never have been tolerated in the American mining districts, but here the miners were unable to get the clerks replaced. Canadian mining laws were also "not precisely adapted to conditions in the Klondike" and had "sometimes contradictory wording" in the regulations, which caused additional confusion.²³⁴ When the head of gov-

225. *Id.*

226. *Id.* Because many miners objected to paying royalties, the Northwest Mounted Police began collecting samples and measuring mines in 1899 to estimate gold production. *Id.* at 361.

227. *Id.* at 361.

228. *Id.* at 364-65.

229. *Id.* at 365.

230. *Id.*

231. *Id.*

232. *Id.* at 366.

233. *Id.* at 367.

234. *Id.* at 365.

ernment in the area finally arrived, he refused to act on many issues because he was planning to leave in a few months.²³⁵

The experience under American federal law also suggests (some of the possible) characteristics of authoritarian law solutions. Duane Smith, who is generally critical of miners' law, notes that despite what he considers wise features of the 1872 federal mining law, "[r]egrettably, no means were provided to enforce the law continuously and honestly," leading to expensive litigation.²³⁶ Arthur Noyes, the first federal judge of the Nome, Alaska judicial district, began appropriating miners' claims for his own company within a day of his arrival and then refused to hear protests against his actions, even ordering federal troops to defend "his" claims from the dispossessed miners.²³⁷

The basic federal laws governing mining (the Mining Law of 1866,²³⁸ the Placer Act of 1870,²³⁹ and the General Mining Law of 1872²⁴⁰) were based on free access but overlaid it with what a critic described as "machinery very ingenious."²⁴¹ The 1866 law's adoption, due largely to clever parliamentary maneuvering by its Senate sponsor,²⁴² is a stark contrast to the openness and flexibility of miners' law. Further, the federal mining laws were "beset with a chaotic number of uncertainties that have hampered application and enforcement."²⁴³ Even John Leshy, who is unsympathetic to miners' law, concluded that "by almost any measure the [federal] Mining Law has burdened the judiciary to an extent astonishing for a single federal statute."²⁴⁴ Even more than the costs imposed by their needless complexity, federal mining laws have proven unsuccessful at segregating miners from others seeking access to federal lands for non-mining purposes.²⁴⁵ Further it has allowed "rank speculators" to tie up large areas, impeding access by "legitimate mining operators."²⁴⁶ For all its flaws, miners' law generally

235. *Id.* at 365-66.

236. SMITH, ROCKY MOUNTAIN, *supra* note 48, at 73. California Senator James McDougal attempted to keep federal law simple by offering an amendment to the 1866 Mining Law bill that would have replaced the entire statute with a single provision opening mineral lands and recognizing mining districts. LESHY, *supra* note 30, at 1.

237. MARKS, *supra* note 115, at 269.

238. 14 Stat. 251 (1866).

239. 16 Stat. 217 (1870).

240. 17 Stat. 91 (1872).

241. LESHY, *supra* note 30, at 2.

242. *Id.* at 15. When the chairman of the House Public Lands Committee buried the Senate passed version, the Senate sponsor took a House passed bill on rights-of-way for ditch and canal owners and substituted his bill's text. The "amended" bill was returned to the House Committee on Mines and Mining and accepted within four days.

243. *Id.* at 19.

244. *Id.* at 20 (noting more than 200 Supreme Court decisions dealing with it).

245. *Id.* at 55.

246. *Id.*

avoided both problems. The federal laws also created what Colorado Senator Charles Thomas called “a veritable paradise for the blackmailer and scoundrel.”²⁴⁷ By making location claims and threatening litigation, individuals could often force others to pay them off.²⁴⁸

In sum, miners’ law as a customary legal institution and solution to the free rider problem was a success. In the face of what in retrospect appear to be almost insurmountable obstacles, a society of strangers wandering in alien lands built a resilient institution capable of adapting to social and technological changes which occurred with a rapidity which makes our present-day society appear tame.

B. *Vigilantes*

Vigilantism is in many ways the purest example of the free rider problem inherent in the private provision of law. While vigilantism and vigilantes have a justifiably mixed reputation among many American historians and legal scholars, vigilance committees produced rules, dispute resolution bodies, and enforcement mechanisms.²⁴⁹ Vigilance committees translated these elements into customary legal institutions with varying degrees of formality. Some vigilante organizations, like the 1856 San Francisco committee, operated with relatively formal structures, becoming almost parallel governments.²⁵⁰ Others, like the Montana Vigilantes, were less formally structured.

To “succeed” as a customary law institution a vigilance committee must accomplish three things. First, it must end the threat it was formed to combat. Second, it must avoid making mistakes, i.e., punishing innocent people and not punishing the guilty. Third, it must accomplish these goals

247. *Id.* at 78.

248. *Id.* at 78-79.

249. See, e.g., Richard Maxwell Brown, *Violence* in THE OXFORD HISTORY OF THE AMERICAN WEST 396 (Clyde A. Milner II, et. al., eds., 1994) (“[t]he local campaigns of vigilantes were often aspects of a crucial pattern of violence pervading the West from the 1850s to 1920. At its core was the conservative, consolidating authority of capital—the force that was, in the scholar Alan Trachtenberg’s conception, ‘incorporating’ America during the late nineteenth century”). WATKINS, *supra* note 35, at 244 (vigilantism “contributed very little to the evolution of civilization. In fact, it might even be said that it hampered that evolution nearly as much as the criminality it was ostensibly designed to eliminate. It was a disruptive force, not one committed to growth”).

250. In addition to attempting to explain the conditions under which private legal systems can emerge, private legal systems need to deal with the Leviathan problem. One of the reasons people might be more comfortable with the State’s monopoly of force than with a competitive legal system is that they might believe that constitutions, courts, and other mechanisms function effectively to restrain Leviathan but would prove ineffective against private entities. A competitive legal system might ultimately lead to monopolization by a private entity, and that would be less desirable than a public monopoly with built in restraints. It is, of course, open to question how well those constraints work, but the problem is a real one. What keeps a private legal system from overstepping its limits and becoming, if not the state, then at least an equally rapacious predator?

while keeping the cost to the participants low enough to induce participation. The vigilance committees discussed here are some of the most prominent examples of 19th century vigilantism, although they are certainly not “representative” of the broader social phenomenon. The San Francisco committee came close to creating a parallel State. The Montana committee overcame significant obstacles to cooperation to defeat a much stronger criminal organization.

These experiences suggest two important lessons for customary legal institutions. First, customary law depends on overcoming free rider problems. The experience in Montana in particular suggests some of the ways in which these problems can be overcome. Second, the San Francisco experience provides a guide both to avoiding the Leviathan problem and to selecting the features of customary law which make its institutions superior to the institutions created by authoritarian law. Indeed the two lessons are linked—vigilantism can be, as it was in Montana, a spontaneous enforcement of community norms by individuals with no state authorization or it can be, as it was in San Francisco, substitution of one set of norms for another through the capture of the apparatus of the state. In both cases, the individuals moved to act must overcome significant free rider problems—being a vigilante may provide a few with excitement but it is largely a combination of extensive periods of boredom combined with short periods of intense danger, much the combination required to be a policeman today. Sustaining individual action requires either powerful feelings of individual responsibility (as in Montana) or the lure of the rich prize offered to a successful coup d’etat (as in San Francisco).

1. The San Francisco Vigilance Committee of 1856²⁵¹

San Francisco grew up in the boom of the Gold Rush and its rapid growth gave it a character different from other American cities. At "the end of 1847 San Francisco had 200 buildings and 800 inhabitants—one year later it would be the great metropolis of the Pacific Coast."²⁵² After an initial population loss as everyone raced to the mines,²⁵³ San Francisco boomed through the winter of 1849-50.²⁵⁴ With 15,000²⁵⁵ people in 1849 it was "[a] place without homes, a boom town of men, . . . given over entirely to busi-

251. The primary sources used for this section are: (1) H. H. BANCROFT, *POPULAR TRIBUNALS* (1887) (VOLS. 36 AND 37 OF THE WORKS OF HUBERT HOWE BANCROFT); (2) GEORGE R. STEWART, *COMMITTEE OF VIGILANCE* (1964); (3) STANTON A. COBLENTZ, *VILLAINS AND VIGILANTES* (1936); (4) ALAN VALENTINE, *VIGILANTE JUSTICE* (1956); (5) JOSIAH ROYCE, *CALIFORNIA FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANTE COMMITTEE IN SAN FRANCISCO* (1886); (6) MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851* (1921); (7) ROGER W. LOTCHIN, *SAN FRANCISCO: 1846-1856 FROM HAMLET TO CITY* (1974); ROBERT M. SENKEWICZ, *VIGILANTES IN GOLD RUSH CALIFORNIA* (1985); and (9) FRANK SOULÉ, JOHN H. GIHON, AND JAMES NISBET, *THE ANNALS OF SAN FRANCISCO* (1855).

Bancroft covered the 1851 Committee at great length having interviewed many of the members and having had access to the Committee's papers. His book includes a great deal of material which must be treated with caution either because no authority is cited or because it appears to be a record of a conversation which Bancroft constructed. Bancroft was also an unabashed partisan of both the 1851 and 1856 committees. Nevertheless it served as a valuable source. Stewart's book is less "academic" in style than some of the others, which may make it the preferred source for readers seeking more detail. His source notes partially compensate for the absence of footnotes, however, and he presents a careful chronology of the Committee's actions. Williams book was begun as an introduction to the Bancroft collection of the 1851 Committee's papers she was editing. She expanded the work to an entire book as she worked with the material. While not as unaware of the Committee's flaws as Bancroft, she is still a generally sympathetic historian. Her chronology of events is carefully done without respect to her sympathies, however, and I have relied on her account for the facts of the Committee's actions. Royce, who grew up in California in the 1850s and 1860s, wrote his book while on the faculty at Harvard and is widely held to be one of the best authorities on early California. Robert G. Cleland, *Introduction*, in ROYCE, *supra* at xxix. Lotchin's history focuses on San Francisco as an example of urban problems. As Richard Wade's foreword puts it, Lotchin "provides the movement with an urban context He sees it not so much as a bout between 'good guys' and 'bad guys' (which side was which varies with the author's interpretation), but rather the outgrowth of a search for community." LOTCHIN, *supra* at ix. Lotchin draws heavily on the *Bulletin*, a newspaper closely associated with the 1856 Vigilantes. *Id.* at 383, n.1. Senkewicz draws together the early writers' focus on the centrality of vigilantism to San Francisco in the 1850s and the later historians' analysis which placed the two committees in a political and economic context. See SENKEWICZ, *supra* note 187, at 203-31 for a historiographic discussion of the major works on the committees.

It is important to note that I do not discuss Richard Maxwell Brown's interpretation of western vigilance movements as part of what he terms the "Western Civil War of Incorporation" during the period 1850-1920. See, e.g., Richard Maxwell Brown, *Violence*, in *THE OXFORD HISTORY OF THE AMERICAN WEST* 393, 396-418 (Clyde A. Milner II, et al., eds., 1994). Briefly, Brown argues that vigilance was part of a process, the assertion of authority by "the conservative, consolidating authority of capital" against Indians, southwestern Hispanics, hard-rock miners and settlers. Although Brown's analysis is powerful, I believe it neglects the spontaneous order that developed throughout the West by forcing events into a class-based analysis. A full discussion of Brown's argument, however, must await future work.

252. HOLLIDAY, *supra* note 30, at 32. See also LOTCHIN, *supra* note 251, at 8 (population in 1848 850-1,000); SENKEWICZ, *supra* note 187, at 14 (2,000 in February 1849, 5,000 by December 1849).

253. HOLLIDAY, *supra* note 30, at 35; WATKINS, *supra* note 35, at 27.

254. LOTCHIN, *supra* note 251, at 49.

255. TAYLOR, *supra* note 30, at 153.

ness, speculation and entertainment.²⁵⁶ In response to a variety of conditions, including gangs and fires, a number of leading citizens organized a vigilance committee in 1851. In all, that committee arrested ninety-one people, hung four, whipped one, deported fourteen to Australia, ordered fourteen to leave the state,²⁵⁷ turned fifteen over to the official courts and released at least forty-one.²⁵⁸ By September 1851, the beginning of the peak trading season, committee activity significantly diminished since “[b]eing a vigilante was hard work and practically a full time job” and the prospect of gains from trade limited men’s interest in continuing to participate.²⁵⁹

San Francisco’s explosive growth continued after 1851 and population grew to 56,000.²⁶⁰ More than just more people, San Francisco grew as a center of trade. Tonnage of cargo entering in 1855 was more than ten times what it had been in 1848, despite the beginning of an economic downturn.²⁶¹ The winter of 1853-54 brought a great financial depression, which lasted until 1858-59.²⁶²

The production of the mines began to fall off, immigration decreased, many people left the land, the consumption of food diminished, interest and rents declined in San Francisco, and thirty percent of the warehouses were left empty.²⁶³

The financial crisis spread quickly.²⁶⁴ In addition to the financial crisis in the private sector, fall 1854 also brought with it scandal when the popular businessman and city father Henry Meiggs was discovered to have used

256. HOLLIDAY, *supra* note 30, at 301.

257. Its actions also spurred an unknown number of residents to leave San Francisco either temporarily or permanently.

258. STEWART, *supra* note 251, at 288. What happened to two of the ninety-one is unknown. Stewart suggests they were discharged. *Id.* See also SENKEWICZ, *supra* note 187, at 84-85.

259. SENKEWICZ, *supra* note 187, at 89.

260. *Id.* at 14. Between 1851 and 1860 San Francisco grew rapidly, making it “the only community west of the Missouri River frontier that clearly deserved to be called a city.” PAUL, *supra* note 96, at 16; ROYCE, *supra* note 251, at 333 (1852 and 1853 were “years of rapid growth and great general prosperity”).

261. LOTCHIN, *supra* note 251, at 53.

262. ROYCE, *supra* note 251, at 333; LOTCHIN, *supra* note 251, at 48.

263. ROYCE, *supra* note 251, at 333 (footnote omitted).

264. “In 1855 there were 197 bankruptcies with liabilities of \$8,377,827 and assets of only \$1,519,175. Time proved even those assets to have been overestimated.” LOTCHIN, *supra* note 251, at 60. The *Alta California* reported in 1855 “Nearly all the prominent operators of 1852-53 are now bankrupt, and the mass of smaller men are utterly ruined.” LOTCHIN, *supra* note 251, at 63. The financial stresses on the city’s businesses were not eased by the numerous taxes and license fees required by the city and state; both “required licenses for virtually every kind of significant commercial activity.” SENKEWICZ, *supra* note 187, at 68-70. As Robert Senkewicz notes “commerce and mining were the major occupations of the state . . . and since there were more miners than merchants voting in the state, commerce was a major object of the successive state revenue laws.” *Id.* at 67. By the time of the 1856 Vigilance Committee, however, the worst of the financial crisis was over. LOTCHIN, *supra* note 251, at 250.

forged city warrants as collateral for land speculation and fled the city for Peru.²⁶⁵

Moreover, despite the 1851 vigilance committee, fires continued to plague San Francisco. The *Alta California* reported over 250 fires between 1851 and 1856, attributing almost a third to arson.²⁶⁶ Although the criminal justice system was better organized by 1856 than it had been in 1851, San Franciscans had not devoted much effort to solving the city's many problems in the year since 1851.²⁶⁷

The combination of public and private corruption, financial distress, and the unresolved problems of crime²⁶⁸ produced a state of affairs nearly as chaotic as 1851, with residents somewhat less optimistic about the future.²⁶⁹ The one popular institution with widespread public respect was the network of volunteer fire companies.²⁷⁰ Many of the '56 Committee's business supporters "saw a need for an honest and stable city government as a precondition for attracting New York City investors."²⁷¹ The final ingredient in the mix was the political differences between different factions in California. The Know-Nothing Party, an expression of the 1851-53 nonpartisan efforts in San Francisco, which in turn had been based upon the 1851 Vigilance Committee,²⁷² was losing steam by 1855. Those opposed to the local Democratic machine, built around the Irish, were casting about for an alternative to keep the "best" men in control.²⁷³

The murders of two prominent men, United States Marshall William H. Richardson in November 1855 by prominent gambler James Cora and newspaper editor James King of William in May 1856 by San Francisco city councilman James P. Casey, were the focal points around which the

265. ROYCE, *supra* note 251, at 335-339. The city repudiated over 80% of its debt in what Royce termed "either an appalling confession of corruption or a most disgraceful repudiation (or more probably both)." *Id.* at 340.

266. LOTCHIN, *supra* note 251, at 177. Anniversaries of the May 1851 fire brought attempts to repeat it—three in May 1852 alone. *Id.*

267. *Id.* at 199-200.

268. *Id.* at 190 ("Universal transience that rapidly shuffled witnesses, prosecutors, and criminals in and out of towns" contributed to lack of success at controlling crime).

269. John Parrot, for example, wrote to a St. Louis businessman that

[i]f I could find a purchaser at 50 cents on the dollar for all my property in California, I would take it and abandon the country forever. I at times am so much disgusted at the turn things have taken in the State, to say nothing about the thieves and corruption and insecurity of life and property, that I deeply regret ever having invested my all in it.

DAVID DARY, *ENTREPRENEURS OF THE OLD WEST* 127 (1986).

270. LOTCHIN, *supra* note 251, at 180-81.

271. DARY, *supra* note 269, at 127.

272. SENKEWICZ, *supra* note 187, at 123.

273. *Id.*

1856 vigilantes organized.²⁷⁴ Although Cora and Casey were promptly arrested and jailed, King's murder "unloosed pandemonium" in San Francisco; in response a new vigilance committee organized, including some (but not all) members of the 1851 Committee and many new members.²⁷⁵ By noon the day after King's murder the Committee had more than 1,500 members.²⁷⁶ An Executive Committee, which eventually grew to 37, directed the Committee's work. Regular military drills under members with military or police experience began.²⁷⁷ The Committee raised "several hundreds of thousands of dollars" to fund its activities.²⁷⁸ The Committee and its supporters saw themselves as "an all-embracing alliance of worthy citizens" that cut across traditional class lines to produce "a revolution of the 'legitimates.'"²⁷⁹ The speed of the 1856 Committee's organization "indicates, at the very least, that the merchants of the city were much more organized than they had been in 1851."²⁸⁰

The day after it organized, the Executive Committee met and decided that the Committee should take Cora and Casey from the county jail for trial by the Committee.²⁸¹ The vigilantes seized Cora and Casey and removed them to the Committee's headquarters.²⁸² The Vigilance Committee began their trial of the prisoners on May 20.²⁸³ The Committee also sent a commit-

274. WILLIAM HARRY ELLISON, *A SELF-GOVERNING DOMINION: CALIFORNIA, 1849-1860* 235-240 (1950).

275. *Id.* at 239.

276. *Id.* at 240. Chinese and African-Americans were not permitted to join. *Id.*

277. *Id.*

278. SENKEWICZ, *supra* note 187, at 177-78.

279. LOTCHIN, *supra* note 251, at 255. Even more than the 1851 Committee, the 1856 Committee was dominated by businessmen. SENKEWICZ, *supra* note 187, at 169.

280. *Id.* at 170.

281. ELLISON, *supra* note 274, at 240-41.

282. ROYCE, *supra* note 251, at 352. California Governor John Neely Johnson, "not the ablest of California's statesmen," *id.* at 347, arrived in San Francisco on May 16, two days after King's shooting. ELLISON, *supra* note 274, at 243. Coleman claimed later that at the meeting the Governor had told him "Go to it, old boy! But get through as quickly as you can. Don't prolong it: because there is a terrible opposition and a terrible pressure." William T. Coleman, *San Francisco Vigilance Committees* 21 *CENTURY MAG.* (n.s.) 133, 140 (1891). Committee critics describe the meeting differently. *See, e.g.,* WILLIAM T. SHERMAN, *I MEMOIRS* 122 (1891). He met with Coleman at the International Hotel that evening. ELLISON, *supra* note 274, at 243. After meeting with General William T. Sherman, recently appointed major general of the California militia and several "law and order" party supporters to review the situation, the Governor concluded an agreement with the Vigilantes to allow them to place a group of men inside the jail to "assist" with security. In exchange the Vigilantes promised not to attack the jail without first withdrawing those men and notifying the governor. *Id.* at 244. This agreement ceded the Committee an extraordinary amount of power. However, the Governor was not in a strong negotiating position because the Committee had most of the armed force in the area under its control. ROYCE, *supra* note 251, at 349. Two days later the Vigilantes withdrew from the jail, gave the agreed notice, and promptly surrounded the jail with 1,500-3,000 men and a cannon. *Id.* at 245. Since the sheriff was left with only thirty men to defend the building, the governor gave him permission to surrender, which he did. *Id.*

283. ELLISON, *supra* note 274, at 246. The Committee decided that decisions in the trial should be by majority vote, verdicts should be approved by a board of delegates, trials would recess for no longer than 30 minutes, and each prisoner would be able to choose defense counsel only from among the members

tee to call upon the governor and mayor to tell them that the government might proceed in civil and ordinary cases.²⁸⁴ As Ellison notes, “[t]his was a clear assertion of sovereignty and an audacious subordination of the state to the authority of an unlawful body.”²⁸⁵ Both men were tried and convicted by the Committee and sentenced to death.²⁸⁶ They were executed on Friday, May 23, as King’s funeral procession passed through the streets.²⁸⁷ Thus only nine days after King’s shooting the Vigilance Committee had taken control of San Francisco from the state and municipal governments. They had done so openly and with sufficient resources and organizational ability to field thousands of orderly troops, conduct public executions, and defy the official government.

Although sparked by the killings of Richardson and King, the Committee did not disband after executing Cora and Casey. Ellison gives three reasons the Committee continued:

Foremost were their deep distrust of constituted authority and their unlimited confidence in the purity of their own motives and procedures. Also, the vigilantes were aware that they had so aroused the supporters of law, and the authorities, that dissolution of the organization at this time would have involved many leaders in serious legal difficulties. More decisive than anything else, however, was the belief of the central group of the vigilantes that they had a messianic mission to perform and that they must go on until their work was finished.²⁸⁸

The Executive Committee reorganized itself after the executions, removing those members whose loyalty to the leadership was not absolute.²⁸⁹ It continued to try and punish citizens, banishing seventeen accused of political corruption during the next few days.²⁹⁰

Opposition to the Committee developed, with a “law and order” party holding a mass meeting on June 2 at which the crowd passed a resolution

of the Executive Committee. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 246-47; ROYCE, *supra* note 251, at 355-56.

287. ELLISON, *supra* note 274, at 247; ROYCE, *supra* note 251, at 356.

288. ELLISON, *supra* note 274, at 248. Royce gives a sympathetic account of the Committee’s motives in continuing, arguing the members “felt it a sin to abandon their task,” ROYCE, *supra* note 251, at 357, which reinforces Ellison’s point about the Committee’s messianic fervor.

289. ELLISON, *supra* note 274, at 249.

290. *Id.* As these were all supporters of Democratic leader Broderick, there is considerable grounds to believe a political purge was the primary aim of the Committee. SENKEWICZ, *supra* note 187, at 172-73. Broderick was called for questioning, but opted to leave town instead. *Id.* The Committee “quite methodically and quite effectively” destroyed Broderick’s political machine in San Francisco. *Id.* at 173.

calling for restoration of law and order and demanding that “every free citizen be remitted to those inalienable rights which a free constitution and equal laws assume to them.”²⁹¹ The state government also took steps to intervene, with the governor declaring San Francisco to be in a state of insurrection and ordering all persons subject to military duty to report to state authorities.²⁹² The response to the governor’s proclamation was less than overwhelming, however, and no effective action was taken.²⁹³ The federal army commander in San Francisco further weakened the “law and order” party’s response by refusing to release federal weapons without authorization from the President.²⁹⁴ A group of citizens then undertook to mediate the problem and to seek a compromise in which the governor would withdraw his proclamation and disband his forces in exchange for an agreement not to prevent service of writs and a cessation of public displays of force by the Vigilance Committee.²⁹⁵ The failure of this conference led the vigilantes to intensify their military preparations, placing units on patrol continuously and preparing for an attack.²⁹⁶ They also participated in a public meeting held with at last 15,000 people which solidified popular support for the vigilantes.²⁹⁷

Both the vigilantes and the “law and order” party continued to organize and attempt to build up their forces. When a confrontation between a group of vigilantes and some of the “law and order” party got out of hand, the “excitable” California Supreme Court Justice David Terry stabbed a vigilante.²⁹⁸ The Committee ordered Terry’s arrest, sent military parties to sur-

291. ELLISON, *supra* note 274, at 250-51 (quoting resolution); ROYCE, *supra* note 52, at 361.

292. ELLISON, *supra* note 274, at 251; ROYCE, *supra* note 52, at 362.

293. ELLISON, *supra* note 274, at 251.

294. *Id.*; ROYCE, *supra* note 251, at 361.

295. ELLISON, *supra* note 274, at 252.

296. *Id.* at 252-53; ROYCE, *supra* note 251, at 363.

297. The main speaker, Bailie Peyton galvanized that support.

His graphic description of political corruption in the city, which, he asserted, the vigilantes were cleaning out in spite of the counterefforts of the law-and-order forces, struck a popular chord. His adroitness in showing that the vigilance committee must either be sustained or put down, and that any attack on it by the state’s authority would result in great bloodshed, influenced many to stand by the committee.

ELLISON, *supra* note 274, at 254.

