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John Phillip Reid

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Prosecuting the Elephant: Trials and Judicial Behavior on the Overland Trail

*John Phillip Reid**

I. INTRODUCTION

As the Gold Rush of 1849 went down the neck of the elephant[1] on Hudspeth's Cutoff,[2] a physician who had been wandering about lost for part of the day stumbled upon a valley in which he spied his wagons corralled with others far below. In the twilight he beheld a scene so pleasing that he took time to describe it for readers of the *Western Christian,* a newspaper printed in Elgin, Illinois.

> There almost under my feet was a grand encampment. Several hundred human and inhuman beings were congregated in one of the most delightful spots on the route. A deep valley . . . the lamps and candles and huge bonfires turning night to day—a group there laughing and swearing and gambling—another trying a criminal for a murder recently committed—a hundred males and half a dozen females dancing cotillion on the base rock to the music of flute and hautboy and clarionet [*sic*] and violin and horn—the loud laughter from that little group where some wag is retailing some ridiculous misadventure comes up here distinct and clear and quite refreshing—and yonder little squad sure as I live it is a prayer meeting.[3]

If this forty-niner was more poetic than most of his fellow emigrants, he was in one respect typical of travelers on the overland trail—he saw no need to dwell upon events that interest the legal historian. An educated man writing for publication in a church newspaper, he mentions the fact that "a criminal" was

* Professor of Law, New York University. B.S.S., 1952, Georgetown University; L.L.B., 1955, Harvard University; L.L.M., 1960, J.S.D., 1962, New York University.

1. Emigrants going across the continent on the overland trail, especially those joining the Gold Rush, referred to their adventure as "seeing the elephant" and to the trip as "the elephant." Thus one man wrote in his diary after twelve days down the Humboldt River: "We have now got far enough along to begin to have a sight of the Elephant." E. INGALLS, JOURNAL OF A TRIP TO CALIFORNIA 37 (1852) (entry for July 27, 1850).

2. A California-bound deviation from the original Oregon trail, it avoided Fort Hall and the Snake River area by crossing the desert from Soda Springs to the City of Rocks, near today's Almo, Idaho.

3. I. Lord, Journal of 1849, entry for Aug. 11, 1849 (ms., Huntington Library, San Marino, Cal.). Note: This and other items in The Huntington Library are reproduced by permission.

being tried for "murder" but tells us nothing else. It is not revealed by what authority the person was charged, who was the judge, whether there was a jury, or if counsel was permitted. Even the outcome is unrecorded—whether "the defendant" was found innocent or, if guilty, how punished and by whom.

"There is a man to be tried for murder tomorrow," another physician had written about a month earlier just beyond the Devil's Gate in today's Wyoming.[4] "Of course *'Judge Lynch'* holds the Court out here. I do not know the particulars. The murdered man[']s name was Read."[5] Again, no details are provided;[6] that "law" was being enforced in a region where law supposedly did not exist was a phenomenon deserving no comment.[7]

Where participants were reluctant to tread, historians must fearlessly generalize. The emigrants, we are told, created their own lawmaking and law-enforcing machinery,[8] which preserved order[9] and probably deterred crime.[10] The verdict, however, has not been unanimous. One historian has suggested that the courts and judges of the overland trail were impressive accomplishments.[11] No, they were "grim" and "drumhead," replied another who was not sure "whether these extralegal proceedings should be classified as lynchings or an extension of Anglo-Saxon justice."[12] Lawyers have been just as uncertain, wondering whether the evidence proves anything specific, and, if it does, whether it proves once again that generalities about law are so riddled with exceptions that they are not generalities at all.[13]

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4. Between the present towns of Alcova and Jeffrey City.

