

Introduction

Murder is the king of crimes. No crime is worse, except (perhaps) treason. Murder is defined, basically, as the unlawful killing of another human being, but every society has its own understanding of which killings are lawful and which are not. Only law and custom can tell us exactly what “murder” means in a given legal order. A justified or excusable killing is not murder. For example, in California, a killing is “excusable” if it was “committed by accident or misfortune” and is “justifiable” when done in self-defense (or in the “lawful defense” of a member of the family).¹ You can kill someone who, for no good reason, is about to plunge a dagger into your heart. In wartime, during battle, soldiers have a positive duty to kill the enemy. But soldiers are not supposed to kill prisoners of war or enemy soldiers who surrender.

These excuses and exceptions are well known. American law also classifies types of unlawful killing into grades and classes. Murder comes in “degrees.” “First-degree” murder is the worst, the most serious. A planned, deliberate murder is first-degree murder. Other homicides are classified as second-degree murder or manslaughter. These are one or two steps down from first-degree murder. Killing that results from reckless behavior – by a drunk driver, say – is seriously criminal, but is not first-degree murder. Homicide law, in the American states (and elsewhere), is full of subtle distinctions. Nonetheless, it is generally the case that the most serious punishments are reserved for killing that meets the legal definition of murder, especially first-degree murder.

Penal codes do not come from outer space. They are catalogs of behaviors that society condemns, and catalogs of the prices that violators should or must pay. The codes, on the whole, reflect the moral sense of their communities. A person who kills an innocent stranger in cold blood, or who robs a convenience store (for example) and shoots to death a trembling store clerk – that person, most of us feel, deserves the full fury of the law. A man who breaks into a house to rob it and vandalize it, and who kills the owner without a qualm when the owner comes

¹ Cal. Penal Code, §§195, 197.

suddenly home – this man has committed an appalling crime and deserves strong punishment.

Penal codes are long and complex, because societies are complex. Legal norms can be confused, ambiguous, contested. The same is true of social norms, probably even more so. Moreover, a country or state usually has a single penal code, which (in theory at least) applies to everybody and covers all situations. But there is no single “code” of social norms. Norms can vary from group to group. They might be in flux. Citizens might disagree about what the norms mean and when they apply. Many devoutly religious people strongly believe that it is murder plain and simple to kill an unborn child in its mother’s womb. But abortion, in the United States and in most countries at this point in time, is perfectly legal under many circumstances. Indeed, according to the Supreme Court of the United States, in the famous case of *Roe v. Wade*,² a woman has a constitutional right to an abortion, at least in the early stages of pregnancy. The decision was and is extremely controversial. Many people long for the time when the Court might overrule this decision and wipe it from the books.

This book is about a different situation. It is about killings that, historically, the formal law plainly condemned, but social norms (apparently) did not. To put it another way: if we simply read the language of the penal codes, these killings seemed to be murder; they did not fall into any known and recognized exceptions. But the behavior of the system was quite different. These killings were rarely or never punished. They were in this sense crimes without punishment. The law *assigned* them a punishment, but the punishment was never or only rarely imposed. Obviously, the law is not a machine that runs automatically; it is a system, and actual people run it. A clause in the penal code is mere words if police, or prosecutors, or judges and juries, or some combination of these, simply ignore it.

This book deals with forms of homicides that fit this pattern: murder in theory, but something else in practice. It is largely, but not exclusively, historical, largely, but not exclusively, about American law in the nineteenth century, and the first half or so of the twentieth. As we see in what follows, the situation has changed a great deal between then and now.

This book asks: What situations fall or have fallen into this category? How did the legal system, in practice, respond to these situations and how have actions and reactions changed over time? Why did these crimes escape punishment in the first place, and why have these changes taken place?

The situations seem, on the surface, quite different, and to have very little in common. We begin with a brief look at the vigilante tradition, particularly in the Old West, and lynch law, particularly in the Old South. We move on to cases of the so-called unwritten law: a man kills his wife’s lover, or a woman kills her abusive spouse. Then we examine cases of unmarried women accused of killing their newborn children, and, finally, so-called mercy killings – cases, where, for example, a family member

² *Roe v. Wade*, 410 U.S. 113 (1973).