298. *Id.* at 256. The confrontation grew out a seizure of weapons by the vigilantes from two law and order men, who were released. Those two proceeded to make open threats against the committee, which then sought to recapture them. After finding them with Terry, Terry ordered the vigilantes to withdraw, which they did. Terry and the others then headed for the federal armory. Enroute they were accosted by a group of vigilantes who again tried to arrest the two men. During the scuffle that followed, Terry stabbed vigilante Sterling Hopkins in the neck. ELLISON, *supra* note 274, at 255-56. For a lively, and partisan, account, of Terry’s subsequent colorful career see George C. Gorham, *The Story of the Attempted Assassination of Justice Field By a Former Associate on the Supreme Bench of California*, in STEPHEN J. FIELD, *PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA* (Da Capo Press ed., 1968) (1893).

round and capture all opposition armories, and disarmed opponents.²⁹⁹ Terry's arrest posed a problem for the Committee: As one member put it, "We started out to hunt coyotes, but we've got a grizzly bear on our hands; and we don't know what to do with him."³⁰⁰ As Robert Senkewicz noted:

They could not let Terry go, for that would be an open confession of weakness. He was too important for them to deport casually, as they had deported the Irish ballot box stuffers, and they could hardly hang him because that would no doubt bring the state and federal authorities into action against them.³⁰¹

Terry's trial was repeatedly delayed by negotiations, threats of federal intervention, and internal disagreements and he was kept in custody for five weeks.³⁰² When the wounded vigilante recovered, a small group of members of the Executive Committee arranged for Terry's release at night³⁰³ on the grounds that "the usual punishment in their power to inflict not being applicable in the present instance."³⁰⁴ "The early morning secret discharge of Terry created great dissatisfaction and nearly broke up the vigilance committee."³⁰⁵ Many Committee supporters saw the release as a betrayal of the reform motives.³⁰⁶

The 1856 Committee brought its affairs to a close in mid-August, staging an elaborate military parade and ceremony.³⁰⁷ The Executive Committee continued in session, however, issuing statements to the press justifying its actions,³⁰⁸ intervening in jury selection in the official courts by posting lists of prospective jurors it considered questionable,³⁰⁹ and promoting a political slate.³¹⁰ Few vigilantes were criminally prosecuted for their actions and none convicted.³¹¹ A few victims attempted civil suits but only

299. ELLISON, *supra* note 274, at 256-57.

300. THEODORE H. HITTELL, 3 HISTORY OF CALIFORNIA 588 (1898) (quoting James Dows).

301. SENKEWICZ, *supra* note 187, at 176.

302. ELLISON, *supra* note 274, at 259-60.

303. *Id.* at 260-61.

304. *Id.* at 260.

305. *Id.* at 261.

306. Bancroft describes the reaction: "Some were sorrowfully disappointed; others swearingly rampant. Their late idol, the Vigilance Committee, the people now cursed as traitors, weak and treacherous sycophants, who strangle smilingly friendless criminals, but dare not touch the august Terry's garments." BANCROFT, 2 POPULAR TRIBUNALS, *supra* note 251, at 475.

307. ELLISON, *supra* note 274, at 263.

308. *Id.* at 264. An August 27 open letter, for example, justified the Committee's actions as carried out with "rectitude of intention, loyalty to republican principles, and a devoted adherence to the true spirit of government and law." *Id.*

309. *Id.*

310. *Id.* at 264-265.

311. *Id.* at 265-66.

two resulted in damage awards.³¹²

There are two views of the organization of the 1856 Committee. The positive account identified with Committee sympathizers like Royce, is that King's shooting provoked such "a state of popular feeling [that] a mob was imminent."³¹³ The organization of the Vigilance Committee was a means of controlling popular feeling and channeling it into less destructive avenues.

The business men therefore chose to calm the spirits of more excitable people and to enlist their active services in the cause of good order, by choosing the only alternative. They avoided mob law, pure and simple, only by organizing the most remarkable of all the popular tribunals, whereby was effected that unique historical occurrence, a Business Man's Revolution.³¹⁴

Some writers like Lotchin conclude that the seizure of power was "a necessity" by the Committee members to protect themselves from prosecution for the hangings.³¹⁵ The less charitable view, epitomized by Committee critics like Myers, was that the organizers were in desperate straits financially and needed an excuse to buy time from their creditors.

Time could be bought by arranging for newspapers—not themselves—to explain to wholesalers on the Atlantic side that a state of emergency was stopping business in its San Francisco tracks. Therefore they used the wounding of one man as an excuse for proclaiming that their city was the nesting place of chaos.³¹⁶

Both supporters and critics agree, however, that the 1856 Committee was from the start a well organized effort of leading elements of the business community. One reason the business community was able to come together so easily was the heavy tax burdens imposed on them—"from the days of the Stamp Act until now, there was nothing like the government when it came to uniting competing businessmen."³¹⁷

The Committee had a dramatic impact on San Francisco politics. It brought a large number of political novices into politics and created a new political force which dominated city government from the fall 1856 elections until 1867.³¹⁸ The 1856 Committee wrapped itself in the rhetoric of the

312. *Id.* at 266.

313. ROYCE, *supra* note 251, at 346.

314. *Id.*

315. LOTCHIN, *supra* note 251, at 264.

316. JOHN MYERS, SAN FRANCISCO'S REIGN OF TERROR 112 (1966).

317. *Id.* at 70.

318. *Id.* at 185, 188, 190.

American tradition, justifying its actions by reference to the American Revolution and a social contractarian view of the State.³¹⁹ They combined this with an “ideology of community” favoring nonpartisan local elections and a local primary.³²⁰ Although the 1856 Committee operated on a much grander scale than the 1851 Committee it is far from clear that San Francisco’s problems were worse in 1856 than in 1851. Lotchin, for example, notes that the judiciary was “much superior” in 1856.³²¹

The overall record of the 1856 Committee is largely negative, although even a severe critic such as Ellison concedes that it did “rid the state of some undesirables” and improve political life “temporarily” in San Francisco “by the creation of an organization” and awakening “an interest, even though a distorted one” in civic affairs.³²² Its failings were much more significant, however. Many of its activities seem questionable in hindsight, motivated by partisanship or personal reasons. Even its strongest defenders, such as Royce, concede that the Committee undertook questionable activities, although they argue that these were necessary to prevent it from losing its hold on the mob.³²³ Its success in combating crime was limited.³²⁴

The 1856 Committee’s interactions with the State are particularly interesting. Whether one accepts Coleman’s account of his meetings with the governor or the Committee’s critics’ version, the governor was clearly negotiating from a position of weakness. The refusal of federal military forces to support the “law and order” party, the defection of at least some militia units to the Committee, and the mobs in the street would have been a challenge even for the most astute political leader. The Committee seized on this weakness, however. More than any of the other western vigilance movements, the 1856 Committee succumbed to the Leviathan problem, seizing for itself the effective monopoly on the use of force. Whether or not it actually implemented a “reign of terror,” as its more severe critics assert,³²⁵ the Committee became the State, much like the Wyoming cattlemen discussed below. To the extent the Committee’s activities reflected political differences, their actions were more coup d’etat than private provision of law.³²⁶

319. LOTCHIN, *supra* note 251, at 261-62 (summarizing views expressed by 1856 Committee and its supporters).

320. *Id.* at 262-64.

321. *Id.* at 199.

322. ELLISON, *supra* note 274, at 266.

323. ROYCE, *supra* note 251, at 357.

324. LOTCHIN, *supra* note 251, at 195 (“the deterrent soon wore off”); *id.* at 196 (listing serious crimes which occurred during period of Vigilante actions).

325. *See, e.g.*, MYERS, *supra* note 316, at 2 (1856 Committee “patented the whole bag of totalitarian tricks”).

326. Lotchin argues the 1856 Committee was “unfair and unreasonable” but not “undemocratic.” “There was no small, conspiratorial clique which seized power. The use of terror was real enough, but it

2. The Montana Vigilance Committee of 1864³²⁷

Word of massive gold discoveries in the southwestern portion of Montana Territory led to a sizable rush of miners and others into the Territory in 1862 and 1863, particularly around present day Helena ("Last Chance Gulch"), Bannack, and Virginia City. As described earlier in section II A, tens of thousands of people arrived in a short time in what had been a largely uninhabited area (aside from a few Native Americans). Mining districts were quickly organized and prospered. Road agents, men who robbed

was supported by the mass of people and wielded by acknowledged community leaders, the merchants." LOTCHIN, *supra* note 251, at 261. Coups, of course, can be popular and the popular support for the Committee does not alter its displacement of the legitimate government with a parallel state.

327. Source note: My primary sources for the 1864 Montana vigilantes are the following: (1) Thomas Dimsdale's first hand account (see *supra* note 69); (2) Nathaniel Langford's first hand account (see note 61); (3) LEW. L. CALLOWAY, MONTANA'S RIGHTEOUS HANGMEN: THE VIGILANTES IN ACTION (1982); (4) R. E. MATHER & F. E. BOSWELL'S HANGING THE SHERIFF and VIGILANTE VICTIMS (1991) [hereinafter HANGING THE SHERIFF or VIGILANTE VICTIMS]; and (5) HOFFMAN BIRNEY, VIGILANTES (1929). Dimsdale was a contemporary of the vigilantes and first published his account in his newspaper, the *Montana Post*, and then as a book in 1865. Granville Stuart called his account "absolutely correct." II GRANVILLE STUART, FORTY YEARS ON THE FRONTIER 31 (Paul C. Phillips ed., 1925). Langford was an active and important member of the vigilance committee and originally published his account in 1890. Calloway arrived in Montana after the vigilance committee had ceased to operate but was a contemporary of many of the vigilantes and an active participant in Montana politics, serving as a mayor of Virginia City, a judge, a county attorney, and Chief Justice of the Montana Supreme Court. Birney's account draws heavily on discussions with Calloway among other things. All five are quite favorable toward the vigilantes. There is also a novel based on the Montana Vigilantes, AL DEMPSEY, WHAT LAW THERE WAS (1991). Dempsey presents Plummer as torn between his desire to live a clean life and his past associations, which ultimately prevail, and credits the Masons with stopping him.

Mather and Boswell argue the Vigilantes were engaged in a combination of settling personal grievances, regional rivalries, and political differences. Although Mather and Boswell present new information on the background of some of the men hanged by the Vigilantes, their central thesis is unconvincing for several reasons. First, they rely extensively on family background to show that the hanged men were of "good character." See, e.g., VIGILANTE VICTIMS, *supra* at 36 (Buck Stinson "born into a highly respected North Carolina family"). They also make a concerted attempt to show that many vigilante leaders gambled, drank, and married extremely young Indian wives. See, e.g., *id.* at 173 (Granville Stuart married a twelve year old Indian). Second, and more importantly, their claims rest on simultaneously denying the existence of a significant crime problem in the mining area and arguing significant crime continued after the winter of 1864-65. See, e.g., *id.* at 164 (had only been "three profitable robberies" during road agent period); *id.* at 153 ("robberies did continue" after Vigilance Committee hung road agents) and HANGING THE SHERIFF, *supra* at 93-95 (road agent activity continues "on a larger scale than before" vigilante action) and 100 (crime "not as high as would be expected" before Plummer hung). Third, Mather and Boswell argue that not only were the contemporary, pro-vigilante writers biased (a plausible claim) but that the preeminent twentieth century Montana historians were bamboozled by the nineteenth century writers, aided by Wilbur Sanders' actions as the first president of the Montana Historical Society, which is a far less plausible claim. VIGILANTE VICTIMS, *supra* at 152, 171-72. Fourth, as they state in their introduction to *Hanging the Sheriff*, "[I]t was only as we came to know [Plummer] well enough to trust his word" that they were able to resolve some disputed issues of fact. HANGING THE SHERIFF, *supra* at 7. Finally, they selectively accept portions of Langford's and Dimsdale's accounts to bolster their case, while dismissing those portions which conflict with their version of events as self-serving. Incredibly, they make a case of Plummer shooting and killing another man sound almost virtuous, suggesting he had acquired "the peace making habit" and had become "a professional at mending broken fences." The murdered man, who they claim wanted to kill Plummer, was killed because he "did not have the insight to realize Plummer's patience was wearing thin." *Id.* at 39.

others on the roads, soon followed. Bannack and Virginia City grew up as towns to provide services to the miners. Saloons, gambling houses, and houses of prostitution flourished as means of parting miners from their gold. The riches of the Montana gold rush also drew less savory characters who preferred to gain gold without providing services. Gold rush Montana was thus short on social capital:

The very composition of the society of Bannack at the time was such as to excite suspicion in all minds. Outside of their immediate acquaintances, men knew not whom to trust. They were in the midst of a people which had come from all parts of this country and from many nations of the Old World.³²⁸

The Montana gold rush area was a profitable area for road agent activity because its recent organization meant there was “no regular means for sending [gold] out of the country.”³²⁹ Gold had to be sent to Salt Lake City, 475 miles away, to reach a regular express company and the route to Salt Lake went through unsettled wilderness.³³⁰

Among the people drawn to the new gold rush was Henry Plummer, whose history is somewhat hazy, but who apparently had a lengthy series of problems with the law elsewhere.³³¹ Plummer, “a man of most insinuating address and gentlemanly manners under ordinary circumstances,”³³² arrived in Bannack in the winter of 1862-63 and almost immediately shot and killed the friend with whom he arrived.³³³ He also managed to get himself chosen

328. LANGFORD, *supra* note 61, at 82; see also DIMSDALE, *supra* note 69, at 27 (“It is probable that there never was a mining town of the same size that contained more desperadoes and lawless characters than did Bannack during the winter of 1862-63”).

329. LANGFORD, *supra* note 61, at 142.

330. *Id.*; BIRNEY, *supra* note 67, at 46-47.

331. Plummer had operated in Idaho in 1861. After his gang there “murdered a jovial saloon owner named Hildebrandt, there was a meeting at Lewiston to discuss possible action, but the plausible Plummer talked so strongly on the horrors of anarchy that nothing was done.” GREEVER, *supra* note 29, at 261-62. Langford, who has little good to say about Plummer, recounts a version of Plummer’s history in Idaho which included seducing a married woman into abandoning her husband and children to accompany him and then deserting her. LANGFORD, *supra* note 61, at 14. Dimsdale also mentions the killing of a saloon keeper and a seduction of a married woman. DIMSDALE, *supra* note 69, at 259. An earlier involvement with a married woman resulted in the death of her husband and the case of *People v. Plummer*, 9 Cal. 299 (1858). Mather and Boswell present a portrait of Plummer’s pre-Montana days which casts him in a favorable light.

332. DIMSDALE, *supra* note 69, at 257. See also CALLOWAY, *supra* note 327, at 15 (“Plummer had the appearance and address of a gentleman, an attractive personality—especially ingratiating with women—and a manner which inspired confidence in most men”); BIRNEY, *supra* note 67, at 56-57 (“a courtly, polished gentleman; a skillful, cold-eyed gambler; an admired and trusted official; a gunman as swift and deadly as mountain lightning; the most mysterious, incomprehensible character the West ever knew”). Even Langford describes Plummer as possessing “great executive ability—a power over men that was remarkable, a fine person, polished address, and prescient knowledge of his fellows.” LANGFORD, *supra* note 61, at 80.

333. DIMSDALE, *supra* note 69, at 29-30; LANGFORD, *supra* note 61, at 80-81.

as “sheriff”³³⁴ of both Bannack and Virginia City.³³⁵ From his position as sheriff, Plummer organized a gang of road agents,³³⁶ making road agents his deputies; the one honest deputy was murdered when he refused to join them.³³⁷

Using complex signals, including a particular pattern of shaving, a certain knot in the necktie, and the password “I am innocent,” Plummer’s gang commenced a profitable reign.³³⁸ Plummer placed road agents in the employ of merchants to observe all business transactions and give him notice of shipments of wealth.³³⁹ He used a network of spies to mark stage coaches with a sign when they carried significant gold and to inform them of the movement of individuals with substantial wealth.³⁴⁰ A road agent was placed in the general store with a shoemaker’s bench to report on shipments of gold by the store owners.³⁴¹ The road agents infiltrated the stage company to ensure only tired horses were available for coaches carrying rich prizes.³⁴² They also used brutal killings and threats to gain the acquiescence of a doctor (for treatment),³⁴³ landowners (for resting and hiding places) and vic-

334. Because there was no formal government organized in the area, the job of sheriff was one created by the community.

335. HAMILTON, *supra* note 47, at 224; BIRNEY, *supra* note 67, at 91. Mather and Boswell make the entirely implausible claim that Plummer and his deputies were engaged in “a community service” by serving as law enforcement for the area, as they were only paid for specific acts, not a general salary. HANGING THE SHERIFF, *supra* note 329, at 36.

336. CALLOWAY, *supra* note 327, at 15; DIMSDALE, *supra* note 69, at 74. Plummer was also almost named Deputy U.S. Marshall for the area, which Langford prevented, earning Langford Plummer’s hatred. LANGFORD, *supra* note 61, at 138-39 (recounting election of deputy marshal and later attempt by Plummer to kill Langford); BIRNEY, *supra* note 67, at 90-92. As noted earlier, *supra* note 327, Mather and Boswell’s central thesis is that there was no organized gang of road agents.

337. DIMSDALE, *supra* note 69, at 74-76; HAMILTON, *supra* note 47, at 224, 238-39. The killers escaped punishment after a sentimental letter to one’s mother was read. The convicted men’s friends took advantage of the sentiment and confused voting procedure to gain a second vote on their sentence. *Id.* at 240.

338. LANGFORD, *supra* note 61, at 195; BIRNEY, *supra* note 67, at 126. Dimsdale recounts how a road agent stationed on the coach would sing loudly if an attack “had more peril than profit” to signal the others not to attack. DIMSDALE, *supra* note 69, at 90. Birney tells a similar version. BIRNEY, *supra* note 67, at 140-41.

339. LANGFORD, *supra* note 61, at 142.

340. CALLOWAY, *supra* note 327, at 20; LANGFORD, *supra* note 61, at 140 (describing how a road agent worked as a clerk at a ranch where horses were kept and would inform the gang of merchant’s movements); *id.* at 143 (describing system for making vehicles); *id.* at 144-48 (describing operation of system in one robbery); *id.* at 161 (describing how Plummer gave one intended victim a colored scarf to mark him); DIMSDALE, *supra* note 69, at 70 (“road agents had a private mark on the coach when it carried money”).

341. LANGFORD, *supra* note 61, at 142.

342. *Id.* at 144-45; DIMSDALE, *supra* note 69, at 65-66; HAMILTON, *supra* note 47, at 241-42.

343. LANGFORD, *supra* note 61, at 98 (recounting how Plummer forced Dr. Glick to treat wounded road agents and keep quiet about it through threats); *id.* at 96-97 (recounting how Glick was forced to treat Plummer). Glick, at least, had some revenge: He dug up Plummer’s corpse and dissected the arm to find a bullet. *Id.* at 99-100; BIRNEY, *supra* note 67, at 89. Mather and Boswell argue Dr. Glick fabricated his story to curry favor with the Vigilantes because he feared retaliation against him for having testified for the defense at the trial of George Ives. VIGILANTE VICTIMS, *supra* note 327, at 101-02.

tims (to gain their silence).³⁴⁴ Road agents waited in town after robberies to learn if the victims had identified the robbers.³⁴⁵ The road agents' communication network—"a system of horseback telegraphy as unailing as electricity"³⁴⁶—was probably the most sophisticated in Montana at that time, enabling them to communicate information about prospective victims and to avoid capture on at least one occasion.³⁴⁷ The road agents covered Plummer's absences from town by sending false messages requesting him to inspect a silver mine, as his Nevada experience "was thought to qualify him for determining its value with considerable accuracy."³⁴⁸ Through Plummer's control of the sheriff's offices in both towns, the road agents prevented action against them by legal authorities.³⁴⁹ Falsely spreading rumors that the Vigilantes intended to attack prominent citizens,³⁵⁰ the road agents were able to temporarily prevent many law abiding citizens from joining the attack on the road agents.³⁵¹

The road agents killed at least 102 men.³⁵² In general, the road agents chose their victims well. They did not attack in the mines, for example, where the miners' courts would have quickly rallied against them, but attacked individual men on the highway. They were also successful because they were unified in their purpose. "[S]o long as every man distrusted his neighbor,"³⁵³ the rest of the community was helpless. In sum, Plummer's road agents were a successful, highly organized, and brutal criminal syndicate with more armed force available to it than any other organization in southwestern Montana in 1863.

344. LANGFORD, *supra* note 61, at 149 (victim tells Plummer who asked if he knew men who had robbed him "No, and if I did, I'd not be such a fool as to tell who they were" and Plummer responds "You stick to that and you'll be alright"); *id.* at 153 (threat to victim reported); *id.* at 170 (recounting threat); DIMSDALE, *supra* note 69, at 87-88 (recounting threat).

345. LANGFORD, *supra* note 61, at 148; DIMSDALE, *supra* note 69, at 70, 86-87.

346. LANGFORD, *supra* note 61, at 143. Even after the organization of the Vigilantes, the system continued to function because the Vigilantes were unaware for some time of the role of some of the messengers. DIMSDALE, *supra* note 69, at 126. In carrying word of the Vigilantes' formation a messenger "traveled with such rapidity as to kill two horses." *Id.* at 127.

347. CALLOWAY, *supra* note 327, at 53 (describing how road agents warned of approach of vigilantes).

348. LANGFORD, *supra* note 61, at 141; BIRNEY, *supra* note 67, at 169.

349. LANGFORD, *supra* note 61, at 114; DIMSDALE, *supra* note 69, at 74 (Plummer "ruled with a rod of iron").

350. DIMSDALE, *supra* note 69, at 111 (recounting how Plummer spread a rumor after the arrest of the first road agents "that the men of Alder Gulch were wild with excitement and ungovernable from passion; that a vigilance committee had been formed; a number of the best citizens hanged, and that from three to five hundred men were on their way to Bannack City to hang Plummer," his deputies, and three unconnected, respected citizens. The result was that "quite a number of the good citizens clubbed together to defend each other"). See also BIRNEY, *supra* note 67, at 200-01.

351. LANGFORD, *supra* note 61, at 189.

352. *Id.* at 1113 (102 killed); DIMSDALE, *supra* note 69, at 15 (more than 100 killed). But see Mather and Boswell, VIGILANTE VICTIMS, *supra* note 327, at 164 (claiming only one known killing in connection with a robbery).

353. LANGFORD, *supra* note 61, at 83.

Their brutal reputation and overwhelming armed strength ensured that no individual would challenge the road agents alone. Vigilante Nathaniel Langford later described the situation as follows:

No true spirit of reform had yet animated the people. When appealed to for combination and resistance to the fearful power now growing into an absolute and bloody dictatorship, they based their refusal upon selfish and personal considerations. They could not act without endangering their lives. They intended to leave the country as soon as their claims were worked out. They would be driven from their claims, and robbed of all they had taken from them, if they engaged in any active opposition to the roughs; whereas, if they remained passive, and attended to their own business, there was a chance for them to take their money back to their families. It was impossible to assemble a meeting for the purpose of considering and discussing with safety the conditions and expose of the people.³⁵⁴

The road agents were able to intimidate individuals effectively but they still feared the community as a whole. After two road agents brutally murdered several Indians, including a baby and a Frenchman who had been visiting the Indians, a miners' court was organized.³⁵⁵ When the road agents fled, they were tracked and cornered. They were persuaded to surrender and return by the promise of a trial by jury.³⁵⁶ The community sought to impose a miners' court instead—causing the road agents some consternation.

They regarded a trial by the mass as certain of conviction as a trial by jury would be of acquittal, not because the latter would be any less likely than the former to perceive their guilt, but because fear of personal consequences would prevent them from declaring it. Men whose identity was lost in a crowd would do that which, if they were known, would mark them as victims for future assassination.³⁵⁷

They managed to secure a trial by jury, with the unfortunate assistance of

354. *Id.* at 108.

355. *Id.* at 83-84; DIMSDALE, *supra* note 69, at 33-35; BIRNEY, *supra* note 67, at 79-80; HAMILTON, *supra* note 47, at 221-23. Interestingly, while Mather and Boswell provide great detail about some aspects of the hanged men's lives, this incident is mentioned in VIGILANTE VICTIMS primarily in connection with a military commander's warning afterwards to leave the Bannack Indians alone—they note only that road agent Stinson "may have smarted under the chastisement." VIGILANTE VICTIMS, *supra* note 327, at 38. In HANGING THE SHERIFF, they use the incident to impugn others' attitudes toward Indians in unrelated incidents and to make the unsubstantiated claim that Plummer was responsible for the agreement to provide them a fair trial. HANGING THE SHERIFF, *supra* note 327, at 27-28.

356. LANGFORD, *supra* note 61, at 85; DIMSDALE, *supra* note 69, at 36-37.

357. LANGFORD, *supra* note 61, at 86.

Langford who argued that a deal was a deal.³⁵⁸ The intimidation tactics³⁵⁹ worked, for the jury voted 11-1 for acquittal (Langford was the lone hold out) and ultimately compromised on banishment.³⁶⁰ The jury's calculus is revealed by Langford's account of one juror's decision:

One of the jurymen said that the prisoners ought never to have been tried by a jury, but in a miners' court, that he should not be governed in his decision by the merits of the case, but that, as he had a family in the States to whom his obligations were greater than to the community, he should have to vote for acquittal.³⁶¹

The banishments were quickly revoked.³⁶² In retaliation for even these mild checks on their behavior, the road agents resolved to kill everyone who had participated in the trial.³⁶³ They successfully killed or drove into exile twenty of the twenty-seven participants.³⁶⁴

The accidental discovery of one of the road agents' victims, Nicholas Tbolt, "a mere boy"³⁶⁵ who was well-liked,³⁶⁶ sparked the formation of the Vigilance Committee. A hunter found Tbolt near the ranch of two of the road agents about ten days after his death, and brought his body to Nevada City.³⁶⁷ Tbolt's body bore marks indicating he had been dragged into the brush while still alive.³⁶⁸ In Dimsdale's words, "[t]he indignation of the people was excited by the spectacle" of Tbolt's body awaiting burial and a group of more than twenty-five men went to the ranch to capture the two road agents.³⁶⁹ In addition, the road agents' recent murder of Lloyd Ma-

358. *Id.* at 87; DIMSDALE, *supra* note 69, at 37; BIRNEY, *supra* note 67, at 81; HAMILTON, *supra* note 47, at 221-22.

359. LANGFORD, *supra* note 61, at 89; DIMSDALE, *supra* note 69, at 38; BIRNEY, *supra* note 67, at 82; HAMILTON, *supra* note 47, at 221.

360. LANGFORD, *supra* note 61, at 89; DIMSDALE, *supra* note 69, at 37; BIRNEY, *supra* note 67, at 82; HAMILTON, *supra* note 47, at 222.

361. LANGFORD, *supra* note 61, at 89.

362. *Id.* at 89; BIRNEY, *supra* note 67, at 82.