5. C. Parke, Notes Crossing the Plains, entry for July 2, 1849 (ms., Huntington Library, San Marino, Cal.).

6. There is, however, a note written at a later time that says: "Note: This man was afterward hung by [the] vigilante Committee for Stealing." *Id.*

7. Emigrants generally noted the absence of law as a socio-moral, rather than legal phenomenon. Thus, after three wagons were admitted to his train, C.W. Smith wrote: "Our new associates appear like upright men—men who would respect justice where there is no law." C. Smith, Journal of a Trip to California Across the Continent from Weston, Mo., to Weber Creek, California, in the Summer of 1850, at 28-29, *quoted in* Read, *Diseases, Drugs, and Doctors on the Oregon-California Trail in the Gold-Rush Years,* 38 MO. HIST. REV. 260, 273 (1944).

8. R. BILLINGTON, THE FAR WESTERN FRONTIER, 1830*1860, at 99 (1956).

9. O. COY, THE GREAT TREK 112-13 (1931).

10. I. PADEN, THE WAKE OF THE PRAIRIE SCHOONER 260 (1943).

11. *See* W. GHENT, THE ROAD TO OREGON 109-11 (1929).

12. M. MATTES, THE GREAT PLATTE RIVER ROAD 79 (1969).

13. One lawyer suggests that historians have taken the ideal as described in romanticized reminiscences and have transformed it into a norm unreflective of realities on the overland trail. *See* Langum, *Pioneer Justice on the Overland Trails,* 5 W. HIST. Q. 421 (1974). Romanticized remembrance is apparently a quality of evidence attractive to the type of historian who writes of the overland trail.

II. Recreating the Remembered Judicial Process

Some generalities about prosecutions and criminal tribunals on the overland trail may safely be made, for there are facts about which we can be reasonably certain. Consider that "criminal" being tried for "murder" on Hudspeth's Cutoff in 1849. There is no doubt the defendant was a male, not a female; just as certainly, he was not an Indian and probably not a black. Most likely the man was an American, although he could have been Canadian or European. Beyond any doubt he was given a trial that most who were present, if asked, would have called "fair." Their criteria of judgment would not have been those of a criminal lawyer, but would have been based on their remembrance of certain traditions observed in courtrooms back home—twelve jurors, a presiding officer addressed as "Your Honor" or "Judge," and witnesses instructed to tell the whole truth. Thus, in the view of an overland emigrant, a defendant enjoying these trappings of justice might complain of the jurisdiction, but not of the fairness.

In the absence of direct evidence, one question that cannot be answered is whether the "criminal" tried at Hudspeth's Cutoff was convicted. An accused on the overland trail was not automatically found guilty. He might be adjudged innocent, released due to lack of evidence, or found to have acted in self-defense. If the defendant was convicted, however, he may have been hanged, whipped, or expelled from the train. It is unlikely (though it would not have been unprecedented) that no penalty was imposed, since few overland companies would take the trouble of accusing, trying, and judging an individual guilty of murder without exacting retribution.

It would be wrong to stereotype the trial on Hudspeth's Cutoff as a creature of the moment, a vigilante gathering of strangers never to assemble as a group again, bent on obtaining vengeance on behalf of a person they did not know. Before starting out on the trail, many overland groups created judicial institutions and drafted rules for trial. Generally, those taking this trouble were concerned with resolving disputes and maintaining harmony between members of their own train by mandating adjudication in place of potentially disruptive, face-to-face conflict. Joint-stock companies,[14] in which property was concurrently owned and could

14. Joint-stock companies were formed by members who purchased equal shares and owned equal rights in the concurrent property and equal claims to all profits. *See* O. Howe, Argonauts of '49, at 4-5 (1923).

be divided only with difficulty beyond the Missouri River,[15] were most likely to have tribunals of adjudication, but many traveling companies had them as well.[16] The rules of a traveling company organized at Kanesville, Iowa, provided: "Resolved, That in case of any dispute arising between any members of the Company, they shall be referred to three arbiters, one chosen by each party, and one by the two chosen, whose decision shall be final."[17]