(or doctor) eases a dying, pain-wracked person into the other world. A short chapter also considers what I call “black swan” cases, unusual situations that do not fit into a common pattern. Two well-known cases arose out of trouble on the high seas – in one, men, adrift in the Atlantic and starving, killed a teenager and ate his flesh to stay alive; in another, crew members in an overloaded boat simply tossed people into the sea.

At the other end of the scale, people who kill police officers can expect particularly harsh punishment. Blacks who kill whites are more likely to get a death sentence than whites who kill blacks. In the Old South, an African-American accused of injuring or killing a white person was liable to be lynched; if tried in court, he was almost certain to be condemned to death. A second book could be written, which you could call *Crimes with Huge Punishment*, or *Overpunished Crimes*, or some such title.

But our topic here is homicide that results in no punishment at all, or, at best, light punishment. The instances I mentioned seem to have nothing much in common, except for the punishment or lack of it. And, to be sure, they are very different. In the final chapter, I try to answer a few basic questions. First and foremost is the question: what explains the gaps between the formal law and the behavior of the system? I argue that most of these gaps represent a particular type of clash, between norms and cultures. And I try to show how the structure of the legal system – the jury system, very notably – acts as an enabler and permits, in short, this kind of split between law and practice.

Most of my examples, as I said, are historical, and also, for the most part, no longer part of the living law. This, then, is also a study of social change: What led to the rise and fall of these unwritten laws? What do they tell us about the evolution of American society? This too is a theme of the final chapter.

1

Popular Justice and Injustice

On display in the Carbon County Museum in Rawlins, Wyoming, is a pair of shoes made of human skin. The skin belonged to an outlaw, Big Nose George Parrott, who was lynched in March 1881. Big Nose George was a bandit, part of a gang of desperados. He was complicit in the murder of a deputy sheriff; he was also involved in the murder of a detective who had chased Big Nose and his gang. Big Nose was arraigned in Rawlins, tried, found guilty, and sentenced to hang. Ten days before the date of his appointment with the gallows, he managed to escape. Big Nose did not get very far. A group of men caught him, tied his hands behind his back, put a noose around his neck, and forced him to climb a ladder: he died on this makeshift gallows; a crowd of some 200 people watched him choke to death. Dr. John Osborne, who was there, skinned the corpse and made shoes from the skin. Dr. Osborne became governor of Wyoming in 1893; supposedly he wore the shoes on inauguration day.¹

This morbid tale combines elements of two types of action: the vigilante movement in the American West and lynching in the American South. Big Nose was the victim of a lynch mob; the mob killed him, even though ordinary legal process would have produced, and was about to produce, the same result (perhaps less flamboyantly). In many ways, his fate was similar to the fate of many African-Americans, lynched by angry white mobs, at roughly the same period of time. The mob that lynched Big Nose was ad hoc, hastily put together. Otherwise, his fate was like the fate of many outlaws, or presumed outlaws, who were put to death by groups of men who called themselves vigilantes.

BELOVED ROUGHNECKS

Most people, I imagine, have heard of the vigilantes and the vigilante movement; it is part of the mystique of the Old West. One of the highlights of the year in Helena,

¹ Lori van Pelt, "Big Nose George: A Grisly Frontier Tale," www.wyohistory.org/encyclopedia/big-nose-george-grisly-frontier-tale, visited Sept. 2, 2016.

Montana, is the Vigilante Parade, which has been held for many years. Vigilantes figure in a number of movie “Westerns.” Vigilante movements, in Richard Maxwell Brown’s definition, are “organized, extralegal movements, the members of which take the law into their own hands.”² This definition can be stretched to cover all sorts of actions and activities, including some in the present day. It can cover outbursts of group action that go far back in American history: for example, the South Carolina Regulators of the late 1760s, an organized group who took “relentless and harsh” action against those that the group considered outlaws.³

But what we might think of as the golden age of vigilantes came almost a century later, in the period from the 1850s on, and mostly (though not entirely) in the American West. The most famous instances of all were the two San Francisco “vigilance committees” of the 1850s. The term “vigilante,” which is of course a Spanish word, seems to date from this period; the first usage of the word is indeed recorded in San Francisco, in 1856.