363. LANGFORD, *supra* note 61, at 91.

364. *Id.* at 96; DIMSDALE, *supra* note 69, at 47.

365. CALLOWAY, *supra* note 327, at 23. Birney notes that "there are those who assert that the organization was completed and its membership decided upon" earlier. BIRNEY, *supra* note 67, at 11. The Vigilante Oath, however, clearly dates the organization on December 23, 1863.

366. BIRNEY, *supra* note 67, at 180. Prior to the discovery of Tbolt's body, he had been thought to have run off with money from his employer. LANGFORD, *supra* note 61, at 178; DIMSDALE, *supra* note 69, at 94; BIRNEY, *supra* note 67, at 180.

367. LANGFORD, *supra* note 61, at 176-79; DIMSDALE, *supra* note 69, at 95-96; BIRNEY, *supra* note 67, at 180-01.

368. LANGFORD, *supra* note 61, at 179; DIMSDALE, *supra* note 69, at 95; BIRNEY, *supra* note 67, at 180.

369. DIMSDALE, *supra* note 69, at 96. *See also* LANGFORD, *supra* note 61, at 179 ("[t]hese appalling witnesses to the cruelty and fiendishness of the perpetrator of this bloody deed roused the indignation of the people to a fearful pitch"); CALLOWAY, *supra* note 327, at 24 (describing how William Clark suggested the formation of a vigilance committee in response to the murder of Tbolt); BIRNEY, *supra* note

gruder, a well liked merchant being considered as a delegate to Congress, gave his friends in Virginia City "an especial cause for vengeance" on the gang.³⁷⁰ While these events were the direct cause of the Committee's organization, two other factors also contributed.

First was the extent of the road agents' assaults on the community. As Langford describes it "[t]he people bore with crime until punishment became a duty and neglect a crime."³⁷¹ Second was the chance mutual discovery of a large group of Masons in Bannack. Brought together for the funeral of the "first natural death" in the area when the dying man signaled his desire for a Masonic funeral, a large group gathered.³⁷² Not only did the Masons discover each other, the road agents discovered in the Masons, in Langford's words, "an association . . . that would stand by and protect all its members in the hour of danger."³⁷³ The road agents left the Masons alone: "Of the one hundred and two persons murdered by Henry Plummer's gang, not one was a Mason."³⁷⁴

The unorganized group of outraged citizens who set out to punish Tbalt's killers found several men at the ranch where Tbalt's body was discovered.³⁷⁵ They separately questioned one suspected road agent, Long John, and pressured him to confess by pointing out that his failure to notify anyone of Tbalt's body for nine days was itself a hanging offense.³⁷⁶ Behaving as one would expect someone in a literal Prisoner's Dilemma to act, Long John then implicated George Ives, another man being held, as the actual killer.³⁷⁷ A third suspected road agent, George Hildeman, was also arrested nearby.³⁷⁸ The capture of these three was accomplished partly by taking them by surprise, partly because two were unaware of Long John's capture, and partly because all trusted Plummer's control of the machinery of law in Virginia City to protect them.³⁷⁹ The three prisoners were taken to Nevada

67, at 181.

370. DIMSDALE, *supra* note 69, at 121; LANGFORD, *supra* note 61, at 191.

371. LANGFORD, *supra* note 61, at 9.

372. *Id.* at 112-13; HAMILTON, *supra* note 47, at 223-24. Dimsdale does not mention the Masonic connection although he was a Mason, perhaps because he was and did not want to reveal information about the group so soon after its activities. *Id.* at 513. Birney notes that Dimsdale "refrains sedulously from mentioning more than one or two names" and suspected him of "being deliberately inaccurate as to dates." BIRNEY, *supra* note 67, at 12. Mather and Boswell see the Masonic connection as evidence of class lines between the vigilantes and the road agents. VIGILANTE VICTIMS, *supra* note 327, at 170.

373. LANGFORD, *supra* note 61, at 113.

374. *Id.*

375. *Id.* at 179-80; DIMSDALE, *supra* note 69, at 97-100; BIRNEY, *supra* note 67, at 182-83.

376. LANGFORD, *supra* note 61, at 181; DIMSDALE, *supra* note 69, at 98; BIRNEY, *supra* note 67, at 185. See WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING (1990) (parallel to Iceland).

377. LANGFORD, *supra* note 61, at 181; CALLOWAY, *supra* note 327, at 26; DIMSDALE, *supra* note 69, at 98; BIRNEY, *supra* note 67, at 185.

378. LANGFORD, *supra* note 61, at 182; DIMSDALE, *supra* note 69, at 100-01; BIRNEY, *supra* note 67, at 186.

379. As sheriff, Plummer would choose the jury. LANGFORD, *supra* note 61, at 182; DIMSDALE, *supra*

City instead, however, and tried by a miners' court the following day.³⁸⁰ As word spread of their arrest, the town filled with friends and associates of the accused and word was sent to Plummer to get "what is as fitly called *hocus pocus* as *habeas corpus*" to gain control of the three men.³⁸¹

The trial was conducted by the miners as a whole, but as there were 1,500 to 2,000 miners present,³⁸² an advisory jury was drawn from the Nevada and Junction mining districts.³⁸³ The miners appointed lawyers for the prisoners and the prosecution. Col. Wilbur F. Sanders, an able young lawyer who went on to play an important role in Montana politics for more than thirty years,³⁸⁴ was chosen as the lead prosecutor.³⁸⁵ After vigorous argument, during which Sanders and defense counsel almost came to blows,³⁸⁶ and a half hour's deliberations, 23 of the 24 jurors reported the men as guilty and the 24th refused to give a verdict.³⁸⁷ The assembled miners then adopted the report of the 23.³⁸⁸ It was dark by the time the jury found the men guilty and many, including the defendants, expected that sentencing would be taken up the next day, leaving plenty of time for Plummer to intervene.³⁸⁹ Sanders surprised the crowd, and especially Ives, however, by moving for Ives' immediate execution.³⁹⁰ The motion carried before Ives and his friends realized

note 69, at 101.

380. LANGFORD, *supra* note 61, at 184; CALLOWAY, *supra* note 327, at 31; DIMSDALE, *supra* note 69, at 103-04; HAMILTON, *supra* note 47, at 246.

381. DIMSDALE, *supra* note 69, at 104; LANGFORD, *supra* note 61, at 184.

382. LANGFORD, *supra* note 61, at 184; DIMSDALE, *supra* note 69, at 105 (1500 present); BIRNEY, *supra* note 67, at 196 (1,000-1,500 men present).

383. CALLOWAY, *supra* note 327, at 31. Ives' friends attempted to expand the jury to 36 to increase the chances of a hung jury. BIRNEY, *supra* note 67, at 194-95; HAMILTON, *supra* note 47, at 247.

384. Sanders served as a member of the 1865 Codification Commission, delegate to the Republican National Convention four times, four terms in the territorial legislature, U.S. Senator from 1890-93, president of the Historical Society of Montana from 1865-1891, in various offices in the Society of Montana Pioneers, president of the trustees of Montana Wesleyan University, president of the state bar association, and school and public library trustee in Helena. Dave Walter, *Wilbur Fisk Sanders* MONTANA MAGAZINE, Jan./Feb. 1984, at 58-59.

385. LANGFORD, *supra* note 61, at 184; CALLOWAY, *supra* note 327, at 31; DIMSDALE, *supra* note 69, at 107 (Sanders was "fearless as a lion" in prosecuting); BIRNEY, *supra* note 67, at 192 (Sanders the "brawniest, most courageous character" in Vigilantes). Mather and Boswell claim that Sanders was offered \$500 to serve as defense attorney or to remain neutral. VIGILANTE VICTIMS, *supra* note 327, at 152.

386. DIMSDALE, *supra* note 69, at 107 ("A mortal strife between Colonel Sanders and one of the opposing lawyers was only prevented by the prompt action of wise men, who corralled the combatants on their way to fight"); LANGFORD, *supra* note 61, at 185.

387. DIMSDALE, *supra* note 69, at 108; LANGFORD, *supra* note 61, at 186; HAMILTON, *supra* note 47, at 249. Langford reports that the lone hold out believed Ives a road agent but felt the evidence on Tbat's murder to be insufficient. LANGFORD, *supra* note 61, at 187; *see also* CALLOWAY, *supra* note 327, at 34; BIRNEY, *supra* note 67, at 203.

388. LANGFORD, *supra* note 61, at 186; DIMSDALE, *supra* note 69, at 108.

389. CALLOWAY, *supra* note 327, at 34; DIMSDALE, *supra* note 69, at 108. Since Plummer appears to have focused his efforts on saving himself rather than Ives, he did not arrive to prevent the execution. *Id.* at 111; BIRNEY, *supra* note, at 200 ("The skin of Henry Plummer was the only hide which he was interested in saving").

390. DIMSDALE, *supra* note 69, at 108-09; LANGFORD, *supra* note 61, at 186; CALLOWAY, *supra* note

what had happened³⁹¹ and Ives was hung “fifty-eight minutes from the time that his doom was fixed.”³⁹² Hildeman was banished and given ten days to leave the Territory because he was widely known to be “a weak and somewhat imbecile old fellow.”³⁹³ Long John was freed and allowed to remain in the Territory because he had provided information against Ives.³⁹⁴

Men in both Virginia City and Nevada City reacted to Ives’ execution by organizing Vigilance Committees, which quickly combined.³⁹⁵ The Vigilance Committee was able to organize quickly for several reasons. First, the men who led the efforts to execute Ives knew they were marked men.³⁹⁶ Second, the killings of Tbolt and Magruder had made the citizens aware that no one was safe from the road agents. Combined with the road agents’ increasing efficiency at separating citizens from their wealth, this lessened the expected payoff from remaining quiet. Third, the successful capture, trial, and execution of Ives altered the expected payoffs from action, making success seem more likely. Fourth, one of the organizers had lived in San Francisco during the vigilance committees there and several had lived in Denver where “a vigilance committee patterned after the one in San Francisco, had been cleaning up the town.”³⁹⁷ Their background helped solve the organizational problems by providing a model.³⁹⁸

Between December 21, 1863 and February 3, 1864, the Vigilance Committee hung twenty-two members of Plummer’s gang (including Plummer and his principal deputies) and several others fled the Territory.³⁹⁹

327, at 34.

391. DIMSDALE, *supra* note 69, at 109. Ives’ attempt to secure time to write his mother and sister was rejected when X. Beidler, who went on to play a prominent role in the Vigilante Committee, responded, “[a]sk him how long a time he gave the Dutchman.” DIMSDALE, *supra* note 69, at 110; BIRNEY, *supra* note 67, at 205-06.

392. DIMSDALE, *supra* note 69, at 113; LANGFORD, *supra* note 61, at 189.

393. DIMSDALE, *supra* note 69, at 116-17; *see also* LANGFORD, *supra* note 61, at 190; BIRNEY, *supra* note 67, at 227.

394. DIMSDALE, *supra* note 69, at 118; LANGFORD, *supra* note 61, at 191.

395. DIMSDALE, *supra* note 69, at 120; LANGFORD, *supra* note 61, at 191; BIRNEY, *supra* note 67, at 215-18; HAMILTON, *supra* note 47, at 250-51.

396. BIRNEY, *supra* note 67, at 64. One man approached Sanders the very night of the execution with the intent to kill him and was driven off by a combination of intervention by Sanders’ friends and Sanders’ possession of a weapon. DIMSDALE, *supra* note 69, at 119-20.

397. CALLOWAY, *supra* note 327, at 37; *see also* HAMILTON, *supra* note 47, at 251 (“[t]here were men in Alder Gulch who had seen Vigilance Committees in action”); *id.* at 253 (“young men from California” suggested regulations).

398. CALLOWAY, *supra* note 327, at 43 (quoting a participant that “men from California” told others how to organize); BIRNEY, *supra* note 67, at 217 (quoting account by Adriel B. Davis, a member of Committee, which told how early members from California told them “how the Committee was organized in California and he suggested organizing on the same principles, which he did.”).

399. DIMSDALE, *supra* note 69, at 23-24. Calloway estimates there were at least fifty in the “inner circle” with a hundred more allies. CALLOWAY, *supra* note 327, at 20. Birney lists thirty-eight names and estimates membership in the gang was more than fifty. BIRNEY, *supra* note 67, at 127. One of the road agents hung was Erastus “Red” Yeager, who had been a childhood schoolmate of Granville Stuart

Once organized, the Vigilance Committee

determined that the pursuit of the miscreants . . . should be commenced and maintained with a relentless earnestness, which should know no abatement until the last blood-stained marauder had paid the penalty of his crimes by death on the gallows; or had escaped the retribution in store for him by successful flight to other countries.⁴⁰⁰

This decision, enforced on occasion by threats of immediate punishment against defecting vigilantes,⁴⁰¹ helped create the conditions necessary to sustain the Vigilance Committee's cooperative effort. A constant problem for miners' courts had been that miners would drift away and verdicts could be reversed by the convicted man's friends who waited around.⁴⁰² Miners often left miners' courts because mining gold was much more profitable than participating in a court. Sanders had prevented this happening with respect to Ives by his prompt action. The lesson for the Committee was clear. Although winter weather meant people would not be returning their claims, there were many more pleasant activities than sneaking up on armed killers during a Montana winter.⁴⁰³ The constant pursuit strategy also helped prevent retaliation by the road agents.

Ranging widely over southwestern Montana Territory, the Vigilance Committee was remarkably successful in tracking down and executing road agents.⁴⁰⁴ The Committee dispensed with miners' courts and simply arrested and hanged road agents who became known to them through confessions

in Iowa. I STUART, *supra* note 33, at 29-30.

400. DIMSDALE, *supra* note 69, at 125.

401. *Id.* at 131 ("[o]ne of the party who had been particularly lip-courageous now began to weaken [after the group decided to hang two road agents] and discovered that he should lose \$2,000 if he did not go home at once. Persuasion only paled his lips, and he started off. The click! click! click! click! of four guns, however, so far directed his fears into an even more personal channel, that he concluded to stay"). The Committee also adopted an oath and a set of "regulations and bye laws." CALLOWAY, *supra* note 327, at 45-49. The oath was signed by 24 men and pledged each signer to "reveal no secrets, violate no laws of right and never desert each other or our standard of justice." *Id.* at 45; BIRNEY, *supra* note 67, at 211-12. The "Regulations and Bye Laws" provided for officers, an Executive Committee to try suspects, and a military structure of companies to carry out the orders of the leaders. CALLOWAY, *supra* note 327, at 46-49; BIRNEY, *supra* note 67, at 218-21. The Vigilantes originally resolved that "[t]he only punishment that shall be inflicted by this Committee is death." CALLOWAY, *supra* note 327, at 49; BIRNEY, *supra* note 67, at 221. The Vigilantes later modified this rule, finding it inadequate for handling cases in which there was not "irrefutable evidence of guilt." CALLOWAY, *supra* note 327, at 111; BIRNEY, *supra* note 67, at 297.

402. *See, e.g., supra* note 337.

403. Calloway describes the Vigilantes' expeditions as "continuous hardships," noting the men were traveling in a severe winter with little to eat. CALLOWAY, *supra* note 327, at 53. Dimsdale makes mention of the "great hardships from the inclemency of the weather." DIMSDALE, *supra* note 69, at 127.

404. Dimsdale, Langford and Birney set forth each agent's capture, trial and execution in more detail than is necessary here.

and identifying characteristics such as wounds.⁴⁰⁵ A “Ferretting Committee” conducted investigations.⁴⁰⁶ Executive decisions were made by public vote, for example, by stepping to one side or another of a room or road.⁴⁰⁷ Public decisionmaking reinforced the “one for all and all for one” atmosphere by preventing private defections on decisions which might bring retaliation. (Committee members commonly wore disguises but Dimsdale records instances in which captured road agents recognized Committee members by their voices.) Funds were raised by subscriptions.⁴⁰⁸ In one instance a captured road agent offered to make restitution if he would be released. The Committee opted to hang him, but itself paid restitution to the road agent’s victim since their acts had precluded the victim gaining restitution from the road agent.⁴⁰⁹ The Committee also banished the lawyers who had regularly represented the road agents.⁴¹⁰ Surprisingly, the Committee released several men arrested because of insufficient evidence, including some later found to have participated in the road agents’ activities.⁴¹¹ Most accounts charge the vigilantes with only one “mistake.”⁴¹²

After the capture and execution of Plummer’s gang of road agents,

405. DIMSDALE, *supra* note 69, at 172-73. The Committee benefited from some early confessions which helped provide a list of suspects. LANGFORD, *supra* note 61, at 195; CALLOWAY, *supra* note 327, at 60; DIMSDALE, *supra* note 69, at 132-33.

406. CALLOWAY, *supra* note 327, at 121; BIRNEY, *supra* note 67, at 264.

407. DIMSDALE, *supra* note 69, at 184; LANGFORD, *supra* note 61, at 194; BIRNEY, *supra* note 67, at 231-32.

408. CALLOWAY, *supra* note 327, at 121.

409. DIMSDALE, *supra* note 69, at 221; CALLOWAY, *supra* note 327, at 116-17.

410. LANGFORD, *supra* note 61, at 253-54; DIMSDALE, *supra* note 69, at 24.

411. DIMSDALE, *supra* note 69, at 165, 176; LANGFORD, *supra* note 61, at 245; CALLOWAY, *supra* note 327, at 66, 111 (“the Vigilantes were not satisfied with proving a man guilty beyond a reasonable doubt; they required what amounted to absolute certainty”); BIRNEY, *supra* note 67, at 270-71.

412. The one “mistake” made by the Vigilance Committee was their execution of “Captain” Joseph A. Slade. Slade had been a famous and tyrannical stage company agent. Mark Twain, for example wrote about Slade’s exploits. MARK TWAIN, *ROUGHING IT* 70-83 (1875) (“two-thirds of the talk of drivers and conductors [on the stage Twain was riding in 1861] had been about this man Slade”). “Save for this execution, the Vigilantes of Montana have been well-nigh universally commended. For this act they have been fiercely condemned and as vigorously commended.” CALLOWAY, *supra* note 327, at 109. Dimsdale took the part of the Vigilantes, summing up their work by saying “there is nothing on their record for which an apology is either necessary or expedient.” DIMSDALE, *supra* note 69, at 267; BIRNEY, *supra* note 67, at 223. (Slade a “possible exception” to Vigilantes hanging only men who had “earned every inch of the rope”)

Why did they kill Slade? Dimsdale argues that it was “the protest of society on behalf of social order and the rights of man.” DIMSDALE, *supra* note 69, at 205. Calloway terms it a question of whether law and order was to be preserved or “all that had been gained to be lost?” CALLOWAY, *supra* note 327, at 109. Both claims seem over-dramatic. Slade’s behavior was little different than that of many others, as even Calloway concedes. What does seem to distinguish him from others, however, was the combination of his reputation as a killer and his direct challenges to multiple vigilantes. Moreover, the seriousness with which Slade’s conduct was viewed can be seen by the unanimous decision of a large group (Langford and Dimsdale claim 600). LANGFORD, *supra* note 61, at 288; DIMSDALE, *supra* note 69, at 199. A number of Slade’s friends participated in the decision. LANGFORD, *supra* note 61, at 288; CALLOWAY, *supra* note 327, at 107; DIMSDALE, *supra* note 69, at 200-01.

crime sharply diminished.⁴¹³ Langford, who of course had powerful reasons for justifying the Vigilantes' actions, argued that not only were the Vigilantes necessary because of the absence of authoritarian law but that they provided something the State could not:

Practically, [the people] had no law, but, if law had existed, it could not have afforded adequate redress. . . . Men of criminal instincts were cowed before the majesty of an outraged people's wrath, and the very thought of crime became a terror to them. . . . Fear, more potent than conscience, forced even the worst of men to observe the requirements of civilized society, and a feeling of comparative security among all classes was the result.⁴¹⁴

To put Langford's analysis into the analytic framework used here, one can argue that the Vigilantes' actions were necessary to alter the payoffs for defection. Given the wealth that was available to road agents and the difficulties the authoritarian legal system would have faced in containing an organized band (even if Plummer had not controlled it),⁴¹⁵ it may well be true that the Vigilantes' approach was the most likely to succeed.⁴¹⁶

The Montana Vigilance Committee serves as something of a poster child for vigilance committees. It broke a vicious criminal organization, one which had successfully captured the area's legal authority. It operated swiftly and, by most accounts, fairly under the circumstances, executing only men whose guilt was relatively clearly established.⁴¹⁷ Finally it disbanded quickly after achieving its objectives. In his introduction to his account, Vigilante Nathaniel Langford summed up the Committee's actions by saying:

Although not the first exhibition of Vigilante justice, the one I here

413. CALLOWAY, *supra* note 327, at 253 ("when the robbers were dead the people felt safe, not for themselves alone, but for their pursuits and their property"); DIMSDALE, *supra* note 69, at 267 ("[l]ess than three years ago, this home of well-ordered industry, progress, and social order was a den of cut-throats and murderers").

414. LANGFORD, *supra* note 61, at 253.

415. Dimsdale argued that the road agents were "too strong for legal repression" and that the Vigilantes were "the only organization able to cope with the rampant lawlessness" in Montana. DIMSDALE, *supra* note 69, at 266.

416. The official legal apparatus approved of the Vigilantes. When Territorial Chief Justice Hezekiah L. Hosmer opened the first court in the newly formed Montana Territory on December 5, 1864, he praised the Vigilance Committee as "an organization, which, in the absence of law, assumed the delicate and responsible office of purging society of all offenders against its peace, happiness and safety." CALLOWAY, *supra* note 327, at 125. However, Hosmer continued, now that the courts had arrived, there was no further need for the Committee's activities. *Id.* at 126.

417. After the destruction of Plummer's gang there were some instances in which individuals were hanged by men claiming to be Vigilantes. Langford disclaims these, noting that "the men who had misused [the Vigilante institution's] power were given to understand that any further employment of them would probably cause it to react upon themselves." LANGFORD, *supra* note 61, at 297.

record was the most thorough and severe, and stands as an example for all new settlements that in the future may be similarly afflicted, for it was not until driven to it both by the frequent and unremitting villainies of the ruffians, and by the necessities of a condition for which there was no law in existence, that the people resorted to measures of their own, and made and enforced law as suited to the exigency.⁴¹⁸

There are several important features of the vigilantes' actions in Montana. First, their organization was impressive because it overcame "the desire to escape responsibility, to acquire something and leave in peace, [which] prevented any active measures of protection."⁴¹⁹ Second, the Vigilantes overcame a superior organization, one which had successfully stolen tens of thousands of dollars and which had control of the legal machinery (such as it was) of the State. Third, the Montana Vigilantes did not do what some of their counterparts elsewhere did—they did not use their success to advance their personal positions or destroy their political opponents. Perhaps most remarkably, the Vigilance Committee is generally acknowledged to have made only one "mistake" and ceased its operations after eliminating the road agents without conducting a general purge of suspected wrongdoers or political opponents.⁴²⁰ Since the Committee operated during a time of deep political passions in Montana over the Civil War (Montana had many Southern sympathizers), its self-restraint is even more remarkable. Finally, there is clearly a role for entrepreneurs in making private law work. Col. Wilbur F. Sanders, James Williams, Nathaniel Langford, and X. Beidler, among others, played major roles in its development because of their natural leadership abilities.

3. Vigilance and Private Production of Law

The vigilance committees are the most problematic examples of customary law. To the extent they are disorganized they run the risk of degenerating into mere mobs, with all the attendant losses of accuracy and deliberation that entails. As they became more organized, however, they began to look uncomfortably like the Leviathan. What then can we learn about the private provision of law from these examples?

There are negative lessons. Private bodies that look like the State and

418. LANGFORD, *supra* note 61, at 11.

419. *Id.* at 138.

420. Mather and Boswell argue that the Committee, which they acknowledge included Democrats, was engaged in a political purge because many of the leaders were Republicans and nine of the men hung, who they assert were the only ones "who took an interest in politics," were Democrats. VIGILANTE VICTIMS, *supra* note 327, at 161.

act like the State, as with the 1856 Committee, are subject to the same problems (or worse) as the State. As Diego Gambetta notes in his account of the Sicilian Mafia, one solution to an organized crime problem is simply “a bigger Mafia” which can “solve” the problems presented by a criminal organization.⁴²¹ Gambetta’s example illustrates the dangers of such solutions, however, because the most effective attack on the Sicilian Mafia (at least until recently) was the Fascist state.⁴²² Private law providers ought, therefore, to seek alternative models for their organization. Similarly, monopolies on power tend to produce at best questionable results and at worst horrendous brutality. Competition has many benefits in the marketplace and the experience of the vigilante movements suggests it is worth applying to the provision of law as well. The vigilance committees also confirm the reality of the free rider problems in providing law. Law does have some public good aspects and relying on volunteers is likely to lead us to too little law. (That is not to say, however, that relying on elected volunteers is necessarily better.)

These vigilante movements also suggest some positive lessons. Of the two discussed here (and I would argue of 19th century vigilante movements more generally), the Montana Vigilantes stand out as a successful episode. What distinguishes them from the California committee? First, the Montana Vigilantes had much more limited goals. They were not seeking to reform a political structure but to enforce a very limited set of rights to life and property. Second, they operated in an environment which enabled them to focus on their core mission. Finally, they did not have to defend themselves against both the criminals they fought and the State. The 1856 San Francisco Committee, in particular, was in open conflict with the State (albeit a particularly weak and ineffective State) and that conflict created an enormous incentive to overpower the State and create a counter-Leviathan. Reducing the points of conflict between authoritarian law and customary law by allowing enforceable opt-outs is thus likely to be of particular utility. Perhaps the most remarkable thing about the Montana vigilantes is that they overcame the free rider problem and privately produced law that the state was unable to provide. Defeating Plummer’s gang would have been a substantial accomplishment for any organization; doing so with a network of volunteers in an isolated region in the dead of winter is truly remarkable. If these men could overcome the free rider problem, we should be confident about our ability to do so under the less challenging circumstances we face today.

421. Diego Gambetta, *Mafia: The Price of Distrust* in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 167 (Diego Gambetta, ed., 1988).