The method of dealing with disputes varied among different companies. Some overland constitutions like the one just quoted sought to avoid conflict by utilizing arbitration more than adjudication. The rules of a few companies left selection of arbitrators to the litigants;[18] other companies referred disputes to permanent committees. One company organized at Council Bluffs had a three-man "Committee to settle difficulties;"[19] another had "a judicial committee, to decide on all causes of complaint that might arise on the road, whether civil or criminal."[20] Some constitutions entrusted the judicial process to those who also made the company's executive and legislative decisions. For example, the constitution of a company from Muscatine, Iowa, vested in "a Committee on Regulations" the duty "to see that these rules are carefully observed, and to make all rules to regulate the affairs of the emigrants, as they may deem advisable, and to adjudicate all questions of dispute and to see that the rights of each emigrant are protected and enforced."[21]

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15. Reid, *Dividing the Elephant: The Separation of Mess and Joint Stock Property on the Overland Trail*, 28 HASTINGS L.J. 73, 79-89 (1976).

16. Traveling companies were organized by emigrants for purposes of the overland journey only. Emigrants in these companies generally did not own property concurrently, and the companies were automatically disbanded on reaching their destinations. For a brief discussion, see D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 65-71 (1965).

17. Resolutions of the Beloit Company, May 6, 1850, recorded in Journal of Silas Newcomb of Madison, Wisconsin, 1 April 1850 to 31 March 1851, at 30 (ms., Beinecke Library, Yale Univ.); Iowa Clipping File 2 "Gold Rush," (typescript, Iowa State Hist. Dep't, Des Moines); *see* L. SAWYER, WAY SKETCHES CONTAINING INCIDENTS OF TRAVEL ACROSS THE PLAINS FROM ST. JOSEPH TO CALIFORNIA IN 1850, at 19 n.3 (E. Eberstadt ed. 1926).

18. *"Article 4th*—That all controversies arising, shall be arbitrated by three men; each party to choose one man from the company, and those two shall name a third, and their decision shall be final." Constitution of the Wisconsin Blues Organized 8 May 1850 (Western Americana Collection, Beinecke Library, Yale Univ.).

19. The Missouri and Iowa Mining Company, The Frontier Guardian [Kanesville, Iowa], May 29, 1850, at 2, col. 5.

20. F. LANGWORTHY, SCENERY OF THE PLAINS, MOUNTAINS AND MINES 14 (P. Phillips ed. 1932) (entry for May 11, 1850).

21. Report of the Muscatine-California Emigrants' Association, regulation 3, *reprinted in* Lorch, *Iowa and the California Gold Rush of 1849*, 30 IOWA J. HIST. & POL. 307, 315 (1932).

It is worth noting what appears to be a compromise between the desire of allowing the litigants to select their own arbitrators and the apparent desire for uniformity and continuity in judgments that more readily could be anticipated from permanent committees. A passenger train[22] traveling overland via the Texas route set up a "panel of *Jurors*"[23] consisting of thirty-two members. From that panel each party to a dispute was to choose six, and the twelve jurors so chosen were required to "choose one more from the same body, whose duty it [was] to give the casting vote and fix the degree of punishment to all persons found guilty."[24] Though the number of jurors in such a panel may seem large, the very size gave parties some area of selection. At the same time, if all members of the panel kept themselves informed about decisions and the criteria of judgments, verdicts could have been more uniform than if jurors had been taken from the entire company.

While violations of company rules or criminal offenses committed against fellow members of a company might be tried by standing committees, the procedure was sometimes modified by allowing the defendant the option of electing trial by jury.[25] That such may have been the expected norm is suggested by the bylaws of a company from Illinois, whose members, in framing the most elaborate regulations of 1849, seem to have considered just about every issue. The rules adopted indicate that jury trial was the preferred method of resolving criminal charges on the overland trail.

Under these rules, crimes were graded into three groups—minor offenses, assault with a deadly weapon, and homicide—with different trial standards for each. Anticipating the condi-

22. A company in which the members paid for their passage overland to California, much as if purchasing tickets on a common carrier.