In the wake of the Gold Rush, thousands of people poured into San Francisco. The city exploded in a kind of demographic stampede. It was a rough, raw, turbulent place, bursting at the seams. Crime was, or seemed to be, rampant. Law and order had broken down. At least this is what many people thought. Hubert Bancroft, writing about San Francisco as it was in December 1850, described a city in chaos: “Crime stalked boldly in the public thoroughfares”; frequent fires caused “confusion” and “plunder.” The police force was “small and inefficient. In case of an arrest the law was powerless; false witnesses were suborned . . . not more than one in ten was ever convicted.”⁴

In February 1851, a store was robbed; the owner, C. J. Jansen, was beaten and knocked unconscious; \$2,000 was stolen. Two Australians were arrested. A mob gathered in Portsmouth Square; they held a “popular court,” and a trial of sorts; the leader of the mob, a merchant named William T. Coleman, acted as prosecutor. But the evidence was flimsy, and the “jury” deadlocked; the two Australians escaped with their necks. In June, however, a “Committee of Vigilance” was formed. It put a certain John Jenkins on trial; he was hanged after this “trial” and twenty-eight other bad characters were simply chased out of town.⁵

The second “vigilance committee” came into existence in 1856; this one had more than 6,000 members; it hanged two men, and banished about thirty others. Bancroft reprints a document (which he insists is “genuine”) which the committee gave to a man named James Cusick, telling him to get out of town: “The Committee of

² Richard Maxwell Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (Oxford, New York: Oxford University Press, 1975), pp. 95–96.

³ Manfred Berg, *Popular Justice: A History of Lynching in America* (Chicago: Ivan R. Dee, 2011), p. 15.

⁴ Hubert Bancroft, *Popular Tribunals*, Vol. 1 (San Francisco, CA: The History Company, 1887), p. 137.

⁵ There is a sizeable literature on the subject of the San Francisco vigilance committees; see Kevin J. Mullen, *Let Justice Be Done: Crime and Politics in Early San Francisco* (Reno: University of Nevada Press, 1989); Robert M. Senkewicz, *Vigilantes in Gold Rush San Francisco* (Stanford, CA: Stanford University Press, 1985).

Vigilance, after full investigation and deliberation, have declared you guilty of being a notoriously bad character and dangerous person.” Cusick was warned to “leave the state of California . . . never to return, under the severest penalties.”⁶ To save their necks, people like Cusick accepted their sentence of banishment.

The 1856 Committee of Vigilance, and other vigilante movements, had a good press in their day. Men sang their praises and insisted that the vigilantes had done a good job, had restored law and order, had tamed the wild spirit of criminality and corruption. Hubert Bancroft, their most noted chronicler, was particularly lavish in his praise of the “beloved rough-necks,” who brought about a “speedy and almost bloodless cure” for the epidemic of crime and lawlessness.⁷ Another contemporary, Nathaniel Langford, writing in 1890, chiefly about Montana, thought communities owed their “peace and security” to “the prompt and decisive measures adopted by the Vigilantes.” People, he wrote, “had perfect confidence in the code of the Vigilantes.”⁸

In the years after the formation of the San Francisco vigilance committees, vigilante action spread through the West like wildfire. Vigilance committees were formed in Montana and in other states and territories; more of these vigilante episodes took place in Texas than anywhere else. Mostly, they shared a common goal: quick, merciless justice for thieves, murderers, and all manner of desperados. Sometimes there was no trial at all – nothing but a quick trip to the gallows. At other times, the vigilantes did conduct something more or less resembling a trial, though hardly one that a common law lawyer would recognize, and hardly one that met normal legal standards. In Nevada City, Montana, James Brady was accused of shooting a saloonkeeper, Thomas Murphy. Brady admitted it; said he was drunk at the time. The vigilantes conducted a quick and dirty “trial,” convicted him, and sentenced him to death. They gave him time to write a letter to his daughter, but that was all. There was no appeal from the judgments of vigilance committees. Brady was doomed. “A butcher’s hoist was used for Brady’s hanging with a box and a plank rigged for his drop”; he was executed in front of a crowd of people on June 15, 1864.⁹ In Montana, two men arrested for horse-stealing actually got a two-day trial in 1868.¹⁰

Richard Maxwell Brown counted more than 300 instances of vigilante action.¹¹ Of these, something in excess of 200 took place in the western United States, in the period between 1850 and the beginning of the twentieth century. Not all of them made heavy use of the hangman’s rope; an 1884 movement in Montana, however, directed against horse and cattle thieves, claimed thirty-five victims.¹² Warnings to get out of town were another common tactic of the vigilantes. Most of the men

⁶ Bancroft, *Popular Tribunals* 2 (1887), p. 276.