422. *Id.*

C. *Cattlemen, Rustlers, and Mavericks*⁴²³

Placer rushes brought men to western and central Montana but eastern Montana and Wyoming had little to offer except grass. Grass, however, turned out to be quite useful, particularly when it was free, and the free range cattle industry grew rapidly in Montana and Wyoming during the 1870s and 1880s.⁴²⁴ In many respects the coming of cattle was as sudden and significant a change as the discovery of gold.

At the close of the Civil War enormous herds of buffalo still ranged the Great Plains, a region constituting a fourth of the United States. Many Americans still thought of it as "The Great American Desert," suitable only for the wandering bands of Indians who found a home there. Twenty years later, the buffalo herds had virtually disappeared, the Indians had been pushed aside, and the cattle kingdom seemingly reigned supreme. Cowboys and cattle kings characterized the region, a remarkable transformation.⁴²⁵

The cattle kingdom of the Great Plains lasted almost twenty-five years—fifteen of growth and ten of dominance, making it what Walter Prescott Webb called "one of the outstanding phenomena in American history."⁴²⁶

Like the placer era, the free range period was one in which a small initial investment could quickly lead to a large fortune.⁴²⁷ Like the Gold Rush's spread from California, the range cattle industry spread from Texas to all or part of twelve states in ten years: "For rapidity of expansion there is perhaps not a parallel to this movement in American history."⁴²⁸ Also like the placer rushes, the free range industry was dependent upon customary legal institu-

423. Source note: This section draws heavily on the following sources: (1) LEWIS ATHERTON, *THE CATTLE KINGS* (1961); (2) ERNEST STAPLES OSGOOD, *THE DAY OF THE CATTLEMEN* (1929); (3) EDWARD EVERETT DALE, *COW COUNTRY* (1942); (4) HELENA HUNTINGTON SMITH, *THE WAR ON POWDER RIVER* (1966) [hereinafter SMITH]; (5) E. C. ABBOTT AND HELENA HUNTINGTON SMITH, *WE POINTED THEM NORTH* (1939) [hereinafter ABBOTT & SMITH]; (6) ROBERT H. FLETCHER, *FREE GRASS TO FENCES* (1960); (7) MARI SANDOZ, *THE CATTLEMEN* (1958); and (8) WALTER PRESCOTT WEBB, *THE GREAT PLAINS* (1931). Sources specific to Wyoming or Montana are discussed in source notes in those sections. Atherton's work is a classic, surveying the cattle kings and examining their role as a class as well as thoroughly describing the background of the industry. I have not found a more recent work which gives a better picture of the times or the cattle kings. Similarly, Osgood and Dale provide a broad overview of the range cattle industry. Webb describes the transformative nature of the Great Plains, arguing that the tremendous differences between the lands east and west of the 98th meridian created a new world to the west.

424. SMITH, *supra* note 423, at 9-11; JOSEPH KINSEY HOWARD, *MONTANA HIGH, WIDE, AND HANDSOME* 103-04 (1959); HAMILTON, *supra* note 47, at 384-85.

425. ATHERTON, *supra* note 423, at 1.

426. WEBB, *supra* note 423, at 225.

427. FLETCHER, *supra* note 423, at 52 (all one needed was "a few saddle horses, a log ranch house, and a branding iron . . . sometimes just the branding iron").

428. WEBB, *supra* note 423, at 257.

tions because title to “free” grass could not be legally obtained through the authoritarian legal system. Like the placer miners, the free range cattlemen developed customary law institutions which enabled them to allocate the range and rights to the roaming herds of cattle.

Like the mining frontier, much of the cattle frontier was distant from the State’s law. For example, Atherton notes that ranchers in the Dakota Bad Lands in the early 1880s

had to rely on distant courts, nonresident law enforcement agents, and threats of retaliation against desperadoes by the better element locally. Respectable people even hesitated to try to organize a county government for fear that the lawless element would gain control.⁴²⁹

The cattlemen thus confronted similar free rider problems in constructing a social order on the range to those faced by the miners and others in earlier decades. Any cattleman who individually hired guards for his herds, for example, benefitted his neighbors’ intermingled cattle as well.

Changes in laws, social habits, and technology all contributed to the creation of the cattle kingdom of the Plains.⁴³⁰ By 1885-86, there were probably about 1.5 million cattle in Wyoming⁴³¹ and over half a million in Montana.⁴³² Increasing settlement, over-stocking of the range, and other factors brought conflicts between those with large cattle operations and those without, however. In Montana those tensions were successfully mediated by customary institutions. In Wyoming they produced a war. This section explores some of the differences between the two and how the monopoly of power held by the Wyoming “cattle kings” contributed to the disas-

429. ATHERTON, *supra* note 423, at 32. The problem of the lawless element gaining control is the problem identified by Randy Barnett, *Pursuing Justice in a Free Society: Part One*, 4 CRIM. JUST. ETHICS 50 (1985) and *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, 5 CRIM. JUST. ETHICS 30 (1986).

430. ATHERTON, *supra* note 423, at 1 (opening of range, exclusion of railroads, invention of refrigerator cars, changes in British investment laws, increased meat consumption, rise of world markets); FLETCHER, *supra* note 423, at 54 (refrigerated shipping and increased sales of dressed beef); WEBB, *supra* note 423, at 179, 318 (six shooter, barbed wire, and windmill crucial to settling the Great Plains).

431. T. A. LARSON, HISTORY OF WYOMING 167 (1965). Herd size fell about fifteen percent in the severe winter of 1886-87. *Id.* at 191.

432. HAMILTON, *supra* note 47, at 393. Most of these were in the huge herds owned by the “cattle kings” but increasing numbers of small ranchers were appearing. The industry quickly attracted capital—in 1883 alone twenty companies with capitalization totaling over \$12 million incorporated in Wyoming. OSGOOD, *supra* note 423, at 97. Many of the cattle operations were funded with foreign capital, particularly from Britain. SMITH, *supra* note 423, at 11; ATHERTON, *supra* note 423, at 190-91 (“at least thirty-three” investment companies formed in Great Britain between 1879-1888 to invest in American ranching, which invested at least \$20 million, and possibly up to \$45 million).

trous results there.⁴³³

1. The Free Range Cattle Industry

"In the beginning of ranching in the West the country was wide open and free, and grass was without limit throughout the whole region. The cattle were of Texas origin, low-grade and hardy."⁴³⁴ A rancher chose a headquarters, usually along a stream.⁴³⁵ "At first he had no neighbors, and his range covered about all the country that the cattle wanted to roam over; but after a time another rancher would establish himself" nearby on the same stream.⁴³⁶ As more neighbors arrived, the range was divided, even though no rancher legally owned the rangeland.⁴³⁷ A rancher "did possess what was recognized by his neighbors (but not by law) as range rights"—a right to water and to the surrounding range.⁴³⁸ Within a few years men with herds often numbering in the thousands would turn their unsupervised cattle loose onto public lands in the fall to fend for themselves in the winter⁴³⁹ and gather them in a spring roundup to reap this bonanza.⁴⁴⁰ "Under such conditions it was impossible to keep the cattle of one ranch from mingling with those of another. There was little effort at first to do so."⁴⁴¹ By the end of the 1870s the potential of the "Great American Desert" for cattle raising was becoming clear. Enthusiastic boosters in both Montana and Wyoming published books and pamphlets expounding on the virtues of free range cattle ranching. "Risk? There is almost none" enthused a Helena bank president in 1879⁴⁴² and he was far from alone.⁴⁴³

433. The "cattle kingdom" spread over parts of Texas, Oklahoma, Kansas, Nebraska, North and South Dakota, Montana, Wyoming, Nevada, Utah, Colorado, and New Mexico. WEBB, *supra* note 423, at 257. The reader will be surprised to learn that space considerations actually did play a role in the writing of this Article and that the focus on Montana and Wyoming is the result.

434. *Id.* at 228.

435. *Id.*

436. *Id.*

437. *Id.* at 229.

438. *Id.*

439. There was no herd management. Herds were not fed or driven to sheltered spots; bulls were not segregated from the herds to prevent winter calving. SMITH, *supra* note 423, at 34. The Baron de Bonnemans, one of the many European aristocrats drawn to the cattle business, said his cattle just "ran around" without management. ATHERTON, *supra* note 423, at 14. Open range grazing was necessary because cattle required forty acres each in Wyoming and the 160 acre units available by homesteading were therefore useless for ranching. Open range grazing also saved on costs: No fencing was needed and no labor was necessary during the winter. LARSON, *supra* note 431, at 177.

440. LARSON, *supra* note 431, at 164-65 & ch. 7 generally.

441. WEBB, *supra* note 423, at 229. Cowboys would sometimes "drift" cattle back to their own ranges—"a neighborly act, advantageous to everybody" and willingly done "as long as there was plenty of room." *Id.*

442. ROBERT E. STRATHORN, THE RESOURCES OF MONTANA TERRITORY AND ATTRACTIONS OF YELLOWSTONE PARK (1879) (quoting Sam T. Hauser, President, First National Bank, Helena, Montana).

443. FLETCHER, *supra* note 423, at 45; SMITH, *supra* note 423, at 9-12; II STUART, *supra* note 327, at 185 ("[e]astern papers and magazines published all sorts of romantic tales about the ease and rapidity

Herds were driven east to meet the approaching Northern Pacific tracks or to the Union Pacific in Wyoming and shipped east to Chicago.⁴⁴⁴ The early 1880s were a “great boom” for cattlemen—a time of “golden visions in a blaze of glory.”⁴⁴⁵ Until the hard winter of 1886-87, many ranchers treated their ranches “as a seasonal occupation in which owners needed to be present on the home range only a few months each year.”⁴⁴⁶

In some ways range life was idyllic. The land had no value, the grass was free, the water belonged to the first comer, and about all a man needed to “set him up” in the business was a “bunch” of cattle and enough common sense to handle them and enough range to protect them without aid of law.⁴⁴⁷

As an unregulated commons, however, the free grass range was quickly heading for trouble.

The northern plains presented those who moved there with conditions unlike anything in the East or other parts of the West.⁴⁴⁸ One of the most important differences was the lack of water.⁴⁴⁹ Water was scarce and its appearance erratic, leading to periodic droughts.⁴⁵⁰ The failure of federal policy to take that lack into account turned policies which worked reasonably elsewhere, such as the homestead size of 160 acres,⁴⁵¹ to fail miserably in the Great Plains.⁴⁵² Indeed, Webb concludes that “[t]here has never been

with which vast fortunes were being accumulated by the Cattle Kings” but did not mention “severe winters, storms, dry parched summer ranges, predatory animals, hostile Indians, and energetic ‘rustlers,’ or the dangers of overstocking the ranges”).

444. FLETCHER, *supra* note 423, at 47. See also II STUART, *supra* note 327, at 180 (1883 roundup drove cattle to Custer, Wyoming to meet the Northern Pacific, a one hundred and twenty mile drive).

445. WEBB, *supra* note 423, at 233.

446. ATHERTON, *supra* note 423, at 14.

447. WEBB, *supra* note 423, at 230.

448. *Id.* at 390 (“practically every condition . . . was materially different”).

449. *Id.* at 352 (land was “practically free” in the West, “[b]ut water was very dear”).

450. *Id.* at 343-44. Settlers had some odd theories about rainfall. Some believed rainfall would follow settlement, others thought fires, the railroads, or telegraph wires would bring rain. *Id.* at 397.

451. HOWARD, *supra* note 424, at 30-37.

452. There were serious problems with homesteading more generally which existed in both Wyoming and the rest of the West. For example, homesteading encouraged settlement even before farming would be economical in a region—in effect making the price of land include years of hardship while waiting to make farming economically viable. Richard L. Stroup, *Buying Misery with Federal Land*, 57 PUBLIC CHOICE 69, 70-71 (1988); Terry L. Anderson and P. J. Hill, *The Race for Property Rights*, 33 J.L. & ECON. 177, 195 (1990) (“pioneers paid for the land in terms of foregone wealth, privations, and hardships”). See also Douglas W. Allen, *Homesteading and Property Rights*; or, “How The West Was Really Won,” 34 J. LAW & ECON. 1, 22-23 (1991) (arguing homesteading served the important purpose of establishing U.S. control of empty lands before Mexico, Britain, Texas, Spain, Russia, or Indians could preclude American expansion). The size of homestead claims, had also been set with eastern conditions in mind, not the arid lands. 160 acres was simply not adequate in much of the West. Webb describes in detail the development of The Homestead Law. WEBB, *supra* note 423, at 387-431. Basically, cattle operations required at least four sections to be successful and even under liberal interpretations of federal land law only a quarter of that could be legally obtained. *Id.* at 393, 412, 415.

written into the Federal Statutes a single law governing lands in the arid region that meets the needs of the stock farmer or the ranchman."⁴⁴³ The failures of federal land policy prevented the formal legal system from creating and enforcing economically viable property rights in western lands.⁴⁴⁴ For example, because title to federal land could not be legally obtained in the plains,⁴⁴⁵ enforcing customary rights became increasingly difficult as the population grew larger and more heterogeneous (i.e., small ranchers, farmers, and sheep arrived). Where ranchers were able to get title to or lease land (as in Texas, whose independence prior to joining the Union spared it federal control of land within its borders), ranchers used their control to impose law and order.⁴⁴⁶ Since the Texas ranches were owned outright, their owners were able to internalize the benefits of law production and, not surprisingly, produced more of it than the Plains ranchers, who could not. A Plains rancher had to resort to subterfuges like paying his cowboys to homestead along streams for the rancher.⁴⁴⁷ Even as early as 1875 the federal General Land Office reported to Congress that "title to the public lands cannot be honestly acquired under the homestead laws" in the west.⁴⁴⁸ Moreover, unlike the wetter eastern states, dividing the arid lands of the West into square sections and 160 acre parcels left many without access to water.⁴⁴⁹ (By homesteading a parcel with water, one individual could control large territories surrounding it.) If the federal government had followed the recommendations of its own experts with respect to location and size of homesteads it might have avoided many of the conflicts over the range.⁴⁵⁰ Finally, the federal, state, and territorial governments and railroads actively promoted set-

443. *Id.* at 357.

444. JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES (1878). Powell argued for allowing individuals to form irrigation districts to provide water. Notably Powell did not recommend participation by the federal government in reclamation: "I say to the Government: Hands off! Furnish the people with the institutions of justice, and let them do the work for themselves." John Wesley Powell, *Institutions for the Arid Lands*, 18 CENTURY (n.s.) 111, 113 (1890). Powell also argued the land unit should be 2650 acres instead of 160. *Id.* at 32.

445. HAMILTON, *supra* note 47, at 394.

446. ATHERTON, *supra* note 423, at 43-44 (describing "severe moral regulations," use of ex-Texas ranchers, and other measures); WEBB, *supra* note 423, at 398 (Texas land law "almost but never quite kept pace with practice"); *id.* at 425-27 (describing Texas land policy which allowed purchase of up to three sections of grazing land by 1885 and four by 1887). The Texas example is developed more completely in Andrew P. Morriss, *Law on the Range: Private Provision of Law Among the Plains Cattle Kings* (unpublished manuscript on file with author).

447. WEBB, *supra* note 423, at 241.

448. REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 44TH CONG. (1875) (cited in WEBB, *supra* note 423, at 417).

449. Another policy which caused problems was the use of a grid for surveys. Since surveys did not follow the topology, sections were left without water. HOWARD, *supra* note 424, at 35. OSGOOD, *supra* note 423, at 18 (describing how customary legal institutions function in areas of Spanish and Mexican settlement to allocate water access and concluding that "[t]he survey and sale of the land in regular sections would probably drive out the present population. . . .")

450. Easterners had trouble understanding the difference between the size of land holdings in the west and east and so resisted legislation permitting reasonable legal land usage rules. ATHERTON, *supra* note 423, at 167.

tlement in arid regions incapable of supporting small scale farming in the long term.⁴⁶¹

Cattlemen were forced to cooperate to some extent by their industry's characteristics.⁴⁶² Roundups were more efficient when conducted jointly.⁴⁶³ Cattle grazed on unfenced public lands became intermingled,⁴⁶⁴ access to scarce water had to be shared, and cattle protected from human and animal predators.⁴⁶⁵ Preventing duplication of brands required coordination. Government often was too slow to respond, particularly during the territorial period,⁴⁶⁶ forcing private solutions. One example of cooperation was the practice of providing free board to visitors,⁴⁶⁷ which enabled many cowboys to survive during the slow winter months by riding from ranch to ranch for brief visits.⁴⁶⁸

The cattlemen formed livestock associations which "exercised real government functions."⁴⁶⁹ "The rules and regulations adopted by them were respected as law and were obeyed as faithfully as the statutes of any legislative body."⁴⁷⁰ Moreover, there were many ways to deal with defectors—"[p]rairie fires could be set, cattle herds stampeded, and help in times of sickness and accident denied in ways other than outright refusal."⁴⁷¹ The many opportunities to retaliate also promoted keeping one's word, since failure to do so could cause serious problems later.⁴⁷² (The threat of future retaliation did not stop the fleecing of outsiders who were unable to retaliate.)⁴⁷³

461. OSGOOD, *supra* note 423, at 43-44.

462. Not all cooperated, of course. The Marquis de Mores in the Dakota range, for example, "gave only token support to movements to end the depredations" of rustlers as long as his property was not taken. ATHERTON, *supra* note 423, at 36.

463. FLETCHER, *supra* note 423, at 57; WEBB, *supra* note 423, at 230.

464. As the large cattle operations increasingly invested in improved livestock, intermingling could depress the value of their herds and increase the value of their neighbors. Wyoming stock growers, for example, bought \$200,000 of mostly thoroughbred bulls in 1883. OSGOOD, *supra* note 423, at 94, n. 27. Montana cattlemen were upgrading their stock by the early 1880s. FLETCHER, *supra* note 423, at 57; II STUART, *supra* note 327, at 178. On improving stock, see also SMITH, ROCKY MOUNTAIN, *supra* note 48, at 125. The increase in imported cattle also introduced new problems with communicable diseases. OSGOOD, *supra* note 423, at 94.

465. HAMILTON, *supra* note 47, at 403; ATHERTON, *supra* note 423, at 109-10.

466. HAMILTON, *supra* note 47, at 404.

467. SMITH, *supra* note 423, at 109-110.

468. *Id.* at 110.

469. Wyoming stockmen organized in 1873. SMITH, *supra* note 423, at 26. The first organization was the Laramie County Stock Association. It became the Wyoming Stock Grower's Association in 1879. *Id.* Gold region Montana stockmen organized in February 1879. FLETCHER, *supra* note 423, at 58; MICHAEL P. MALONE, RICHARD B. ROEDER, AND WILLIAM L. LANG, MONTANA: A HISTORY OF TWO CENTURIES 160 (Rev. ed. 1991). Western Montana stockmen organized in 1881, and eastern Montana stockmen organized in 1883. The various Montana organizations merged in 1885. *Id.* at 160.

470. HAMILTON, *supra* note 47, at 404.

471. ATHERTON, *supra* note 423, at 41-42.

472. *Id.* at 134.

473. *Id.* at 137.

Cattle kings' interests clashed with small farmers and ranchers' interests in several areas. Part of the conflict was due to the incompatibility of farming and ranching: "The farmer's fence has cut across [the cattleman's] range and his bewildered cattle and horses have blundered into it."⁴⁷⁴ Another reason for conflict was the pressure put on the range by overstocking.⁴⁷⁵ The increasing numbers of cattle grazing in Wyoming through the mid-1880s⁴⁷⁶ was already causing problems by 1884⁴⁷⁷ and led to disaster in the winter of 1886-87.⁴⁷⁸ Overstocking in the free grass era was not an irrational policy however—it was a predictable response to the commons problem, especially since government policy prevented the development of many possible solutions. Overstocking also increased in part because "some of the wiser cattlemen" saw the free grass era coming to an end⁴⁷⁹ and began playing an end-game strategy.

Control of access was a major source of conflict. Barbed wire began to be manufactured on a large scale in 1874⁴⁸⁰ and barbed wire meant the treeless plains could be fenced at a reasonable cost.⁴⁸¹ After 1875 farmers spread west and conflicts between farmers and cattlemen increased.⁴⁸² Moreover, the same homestead law which denied cattlemen adequate range "served as effective bait which lured the farmers" west.⁴⁸³ As ranching grew, the larger operations began to fence with barbed-wire to keep out competitors and to prevent diseased cattle from mingling with their herds. The experience of the early 1880s convinced many cattle kings of the need for fencing, herd

474. HOWARD, *supra* note 424, at 13. See also II STUART, *supra* note 327, at 187 ("[t]he cattlemen did not want to see fences on the range as during severe storms the cattle drifted for miles and if they should strike a fence they were likely to drift against it and perish with the cold").

475. Overstocking caused a variety of problems—there was not enough food and shelter on the range for all the cattle, cattle paths caused erosion, and streams dried up (in part because beaver were trapped out and their dams no longer retained moisture). ATHERTON, *supra* note 423, at 156. Native grasses also were replaced by brush. *Id.* at 165.

476. Part of the increase was due to the 1885 eviction of 200,000 cattle from leased lands in Indian Territory (Oklahoma). SMITH, *supra* note 423, at 125.

477. *Id.* at 18.

478. 1886-87 was a terrible year for the cattle business in Wyoming. The summer of 1886 was a severe drought, "more cattle than ever before had been piled onto the range" and still more cattle were being brought into Wyoming. SMITH, *supra* note 423, at 35-36. When the severe winter hit, some herds lost more than ninety percent. *Id.* at 36-37. The result of the combination of bad weather, mismanagement, and overstocking was "the most appalling mass slaughter of animals the West had ever seen or would see again, second only to the slaughter of the buffalo." *Id.* at 38. The average loss in Wyoming was probably about 50%. *Id.* at 46. Absentee ownership accentuated the problems creating "all the abuses common to absentee ownership." OSGOOD, *supra* note 423, at 103-04. Even this disaster only accelerated the changes in the industry already under way, however, and did not cause an abrupt change in ranching techniques. ATHERTON, *supra* note 423, at 5.

479. WEBB, *supra* note 423, at 235.

480. FLETCHER, *supra* note 423, at 33.

481. WEBB, *supra* note 423, at 238.

482. *Id.* at 317.

483. *Id.*

management, and even winter feeding.⁴⁸⁴ Cattlemen also began to improve their herds with higher grade cattle, something facilitated by fencing the range.⁴⁸⁵

One solution to the problem of the unavailability of legal title was to simply take possession without regard to title. Cattlemen often simply fenced public lands.⁴⁸⁶ By 1887, for example, almost 250,000 acres of public land had been fenced illegally in Montana alone.⁴⁸⁷ (Federal officials went to work removing it and cleared 135,000 acres in Montana during 1887.⁴⁸⁸) Even those who sought to buy range were often frustrated. Granville Stuart, for example, settled on a 1,000 acre meadow in central Montana but could get title only to 400 acres—“[t]he bulk of the range was unsurveyed and no title could be obtained.”⁴⁸⁹ Cattle kings who bought railroad land, which alternated with public land along railroad rights of way, often simply fenced the public land with their adjacent property to reduce fencing costs.⁴⁹⁰ Illegal fencing reached its peak in the mid-1880s and declined after a vigorous federal law enforcement campaign against the practice.⁴⁹¹ At the same time, the cattle kings objected to settlers’ fencing their land because it obstructed the herds.⁴⁹²

A second major source of conflict was maverick cattle—unbranded animals found during a general roundup.⁴⁹³ Smith calls it “the most confused, embittered, explosive question ever to bedevil the cattle range.”⁴⁹⁴ Open range ranching meant there were many of these mavericks⁴⁹⁵ and, at first, anyone with a branding iron could claim a maverick.⁴⁹⁶ The traditional Texas rule was the “law of accustomed range,” under which a maverick

484. ATHERTON, *supra* note 423, at 168-69.

485. WEBB, *supra* note 423, at 239.

486. *Id.* at 238. The cattlemen tried creative methods. For example, one rancher purchased a railroad land grant composed of the odd numbered sections of a Montana township. Working with the owners of the even sections outside the township, he fenced the entire thing entirely on private land but enclosing the public sections as well. Another left openings on a lake and into an impassable coulee, arguing there was no complete enclosure. Both lost in court. HOWARD, *supra* note 424, at 103.

487. *Id.* at 108.

488. *Id.* at 109.

489. FLETCHER, *supra* note 423, at 47.

490. LARSON, *supra* note 431, at 179.

491. *Id.* at 179-80.

492. ASA SHINN MERCER, *THE BANDITTI OF THE PLAINS; OR THE CATTLEMEN'S INVASION OF WYOMING IN 1892 [THE CROWNING INFAMY OF THE AGES]* (1954 ed.) (1894)

493. Mavericks were largely calves which were missed during a roundup or which were orphaned. SMITH, *supra* note 327, at 51. They also included unbranded mature cattle.

494. SMITH, *supra* note 423, at 25.

495. The huge roundups conducted each year contributed to the maverick problem because their huge size and speed meant more cattle were missed, and so more unbranded calves grew up on the range. *Id.* at 33-34.

496. LARSON, *supra* note 431, at 182-83.

belonged to whoever's range it was found upon.⁴⁹⁷ As Robert Fletcher noted, this rule "would not hold water when applied to a country that so recently had been the accustomed range of buffalo and was now occupied by dozens of [branding] irons."⁴⁹⁸ The potential gains for defectors were high. For example, some large outfits, found it more profitable to pay bonuses to their cowboys to brand anything they found with their employers' brand.⁴⁹⁹ This practice contributed to the tendency of cowboys "to look upon the unbranded, motherless calf as common, or public property, to be gathered in by the lucky finder."⁵⁰⁰ Finding a means of fairly allocating mavericks became an increasingly important issue but mavericks were just a special case of the more general problem of rustling.