23. W. MILES, JOURNAL OF THE SUFFERINGS AND HARDSHIPS OF CAPT. PARKER H. FRENCH'S OVERLAND EXPEDITION TO CALIFORNIA 10 (1851).

24. *Id.* at 11.

25. For example, the three-member executive committee of a Council Bluffs company, appointed to inspect outfits and judge the quality of draft animals hauling individual wagons, was also authorized

> to hear and adjudicate all charges or complaint[s] made against any member of the company—power shall be invested in them, to cause to be brought before them any person or persons against whom complaint shall be made, and for that purpose they shall issue process directed to any of the officers, whose duty it shall be to execute the same. The trial by a jury of six shall be granted to all persons claiming it.

Constitution of the California Express Company, art. 5, The Frontier Guardian [Kanesville, Iowa], May 30, 1849, at 3, col. 3.

tions of law enforcement as they would exist on the trail, the constitutionmakers did not determine the lesser offenses, but left their definition to the vote of the entire company. The question of guilt was to be decided by a jury of five.

> In case [of] any complaints made to the Captain, by any member of the company, that any of the rules or regulations have been violated, or that any of the company have violated the laws of order, right and justice, which are evident to all men, it shall be his duty at the first camping place, to call a meeting of the company, and state to them the complaint that has been made, when, if the company decide, by a vote of a majority, that the offence is of that character—deserving punishment, they shall proceed to the trial of the person complained of, in the following manner. The names of all the company except the parties, the witnesses, and the mess-mates of the party complained of, shall be placed in a box, and five drawn promiscuously therefrom, which five persons shall constitute a jury to try the case. The witnesses, shall be examined under oath, by a person appointed by the Captain, and after a full and fair hearing, the jury shall decide the case by a majority, the jurors to be sworn to do justice between the two parties.[26]

For crimes of assault with a deadly weapon, conviction was more difficult. Verdicts had to be unanimous, and, if found guilty, the defendant could appeal.[27] When a member drew a "deadly weapon on another, except in self-defence, or has threatened the life of another," the question put to the jury was not guilt or innocence but whether "it is unsafe that he shall continue with us." If the jury unanimously agreed that the individual posed a menace, he was expelled.[28]

In a homicide case the jury's size was increased to twelve persons, "and six unqualified challenges [were] allowed on both sides, and as many more as good reason [could] be shown for."[29] Again the verdict had to be unanimous, but "from it there [could] be no appeal."[30] Instead of providing for appeals in homicide cases, the drafters of this constitution concentrated on solving the problem posed by the possibility of hung juries.

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26. By-Laws of the Green and Jersey County Company § 1 (1849), *reprinted in* E. PAGE, WAGONS WEST 338 (1930).

27. The provision for appeal found in § 1 was incorporated by reference into § 2, which dealt with assaults. *Id.* § 2, *reprinted at* 339.

28. *Id.* § 2, *reprinted at* 338-39.

29. *Id.* § 4, *reprinted at* 339.

30. *Id.*

> If the jury cannot agree, a new jury shall be empannelled [*sic*] from the balance of the company, and second trial be had, and so on, to a third jury, when, if the third jury cannot agree, it shall be considered as an acquittal. But if found guilty of wilful murder, a file of twelve men shall be selected, by lot, under the direction of the Captain to execute the penalty of death on the convicted person.[31]

These provisions for trials were much more elaborate than the average. Indeed, by mandating that the secretary make a record,[32] they were unique. Just about the only institution overlooked by this Illinois company was a separate court of appeals which, surprisingly, some organizations included in their constitutional structure of government.[33]