⁷ Hubert Bancroft, *Popular Tribunals* 1 (1887), pp. 11, 16.

⁸ Nathaniel Pitt Langford, *Vigilante Days and Ways: The Pioneers of the Rockies* (New York: Merrill, 1890), p. 537.

⁹ Mark C. Dillon, *The Montana Vigilantes, 1863–1870: Gold, Guns, and Gallows* (Logan: Utah State University Press, 2013), pp. 301–302.

¹⁰ *Ibid.*, p. 304. ¹¹ Brown, *Strain of Violence*, p. 96. ¹² *Ibid.*, p. 101.

fingered by vigilance committees were guilty of some crime, often murder. But this was not always the case. One striking incident concerned Captain J. A. Slade, at least as Thomas Dimsdale recounted it.¹³ Slade also figures, in a very colorful way, in Mark Twain's book *Roughing It*, his history of his "variegated vagabondizing," which he published in 1871. Slade, according to Dimsdale, came to Virginia City in 1863. He could be a "kind-hearted and intelligent gentleman," but when he drank, he turned into a "reckless demon." He would gallop through the streets, shouting and yelling, firing his revolvers, breaking into taverns and shooting at the lamps, and in general vandalizing and terrorizing the town. One morning, the sheriff tried to arrest him and began to read a warrant: Slade tore it up and, with his buddies, ended any talk of arrest. This defiant behavior amounted to a kind of "declaration of war," and the vigilance committee, after Slade continued to commit various outrages, decided to get rid of him once and for all. Slade, seized by the committee, begged for his life; he pleaded for a chance to see his wife, who was living at their ranch. A messenger rode off to tell her what had happened; when she heard, she drove on a "fleet charger," as fast as she could, over "twelve miles of rough and rocky ground," in a desperate attempt to save her husband's life. Too late. Slade was hanged. The body was cut down and carried to a hotel, at which point his wife arrived to discover that "she was a widow. Her grief and heart-piercing cries were terrible evidences of the depth of her attachment." But Slade's execution "had a most wonderful effect upon society," at least in Dimsdale's view.

In Mark Twain's account, Slade had been a serial killer before his Virginia City days. Twain recounts the story of his hanging, quoting directly from the "bloodthirsty interesting little Montana book" of Thomas Dimsdale. But all Slade's murders were in the past (if they existed at all). Slade died for other sins. The men who strung up Captain Slade, and the men who led, or who took part in, vigilante actions, acted as judge, jury, and executioner. Slade might have been a murderer, he might have deserved to die on the gallows. But there was no trial, no proceedings before the courts, no juries, no judges, no due process.

Vigilantes had nothing but contempt for the formal system of justice. Dimsdale's account makes this clear; he sneers at the ordinary brand of justice, with its long delays, its "wearisome proceedings." He accuses local juries of being lawless themselves: paying no attention, for example, to the judge's instructions. If what the defendant did was "a crime against the Mountain Code," it would be punished; if not, the jury would not convict. Judges and juries would punish thieves, but "in affairs of single combats, assaults, shootings, stabbings, and highway robberies," the law was "worse than useless."¹⁴ This low opinion of ordinary legal process was widely shared – widely shared, that is, among the vigilantes and their backers. Bancroft, for example, claimed that (in San Francisco at least) crime wove around itself "the

¹³ Thomas J. Dimsdale, *The Vigilantes of Montana* (reprint edition, Montana: Two-Dot, 2003), pp. 170–180; see also Dillon, *Montana Vigilantes*, pp. 321–327.