The third major conflict was over rustling. "The cattle rustler was to the stockman what the road agent had been to the placer miner."⁵⁰¹ Rustling was not limited to roping mavericks, of course. "Ranchers on the Northern plains recognized grim truth as well as humor in the universal story of the stranger who arrived in a community leading a steer from whose progeny he rapidly developed a whole herd of cattle."⁵⁰² Even when small holders were honest, they were often under suspicion. Absentee ownership of herds accentuated the problem as "[s]omehow, a calf belonging to a company with offices in Edinburgh or New York did not seem quite as much a piece of private property as that of a neighbor on the range."⁵⁰³

The free range cattle industry thus faced three significant problems.⁵⁰⁴ First, cattlemen had no means to secure property rights in the range. Denied the ability to obtain adequate public land, the cattle kings were increasingly

497. SMITH, *supra* note 423, at 52; OSGOOD, *supra* note 423, at 33 (describing how "law of accustomed range" was codified in Texas statute in 1866). When ranchers cooperated in a joint round up, they often divided the mavericks in proportion to the relative herd sizes of the participants. LARSON, *supra* note 431, at 183. The Texas rule probably had its origins in the conversion of free roaming cattle to branded, privately owned cattle by Texans after the Texas revolution. During the revolution and border war with Mexico which followed, Mexican ranchers found the land north of the Rio Grande "untenable" and abandoned their ranches and some of their stock. As the Texans entered into this area, the republic declared the strays public property and the Texans began branding whatever unbranded cattle they found. WEBB, *supra* note 423, at 210.

498. FLETCHER, *supra* note 423, at 57.

499. SMITH, *supra* note 423, at 57-58; MERCER, *supra* note 492, at 14.

500. MERCER, *supra* note 492, at 14.

501. HAMILTON, *supra* note 47, at 397.

502. ATHERTON, *supra* note 423, at 33. See also SMITH, ROCKY MOUNTAIN, *supra* note 48, at 123 (attributing anecdote to Bill Nye).

503. OSGOOD, *supra* note 423, at 104.

504. It is important to be clear about what was *not* the problem of the open range—its appropriation by private individuals. Beginning with the Homestead Act of 1862, land policy in the United States was based on the idea that the public interest was best served by providing free land to settlers and gaining "the increased national prosperity and increased property values" which would result. WEBB, *supra* note 423, at 404. Government revenues would come from taxes on prosperity, not from sale of lands as they had before 1862. *Id.* That quite a bit of the public domain ended up in private hands was a shared, national goal, not an objection to the cattlemen's appropriations.

confronted not only by competing claims from within the industry but by incompatible claims from homesteaders who could obtain legal title. Second, increased herd sizes meant more mavericks, and without a fair allocation of mavericks each risked substantial losses to the others. As the initial heady estimates of profits grew more realistic, mavericks also became more important as a profit source. Finally, the vast expanses of the Plains suited rustlers as much as they did cattle. Since one of the attractions of a range cattle operation was the low overhead, posting guards with herds would undercut the cost advantage that was the reason for the industry's existence, a free-rider problem that the cattlemen recognized.⁵⁰⁵

2. Montana⁵⁰⁶

The first serious cattle ranching in Montana followed the placer rushes because thousands of hungry miners needed to be fed.⁵⁰⁷ Starting with small herds, often built from purchases of worn-out cattle from passing emigrants,⁵⁰⁸ the cattle business soon expanded to include cattle driven up from Texas (the first herd arrived in 1866⁵⁰⁹) or east from Oregon.⁵¹⁰ The cattle industry continued to grow in Montana through the early 1870s despite setbacks such as the closing of the Bozeman Trail by a treaty with the Sioux and Cheyenne.⁵¹¹ By 1872 there were over 75,000 cattle in Montana.⁵¹² Cattlemen began seeking outside markets (by 1874 one local estimate was that there were 17,000 more cattle in Montana than needed to feed the local

505. Montana rancher Robert Ford, advocating collective action, told his neighbors

The stealing of cattle and horses is becoming a common occurrence and by organizing and all of us becoming detectives as it were, we can the easier put a stop to this thieving business. As it is now, if a man steals thirty or forty head of cattle from you or me and gets off with them, the chances are we will never exert ourselves to catch him because the cost is too great and we will say, "Let him go." But if we organize and bear our pro rata share of the expense, the thief will be hunted down and punished and it will cost each of us but little.

FLETCHER, *supra* note 423, at 59.

506. The primary sources for this section are: II GRANVILLE STUART, FORTY YEARS ON THE FRONTIER, *supra* note 327; Oscar O. Mueller, *The Central Montana Vigilante Raids of 1884*, 1 MONTANA: THE MAGAZINE OF WESTERN HISTORY 23, 35 (1951).

507. FLETCHER, *supra* note 423, at 18-27, 20 ("[a] hard-working miner, with appetite further whetted by youth, wanted meat as a major part of his diet and he didn't cavail about quality. He had no time to hunt game even if there had been enough to go around"). II STUART, *supra* note 327, at 97-98 ("by 1863 cattle growing had become an industry of considerable importance"). Several ranching operations began in 1856, aimed at cattle and horse trading with emigrants, the first territorial law on marks and brands was passed in 1864-65 and in 1866 the first herd of Texas longhorns reached Montana. ATHERTON, *supra* note 423, at 9.

508. *Id.* at 8.

509. FLETCHER, *supra* note 423, at 25; II STUART, *supra* note 327, at 98.

510. FLETCHER, *supra* note 423, at 39-40.

511. *Id.* at 27-31.

512. OSGOOD, *supra* note 423, at 21. Without the easy access to rail lines provided in Wyoming by the Union Pacific, herds soon outgrew local demand for beef and there was no easy access to outside markets. *Id.* at 53-54.

population⁵¹³). By the late 1870s the cattle industry was edging into the western edge of the Great Plains.⁵¹⁴ More than 100,000 cattle were brought into the Territory in 1885 alone.⁵¹⁵

There was no way to prevent the over-stocking of the ranges as they were free to all and men felt disposed to take big chances for the hope of large returns. The range business was no longer a reasonably safe business; it was from this time on a "gamble" with the trump cards in the hands of the elements.⁵¹⁶

Because the weather was "ideal" for several years,⁵¹⁷ the industry continued to flourish. "Ideal" weather does not last forever, however, and 1886 started out poorly in Montana—a drought led to range fires and cattle losses from poisonous plants.⁵¹⁸ The fall rains did not come⁵¹⁹ and an unusually severe winter struck in November.⁵²⁰ Fences prevented cattle from reaching streams, overstocking meant there was no margin of error, and the many new cattle from outside the region were unaccustomed to the rigors of a Montana winter. Despite great efforts, Granville Stuart lost two thirds of his herd and others' losses ranged as high as 100 percent.⁵²¹ When spring finally came

the ranges presented a tragic aspect. Along the streams and in the coulees everywhere were strewn the carcasses of dead cattle. Those that were left alive were poor and ragged in appearance, weak and easily mired in the mud holes.⁵²²

The industry recovered in the 1890s, although Stuart gave up cattle raising as a result.

Because Montana cattlemen shared social status and political and economic power with mining interests from the beginning, however, Montana's cattle kings never achieved the complete political dominance the Wyoming cattle kings enjoyed.⁵²³ This difference expressed itself clearly in the respec-

513. FLETCHER, *supra* note 423, at 32.

514. *Id.* at 36.

515. II STUART, *supra* note 327, at 212.

516. *Id.* at 227.

517. *Id.* at 212.

518. *Id.* at 230-31.

519. *Id.* at 233-34.

520. *Id.* at 234.

521. *Id.* at 235-36.

522. *Id.* at 237. Stuart found the experience so horrifying that "[a] business that had been fascinating to me before, suddenly became distasteful." *Id.*

523. ATHERTON, *supra* note 423, at 268; FLETCHER, *supra* note 423, at 62 (the center of population "remained in the more heavily settled western portion where mining interests predominated. The majority of the voting public were therefore apathetic about the troubles of cowmen and, with such a situation,

tive elite social institutions:

The constitution, by-laws, and rules of conduct [of the Montana Club in Helena] were strikingly similar to those of the Cheyenne Club, but the great importance of mining in Montana meant that cattlemen, mining operators, and businessmen mingled more freely there than at Cheyenne, where ranching interests dominated.⁵²⁴

Moreover, not only did Montana cattlemen have to share power with mining and other businesses but the cattle industry itself was much more diverse than the Wyoming cattle industry. A significant cattle industry centered in the Beaverhead and Deer Lodge valleys used a combination of natural barriers and fences to create private ranches with roughly equal cattle and sheep herds.⁵²⁵ Many of these ranchers were ex-miners whose “experience had rendered them too independent to settle down as employees of a mining company” as mining switched to more capital intensive forms after the placer boom.⁵²⁶

When the cattle industry moved into eastern Montana in the late 1870s and early 1880s, cattlemen had to learn new methods to adapt to the open range.

No longer was he in a country of high mountain ranges, steep divides, and rapid mountain streams—natural barriers that kept his cattle within a comparatively small area; here were open plains over which the cattle might wander for hundreds of miles. No longer were there small streams on every hand; here water was scarce and, as one traveler had remarked many years previous, ‘Those cattle which are . . . to depasture these plains in a future time, must be sound in wind and limb to gather food and water the same day.’ New conditions, that called for cooperation and adjustment, confronted him on his introduction to the range cattle business. The roundup, the maverick, the chuck-wagon, and the cowboy were institutions and terms common enough to the Wyoming cattlemen but unfamiliar to the older Montana stock grower in 1878-1879.⁵²⁷

Cattlemen confronted many problems, such as raids by Indians, through cooperative efforts. Losses to Indians during 1880-81, for example, led a meeting of western Montana stockmen to offer rewards for the capture and

stockmen’s bills had not always” been treated favorably by the legislature).

524. *ATHERTON*, *supra* note 423, at 67.

525. *OSGOOD*, *supra* note 423, at 56.

526. *Id.* at 53.

527. *Id.* at 88.

conviction of traders selling alcohol to Indians.⁵²⁸ They also hired their own guards to “look after Indians.”⁵²⁹ The Montana cattlemen learned quickly—from virtually uninhabited in 1880, central and eastern Montana was emptied of buffalo and filled with 600,000 head of cattle by fall 1883.⁵³⁰ As Granville Stuart summed it up, “[i]t would be impossible to make persons not present on the Montana cattle ranges realize the rapid changes that took place on those ranges in two years.”⁵³¹ As the industry switched from trading cattle to breeding them, cattlemen began to take a greater interest in upgrading their stock,⁵³² increasing the value of their herds. Montana cattle outfits did not own much land—“[t]he land on the ranges was unsurveyed and titles could not be had.”⁵³³ Unlike the Wyoming cattle outfits they did not attempt to fence land either, because fences could trap cattle in storms.⁵³⁴ In the “early range days,” Montana free range cattlemen followed what Granville Stuart somewhat misleadingly termed “the Texas system.”⁵³⁵ In this system, anyone who found an unbranded lost calf branded it “without ever trying to ascertain to whom the animal belonged.”⁵³⁶ Stuart opposed this system because

[i]t was only a step from “mavericking” to branding any calf without a brand and from that to changing brands. Cowboys permitted to brand promiscuously for a company soon found they could as easily steal calves and brand for themselves. . . . In the broad open country of the range a man’s conscience is apt to become elastic.⁵³⁷

When Granville Stuart’s “D-S” outfit was joined on the eastern Montana range by several others in 1881, they “pooled” and worked the round up cooperatively. Stock owners had one vote per rider furnished. Outfits with under 1,000 head either provided a rider or paid \$2.00 per head. Outfits with more than 1,000 head furnished one rider per thousand.⁵³⁸ The group decided to require seven bull calves per hundred heifer calves and dispatched riders to the more remote regions to hunt for missing cattle.⁵³⁹ Mavericks were sold at auctions at which any cattle owner could bid.⁵⁴⁰ An inspection committee of three checked bulls and could require owners of bulls found “too old to

528. II STUART, *supra* note 327, at 156.

529. *Id.* at 157.

530. *Id.* at 187-88.

531. *Id.* at 187.

532. FLETCHER, *supra* note 423, at 57.

533. II STUART, *supra* note 327, at 187.

534. *Id.* at 187.

535. *Id.* at 167.

536. *Id.*

537. *Id.*

538. *Id.* at 166.

539. *Id.*

540. *Id.*

be of service” to castrate and replace the bulls.⁵⁴¹

Montana’s cattle kings did not actively oppose smaller operators as Wyoming’s cattle kings did. Indeed, Granville Stuart claims that “[t]here was never, in Montana, any attempt on the part of the large cattle companies to keep out small owners, homesteaders, or permanent settlers. On the contrary every possible assistance was given to the settlers by the larger companies.”⁵⁴² For example, settlers were allowed to milk range cattle so long as they shared the milk with the calves. Cattlemen frequently bought butter made from this milk from the homesteaders, paid for schools, provided libraries, and equipment, employed homesteaders, and assisted them in recovering stolen horses and cattle.⁵⁴³

In 1882, Stuart was elected to the Territorial legislature.⁵⁴⁴ Despite the presence of “a number of cattlemen in the legislature,” he was unsuccessful in getting the “much needed laws” he sought enacted.⁵⁴⁵ The legislature’s failures were due to a partisan deadlock, the governor’s veto of many bills which passed, and a lack of interest by legislators from western Montana.⁵⁴⁶ As a result, the problem of mavericks was handled in Montana through the local roundup associations, which allocated them each year.⁵⁴⁷ Unable to obtain a Territory-wide solution, as in Wyoming, Montana’s cattlemen developed a decentralized solution.⁵⁴⁸

Rustling was a significant problem in Montana, particularly horse theft. Granville Stuart, for example, claimed “[i]t had become impossible to keep a team or saddle horse on a ranch unless one slept in the manger with a rifle.”⁵⁴⁹ Montana cattlemen took a number of steps to control rustling. They hired stock detectives to catch rustlers, lawyers to help prosecute them, and surveyed other areas for laws. Some Montana cattle kings, such as Granville Stuart, encouraged their employees to purchase cattle, which were then mingled with the employer’s herd, reasoning that this could give their employees a stake in the herds. As a result, Smith notes, “[f]unny how much less trouble they had with rustling” in Montana.⁵⁵⁰ Montana’s cattlemen did succeed in getting some help from the Territorial government. In 1885 the

541. *Id.* at 177-78.

542. *Id.* at 186.

543. *Id.* at 186-87.

544. *Id.* at 168.

545. *Id.*

546. *Id.* Stuart notes the governor was “a cultural gentleman, a delightful person to meet socially.” Having lived in New York and Europe, he “was entirely out of harmony with his surroundings in Montana and unfamiliar with the industries or the needs of the territory.” *Id.*

547. *Id.* at 168-69.

548. SMITH, *supra* note 423, at 28-29, 111.

549. II STUART, *supra* note 327, at 176.

550. SMITH, *supra* note 423, at 29.

Board of Stock Commissioners began an inspection program, requiring a bill of sale for all cattle being transported out of Montana.⁵⁵¹

Rustling was a problem, even if employee rustling was not. Granville Stuart estimated a three percent loss from rustling in 1883, for example.⁵⁵² Rustlers along the Yellowstone and Missouri Rivers had fortified hideouts and worked with confederates in Canada and elsewhere to dispose of stolen cattle.⁵⁵³

The civil law and the courts had been tried and found wanting. The Montana cattlemen were as peaceable and law-abiding a body of men as could be found anywhere but they had \$35,000,000 worth of property scattered over seventy-five thousand square miles of practically uninhabited country and it must be protected from thieves. The only way to do it was to make the penalty for stealing so severe that it would lose its attractions.⁵⁵⁴

Reacting to losses of stock, vigilantes in Central Montana hung fifteen to eighteen men during July and August 1884.⁵⁵⁵ While less is known about the activities of this group of vigilantes than some others, primarily because they were less talkative,⁵⁵⁶ enough is known to piece together the following events: A relatively lengthy period of trouble with Indians, rustlers, and horse thieves found "conditions were such as to have forced the stockmen off the range, unless drastic action was taken."⁵⁵⁷ One stockman put it this way:

We must either gather up what stock we have left and leave the country or gather up these desperadoes and put them where they will kill and steal no more; there is no alternative, and we choose the latter. It is now simply a state of war.⁵⁵⁸

551. HAMILTON, *supra* note 47, at 399.

552. II STUART, *supra* note 327, at 195. Stuart recounts how a neighbor's "cows invariably had twin calves and frequently triplets, while the range cows in that vicinity would persist in hanging around this man's corral, envying his cows their numerous children and bawling and lamenting their own childless fate." *Id.*

553. HAMILTON, *supra* note 47, at 398; II STUART, *supra* note 506, at 195, 196-97 (rustlers "were strongly fortified" and "armed with the most modern weapons").

554. *Id.* at 196.

555. Mueller, *supra* note 506, at 23, 35. Vigilantes organized by Granville Stuart also worked in lower Yellowstone, using a special train on the Northern Pacific tracks, and also continued into Dakota Territory. Malone reported that "some old-timers" estimate the total killed at more than sixty. MALONE ET AL., *supra* note 469, at 163.

556. Mueller, *supra* note 506, at 23 "The Vigilantes were true to their promise not to make public the facts. . . ." While "hotheads" like the young Theodore Roosevelt agitated for a "cowboy army," Stuart stifled public discussion to ensure secrecy. MALONE ET AL., *supra* note 469, at 163.

557. Mueller, *supra* note 506, at 24. See also FLETCHER, *supra* note 423, at 56.

558. MALONE ET AL., *supra* note 469, at 163.

The stockmen of eastern Montana were organized into two cooperative Roundup Associations, which often worked together.⁵⁵⁹ What Atherton terms “a loose organization of ranchers” furnished funds and men and a decentralized structure of independently operating bands “cleaned out rustlers in eastern Montana and western Dakota.”⁵⁶⁰

Stuart’s group was quite small (fourteen members) and all were “men who had stock on the range and who had suffered at the hands of the thieves.” Stuart later defended their actions, saying “there was not one man taken on suspicion and not one was hanged for a first offense. The men that were taken were members of an organized band of thieves that for more than two years had evaded the law and robbed the range at will.”⁵⁶¹ The vigilantes operated relatively openly,⁵⁶² winning praise from most Montana newspapers.⁵⁶³ Granville Stuart⁵⁶⁴ was elected president of the Montana Stockgrowers in the midst of the activity and James Fergus, a strong defender of extra-legal activities, was elected president of the Montana Pioneers Society and had a new county named after him in 1885.⁵⁶⁵ Mueller, who conducted extensive interviews with contemporaries, concludes that “[w]hile the evidence is not satisfactory, it points toward all of the victims being well-known thieves except [two]. There is little doubt that [those two]

559. Mueller, *supra* note 506, at 26.

560. ATHERTON, *supra* note 423, at 52. On June 25, 1884, a rancher encountered two rustlers with horses he recognized. II STUART, *supra* note 327, at 198. After a gun battle and mounted charge, the rancher killed one and captured the other. *Id.* at 198. Less than two days later the captured rustler was seized by an armed group and hung. *Id.* at 198. On July 3, a stockman and his assistants hung Sam McKenzie and on July 4 two men associated with the rustlers, ‘Rattlesnake Jake’ Fallon and Charles ‘Longhair’ Owen, were killed in a fight in Lewistown. Mueller, *supra* note 506, at 26; II STUART, *supra* note 327, at 200-05. These events were well reported in the press, which “led to a quick exodus of numerous bad men.” Mueller, *supra* note 506, at 26. Several parties of vigilantes were organized and dispatched to areas where the vigilantes had information that rustlers were. *Id.* at 27-28; HAMILTON, *supra* note 47, at 398-399 (describing activities of vigilantes); II STUART, *supra* note 327, at 205-08. Some were successful in finding and executing their targets, while others were not. One captured rustler had a \$10,000 reward outstanding; a detective working with the vigilantes wanted to turn the rustler in to collect the reward, but the vigilante leader refused to take chances and hung the rustler. Mueller, *supra* note 506, at 28. The parties linked up and surrounded a group of about twelve rustlers and attacked. Most of the rustlers were killed or wounded but a number escaped. *Id.* at 30; II STUART, *supra* note 327, at 207-08. Some of the escapees were later captured by soldiers. Mueller, *supra* note 506, at 30; II STUART, *supra* note 327, at 208. A group of vigilantes then “relieved” the government of its prisoners and hanged them. Mueller, *supra* note 506, at 31. The capture and execution of this group of rustlers appears to have been part of a well-coordinated plan in which the local telegraph was used to dispatch vigilantes. *Id.* at 31.

561. II STUART, *supra* note, 327, at 209.

562. Mueller, *supra* note 506, at 34 (Stuart’s papers reveal that “he openly discussed the facts with many prominent stockmen [and reported to Association officials] . . . the horses taken from the thieves in the raids so that [the Association secretary] could assist in finding the owners”).

563. *Id.* at 34.

564. ATHERTON summed up Stuart this way: “He was born a dreamer and a philosopher, a student of books and nature, a lover of all creation.” ATHERTON, *supra* note 423, at 18.

565. Mueller, *supra* note 506, at 34-35.

were conniving with thieves."⁵⁶⁶ Despite his reservations about rogue bands, Atherton too concluded that "in purpose, and generally in action, Stuart's Vigilantes sought to establish order and the protection of life and property for all honest citizens."⁵⁶⁷

After the vigilantes' activities in 1884, the Association set about drafting legislation "that would protect the cattle interests and make any further action of a vigilantes' committee unnecessary."⁵⁶⁸ This time, after what Stuart terms "an all session struggle," they obtained several new laws.⁵⁶⁹ A territorial board of stock commissioners was set up and a tax on cattle, horses, and mules imposed to fund its activities.⁵⁷⁰ These were to include employing stock inspectors to check cattle, horses and mules leaving Montana.⁵⁷¹ Anyone driving out stock without his brand was required to give the inspector a receipt for that stock which could then be taken out of the Territory.⁵⁷² The sale proceeds, however, had to be turned over to the board, which then paid the owners.⁵⁷³ Stuart concluded that this stopped the thefts from the open range.⁵⁷⁴

3. Wyoming and the Johnson County War⁵⁷⁵

Wyoming grew up under somewhat different conditions than Mon-

566. *Id.* at 33.

567. ATHERTON, *supra* note 423, at 52. Atherton concluded that "[p]ossibly at least one band that originally served under Stuart's direction turned to the hanging of small farmers." *Id.*

568. II STUART, *supra* note 327 at 210.

569. *Id.*

570. *Id.*

571. *Id.*

572. *Id.*

573. *Id.*

574. *Id.* at 212.

575. The primary sources for this section are: HELENA HUNTINGTON SMITH, THE WAR ON POWDER RIVER, *supra* note 327; LARSON, *supra* note 431; SAM T. CLOVER, ON SPECIAL ASSIGNMENT (1903); ROBERT B. DAVID, MALCOLM CAMPBELL, SHERIFF (1932); ASA SHINN MERCER, THE BANDITTI OF THE PLAINS; *supra* note 492; and LEWIS L. GOULD, WYOMING: A POLITICAL HISTORY, 1868-1896 (1968). Mercer's polemic is unabashedly anti-Invader, as the title suggests. Mercer, who founded the University of Washington before moving to Wyoming, was a newspaper editor in Buffalo, Wyoming who switched from strident support of the cattle kings to equally strident support for the settlers. (The fascinating history of Mercer's book is described in the Foreword to the 1954 reprint and in SMITH, *supra* note 327, at 277-80). Clover's book is a biography of the Chicago newspaper correspondent who accompanied the Invaders for most of the invasion, although he abandoned them when it became clear they were headed for trouble. (Smith provides a thorough description of the newsman's activities throughout her book). Clover's account is generally pro-Invader. David's biography of Malcolm Campbell also takes a pro-Invader line. The modern historians have been less kind to the Invaders. Larson's account gives a good outline of the events and some of the major personalities. As Larson is the most significant Wyoming historian, the Invaders' failure to persuade him to their cause is significant evidence that they ultimately "lost" the war. Finally, Smith's account is the definitive account not only of the Invasion itself but of the background and aftermath. Her thorough account, drawing on newspaper archives, interviews, countless unpublished papers, and more is evenhanded in its treatment of both sides' faults and failings but makes clear that the Invaders had no one but themselves to blame for their problems in Johnson County long before they settled on murder and terror as a solution.

tana—there was no gold, but there was plenty of grass. Once the railroad came, much sooner than it arrived in Montana,⁵⁷⁶ Wyoming cattlemen had ready access to outside markets for their cattle. Perhaps most importantly, Montana developed a diverse economy mixing ranching, mining, and agriculture. Wyoming had only the cattle and the railroad.⁵⁷⁷ The cattle industry dominated Wyoming and the cattle kings dominated the industry so it is little surprise that “the stock-growing industry was in full command of the law-making department.”⁵⁷⁸ Wyoming’s story, Ernest Osgood concluded, was so intertwined with the growth of the cattle industry “that the story of one is to a very large degree the story of the other.”⁵⁷⁹ Much of this dominance was carried out through the Wyoming Stock Growers Association, formed in 1873.⁵⁸⁰

As the cattle kings found themselves sharing the range with an increasing number of small stock raisers in the 1880s, disputes over rustling, division of the range, and mavericks added up to what a Wyoming newspaper editor termed “an irrepressible conflict” between small ranchers and the cattle kings.⁵⁸¹ “Each,” he concluded “is very much in the other’s way.”⁵⁸² “Soon the have-nots, the little fellows with fifty or a hundred or two hundred head, were proposing their own rule of thumb to the effect that any man who herd[ed] cattle on the range was entitled to brand mavericks.”⁵⁸³ Anyone coming across a maverick could convert it to his property by branding it, and use of a “running iron” to do so was not uncommon.⁵⁸⁴ Claiming a stray “was a temptation few could resist”⁵⁸⁵ but some found chance encounters offered too few opportunities to claim mavericks and took more active steps to take advantage of the rule.⁵⁸⁶ Since small ranchers did not participate in the joint roundups (being neither welcome nor anxious to contribute weeks of labor to rounding up others’ cattle),⁵⁸⁷ most of the

576. The Northern Pacific finally linked Montana to the west coast in 1884 while the Union Pacific crossed Wyoming in 1867. SMITH, *ROCKY MOUNTAIN*, *supra* note 48, at 46. The Northern Pacific reached Miles City in November 1881. FLETCHER, *supra* note 423, at 47.

577. SMITH, *ROCKY MOUNTAIN*, *supra* note 48, at 123. Indeed, before the stock industry developed in the 1860s, “for several years there were indications that Congress might repent of its rashness in setting up a government for a community that was almost non-existent and turn [much of Wyoming] over to the Territory of Colorado.” OSGOOD, *supra* note 423, at 42.