Another surprise is the fact that not every overland company made jurors, selected after an alleged offense had been committed, the triers of fact. Somewhat unusual was the practice of the Oregon Emigrating Company in 1843 of vesting judicial authority in an executive council already in existence. The company's constitution stated: "Any man who shall be guilty of disobedience of orders shall be tried and sentenced at the discretion of the council, which may extend to expulsion from the company."[34] More representative were the rules of an 1846 emigration vesting adjudication with the executive committee but reserving the issue of punishment for the membership as a whole. "The committee of inspection," the rules provided, "shall have power to arraign any person for delinquency of duty, or for the violation of any of the rules or regulations, . . . and the punishment for such delinqency [*sic*] shall be decided upon by a vote of the company."[35]

According to Jesse Applegate, an emigrant of 1843,[36] the provision vesting judicial authority in the executive council worked very well.

> The council was a high court in the most exalted sense. . . . The offender and the aggrieved appeared before it; witnesses were

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31. *Id.*

32. *Id.* § 5, *reprinted at* 339.

33. A. DELANO, LIFE ON THE PLAINS AND AMONG THE DIGGINGS 85 (1854).

34. Constitution of the Oregon Emigrating Company, rule 3, in Letter from Peter H. Burnett to James G. Bennett (Jan. 18, 1844), *reprinted in* THE FRONTIER EXPERIENCE 97 (R. Hine & E. Bingham eds. 1963).

35. Laws of the 1846 Emigration, law 8, in Letter from George L. Curry to the *St. Louis Reveille* (May 11, 1846), *reprinted in* 2 OVERLAND IN 1846, at 522 (D. Morgan ed. 1963).

36. 1 DICTIONARY OF AMERICAN BIOGRAPHY 325-26 (1928).

> examined, and the parties were heard by themselves and sometimes by counsel. The judges thus being made fully acquainted with the case, and being in no way influenced or cramped by technicalities, decided all cases according to their merits. There was but little use for lawyers before this court, for no plea was entertained which was calculated to hinder or defeat the ends of justice.[37]

Applegate has given us a rather romantic reminiscence and what he says must be taken with large grains of salt.[38] Undoubtedly closer to reality is the description of Edwin Bryant, who crossed the continent with the emigration of 1846 and wrote soon after[39]—not a quarter century later as did Applegate.[40] True, Bryant asserted, the committee of inspection called for by the rule quoted above did exist and did function, but there was not much to be said for its judicial capabilities. "The court of arbitrators, appointed to decide disputes between parties, and to punish offenders against the peace and order of the company, does not appear to have much authority," Bryant concluded. "The party condemned is certain to take an appeal to an assembly of the whole, and he is nearly as certain of an acquittal, whatever may have been his transgressions."[41]

Bryant should not be misunderstood. Appeals were allowed under the rules of 1846. He was finding fault neither with the right of appeal nor with the fact that it generally led to acquittals. Bryant was, in fact, satisfied and apparently thought it just as well that prosecutions did not end too often in punishments. The overland emigrants, he pointed out, were in circumstances "where no law prevails except their will."[42] Bryant believed that the company's collective will was an agency that could be trusted to make correct, and even legal, decisions. He concluded:

> So thoroughly, however, are our people inbued with conservative republican principles, and so accustomed are they to order and propriety of deportment, that with a fair understanding, a majority will always be found on the side of right . . . and they

37. Applegate, *A Day with the Cow Column in 1843*, 1 OVERLAND MONTHLY 127, 130-31 (1868), *reprinted in* THE FRONTIER EXPERIENCE 101-02 (R. Hine & E. Bingham eds. 1963) and W. GHENT, *supra* note 11, at 110-11.

38. Langum, *supra* note 13, at 436-39.

39. E. BRYANT, WHAT I SAW IN CALIFORNIA (1849).

40. Applegate was thirty-two years old and the captain of the "Cow Column" of 1843. He published his recollections in 1868. Applegate, *supra* note 37.

41. E. BRYANT, *supra* note 39, at 60, *reprinted in* O. COY, *supra* note 9, at 114.

42. *Id.* at 61, *reprinted in* O. COY, *supra* note 9, at 114.