¹⁴ Dimsdale, *Vigilantes of Montana*, pp. 8–9.

threads of law, as the larva spins the protecting cocoon . . . [U]nprincipled demagogues were placed around the bench, and ruffians made court officers . . . Police officers connived with professional house-breakers and shared the spoil.” In the “interior” it was hard to convict anybody of murder. Juries came from “the hangers-on about court-rooms, men fit for nothing else . . . too lazy to work.”¹⁵

Nathaniel Pitt Langford, who had himself been one of the vigilantes – indeed, a member of the executive committee of the Virginia City vigilance committee – gives us an enlightening story about one James Daniels. Daniels, living in Helena, Montana, got into a quarrel during a card game; the upshot was, he stabbed and killed a man named Gartley. The vigilantes arrested him and turned him over to the “civil authorities.” He was tried for murder; the jury found him guilty only of manslaughter. The judge sentenced him to three years in prison. A “petition for his pardon, signed by thirty-two respectable citizens of Helena,” was given to the acting governor, who “under mistaken sense of his own powers, issued an order for his release.” Daniels left the prison and went back to Helena. At this point, the vigilantes arrested Daniels and hanged him.¹⁶ The ordinary processes of justice had been at work – but the results were not what the vigilantes wanted.

None of these actions by the vigilantes was authorized, yet no one was ever charged with murdering Captain Slade, or for stringing up James Daniels, or for what was done to the other victims of vigilante actions. In fact, many vigilantes were town elites, respectable men in the community. Leading citizens, in instance after instance, stood at the head of vigilante movements. Richard Maxwell Brown quotes from a message sent by a man in Denver, Colorado, in 1859: “There is to be a Vigilance Committee organized in the town this evening. All of the leading men of the town has [*sic*] signed the Constitution.” All of the “first men of the town are determined to punish crime.”¹⁷ “Leading men” were also at the head of the San Francisco vigilance committees. The members, the rank and file, might be drawn from the (male) population as a whole; but the leadership was not. Vigilante membership was also no bar to later success in life. Brown lists a number of men who went on to have distinguished careers. Fennimore Chatterton, like John Osborne, became governor of Wyoming. Two former vigilantes served as governors of New Mexico.¹⁸ Granville Stuart, a Montana vigilante leader, became (among other things) American minister to Uruguay and Paraguay, and president of the Montana Historical Society. Stuart, by the way, organized a group of vigilantes called the “Stranglers”; he also put together a fourteen-man group, in the Musselshell Valley region in Montana, to do something about horse and cattle

¹⁵ Bancroft, *Popular Tribunals* 1, pp. 129–130.

¹⁶ Langford, *Vigilante Days and Ways*, pp. 473–475. Interestingly, Langford, otherwise an apologist for the vigilantes, disapproved of what the vigilantes had done in this case; here they “had exceeded the boundaries of right and justice and became themselves the violators of law and propriety.”

¹⁷ Quoted in Brown, *Strain of Violence*, p. 107. ¹⁸ *Ibid.*, pp. 164–166.

rustling. They shot and hanged rustlers because the law “was powerless to deal with” such thieves.¹⁹

What lay behind the vigilante movement? The obvious answer, and the one repeated over and over again during vigilantes’ prime time, was the assertion that law and order had fatally broken down in Western communities. The towns and mining camps were raw, rowdy, and lawless sites of bloody anarchy. Those who were supposed to uphold the law – sheriffs, for example – could not always be trusted; they were either ineffectual or, what was worse, criminals and highwaymen themselves. Henry Plummer, at one time a county sheriff, was (according to Dimsdale) “chief of the road agent gang.” He ended up on the gallows. The vigilance committee condemned him to death. He was seized at his house, and marched off to execution. He begged for his life, and “seemed almost frantic at the prospect of death.” Standing on the gallows, he “slipped off his necktie and threw it over his shoulder to a young friend who had boarded at his house,” who “threw himself weeping and wailing upon the ground.” Plummer asked for “a good drop,” and he got it; he “died quickly and without much struggle.” His death brought positive results: men “breathed freely” because people like Plummer were “dreaded by almost everyone.”²⁰

Today, in the cool light of history, there is reason to be skeptical about some of these claims. Was Plummer really the criminal Dimsdale described?²¹ Plummer was at one time an elected sheriff; the Democratic Party had nominated him for the territorial assembly.²² The evidence against Plummer, in the view of one modern authority, was “shockingly weak.”²³ And, while no doubt there were law-and-order problems in the West, men like Bancroft and Dimsdale probably exaggerated these problems. The vigilante movements were often *political* movements; some were culture clashes between elites and non-elites, and some were colored by ethnic or religious conflict. This was certainly true in San Francisco. Merchants and leading citizens were at the forefront of the San Francisco vigilance committees: “the most eminent local community leaders,” the “leading businessmen of the city.”²⁴ The executive committee of the 1856 vigilantes had thirty-seven members. Most of them can be identified, and they were primarily importers and merchants; four of the members were bankers.²⁵ The San Francisco vigilance committee of 1856 was in a battle against the Irish and Catholic elements in the city; the goal was to smash the

¹⁹ Dillon, *Montana Vigilantes*, pp. 341–342.