578. MERCER, *supra* note 492, at 11.

579. OSGOOD, *supra* note 423, at 42.

580. LARSON, *supra* note 431, at 171. (It was initially named the Laramie County Stock Growers Association, changing its name in 1879).

581. LARSON, *supra* note 431, at 270 (quoting J.H. Hayford).

582. *Id.*

583. SMITH, *supra* note 423, at 58.

584. *Id.* at 52, 54.

585. *Id.* at 54.

586. These could range from searching a neighbor’s land for untended cows to creating orphans by driving off or killing the mother. *Id.* at 54-55.

587. LARSON, *supra* note 431, at 185.

mavericks went to the large operations. To ensure that this practice continued, the cattle kings' organization, the Wyoming Stock Growers Association, persuaded the Territorial legislature to pass a Maverick Law in 1884,⁵⁸⁸ which placed full control over roundups in the Association's hands and allocated all mavericks to the Association.⁵⁸⁹ "Small cattlemen who were not members of the association despised the Maverick Law."⁵⁹⁰ Smith labels it "[o]ne of the worst pieces of legislation ever inflicted on the West."⁵⁹¹

The law defined mavericks as "all neat cattle, regardless of age, found running at large in this territory without a mother, and upon which there is no brand."⁵⁹² The Maverick Law had a number of provisions which assured mavericks would end up only in the herds of the cattle kings.⁵⁹³ First, all mavericks found were to be held on behalf of the Association. Second, no cattle were to be branded between February 15 and the beginning of the spring roundup (approximately three months later), preventing small holders from branding any cattle from their own herds which had strayed. Third, only those posting a bond of \$2,000 to the Association could bid on mavericks, which rarely sold for more than \$10.⁵⁹⁴ Finally, the funds from sales were turned over to the Association for "the payment of cattle inspectors and other like purposes." The effect of the law was to prevent anyone from purchasing a maverick except the cattle kings.⁵⁹⁵

Public opinion turned further against the law and the Association when it was discovered in 1888 that not only was the maverick fund under the control of the Association but that stock detectives' wages were being funded by county taxes and an old law providing rewards to those who obtained convictions of cattle, horse, and mule thieves was also being used to

588. 1884 Wyo. Sess. Laws. ch. 87, § 1, at 148-52.

589. SMITH, *supra* note 423, at 59-60; LARSON, *supra* note 431, at 184. Neither Colorado nor Montana turned control of the maverick issues over to the big cattle growers. SMITH, *supra* note 423, at 59, 63 ("[n]ot only was authority over livestock matters vested in the government of the state or territory instead of in a stock-growers' association, but the authority was decentralized and democratic. There was no fuss over maverick sales because they were left in local hands").

590. LARSON, *supra* note 431, at 184.

591. SMITH, *supra* note 423, at 59. Mercer is uncharacteristically restrained, noting only that "[t]he law was declared unconstitutional by many of the leading lawyers, and deemed to be in the interest of corporations with large holdings." MERCER, *supra* note 492, at 14.

592. 1884 Wyo. Sess. Laws ch. 87, § 1, 148-52.

593. SMITH, *supra* note 423, at 60-63.

594. This provision was not added until 1888. *Id.* at 86.

595. Settlers had some success in the courts in challenging the Maverick Law. In one of the first civil suits under it, two cowhands successfully resisted a claim on some mavericks by the Association and even won damages for cattle that the Association had allegedly seized. *Id.* at 64-67. Although the district judge avoided the issue of the law's constitutionality, the settlers interpreted the decision as holding it unconstitutional. *Id.* at 67, 70. In a somewhat unusual move, the territorial attorney general and association secretary and lawyers called on the judge to clarify his opinion and the judge told them he had not passed on the constitutional issue. *Id.* at 67.

provide public funds to the Associations' stock detectives.⁵⁹⁶ In response, the Association decided to back a territorial livestock commission to handle the maverick issue but it took steps to ensure it retained control.⁵⁹⁷ Just in case any loopholes remained which might allow an outsider to purchase a maverick, local restrictions were imposed through blacklists and other extra-legal means.⁵⁹⁸ These included an employment blacklist against anyone who owned either a brand or cattle.⁵⁹⁹ The blacklist was enforced by threatening any Association member with exclusion from roundups or other Association activities: "It was tantamount to reading him out of the stock business in Wyoming Territory."⁶⁰⁰ The blacklist forced all those who aspired to be more than an employee into opposition to the cattle kings. Denied employment, and denied a winter subsistence existence by the Association's insistence on elimination of the practice of providing free meals for guests,⁶⁰¹ many cowboys saw no reason to adopt an attitude of anything but open hostility toward the cattle kings.⁶⁰² By severing and fraying the bonds which promoted cooperation on the range, either for short term gain or because they refused to see the cowboy settlers as legitimate participants in the business, the cattle kings unraveled their society.

In 1890, when eight of twelve members of the upper house of the legislature, including all five members of the livestock committee, were Association members, the Association strengthened its grip on the commission and maverick sales.⁶⁰³ By the end of 1890 when Wyoming became a state, the Association

not only controlled the legislature, it had a friend in the governor's chair, friend on the bench, and a friend in the White House in Washington (President Benjamin Harrison) who were subservient to its wishes. It had, in short, or it was, a machine which ruled Wyoming.⁶⁰⁴

596. *Id.* at 83. The combination of those revenue sources enabled stock detectives to make more than five times the average cowboy's monthly wages. *Id.*

597. *Id.* at 82-83.

598. *Id.* at 87.

599. *Id.* at 27. This blacklist contained "nearly every man in the country who owned a hoof of stock" and all on it were to be kept out of the roundups. *Id.* at 149 (quoting Jack Flagg).

600. *Id.* at 28.

601. *Id.* at 31-33, 110-111. Cowboys had "ridden the grub line," traveling from ranch to ranch during the winter trading news and a few chores for meals and a place to stay. *Id.* at 110. "[T]he foreign aristocrats and the smart eastern businessmen found it a nuisance. . . [s]o they decided to put a stop to it." *Id.*

602. A combination of wage cuts and elimination of free meals in winter drove many into rustling to survive. SMITH, *supra* note 327, at 31-32; See also CLOVER, *supra* note 575, at 232 ("[r]ange-riders . . . feel no particular interest in their non-resident employers").

603. SMITH, *supra* note 423, at 85. (Commission restructuring "guaranteed that control of livestock matters would be kept in the hands of the clique in Cheyenne. . . .")

604. *Id.*

Perhaps because the Association's complete control of State government made the Maverick Law superfluous, the Maverick Law was repealed entirely by the first state legislature. Instead, the Association determined that mavericks were to be divided daily among members in proportion to the number of calves branded by each outfit.⁶⁰⁵

One reason the Maverick Law was no longer needed was that the cattle kings controlled sales of cattle at the cattle markets through the Board of Live Stock Commissioners. The Board compiled a list of "rustler brands" from the Association's members. Board inspectors at markets would then seize either the cattle or the proceeds of sales of cattle bearing these brands and hold them until the cattle's owner proved legitimate ownership.⁶⁰⁶ In effect the Board, and thus the Association which controlled it, had the ability to seize any non-Association members' cattle based solely on an unverified complaint by an Association member and hold them indefinitely until satisfactory "proof" was furnished. During 1891 about five carloads of cattle were seized and over \$4,000 impounded.⁶⁰⁷ All the cattle seized were from Johnson County.⁶⁰⁸ The effect of these seizures was to bring the settlers in Johnson County together with previously unaligned citizens, joining in a petition for release of the impounded funds.⁶⁰⁹ Despite their control of the political and legal apparatus of the state, the cattle kings were convinced there was widespread theft of their cattle and equally convinced that the courts were unreliable in punishing rustlers.⁶¹⁰ The Secretary of the Associa-

605. *Id.* at 88.

606. LARSON, *supra* note 431, at 273; SMITH, *supra* note 423, at 137; MERCER, *supra* note 492, at 29.

607. SMITH, *supra* note 423, at 137.

608. *Id.*

609. *Id.* at 138. When the *Cheyenne Leader*, a generally pro-cattle king paper, joined the call for the return of the impounded funds, the Association called on members to boycott the paper. *Id.*

610. LARSON, *supra* note 431, at 187-90. For a time the Wyoming Stock Growers Association fielded a force of up to 21 private detectives on the range and private inspectors at shipping terminals to combat thefts. However, financial pressures forced them to severely restrict these activities by the late 1880s. *Id.* at 188-89. The cattle kings were right that jury sympathy sometimes made it difficult to convict rustlers, although they exaggerated the extent of the conviction problem. SMITH, *supra* note 423, at 71 ("[O]utside of periods of when feeling ran high there were convictions in cattle cases, while as for horse thieves, they were sent up time and again"); *id.* at 116 (detailing claims of acquittals). There was rustling. Rustlers worked openly in armed groups and "[t]he cowboys were thoroughly disaffected by this time, even in sympathy with the rustlers and they had no intention of interfering." SMITH, *supra* note 423, at 151. Little resistance was offered by the big stockmen either. Smith reports:

In the whole record of preinvasion troubles there is not a single instance of an owner standing up to a rustler in defense of his property and having it out man-to-man; not an instance in which he did what, from his own point of view, he would have been amply justified in doing; took armed men and went after his cattle and recovered them at gunpoint, if necessary.

Id. at 152. Smith argues that had the cattle kings defended their property on the spot, instead of through a campaign of terror aimed at the entire population, public opinion would have approved despite the initial bias against them because the cattle kings would have been fighting for their rights in an accepted fashion. *Id.*

tion wrote in 1888 that

while I would be sorry to see the return of the old days, when it was necessary to defend your property at the expense of human life I am inclined to believe that we shall come to this unless the community insists upon the punishment of cattle thieves through the regular channels of the courts of law.⁶¹¹

Moreover, the Association's problems in obtaining convictions were not caused by juries being made up of rustlers, but because most settlers believed

that the Association operated on the principle of one rule for me and another rule for thee. The average citizen believed that stock-law violations were winked at when committed by favored members, while the same 'mistake' if made by an ordinary fellow would lead to his arrest.⁶¹²

A lack of credibility on the part of Association stock detectives among the general public also made convictions hard to secure—one juror reportedly told a prosecutor after a trial that he would not convict a dog on the basis of the testimony of such liars.⁶¹³ Failure to secure convictions led the Association's leaders to "the dangerous conviction that everybody was out of step but themselves—the press, the public, the juries, the judges."⁶¹⁴

The cattle kings' policies seem almost deliberately designed to create a rustling problem.

The vicious circle went round and round. First men were shut out of work for wages, either because the work no longer existed or because they were accused of some real or suspected offense. Next these men took up homesteads and started raising cattle on their own in order to live. Thirdly, they were barred from the roundups. Of course, they were "compelled to collect their cattle as they could," unless they proposed to starve. Conceivably some of them by this time were no longer particular whether the cattle were theirs

611. LARSON, *supra* note 431, at 190 (quoting Thomas B. Adams). See also CLOVER, *supra* note 575, at 231-32 (giving arguments of cattle kings that "rustler element" controlled local government in Johnson and two other counties).

612. SMITH, *supra* note 423, at 71. Smith recounts a number of incidents in which prominent Association members violated the law with impunity. *Id.* at 71-75. See also MERCER, *supra* note 492, at 15 (attributing juries' reluctance to convict to the Maverick Law).

613. SMITH, *supra* note 423, at 81.

614. *Id.*

or not.⁶¹⁵

Smith sums up the effect of the cattle kings' dominance and attacks on the settlers: "If you call a man a thief, treat him like a thief, and deprive him of all chance to earn a living honestly, the chances are he will oblige you by becoming a thief."⁶¹⁶

Faced with continuing losses to "rustlers," several members of the Wyoming Stock Growers Association determined that "a lynching bee"⁶¹⁷ was the way to resolve the conflict. An invasion of Johnson County in north central Wyoming by a combination of hired Texas gunmen and trusted employees was chosen as the best method⁶¹⁸ and planned for at least a year.⁶¹⁹ Sporadic killings had occurred before the Invasion force was organized,⁶²⁰ but this was to be a group effort. The pre-Invasion killings had not led to successful prosecutions of the killers⁶²¹ and, in at least one case, a national press campaign to justify the killings had been successful.⁶²² The organization of an unsanctioned roundup by the small ranchers, to be held a month before the official state roundups, may have triggered the implementation of the full Invasion plan.⁶²³

615. *Id.* at 113.

616. *Id.*

617. LARSON, *supra* note 431, at 271 (quoting John Clay, president of the association from 1890-1895); see JOHN CLAY, *MY LIFE ON THE RANGE* (1924).

618. LARSON, *supra* note 431, at 271.

619. William H. Kittrell, *Foreword* to MERCER, *supra* note 492, at xxix.

620. One pre-Invasion killing in particular stands out. Ella Watson and James Averell were lynched in 1889. SMITH, *supra* note 423, at 121-34; MERCER, *supra* note 492, at 17-20. Watson, allegedly a prostitute in many accounts, was accused of accepting stolen cattle in payment for her services and Averell was accused of rustling, although Smith concludes it was "based on the flimsiest sort of hearsay." SMITH, *supra* note 423, at 121. Mercer claims Averell "was never accused of stealing cattle." MERCER, *supra* note 492, at 18. Watson and Averell also were homesteading some land one of the cattle kings wanted and had refused to sell out. SMITH, *supra* note 423, at 122-23; MERCER, *supra* note 492, at 18-19. George Hufsmith argues persuasively that Watson and Averell were innocent settlers and that the myth of prostitution and rustling was created by the cattle interests to cover up their real motive for lynching the two—to gain control of their land. GEORGE W. HUFSMITH, *THE WYOMING LYNCHING OF CATTLE KATE 1889* (1993).

There were other pre-Invasion killings as well. LARSON, *supra* note 431, at 272 (listing a lynching of a suspected rustler, attempted murder of another, and "dry gulching" (assassination by a concealed gunman) of two others). SMITH, *supra* note 423, at 148-49 and MERCER, *supra* note 492, at 21-22 (Waggoner lynching); SMITH, *supra* note 423, at 158-59 (attempted murder of Nate Champion). Mercer lists pre-Invasion killings of Waggoner, Orley Jones, and J. A. Tisdale. MERCER, *supra* note 492, at 27. Dunning's confession also details the same killings and his claim that men associated with the Invasion took credit for them. George Dunning, *Confession*, October 6, 1892; SMITH, *supra* note 423, at 158-59.

621. Six men had actually been brought before a grand jury but all went free because all the witnesses had disappeared. SMITH, *supra* note 423, at 133-34 (detailing disappearances and death of witnesses); MERCER, *supra* note 492, at 18-19.

622. SMITH, *supra* note 423, at 126-29 (detailing national and state press accounts are evidence of planning and coordination).

623. *Id.* at 160; Kittrell, *supra* note 619, at xxix.

Using a special six car train,⁶²⁴ twenty-two Texas gunmen,⁶²⁵ one gunman from Idaho,⁶²⁶ nineteen Wyoming "Regulators," horses, wagons, "the latest improved Winchesters and small arms,"⁶²⁷ and "generous quantities" of supplies⁶²⁸ headed north from Cheyenne to Casper. As Kittrell notes, the organization of the train "required great skill in organization and implied support from high places in the State, from the railroads, and in the army and War Department as well."⁶²⁹ The Wyoming contingent was made up of prominent cattlemen and their most trusted employees (no one below the rank of foreman was included). Amazingly, there were also two newspaper reporters⁶³⁰ and a Pennsylvania doctor, a friend of Acting Governor Barber⁶³¹ visiting Wyoming for health reasons, to serve as surgeon.⁶³² The Invaders also took steps to prevent the state militia from intervening, procuring an order from the state national guard to local commanders instructing them to obey only orders from the state headquarters, despite provisions in Wyoming law allowing them to respond to requests for assistance issued by local

624. Clover describes the train as consisting of twelve cars. CLOVER, *supra* note 575, at 234. Just how secret the special train was intended to be in fact was open to question. As Smith notes, "[i]f the stockmen had wanted to attract the attention of every yardman and station loafer in Denver and Cheyenne, that car with the blinds down was the way to do it." SMITH, *supra* note 423, at 196. One bystander learned of the train's purpose and tried to warn Johnson County by telegraph, but the lines were already cut. *Id.* at 196.

625. The Texans were recruited to serve warrants which, of course, did not exist, at \$5 per day plus expenses. SMITH, *supra* note 423, at 192.

626. *Id.* at 192. In one of the many blunders made by the Invaders, the Idaho recruit, George Dunning, was someone who had been involved in "a running series of battles" with the local stockmen. *Id.* at 266. Dunning signed on with the intention of warning the settlers or at least bearing witness against the Invaders. *Id.* at 267. To make sure he could, Dunning managed to leave incriminating evidence with a friend in Idaho, surrendered to local rather than federal authorities, and produced an amazing confession which would have been powerful evidence against the Invaders in court. *Id.* at 268-71.

627. CLOVER, *supra* note 575, at 235.

628. *Id.* at 235.

629. Kittrell, *supra* note 619, at xxx. Planning for the Invasion involved the highest levels of the state. Smith concludes that the evidence confirms participation by many of the leading men of the state. SMITH, *supra* note 423, at 193. John Clay, a prominent cattleman, later wrote that the planners "were backed by every large cattleman in the state and behind them they had the moral influence of the two senators, Warren and Carey." *Id.* at 193. See also MERCER, *supra* note 492 at 33 (claiming Senator Carey contributed \$1,000 to the funds for the Invasion). Dunning claims to have been told by both Senators Carey and Warren, the Governor, and assorted other state and federal officials backed the Invasion. Dunning, *supra* note 620, at 176.

630. SMITH, *supra* note 423, at 197. Planning for the Invasion included manipulation of the press. "The unknown public relations counselor who conceived and directed this phase of the range war deserves to be dug up and deified by the public-relations and press-agentry industry." Kittrell, *supra* note 619, at xxxi. "A spate of articles began reaching the press of the nation, denouncing what was referred to as the 'reign of terror' in Johnson County." SMITH, *supra* note 423, at 180. As Smith notes, this 'reign of terror' had nothing to do with the actual killings in Johnson County, killings which had been performed by the cattle kings and their allies, but was based on unknown persons' threats against unnamed cattlemen. Cattle kings' employees were assaulted and "shot down in cold blood" according to the *Chicago Herald* and the *Washington Star* reported that the rustlers had a death list prepared. *Id.* at 180 (quoting papers); MERCER, *supra* note 492, at 34 (mentioning articles in Washington, Omaha, Chicago, and New York papers).

631. MERCER, *supra* note 492, at 45.

632. LARSON, *supra* note 431, at 274-75.

officials.⁶³³ Finally, the Invaders arranged for the telegraph lines in the area to be repeatedly cut to keep Johnson County isolated.⁶³⁴ Certainly the Invaders did not believe that the authoritarian legal system would offer a serious threat of punishment.

The basic plan appears to have been to quickly kill a number of men (estimates range from 19 to 70) and warn others to leave the area within twenty-four hours, killing those who remained.⁶³⁵ The men to be killed or exiled were chosen by the Executive Committee of the Association from nominations made by Association members.⁶³⁶ The intentions of the men behind the Invasion were made clear by interviews they gave in Denver while the Invasion was in progress. Convinced the cattle kings' forces would triumph, one of the "prominent cattlemen" told the *Cheyenne Daily Tribune* "I am willing to give all the assistance possible for any body of men which will attempt to exterminate the rustlers."⁶³⁷ H. B. Ijams, secretary of the Wyoming Board of Livestock Commissioners told another reporter that the Invaders included some of "the best citizens of the whole state" who were going to Johnson County for "retribution."⁶³⁸ The Invaders planned to move quickly to Buffalo, the county seat, and secure the militia's weapons stored there.⁶³⁹ The plans were not carried out, however, because the Invaders mistakenly delayed their attack on Buffalo in response to a report of seventeen rustlers at the KC Ranch.⁶⁴⁰ Two of the Invaders, including the Pennsylvania doctor, dropped out either before reaching the KC⁶⁴¹ or shortly after the first two "rustlers" were killed.

When the Invaders arrived at the KC after a difficult night march through a storm, they found only two trappers (whom they seized when the

633. SMITH, *supra* note 423, at 193; MERCER, *supra* note 492, at 40 (reprint of order and Wyoming statute). The order was issued at the request of Acting Governor Amos W. Barber, an ally of the cattle kings. SMITH, *supra* note 423, at 193.

634. SMITH, *supra* note 423, at 194-95; CLOVER, *supra* note 575, at 237.

635. LARSON *supra* note 431, at 275-76.

636. *Id.* at 276.

637. *Wipe Them Out*, CHEYENNE DAILY TRIBUNE, April 12, 1892, reprinted in MERCER, *supra* note 492, at 35.

638. Interview, April 11, 1892, reprinted in MERCER, *supra* note 492, at 36-39.

639. MAURICE FRINK, COW COUNTRY CAVALCADE 141-142 (1954). Some accounts report a planned mass meeting

to tell the law-abiding residents that their rights would be recognized and respected. They expected to confess that they opposed the settlers coming into the country, and had done many things against them for which they were sorry now. They wanted to offer to make amends and obtain the cooperation of the honest settlers in protecting property which everybody knew was being stolen wholesale.

Id. SMITH, *supra* note 423, at 194.

640. LARSON, *supra* note 431, at 276-77.

641. SMITH, *supra* note 423, at 202.

trappers went to get water) and two suspected rustlers.⁶⁴² One rustler was shot almost immediately when he walked out of the cabin; he crawled back inside and died several hours later.⁶⁴³ The other was killed after a lengthy siege when the Invaders set fire to a wagon of hay and pitch pine and pushed it against the cabin, forcing him out into the open where he was shot.⁶⁴⁴ The attack was observed by two travelers, who escaped and warned the people in Buffalo.⁶⁴⁵ Enroute to Buffalo the Invaders learned that a superior force was ready there to oppose them.⁶⁴⁶ Once the Invaders realized the people in Buffalo would be warned before the Invaders could reach the town fifty miles away, “[t]he Invaders now knew that time was against them.”⁶⁴⁷ The Invaders then went instead to a friendly ranch, the TA, and fortified it in preparation for a counterattack.⁶⁴⁸

The next morning, more than two hundred armed men, led by Johnson County Sheriff Red Angus, one of the men on the Invaders’ list for execution, arrived and began a siege of the TA.⁶⁴⁹ Meanwhile, Acting Governor Amos Barber learned of the events and, rather than calling out the national guard unit at Buffalo, wired President William Henry Harrison in Washington, D.C. that “an insurrection exists in Johnson County in the state of Wyoming . . . against the government of the said state . . . Open hostilities exist and large bodies of armed men are engaged in battle.”⁶⁵⁰ Barber asked Harrison to send federal troops from Fort McKinney (near Buffalo) to suppress the insurrection because the state militia was unavailable.⁶⁵¹ Wyoming’s two Senators, Joseph M. Carey and F.E. Warren, both allied with the cattle kings, joined Barber’s appeals in person, reportedly getting President Harrison out of bed.⁶⁵² A detachment of cavalry was sent out at 2 a.m. The federal troops took the Invaders into custody at Fort McKinney, both to protect them from the citizens and for the murders at the KC.⁶⁵³ Through a variety of legal maneuvers, the Invaders succeeded in getting all the charges

642. *Id.*

643. LARSON, *supra* note 431, at 277.

644. *Id.* at 277.

645. SMITH, *supra* note 423, at 205-06.

646. *Id.* Smith describes the scene in Buffalo where word of the approaching Invaders reached town: “Buffalo went wild. The streets were filling with armed men from the nearer ranches, while riders were sent to distant parts of the country for help to repel the murderers.” *Id.* at 214.

647. LARSON, *supra* note 431, at 277.

648. LARSON, *supra* note 431, at 277; SMITH, *supra* note 423, at 218 (describing fortifications); MERCER, *supra* note 492, at 65.

649. SMITH, *supra* note 423, at 215-17; MERCER, *supra* note 492, at 68. The settlers began construction of an “Ark of Safety” which they planned to use to fire the ranch buildings. Built of wagons, eight inch logs, and baled hay, the Ark would allow them to get close to the buildings. SMITH, *supra* note 423, at 227; MERCER, *supra* note 492, at 68-69.

650. LARSON, *supra* note 431, at 278; SMITH, *supra* note 423, at 224.

651. LARSON, *supra* note 431, at 278; MERCER, *supra* note 492 at 75.

652. LARSON, *supra* note 431, at 278; SMITH, *supra* note 423, at 224.

653. LARSON, *supra* note 431, at 278; SMITH, *supra* note 423, at 225-26.

against them dropped.⁶⁵⁴

4. Assessing the Cattlemen's Customary Law

Three important lessons about customary law emerge from the experience of the cattlemen. First, the clash between the reality of the Plains and the laws made by "the man of the timber and the town"⁶⁵⁵ shows the superiority of customary legal regimes. Land laws in particular

were persistently broken in the West because they were not made for the West and were wholly unsuited to any arid region. The homestead law gave a man 160 acres and presumed that he should not acquire more. Since a man could not live on 160 acres of land in many parts of the region, he had to acquire more or starve.⁶⁵⁶

The cattlemen developed customary institutions to solve many of their problems. They could not overcome the handicap the homestead laws imposed, however, and so could not control access to the commons, ultimately dooming their institutions. "Not only were absurd laws imposed upon them, but their customs, which might well have received the sanction of law, were too seldom recognized. The blame for a great deal of Western lawlessness rests more with the lawmaker than with the lawbreaker."⁶⁵⁷ Further, as Webb notes "[a]ll legislation was made in favor of the farmer; none was ever made for the cattleman, so far as disposal of the public domain was concerned, except in Texas."⁶⁵⁸ The failure of authoritarian legal institutions to respond to a new set of interests, locked as they were into a farming centered policy, shows a significant weakness. The far greater flexibility and adaptability of customary legal institutions is one means of avoiding this problem.