> will sanction nothing in derogation of the principles of the American constitution and American justice.[43]

What Edwin Bryant was saying might easily be misunderstood by lawyers. We tend to think that crime is deterred only by the certainty of its punishment. That defendants convicted of crimes were able to appeal to what looks to us like a political forum—the entire company membership—and obtain reversals, appears to defeat the deterrent purpose of criminal adjudication. What cannot be overlooked is that our purpose was not the emigrant's purpose. They did not seek deterrence or punishment; instead, they sought harmony. Troublemakers on the overland trail were easily dealt with by expulsion from the group. When a wrongdoer appealed to the entire membership, he was stating explicitly that he wished to remain a member. The fact that he was also escaping punishment was not as material as we might think. Punishment would disrupt the harmony of the group. Forgiveness, following an act attesting to a desire to be part of the group, restored harmony, and restoration of harmony was the first purpose of overland trials.

If one can believe Bryant, there was no need to create permanent judicial tribunals. Emigrants on the trail could be trusted to establish fair and competent courts of justice ad hoc whenever the need arose. Surprisingly, some lawyers seemed to agree.[44] A case in point is the Constitution of the Charlestown, Virginia,[45] Mining Company[46]—a company consisting mainly of "farmers, mechanics and lawyers."[47] Drafted in Virginia long before its members began the trek west, it is difficult to believe the constitution was not the work of an attorney. The constitution contained both an unusually large number of duties and implied offenses[48] and a section calling for the assessment of penalties;[49]

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43. *Id.* at 61-62, *reprinted in* O. COY, *supra* note 9, at 114.

44. Addison Crane, a judge in Indiana who later became a judge in California, believed that by 1852 there was no need even for a constitution or bylaws. A. Crane, Journal of a Trip Across the Plains in 1852, entry for May 12, 1852 (ms., Huntington Library, San Marino, Cal.).

45. Today's West Virginia.

46. This constitution is reprinted in TRAIL TO CALIFORNIA 213 app. (D. Potter ed. 1945) [hereinafter cited as TRAIL TO CALIFORNIA].

47. M. MATTES, *supra* note 12, at 33. "The great number of professional men, enlisted in this expedition, would seem to argue that professional labors are not well rewarded in the United States, or perhaps, that the ranks of all the professions are too much crowded." F. LANGWORTHY, *supra* note 20, at 9 (entry for April 28, 1850).

48. Constitution of the Charlestown, Virginia, Mining Company, arts. XV & XVI, TRAIL TO CALIFORNIA, *supra* note 46, at 219-20 app.

49. *Id.* art. XVII, § 1, TRAIL TO CALIFORNIA, *supra* note 46, at 220 app.

yet there was no provision for trials. The constitution did not even specify what body was to mete out the penalties.[50] Expulsion was authorized by majority vote,[51] and there were fines the officers could impose,[52] but no mention was made of adjudication, argumentation, or defense.

We cannot be certain, but it is quite possible that members of some traveling companies made a conscious, deliberate decision not to create judicial tribunals. What else can be made of a constitution that mentions neither courts nor penalties, yet has an executive committee both for the purpose of "enforcing the Laws of the Company" and to see that the laws were "exercised at all Times."[53] The implication is plain. Should violations occur, or members argue over the meaning of rules, there would be time to call a meeting and decide how the matter would be resolved.

III. Applying the Remembered Judicial Process

We should be grateful to those overland companies that created judicial tribunals or elected judges before civil controversy arose or crime occurred.[54] Doing so when there was no immediate pressure of convening a court allowed them time for careful reflection. The rules they wrote provide some of the best evidence extant of what emigrants thought of the judicial process—of their theory of jurisdiction and their notions of fairness. The constitutions, compacts, and bylaws may not, however, be a guide to specific conduct.[55] While some reports refer to these tribunals as

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50. Trail to California, *supra* note 46, at 18.