²⁰ Dimsdale, *Vigilantes of Montana*, pp. 129, 130–131, 133. For another account along the same lines, see Langford, *Vigilante Days and Ways*, chapter 10, p. 162ff, and Dillon, *Montana Vigilantes*, pp. 141–146.

²¹ On the doubts about Plummer’s criminality, see the discussion in the foreword to the 2003 edition of *Vigilantes of Montana*, by R. E. Mather.

²² Dimsdale, *Vigilantes of Montana*, p. 224.

²³ Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (New York: Palgrave Macmillan, 2002), p. 95.

²⁴ Brown, *Strain of Violence*, p. 97.

²⁵ Robert M. Senkewicz, *Vigilantes in Gold Rush San Francisco* (Stanford, CA: Stanford University Press, 1985), p. 170.

political machine run by Irish-Catholic Democrats.²⁶ In this, the committee of 1856 was quite successful.

In short, these were not simply “popular tribunals,” spontaneous eruptions from ordinary citizens. In Dimsdale’s famous account of the vigilantes of Montana, the element of a culture war is obvious to the careful reader. The book is astonishingly prudish. You have to wonder: is this the Wild West? Dimsdale seems shocked by society in the raw. He talks about saloons, where “poisonous liquors,” with names like “Tangle-leg” and “Tarantula-juice,” are “vended to all comers”; he talks about the “absence of good female society . . . an evil of great magnitude,” the tawdry dance halls, the presence of women of “easy virtue . . . promenading through the camp,” the “all-pervading custom of using strong language,” and that very general sin, “habitual Sabbath breaking.”²⁷ Dimsdale and the vigilantes represented (in a way) polite society; Dimsdale lived in a rough and tough environment, but he seemed curiously unreconciled to it. Yet this man, who wags his finger in disapproval of “Sabbath breaking” and “strong language,” was comfortable with the fact that his group killed people whom it branded enemies of the people, and all without trial or process.

Whatever the underlying motives, what is important to note is the fact that hardly anybody was ever punished for taking part in a vigilante movement. There were criticisms, to be sure, but no one was ever put on trial. And the critics, such as they were, were swimming against the tide. The men who hanged Captain Slade, the men who hanged Henry Plummer, and the men who supported the men who hanged them, hardly stopped to consider that they were committing a crime. These were in fact crimes, but crimes without punishment.

The Western movements are the most famous; they are the ones that gave their name to the vigilantes. But, as we pointed out, the vigilante idea (and practice) goes back as far as the eighteenth century. And movements have cropped up here and there, in every part of the country, that were more or less like the Western vigilantes. The Ku Klux Klan was, in a sense, a vigilante group. Lynch mobs (which we turn to next) were a kind of vigilante group.

The underlying idea still appears to have a certain appeal: citizens, fed up with crime and disorder, take the law into their own hands. At the end of 1920, jewelers in New York formed a “vigilance committee”; they stationed armed guards at jewelry stores, and offered a reward for information that might lead to the arrest and conviction of whoever had killed a fellow jeweler Edwin Andrews.²⁸ Brown gives examples from the 1960s – groups like the North Ward Citizens’ Committee, in Newark, New Jersey, made up mostly of Italian-Americans. These groups patrolled city streets and kept watch in their areas. In 1990, Robert Neely, the chief justice of West Virginia, published a book entitled *Take Back Your Neighborhood*. Neely

²⁶ Brown, *Strain of Violence*, p. 141. ²⁷ Dimsdale, *Vigilantes of Montana*, pp. 3, 4, 9.

²⁸ “Jewelers Form Vigilantes,” *New York Times*, Dec. 18, 1920.