Second, the comparison of Montana and Wyoming cautions against allowing monopolies in law, by either the State or customary institutions. The Montana cattlemen's extralegal actions, for example, were popular and

654. The Invaders and their friends secured removal of the trial to Cheyenne, an area of Invader sympathy. SMITH, *supra* note 423, at 263; MERCER, *supra* note 492, at 124. Witnesses were kidnapped and other unscrupulous methods were used to ensure the trials would produce acquittals. SMITH, *supra* note 423, at 245-51; MERCER, *supra* note 492, at 94-106. After several delays, the trial began with an attempt to seat a jury. After more than a thousand veniremen were examined and only eleven jurors qualified, with none of the 276 defense preemptory challenges or 138 prosecution preemptory challenges yet exercised, "the discouraged and inept Johnson County prosecutor" gave up and the defendants were released. LARSON, *supra* note 431, at 279. The defense objected to the dismissal on grounds that jeopardy had not attached and the defendants might be tried in the future. So a spectator was sworn as the twelfth juror and the prosecution again moved to dismiss. This maneuver left the defendants immune from future prosecution. SMITH, *supra* note 423, at 281-82.

655. WEBB, *supra* note 423, at 206.

656. *Id.* at 498.

657. *Id.* at 500.

658. *Id.* at 428 (note omitted).

widely accepted as having accurately targeted thieves. The Wyoming cattle kings, on the other hand, misused both customary and authoritarian institutions.

Third, the legitimacy of the rights enforced by customary legal institutions is critical. Some historians, however, while rightly condemning the Invaders, fail to recognize the real flaws in the Invasion.⁶⁵⁹ The Invaders were not seeking to vindicate legitimate property rights, they were moving against those whom they had been unable to dispossess with the machinery of government. Having stolen land through illegal fencing and stolen cattle through the combination of the maverick law, the officially mandated roundups, and the inspection and confiscation of "rustler brands," the Invaders discovered their dominance of the Wyoming government was insufficient because the jury system checked their activities on the local level. T.A. Larson's claim that "[h]ad the cattlemen been wiser and more patient, they might have been able to solve their problems within the law"⁶⁶⁰ is mistaken because the Invaders' problem was that they were attempting to defend stolen spoils rather than legitimate property.⁶⁶¹ Indeed, the Invaders' inability to accomplish their aims "within the law" demonstrates the resistance of the judicial branch of government to capture, compared to the more easily captured legislative and executive branches, largely due to the jury system.

Bringing social order to the cattle kingdom required solving the free rider problem in providing law either by extending the authoritarian legal institutions or through customary institutions. The cattlemen across the west confronted many of the most intractable problems for any system of law—the entire free range was, for example, a commons subject to the same tragedy that affects the environment today. Despite this, the Montana cattlemen did remarkably well with a primarily customary solution even while their customary legal institutions were constantly eroded by conflicting pressures (e.g., homestead laws) imposed by the authoritarian legal system. The

659. Most twentieth century authors, including one writing a study commissioned and paid for by the Wyoming Stock Growers Association, have condemned the Invaders. LARSON, *supra* note 431, at 283 (the Invasion was "anachronistic . . . [with] overtones of rugged individualism and Social Darwinism,"); OSGOOD, *supra* note 423, at 248 (conducted by "large cattle outfits, backed by outside capital . . . [which] had lost all the characteristics of frontier enterprises"); and ATHERTON, *supra* note 423, at 55 ("contributed mightily to the popular conviction that the code of the West did involve murder rather than manners, a wealth of evidence to the contrary notwithstanding").

660. LARSON, *supra* note 431, at 283.

661. Larson also asserts that "[t]he Invasion illustrates the low value placed on human life in the West in the nineteenth century. Wyoming people were learning only slowly to place human rights above property rights, although each person, of course, valued his own life." While Larson is right to condemn the Invaders, he is wrong that the War showed a preference for property rights over human rights. The Invaders, and the Wyoming Stock Growers Association more generally, demonstrated a profound contempt for property rights, a contempt which is naturally linked to their contempt for human life.

Wyoming cattlemen, on the other hand, solved their free rider problems all too well by capturing virtually the entire authoritarian legal apparatus of the state and territorial governments. Their cold-blooded plan of “extermination” is a testament to the dangers of allowing monopolies on law. That their attempt at mass murder was foiled only by their own incompetence is a stunning testament to the fragility of the checks and balances we rely on for restraining the authoritarian legal system.

III. REFORMS TO PROMOTE THE DEVELOPMENT OF PRIVATE LAW

It may seem odd to include in a law review article a list of proposed reforms where one is discussing historical events or calling for private actors to undertake actions in their interests precisely because they know their interests better than other people, including the author of this (or any) law review article. Fortunately there are several reforms which I can advocate, which are based on the historical analyses offered above and which do not require possession of local knowledge.

The overall rules which structure our society make a large difference in determining the balance between customary and authoritarian institutions within our society. They matter in obvious ways, as when the State declares an area of law to be reserved to it or when the Constitution forbids the State from making authoritarian law in an area. They also matter in less obvious ways, as when the courts intrude *ex post* into areas parties have agreed *ex ante* to keep private. While we can and should make the rules of our society more friendly to customary law institutions, we need to remember that what ultimately makes customary law work is our commitment to the institutions which comprise a voluntary society. Legal reforms can help but they are not enough. We also need to remember that customary law often exists *despite* the State. As discussed earlier, one of the most powerful parts of Axelrod’s book is his application of his theory to the conduct of trench warfare during World War I, a war and method of war which themselves serve as a serious indictment of statism.

In altering legal rules we need to avoid the problems the less successful historical examples encountered. One significant problem for customary legal systems, particularly those providing criminal law, is limiting the reach of the system to prevent degeneration into extortion. We are able to rationalize the legal monopoly on force we grant to the State, for example, by the checks and balances we impose on the State’s exercise of that force. Although those checks and balances have significant imperfections, with a private system the ability to impose constitutional restrictions is more limited. When the opportunity cost of diverting a legal system to transfers is

high, however, the absence of those checks and balances are less significant. The miners, for example, had a choice of picking up gold⁶⁶² or crafting and administering laws. It is difficult to imagine even the most enthusiastic legislator opting for the latter for very long. Competition can thus substitute for institutional checks and balances. Nevertheless we must remember that we do not want to be too successful at limiting the free rider problems in providing law lest we end up with the Leviathan.

A. A just system of rights

The most important lesson from the West is that customary legal systems perform better when the rights enforced are rights generally recognized in the community as just. Customary legal systems like the mining camps and vigilance committees must rely on the participants' willingness to make sacrifices to provide law. The existence of just claims enhances the ability of victims of particular wrongs to persuade the rest of the community to pay the opportunity costs of participation, and thus is a significant means of overcoming the free rider problem.

It is difficult to specify exactly what the requirement of a just system of rights will require. Randy Barnett suggests that

[f]or social order to exist in such a way as to facilitate the universal pursuit of individual happiness, the law must allow and protect the freedom of each individual to make choices among alternative paths of conduct, to act on those choices, and to appropriate and use resources from the world.⁶⁶³

The justness of particular sets of rights may vary across societies and there are many possible sources of justification for those rights. The common element in the examples discussed here is the reliance on a set of rights very close to the life, liberty, and property listed in the Due Process Clauses to the Fifth and Fourteenth Amendments. Rights in all the societies discussed here were gained through an almost Lockean mixing of labor with natural resources; original appropriation was not a philosophical fiction but a reality which many had personally, and recently, experienced.

Although historical examples cannot constitute or substitute for the rigorous philosophical proof that is certainly beyond my abilities, I believe these examples suggest the widespread recognition of the justness of the

662. Not every miner got rich, most did not. Nevertheless, their presence in the mining camps indicated that they believed that they had a significant opportunity to get rich quickly, and so their *expected* value of mining was much larger than their *expected* gain from legislating, even if time spent concocting methods of rent seeking would have actually produced greater wealth.

663. Barnett, *supra* note 429, at 57.

rights in the mining camps and the Montana vigilante episode. Similarly, the Montana cattlemen's successes were at least partly linked to the limited conception of rights involved. The Wyoming cattlemen were the farthest from a limited, negative view of rights—their own conception of their rights extended not only beyond what was recognized by federal or local authoritarian legal authorities (as did the miners' and Montana cattlemen's claimed rights) but included the positive right to all mavericks and all proceeds of cattle sales not proven to be "legitimate." Moreover, unlike the miners and Montana cattlemen, the Wyoming cattlemen did not create a neutral framework of rights in which all were free to participate. Instead, they operated with 'one rule for me and another for thee.'⁶⁶⁴ The requirement of rights generally recognized as just is thus more limiting than its formulation may suggest. As rights' definitions move beyond a limited set of negative rights, they are less likely to be generally recognized as just.⁶⁶⁵ Moreover because all three groups lacked the State's claim to a monopoly on the use of force, they were forced to rely on a moral claim to justify their actions in each instance. If they strayed too far from just claims, the rest of the population had an effective means to resist. By contrast, the State, with its overwhelming advantage in the means of force and its claim to a monopoly on the legitimate use of force, is far better situated to act unjustly.

B. Well defined private property rights

Property rights were well defined in the mining camps and in the more successful vigilance committee episodes. Mere correlation does not establish causation, of course, but there are several reasons to believe the connection to a well established set of property rights aided in the success of these customary legal systems in overcoming the free rider problem. First, the participants in these customary legal systems had a clear payoff from success of the customary legal system: The protection of their property rights. If the property rights had been less clear, the expected payoff from participating would have been reduced. Thus, if the miners had had to worry that new arrivals would dispossess the current occupants, the payoff from resolving a dispute among current claim holders would have been significantly lower since the winner could lose the claim next week. Second, the clarity of the property rights lowered the cost of identifying violators of the norms enforced by the private legal systems. If members of the Plummer gang, for example, had been able to assert that they were merely repossessing their share of joint property and that the victim had been killed when

664. See note 612.

665. Barnett argues rights must be "compossible"—that is, two rights holders who are acting consistently with their individual rights will not come into a conflict of rights. Barnett, *supra* note 429, at 58. This requirement precludes positive rights.

they resisted turning over the gang member's property, it would have been much harder to persuade others to risk their lives to bring the individuals to justice. Similarly, the looseness with which Westerners often treated outsiders' livestock often reflected the more muddled rights of absentee owners "who found it hard to visualize the conditions as they actually existed on the Laramie Plains, the Powder, and the Yellowstone."⁶⁶⁶ Third, clearly established property rights made identifying corruption among the chosen decision makers straightforward. The corrupt California alcalde discussed earlier, for example, was easily removed from office because the justice of the dispossessed miner's claim was obvious to all. Finally, having clearly established property rights which include the ability to exclude others makes the system more adaptable. The placer gold miners were much more successful at managing conflicts than the hard rock miners, partly because it was nearly impossible to exclude someone tunneling deep under your land. The less successful experience with miners' law in Dakota Territory also illustrates the importance of well-defined rights. As claims shifted from obvious, outdoor claims to underground rights where claim jumping was more easily hidden, the system began to break down. The cattlemen in the free grass era were unable to exclude others from the common resources, making adaptation to increased population more difficult.

C. *Making Opt-outs Enforceable*

Another important reform which could foster the development of private law is to require the State legal system to enforce agreements to use alternatives. Paul Rubin advocates just this as a strategy for creating a legal system in post-Soviet economies:

A decision by the courts or a statutory announcement that the courts will honor and enforce arbitration agreements may be the single most powerful method available for achieving efficient short run decisions and also for generating efficient long run precedents.⁶⁶⁷

Customary law is the spontaneous outgrowth of human interaction. Authoritarian law can crowd out customary law by occupying the space customary law would otherwise fill. For example, miners' law promoted diligent development of claims, as the drafters of the federal mining law recognized when they incorporated local rules and regulations into the authoritarian legal system.⁶⁶⁸ Unfortunately, as federal mining law gradually

666. OSGOOD, *supra* note 423, at 104.

667. Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1, 38 (1994).

668. LESHY, *supra* note 30, at 108. Diligent development was "a central concern" of miners' law. *Id.* at 109.

displaced miners' law, the incentive to develop vanished. The federal law's own explicit requirement of development failed to replace the incentives provided by miners' law because "a combination of marketing inflation, changing economic circumstances, and the Supreme Court's [interpretation allowing] location to precede discovery" reduced it to "a form that mocks its original purpose."⁶⁶⁹

Even more pernicious than the crowding out effect, however, is the State's insistence on intruding into private relationships and rooting out customary legal institutions. Allowing enforceable opt-outs is one way to regain some of the space.⁶⁷⁰ The placer miners were fortunate that circumstances delivered them an opt out based on distance and the comparative sluggishness of the 19th century State. Because their circumstances exercised their option for them, they gained the space to develop customary legal institutions.

Allowing opt-outs is also important because it destroys the State monopoly on law that exists in those areas where the State crowds out customary institutions. An authoritarian legal system subject to real competition loses the monopoly characteristics which are the worst aspects of authoritarian law. The Wyoming cattlemen and 1856 San Francisco Vigilantes are powerful examples of the dangers of commingling monopoly and law. The cattlemen were unable to opt out of the inappropriate federal land regime.

669. *Id.* at 108, 112.

670. Two objections have been traditionally raised to enforcing opt-outs. First, when the courts have accepted, for example, agreements to arbitrate, they reserve the right to refuse to enforce the agreement based on public policy. Can we afford to abandon public policy based review of non-State courts? Certainly. For example, one type of public policy asserted as a basis for overturning labor arbitration cases awards is related to prohibitions on drug use. Since both the union and management have a strong interest in restricting drug users from dangerous behavior in the workplace, it is not difficult to imagine mutually satisfactory negotiations over any potentially hazardous employees' return to the workplace. To the extent that arbitration awards are interpretations of contracts which the parties are free to contract around, where "public policies" of concern to the parties to the contract are at issue, the parties will likely resolve the problem. Where the problem is merely of concern to busybodies intent on imposing their views on others, I am not only happy to concede that the busybodies' concerns will go unaddressed but offer it as a positive feature of increased reliance on private legal systems. Where the arbitration agreement included areas of law outside the contract itself (e.g., libel claims), the parties could choose to specify a privately produced set of rules or rely on existing authoritarian law rules.

Second, placing the power of the State behind a privately produced judgment can have deleterious consequences. One of the significant checks on the power of customary institutions is that their decisions must ultimately either be voluntary complied with or enforced at the cost of those parties who directly benefit from their enforcement. Indeed, what first appears to be a weakness of customary law (its susceptibility to a free rider problem) is actually a strength. Convincing others to participate and overcome the free rider problem limits enforcement to just cases. The State is under no such limits, of course, and easily can bring its enormous resources and power to bear on enforcing even unjust judgments and laws. This problem can be avoided by limiting the State legal system's recognition. If privately obtained agreements are not enforceable through the legal mechanism of the State courts but act to bar the State legal apparatus from acting to review or enforce such agreements, then the limits imposed by the customary law mechanism remain, e.g., reputational sanctions.

They also managed to seize the levers of authoritarian law in Wyoming, without the effects of the limited, intramural competition separation of powers usually provides. Similarly the 1856 Committee in San Francisco became a monopoly and displaced the existing authoritarian legal system with its own. Since it was more of a *coup d'état* than a customary legal institution, the 1856 Committee's power grew unchecked by any competition.

Finally, the fates of the customary laws developed by the miners and cattlemen demonstrate why opt-outs are critical. Miners' law was partially absorbed by the authoritarian legal system, yet the result was far from satisfactory. Although the federal mining law allowed mining districts to enforce their rules, and even granted them semi-official status, the good features of miners' law, such as its adaptability, were soon lost in a maze of technicalities of the mining law. The cattlemen's customary law did not even manage partial absorption.⁶⁷¹ It is thus not enough for the authoritarian legal system to mimic customary institutions.

D. Remove distortions blocking private law

Removing government-induced distortions is a policy recommendation and is the logical first step in addressing any public policy problem, and the law is no exception. One critical distortion is the organized bar's monopoly on an access to the authoritarian legal system. This monopoly is, of course, only effective so long as the authoritarian legal system itself is able to restrict competition among legal systems, since any system burdened by monopolists would suffer a severe competitive disadvantage. The bar's domination of the authoritarian legal system thus demands not only vigorous protective measures against the "unauthorized practice of law" but also acceptance by society of the authoritarian legal system's claim that it is entitled to a monopoly on "law."⁶⁷² A simple step would be to repeal the ban on the "unauthorized practice of law" and allow anyone to provide legal services. Another easily identified distortion to eliminate would be to end the official role "unified" bar associations play in lawyer discipline and stop requiring bar membership by all lawyers admitted in a particular state. Defunding the organized bar would also weaken an important interest group which defends the State monopoly. A second critical distortion is that gov-

671. Walter Prescott Webb speculates the cattlemen's customary law fared worse because eastern lawmakers were familiar with cattle while they knew nothing about placer mining. They therefore fancied themselves capable of writing laws about cattle even when they were not, but recognized their inadequacies in dealing with placer mining. WEBB, *supra* note 423, at 499.

672. In Paul Starr's analysis of the rise of the American Medical Association, for example, he notes that a mere monopolistic guild could not have succeeded as the AMA did. Physicians succeeded in capturing medicine because they "were able to see social interests defined so as to conform with their own. This was the essence of their achievement." PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 144 (1982).

ernment courts are currently priced well below their true cost. The price for access to these courts should be raised for cases not concerned with restrictions on State power. Contract but not First Amendment cases, for example, should pay their way in State courts.⁶⁷³

E. Teach values, facts, and skills

Free rider problems can also be overcome by individuals simply opting not to free ride. We need not all begin to transform ourselves into altruists to limit free riding (and it is a good thing we do not). Cooperation can also be promoted if people learn about both its value and how to cooperate.⁶⁷⁴ A particularly striking example of this method is the role of the "old Californians" who taught others how mining districts could maximize joint welfare as they spread across the mining west. Similarly, some accounts of the 1864 Montana Vigilantes credit a member with experience in the San Francisco Committee with teaching the others how to organize a vigilance committee. The Montana cattlemen also made use of this method by encouraging their employees to own cattle.

Entrepreneurs will have to play a significant role in promoting private legal systems by teaching potential customers how they can serve their interests. Consumers can also learn about the skills needed to expand polycentric legal systems by participating in existing systems. Someone who experiences arbitration in the employment context, for example, may be more open to it in other contexts. Enlarging the shadow of the future suggests several ways in which private legal systems can enhance their chances for success. First, participants can be given a stake in the continuation of the system, increasing the value of the future benefits. Second, private legal systems can specialize in resolving particular classes of disputes, which can increase the frequency of individual parties' interactions (by reducing the pool of disputes). Third, providers of private law can make investments or take other actions which signal their permanence.

673. Below cost pricing has several consequences. First, in the absence of rationing by price, rationing of access to the scarce resource of judicial time occurs through rationing by waiting. BENSON, *supra* note 1, at 99-100. Since there is no relationship between a party's capacity for waiting for a case's resolution and the merits of the party's case, the order of cases is unrelated to their importance. As no legal market exists to allow those parties with greater needs and resources to purchase the position in line of parties ahead of them with less important cases, this is not merely a distributional question. Second, pricing of the courts below cost leads to reduced incentive to provide alternatives. Third, below cost pricing induces parties to bring too much litigation, since they do not pay the full social cost of their decision to litigate. *Id.* at 100. Biasing the choice between litigation and salvaging relationships in favor of litigation has its costs. If litigation is too cheap, too many potentially productive relationships will be ended. Finally, underpricing the legal system generates too many of the externalities associated with government services: "Police are inefficiently used to produce services that do not warrant the costs, too many laws are passed, and too many court cases are brought." *Id.* at 101.

674. AXELROD, *supra* note 19, at 136-139.

F. Be nice

We've all been told to be nice since we were children (or at least we all should have been). It turns out our parents were right about at least this much—niceness is a good strategy for cooperation.⁶⁷⁵ The spread of miners' law illustrates the value of being nice. Miners' courts adopted rules which were nice—so long as you were not the first to defect, your rights were secure. As those rules spread, not only with the dispersion of the California miners but with the success of the rules themselves,⁶⁷⁶ strategies built on successful exploitation would have experienced declining success. At the risk of some understatement, it is safe to conclude that the Wyoming cattlemen were not nice to either the cowboys or settlers. The Wyoming cattlemen's attempts to squeeze every advantage from their dealings with their employees and the settlers ultimately worsened the cattlemen's position.

"Be nice" is good advice for parents to dispense; how do we translate it into policy? Niceness has three policy applications. First, if we believe that nice strategies are successful strategies, we can design our legal institutions for a world in which most people behave nicely. Because courts focus on the cases when things go wrong, lawyers often have a misleading impression that the world is largely made up of relationships, personal and commercial, which fail, parties who breach contracts, and so forth. The less we have to worry about people whose behavior is "not nice," the more confident we ought to feel about relying on polycentric customary legal institutions. One of the most frequent objections to customary law is the endlessly worsening hypothetical of the recalcitrant defector, who in the most extreme forms of this objection, turns into a heavily armed, sociopathic survivalist, immune to all forms of social pressure, ostracism, and custom and whose sole joy in life is disrupting the lives of others. What about him? No legal system, customary or authoritarian is going to do well against such individuals but customary legal systems at least offer the guarantee that such people will not end up with a monopoly on the use of force.

Niceness's success in the world means we do not have to worry too much about sociopathic survivalists. Not only are they not nice people, they will end up not doing well and so there *will* be evolutionary pressure on them to conform. Structuring society to restrain sociopaths tends to lead to a society in which non-sociopaths have few freedoms. Freeing legal institutions from being responsible for anticipating every sociopath's (or at least

675. *Id.* at 33.

676. One can imagine how the reaction of a group of neophyte miners in the Black Hills to a grizzled '49er who announced "Well, we tried this in California in '49 and in Montana in '64, it didn't work then but let's give it another shot here," would differ from a '49er presenting a successful set of institutions and who could end his description with the line "And then we all got rich!"

malevolent breacher of contracts') possible action, can have enormous benefits for the non-sociopathic portion of the population.

Niceness's second policy implication is people's ordinary nice behavior can produce customary law without too much help from others. When two strangers behave nicely toward each other, they begin the evolution of a cultural norm of nice behavior. We do not need a State funded National Institute of Niceness making block grants, running demonstration programs, or creating niceness certification programs. We just need to leave people alone.⁶⁷⁷

The third policy implication of niceness is a recognition that envy is a poor basis for actions. In a zero sum game, every gain to another player represents a loss to you. In those circumstances being envious can help motivate you to succeed. Fortunately, the world is largely made of positive sum games. In those circumstances, envy is a hindrance since you do not have to do better than the other players to do well for yourself.⁶⁷⁸ The mining camps present a particularly striking example of a positive sum game. Since wealth was available for the taking in numerous locations, as long as property rights were secure, individuals could always be the next big winner. California '49er Jackson, for example, noted in his diary that three neighbors "took out over three thousand dollars in six days. Nobody begrudges them their luck for they are good fellows."⁶⁷⁹ In those circumstances, the foolishness of envy is obvious to all. Banfield's Montegrano is the opposite. Not only do people see themselves as unconnected to their neighbors but one resident reported that "many people positively want to prevent others from getting ahead."⁶⁸⁰

We are not all so fortunate as to live in a society where there is gold to be picked up off the ground. Or are we? In a society built around economic freedom with secure property rights, the "gold" is available to any with entrepreneurial skills. And since we can have different visions of what is gold, we can pursue different strategies.

677. Another frequent objection to historical claims about customary legal institutions is that even if they used to function, the displacement of these institutions by the State has created a vacuum which only the State can now fill. This claim was made during the debate over welfare reform, for example. Opponents of reliance on private charity that argued even if welfare was once successfully provided by private sources, once the State had displaced those institutions we became forever locked into State provision of welfare.

678. AXELROD, *supra* note 19, at 112.

679. CANFIELD, *supra* note 30, at 50.

680. BANFIELD, *supra* note 22, at 18.

IV. OPPORTUNITIES FOR DEVELOPING PRIVATE LAW

If we are to overcome free rider problems so that private legal systems can develop, we need to find areas in which we can experiment with them. I briefly examine two candidates: The Internet and “Common Law” courts.

A. *The Internet*

The ‘Wild West’ is a frequently applied metaphor for the Internet.⁶⁸¹ While declaring the revolutionary potential of the Internet is an overused and yet underdocumented practice, the Net is an obvious place to look for applications of customary law.⁶⁸² Whether it will actually change the world (or has already) in all the ways its fans suggest, it does offer several advantages with respect to the development of customary legal institutions. The Internet is experiencing technological change that is similar to that experienced by the placer miners.⁶⁸³ The rapid evolution of computer technology keeps it ahead of the abilities of authoritarian legal institutions to regulate. Even simple technological advances significantly undermine regulatory measures. International callback services, for example, enable callers in one country to take advantage of low cost international calls placed from a third country and avoid local monopolies.⁶⁸⁴ More complex technologies offer even more difficulties for authoritarian legal institutions—a Microsoft senior vice president, for example, argued in a *Wall Street Journal* interview

681. The West as metaphor is used in several ways to explain the Internet: (1) as a means of describing opportunity, see *Sinbad: Soul Man in Cyberspace*, COMPUTER LIFE August 1, 1996, at 42 (1996 WL 7987470); (2) as a means of describing the lack of knowledge about how to act; see, e.g. Matt Miller, *big.risk@cyberspace*, FAR EASTERN ECON. REV., July 11, 1996 (1996 WL-FEER 10569348) (quoting Don De Palma, market research analyst, that “Today we’re in the wild, wild west, with advertising decisions often based on little more than faith.”); and (3) as a means of showing the need for State regulation. See, e.g., *Internet must be made a safe place to work, play*, HOUSTON CHRONICLE, Dec. 2, 1996 (1996 WL 11579434). For a more detailed discussion of my argument here, see Andrew P. Morriss, *Cyberspace Meets the Wild West*, THE FREEMAN (March 1998).

682. As a federal district court found in striking portions of the Communications Decency Act:

No single entity—academic, corporate, governmental, or non-profit—administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.

American Civil Liberties Union v. Reno, 929 F.Supp. 824, 832 (E.D. Pa. 1996).

683. For example, the hardware and software for running the Internet become obsolete every six to twelve months. Simson Garfinkle, *Web Brownout*, WIRED 4.09, 94, 96 (1996).

684. Neal Stephenson, *Mother Earth, Mother Board*, WIRED 4.12, 97, 120-121 (1996) (describing callback services). They also allow callers in one country to take advantage of differentials in international telecommunications “settlement charges,” which vary greatly across pairs of nations. *Id.* (describing settlement charges).

that the Internet's rapid growth was outstripping regulators' abilities: "This is not like regulating trucking. Things are moving so fast, there are so many players. It's got to get to a level of stability . . . before people [even] understand how they're going to use it."⁶⁸⁵ The State as a regulatory mechanism is thus frequently absent.⁶⁸⁶ Bringing social order to the Internet thus requires overcoming free rider problems similar to those necessary to bring order to the west.

Moreover, there is 'gold' in the Net. Large amounts are already spent on online information systems, such as WestLaw and Lexis/Nexis—\$20 billion or more per year.⁶⁸⁷ If the Internet evolves, as some think it will, into a communications network where bandwidth is cheap, it will create enormous opportunities for adding value to information. Nicholas Negroponte, for example, argues that while he does not expect to be willing to pay much for moving information across a network, "I am prepared to pay handsomely for value added to [it]. By this I mean any of the following: Filtering, prioritizing, sanitizing, encrypting, storing, translating, or personalizing, to name a few."⁶⁸⁸ The Net's 'gold' is not quite lying on the ground waiting to be panned or sluiced, but some of it is resting in databases, waiting to be "mined" with modern techniques more comfortable and cheaper

685. Albert R. Karr, *Critics Clamor for More Controls in Cyberspace*, WALL ST. J., Oct. 1, 1996 at B1, B5.

686. Even when it attempts to insert itself into cyberspace, the State is often incapable of effective action. At a Cato Institute conference in the future of money, for example, Bill A. Freza, president of Wireless Computing Associates, identified two differences the development of an economy based on exchanging intangibles in cyberspace might bring from an economy based on exchanging physical goods in the real world:

First and foremost, privacy in cyberspace will not be an abstract political right based on the vagaries of geography, government policy, or cultural norms. In the future, electronic privacy will be an absolute algorithmic certainty. The day will inevitably come when the amount of effort required to breach the shield of privacy provided by low-cost, widely available encryption will exceed the value of such an attack by so many orders of magnitude that it will not be economically feasible to base public policy on such invasions. The governments of the world will have to live with the fact that they will be impotent to pry into many private economic affairs.

Second, cyberspace differs from our everyday world in that coercive force cannot be projected across a network. That is a discomfiting revelation to most legislators, who like to pretend that their power rests on the consent of the governed rather than on the barrel of a gun. Sooner or later, however, any authority that asserts sovereignty over actions that take place entirely within cyberspace must resort to acts of physical coercion or threats thereof.

That, however, requires that the target be identified and located. . . . [I]t is going to get very difficult to keep track of the growing numbers of individuals who are rapidly learning to ply their trades on the Internet.

In practice, that means that ordinary people will be able to create and exchange wealth away from the prying eyes and grasping hands of sovereign powers.

The Future of Money in the Information Age, 18 CATO POL'Y REP. 8, 9, July/August 1996 [hereinafter *Future of Money*].

687. Tom Steinert-Threlkeld, *The Buck Starts Here*, WIRED 4.08, 133, 197 (1996).

688. Nicholas Negroponte, *The Future of Phone Companies*, WIRED 4.09, 238 (1996).

than panning in a cold stream while dodging the Sioux and the U.S. Cavalry.⁶⁸⁹

Perhaps more importantly, the Internet offers the potential to shift many types of transactions into a realm where they are difficult to monitor or regulate. For example, the combination of digital bearer certificates, widespread networks, and cryptography can allow “anonymous point-to-point trading of any kind of capital, with instantaneous clearing and cash settlement.”⁶⁹⁰ Similarly, the rapid reduction of transactions costs are bringing offshore banking within the reach of individuals, something that will, in economist Larry White’s words, bring “an exodus of retail banking business from the regulated onshore sector to the untaxed and unregulated offshore sector.”⁶⁹¹ Changes are not limited to new transactions, they also include altering existing institutions in ways which undermine centralized control.⁶⁹²

The changes introduced by the evolution of technology are thus not only hard to forecast, they are evolving in the direction of freeing individuals from geographic based constraints and nonconsensual controls.⁶⁹³ Changes in the telecommunications business are leading to the “death of distance” as the controlling factor in determining costs.⁶⁹⁴ That and similar changes will thus produce a demand for consent based methods of social cooperation, precisely the strength of customary legal institutions.

These institutions are already developing. Technology is already offering solutions for some of the problems of the Internet which provide tools which would be useful in customary legal institutions. Reputation, for

689. For example, *The Economist* quotes a consultant who notes that banks used to routinely purge data from their systems but now seek to “mine” it instead. *The Machine Age, in Turning Digits Into Dollars*, THE ECONOMIST, Oct. 26, 1996, at 4.

690. Robert Hettinga, *The Internet as Buttonwood Tree*, WIRED 4.08, 110, 112 (1996).

691. *Future of Money*, *supra* note 686, at 9.

692. Union leaderships, to take only one example, are losing some of the power which stemmed from the traditional model where the leadership served as the hub coordinating the membership. The Writers’ Guild leadership was shaken up by dissident members brought together by an informal bulletin board; dissidents in the pilots’ union at American Airlines recently defeated a proposed contract recommended by the union leadership using sophisticated communications techniques to rally a geographically dispersed membership. LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 4 (1995); Scott McCartney, *The Deal-Breakers: How Renegade Pilots at American Airlines Upset the Union’s Pact*, WALL ST. J., Feb. 10, 1997, at A1 (1997 WL-WSJ 2408942).

693. See, e.g., ONLINE LAW: THE SPA’S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET (1996) (“[t]ax laws and the concepts underlying them are grounded on geography—where is a company located or doing business—and on physicality—what tangible things are being sold or services being performed. In many respects the activities of a company doing business electronically transcend geography and physicality. Consequently, taxing authorities are having a difficult time applying their tax laws to electronic commerce, especially when it comes to sales tax on electronic sales or customs duties on the importation of digital goods”).

694. *The Death of Distance*, THE ECONOMIST, Sept. 30, 1995, at 5 (“[t]he death of distance as a determinant of the cost of communications will probably be the single most important economic force shaping society in the first half of the next century”).

example, is frequently used in customary systems, and the appearance of search engines which enable review of a particular e-mail address' contributions across Usenet groups facilitates monitoring individuals' reputations.⁶⁹⁵ The Electronic Frontier Foundation is developing a certification system which will allow consumers to make certain a web merchant is legitimate.⁶⁹⁶ Visa and Mastercard are jointly developing a secure electronic transactions protocol.⁶⁹⁷ The Better Business Bureau has begun an online service which will provide both a standard of business practices and a neutral body for complaints.⁶⁹⁸

There is also a need for institutions to mediate conflicts on the Internet, as was the case for the cattlemen and placer miners. The development of some form of property rights and market exchange is one means of allocating the Net's scarce resources (bandwidth, server resources).⁶⁹⁹ Internet backbone companies already use contracts to ensure their services interconnect.⁷⁰⁰ New technologies, such as agoric systems,⁷⁰¹ offer the ability to allocate bandwidth through decentralized, market-like mechanisms. There are centralized alternatives, but as Internet traffic expands, these become increasingly cumbersome and expensive. Customary legal institutions can thus fill a need.

The Internet as an arena for the growth of customary legal institutions is particularly exciting because much of the potential rests on the disequilib-

695. Internet Access: Deja News Invites Internet Users to Search the World's Largest Online News-group Archive Edge: Work-Group Computing Report (June 3, 1996) (1996 WL 7977805).

696. Stephen Sabludowsky, *Shopping In Cyberspace*, NEW ORLEANS TIMES-PICAYUNE, December 11, 1996 (1996 WL 11203641).

697. *Id.*

698. *Better Business Bureau to Bring Standards to the Internet*, NEWSBYTES, July 22, 1996 (1996 WL 10928098). See <http://www.bbb.org> for the Bureau's efforts. For example, the Bureau provides a "seal" which can be displayed on a company's web site. Clicking on the seal leads to the Bureau's verification procedure, ensuring that it cannot be used illegitimately. Clicking on the seal gives the consumer instant access (depending on modem speed) to the BBB's reports on the company. If the seal is not confirmed, a report is automatically triggered to the BBB for investigation.

699. Bandwidth is scarce for several reasons. First, the links between continents are relatively short of bandwidth. Douglas Barnes, who *Wired* terms "an Oakland-based hacker and cypherpunk," notes that "[v]irtually all communications between countries take place through a very small number of bottlenecks, and the available bandwidth simply isn't that great." Stephenson, *supra* note 684, at 103. Second, without a means of distinguishing the priority of packets, "a user watching *Independence Day* can hog the bandwidth and keep everyone's email from getting through, even though the mail is more valuable and should get through at the cost of dropping a frame or two of video, which would be undetectable." Jeff Sidell, *Agoric Systems: The New Economy of Computation*, WIRED 4.12, 84 (1996).

700. "The Internet is competitive, but it's also cooperative" as one backbone company vice-president put it. Bart Ziegler, *Web Crunch: Slow Crawl on the Internet*, WALL ST. J., August 23, 1996 (1996 WL-WSJ 11795922). The Internet has survived the shut down of the NSF funded backbones and is now operating largely on private networks. *Id.*

701. Agoric systems "allow applications to compete for available bandwidth. Each network switch awards bandwidth to the application willing to pay the highest price—the one that needs it most." Sidell, *supra* note 699, at 84.

rium conditions induced by rapid technological change. As that change has already exceeded the ability of governments to control, the growth of customary law here need not depend on either a voluntary retreat by the State or modification of existing regulations and laws.

B. "Common Law" courts

There is a growing movement in many parts of the United States to establish what proponents call a "common law" court system.⁷⁰² There are reports of the organization of these courts in at least forty states since the first court was organized in Tampa, Florida in 1992.⁷⁰³ These courts appoint twelve member juries (usually all male) which hear arguments and decide cases.⁷⁰⁴ "Common law" courts have several important flaws, however, which prevent them from being part of a voluntary, polycentric legal order.⁷⁰⁵

702. In Ohio, for example, a Columbus group organized such a court in 1996. As one organizer described it, six men "sat around one night and talked about how we all got burned [by the Ohio courts]. Then we decided maybe we should start our own." *Common Law Movement Called Threat, State Legal Officials Worry*, DAYTON DAILY NEWS, Apr. 15, 1996 (1996 WL 6212877) [hereinafter *Common Law Movement Called Threat*]; see also *Group Forms Its 'Own' Supreme Court*, DAYTON DAILY NEWS, Sept. 11, 1995 (1995 WL 8960492).

703. T.C. Brown, *Martyr*, SUNDAY MAGAZINE (PLAIN DEALER), June 23, 1996, at 6, 7. See DEVIN BURGHART & ROBERT CRAWFORD, GUNS AND GAVELS: COMMON LAW COURTS, MILITIAS & WHITE SUPREMACY, at 5 (Coalition for Human Dignity, 1996) (chronology of movement); 19-38 (describing courts in 21 states).

704. Thomas Edwards, *Texan Dissenters Create Their Own Courts*, SAN ANTONIO EXPRESS NEWS, Mar. 3, 1996 (1996 WL 2823307).

705. It is important to note what are *not* problems that disqualify "common law" courts from providing an alternative. Many critics of the movement object to the ideology underlying its existence as racist, anti-Semitic, and sexist. See, e.g., David Corn, *The New Minutemen*, THE NATION, May 5, 1996 (1996 WL 9220398) (claiming many common law adherents are Christian Identity followers); BURGHART & CRAWFORD, *supra* note 703, at 1 (terming "common law" movement "a modern day twist in a long tradition of racist violence"). A repulsive political ideology is not a bar to participation in a polycentric legal system. Of course, such an ideology would limit the ability of a legal system to compete for adherents—an important limitation not present in authoritarian law courts that can be captured by individuals or groups who hold repugnant views. One might argue that the danger is that such an ideology will appeal to people. While I agree that there are some people attracted to such ideas, I doubt there are more than a few. More importantly, if there are a large number of such people, the authoritarian legal system increases the danger. If racists, for example, could gain control of the State legal system, they could enforce racist laws on others. See, e.g., South Africa under the apartheid government; the United States from Reconstruction to the 1960s. As Richard Epstein has described, it took the federal government to break the state government's monopoly to rid ourselves of racially discriminatory state laws. RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992) (detailing application of discriminatory laws before 1964).

Gambetta's "bigger mafia" principle applies here, however, and as a result of reliance on the federal government we are left with the "bigger mafia." To whom can we turn when the federal government violates civil rights? See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (allowing criminalization of consensual sodomy between adults of the same sex); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding World War II internment of U.S. citizens of Japanese ancestry, which Justice Murphy's dissent termed falling into "the ugly abyss of racism"); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (establishing "separate but equal" principle which lasted for sixty years). It is also irrelevant that the doctrinal basis for the movement is what critics term "obscure." See, e.g., *Do You FEAR the U.S. Government?*, <http://www.vi.com/~solgroup/fear/> (visited Mar. 22, 1997), a web site with explanations of constitution-

First, the "common law" courts do not base their jurisdictional claims on consent.⁷⁰⁶ Although they contend that the State courts must have individuals' consent before the State courts can exercise jurisdiction,⁷⁰⁷ they exempt themselves from this requirement. Thus, for example, they assert the ability to place liens on the property of people who do not subscribe to their system,⁷⁰⁸ try nonmembers on criminal charges, and execute non-members convicted of crimes like "treason."⁷⁰⁹ Some argue that *only* their courts are legitimate.⁷¹⁰ Particularly troubling is the distinction drawn by "common law" adherents between "Citizens" and "citizens"⁷¹¹ or "Fourteenth Amendment slaves."⁷¹² This distinction, which can be erased only through their own processes, is used to legitimate second class status for those who do not adhere to their views.

Second, "common law" courts attempt to make use of the State court system as an enforcement mechanism.⁷¹³ This practice suggests their aspira-

alism. Again, in a competitive legal order, such characteristics would limit the appeal of the system, but not bar its presentation as a competitor. Although many of the details of a competitive legal system can be known only through the market discovery process, I am confident that "common law" courts would be outcompeted by organizations like the A.A.A. I use the initials deliberately. Either the American Arbitration Association or the American Automobile Association could out compete the "common law" movement with ease.

706. Some common law courts base their claims on claimed irregularities in the accession of their territory to the United States. The Republic of Texas, for example, is a common law movement based on the belief that Texas was unlawfully annexed to the United States in 1845. Edwards, *supra* note 704. Even without such claims, however, "common law" supporters have set up "republics." In Ohio, for example, where an unlawful annexation claim would be logically impossible, "common law" advocates have named their court "Our One Supreme Court in the Republic of Ohio." *Law Unto Themselves? Being Supreme Is Tricky*, DAYTON DAILY NEWS, Sept. 26, 1995 (1995 WL 896 2329).

707. See, e.g., *The Story of the Buck Act*, <http://www.vii.com/~solgroup/fear/buckact.html> (visited Mar. 22, 1997) (explaining how sending mail using two letter, capitalized state abbreviations accepts federal jurisdiction and concluding "[a]gents of the 'federal' government have NO jurisdiction within the borders of these separate [sic] and sovereign united States [sic] -- unless you give it to them").

708. *Common Law Movement Called Threat*, *supra* note 702 ("Canton Ohio Constitutional Study Group" accused Ohio Attorney General of sedition, treason and perjury for refusing to arrest the seven Ohio Supreme Court justices over a 1992 opinion; "scores" of indictments sent to police, bankers, judges).

709. For example, Ohio common law adherents have circulated "wanted" posters featuring a Columbus policeman who has investigated the group, accusing him of treason, perjury and fraud. Brown, *supra* note 703, at 9.

710. Susan Ladd & Stan Swofford, *The Law of the Land: Group Seeks County Rule*, GREENSBORO NEWS AND RECORD, June 25, 1995 (1995 WL 2616123) (describing North Carolina "common law" court advocate's belief that only a "Christian common law county court" would be allowed).

711. For reasons which are too obscure even for me, the difference in capitalization is an important part of the distinction.

712. *Common Law Movement Called Threat*, *supra* note 702; James Ridgeway & Leonard Zeskind, *Revolution U.S.A.: The Far Right Militias Prepare for Battle*, THE VILLAGE VOICE, May 2, 1995 (1995 WL 10285306) (quoting California newsletter that "[t]he Common Law is available only to White Common Law State Citizens. . . so called 14th Amendment citizens . . . do not have inalienable rights, only limited statutory 'civil rights' that Congress has seen fit to grant them").

713. The "common law" movement advocates "constitutionalism." Summarizing the doctrine would be impossible here, but it rests on a mixture of constitutional interpretation, biblical references, and historical documents, such as the Magna Carta. *Common Law Movement Called Threat*, *supra* note 702.

tion is to replace the authoritarian legal system's chain of command with one placing themselves at the top, rather than to create an alternative, parallel to the State legal system. The Ohio "common law" movement, for example, styles its court "Our One Supreme Court," building its claim to exclusivity into its name. Much as the San Francisco Vigilance Committee of 1856 displaced the State, "common law" adherents appear to aspire to establishing their own monopoly.

The great danger of the "common law" movement is not the movement itself but the State's overreaction to it.⁷¹⁴ Some states, such as Texas and Minnesota, have reacted partly by instructing state courts to not accept "common law" filings.⁷¹⁵ Some states have charged "common law" practitioners with the unauthorized practice of law.⁷¹⁶ Some states, such as Ohio, have passed statutes aimed at prohibiting "common law" activities.⁷¹⁷ This last reaction thus threatens to undermine truly polycentric legal institutions by creating additional legal restraints in support of the authoritarian legal system's monopoly. The appropriate reaction is to refuse to accept "common law" courts' filings.⁷¹⁸ Customary legal systems that offer advantages over the authoritarian legal system will not need such recognition, although they may need the authoritarian legal system to refrain from interfering. A non-recognition rule offers a solution to the problem of parasitic movements such as the "common law" courts while not interfering with the develop-

714. Ohio Chief Justice Thomas Moyer sometimes speaks as if the problem with the "common law" movement in Ohio is that it violates the rights of others. For example, Moyer has said that "[w]hat we cannot do is stand by and allow this, or any other organization or group of people, to attempt to chip away at our system of justice through *threats and intimidation*." Randy Ludlow, *Ohio Keeping Close Tabs on 'Freemen'*, CINCINNATI POST, Mar. 30, 1996 (1996 WL 5056784) (emphasis added). On other occasions Moyer has gone farther and argued that "it's very important that *we in the real justice system* make it clear that there is *one legal system . . .*." Randy Ludlow, *They take law into own hands*, CINCINNATI POST, Dec. 7, 1995 (1995 WL 9999991) (emphasis added).

715. Texas Attorney General Opinion DM-389 (May 2, 1996) (county clerk may refuse to file documents from the "Republic of Texas"); Minnesota Attorney General Opinion 390a-21 (Nov. 5, 1996) (county sheriff not authorized to serve documents from "Minnesota state Republic" or courts with "Common law venue.")

716. *Common Law Movement Called Threat*, *supra* note 702.

717. See, e.g., OHIO REV. CODE §§ 2921.51, 2921.52 (1997). The Anti-Defamation League has drafted a model statute to restrict the movement. *ADL Announces New Legislative Initiative to Counter Newest Manifestation of Extremism—"Common Law Courts,"* http://206.3.178.10:80/PresRele/Milit_71/2719_71.html (visited Mar. 22, 1997). The ADL statute criminalizes conduct by "any person" which "simulates legal process," which is defined as "a document or order issued by a court or filed or recorded for the purpose of exercising jurisdiction or representing a claim against a person or property, or for the purpose of directing a person to appear before a court or tribunal, or to perform or refrain from performing a specified act." This definition is so broad as to encompass many actions which a customary tribunal might take, such as an arbitration tribunal's assertion of jurisdiction over a trade association member which had contractually agreed to be bound by its decisions in consumer complaints.

718. In addition, enforcement of existing criminal statutes is often sufficient. A Dallas County, Texas state judge noted that the main problem with "common law" filings in Texas was a lack of "institutional guts" not a lack of criminal statutes. Thomas G. Watts, *Close-up: Anti-Government Groups Set Up Own 'Courts,' Trillion-dollar Judgments*, DALLAS MORNING NEWS, May 6, 1996.

ment of a polycentric system with real competitors.

V. AN OPTIMISTIC CONCLUSION

Customary legal systems have many advantages, even if we limit the scope of their operation to a few areas. The arguments for private provision of law need not begin with the premise that, having eaten of the apple of the State, we need to reverse our expulsion from the garden of anarcho-capitalism.⁷¹⁹ Readers need not share my belief in the evils of monopoly government (although I hope many will) to see that private legal systems have a comparative advantage in some areas. Encouraging their growth will, at the least, provide a measure of competition for the government legal system. Even slow growth of private alternatives might have an impact similar to Federal Express' and the United Parcel Service's impact on the U.S. Postal Service. The good news is that encouraging such growth should be straightforward.

If we begin by creating the space for customary legal systems to spontaneously arise, we can benefit from their variety and experience with the modern world before abandoning the "safety net"⁷²⁰ of the county courthouse. In doing so, we must guard against strangling the infant private systems with our safety net. We must allow participants to truly opt out of the authoritarian legal system, which means we cannot allow the authoritarian courts to have the last word based on "public policy."

Where might these experiments begin? The Internet is a starting point. Experience there may give us the confidence to relax our reliance on the State further. It may also reveal the arguments made here to be the lunacy that the readers who abandoned this article after the opening paragraphs undoubtedly believe them to be. I am willing to assert the testable hypothesis that, given the opportunity, even those readers will by and large prefer private legal systems once they have experienced them. Surely if the strangers thrown together in the placer rushes can overcome the free-rider problems inherent in customary legal systems, we, who have all the advantages of our existing social capital and modern technology, can do at least as well.

Gradualism has its own dangers, however, particularly when one is advocating a gradual withering of the State. The State rarely concedes power willingly and there is the real danger that the judiciary is as likely to

719. We have, of course, eaten heavily of the apple of the State and we are suffering from its ill-effects. The weary reader will be relieved to be reassured that that is another article, not the introduction to another 100 pages.

720. I use the term "safety net" with some hesitation—the evils of monopoly make this net an expensive and remarkably ineffective one.

not do so as the executive or legislative branches. There are reasons to be optimistic, however, that gradualism need not be a guaranteed failure.

First, the private interests of all judges do not lie in the continuation of the State's legal monopoly. Many existing ADR systems pay significantly more than do public law systems, and have successfully raided the public law system for some of its best decision-makers.⁷²¹ Private systems could offer additional inducements: Superior support staff and equipment, reduced case loads, elimination of delays, improved fringe benefits, and the ability to limit a decision maker's work to areas in which she was interested.⁷²² Similarly, lawyers' interests are diverse; many would prosper in a private system as attorneys who argue before private arbitrators and judges do now. These divided interests reduce the ability of the incumbents to block reforms.

Second, withdrawals from the legal system are relatively easy to accomplish for consent based systems, since participants can agree to not submit their disputes to the government legal system. Unlike legislatures, which can intervene at will, courts require a party to bring a claim before they can assert jurisdiction. Defection from such an agreement is always possible, but reputational sanctions and desire for further dealings limit the parties' ability to defect unpunished. Further, court orders in private cases simply shift bargaining power, allowing parties to contract around them.

Finally, the government judicial system is much smaller and has fewer resources than the executive and legislative branches. The federal judiciary receives well under 1% of federal spending.⁷²³ Even large state court systems, like New York's, spend minuscule amounts compared to the other branches of government.⁷²⁴ In states with small court systems, like Arizona,

721. Ellen Joan Pollock, *Mediation Firms Alter Legal Landscape*, WALL ST. J., Mar. 22, 1993, at B1 (1993 WL-WSJ 708001) (private services which can double state judge's salaries are or have recruited "some of the nation's most distinguished judges"); Dale Vargas, *Scrutiny follows rent-a-judge trade*, SACRAMENTO BEE, Aug. 13, 1989, at B1 (1989 WL 6388566) (California state courts concerned because private courts "literally dried up" the pool of retired judges available for special assignments and lured three prominent judges to retire early); Julie Emery, *Bar Leader Fears Loss of Judges*, SEATTLE TIMES, January 29, 1989, at D2 (1989 WL 6694820) (quoting ABA president that private firms are luring judges to work in private sector with higher salaries and elimination of "minor" cases).

722. Judges clearly value this. See, e.g., Arthur Rotstein, *Senior Judge Decides to Cut Back, Not Out*, FORT WORTH STAR-TELEGRAM, Sept. 22, 1996 (1996 WL 11340601) (quoting U.S. District Judge William Browning that "the real benefit of senior status is you can say you won't take certain kinds of cases. . . ." and Judge Richard Bilby that "[i]t's a lot better life" as a senior judge because he will be free of administrative tasks).

723. Victor Williams, *Keep the Federal Judiciary Out of the Budget Battle*, CHRISTIAN SCI-MONITOR, Jan. 29, 1996, at 19 (1996 WL 5038927) (less than 0.002%).

724. New York's 1996 judicial budget was \$1.13 billion. Gary Spencer, *\$1.13 Billion Budget for Judiciary Passed*, 216 NEW YORK L. J. 1 (July 16, 1996).

the judiciary's resources are even more limited.⁷²⁵ Even if isolated defiance by the less powerful can be punished, widespread withdrawal would be harder to successfully retaliate against. Moreover, to the extent that private provision of public goods can crowd out the State, even a gradual expansion of customary systems can help reduce the scope of the authoritarian system.

What would a polycentric, customary legal order look like? We do not know. While that may be unsatisfying at first, it is the limitless possibilities for human creativity to express itself which makes such a world so exciting to contemplate. The future for a polycentric legal order is brighter than it might first appear. Even modest reforms can brighten it still further.

725. Arizona spent \$95.9 million on courts in 1994-95. Pat Flannery, *Democrats Predict State Deficit*, PHOENIX GAZETTE, Mar. 15, 1995, at A1 (1995 WL 2758224).