51. Constitution of the Charlestown, Virginia, Mining Company, art. XVII, § 2, Trail to California, *supra* note 46, at 221 app.:

> In all cases of expulsion, the President shall announce, in general meeting, the name of the person accused, and the cause of complaint, when a vote shall be taken by ballot. A majority voting in favor of such expulsion, the President shall announce that as the decision, and the accused's connection with the Company shall thereupon cease.

52. Fines were expressly provided for gambling or intoxication. *Id.* art. XVI, §§ 2 & 4, Trails to California, *supra* note 46, at 220 app.

53. Constitution of the California Banner Company, art. II, in Diary of Albert G. Paschel, Overland Trip to California with Ox Team, in the Year 1850, at 10 (typescript, State Hist. Soc'y of Iowa, Iowa City) (entry for May 7, 1850). The same inference can be drawn from a similar constitution mandating supervision of weight requirements and equipment standards. Constitution of the Savannah Oregon Emigrating Society, arts. XIV & XV (1945), *reprinted in* Lockley, *The McNemees and Tetherows with the Migration of 1845—Organization Documents of that Migration*, 25 Q. Ore. Hist. Soc'y 353, 365-69 (1924).

54. *See, e.g.*, 1 J. Thornton, Oregon and California in 1848, at 46 (1849); J. Palmer, Journal of Travels Over the Rocky Mountains 16 (1847).

55. One commentator has noted:

functioning, most do not. In fact, many, like the account written on Hudspeth's Cutoff,[56] do not reveal either the makeup of the court or the procedure followed.

That a trial was conducted seems to be information enough for most overland diarists. "Tried a member for a violent assault with a Bowie-Knife, on his messmate," is all that is said by the captain of a large company governed by a joint-stock constitution.[57] There is no hint whether he convened a constitutional tribunal or created one especially for the occasion. Some emigrants who mention trials did not even indicate who rendered the verdict[58] or what procedure was followed.[59] Moreover, it was not unknown for an emigrant to discuss a case and detail both the crime and the punishment, yet not mention whether a trial had been conducted.[60]

Fortunately, enough emigrants were sufficiently interested to furnish us with some accounts of trials and punishments on the overland trail. There are not as many as we might wish; they are at best a sampling that tells us more about attitudes than about specific procedures. The quantity of evidence is not so large as to enable us to reconstruct a typical trial, yet it is more than sufficient to permit us to draw conclusions about motivations, objectives, and philosophies.

> [T]here is no evidence suggesting a correlation between elaborate rules or judicial machinery and an actual effective operation of pioneer courts. These ordinances or constitutions . . . may be of interest as guides to pioneers' philosophies about law and social organization, [but] they do not help answer the more essential question of how, in fact, not in theory, did the overland pioneer face problems of social disorder, crime, and private conflict.

Langum, *supra* note 13, at 424 n.12.

56. Note 3 and accompanying text *supra*.

57. 1 GOLD RUSH: THE JOURNALS, DRAWINGS, AND OTHER PAPERS OF J. GOLDSBOROUGH BRUFF 227 (G. Read & R. Gaines eds. 1944) (entry for Oct. 17, 1849).

58. Thus one journal tells of a killing: "A court of inquiry pronounced it justifiable homicide." The event occurred near Fort Kearny, which had a garrison of 150 men, but it is not said whether the "court of inquiry" was military or emigrant. William North Steuben and his Journal 1849-50, at 5 (H. Rutledge ed., typescript, Cal. Hist. Soc'y, San Francisco).

59. "While we lay at the spring the man suspected of the murder of Reid on the Platte was examined & honorably acquitted." 1 J. Wood, Diaries of Crossing the Plains in 1849 and Life in the Diggings from 1849 to 1853, entry for July 4, 1849 (ms., Huntington Library, San Marino, Cal.).

60. Thus a diary tells, in great detail, of a homicide that occurred at the northwest end of Nevada's Black Rock Desert. The reasons for the killing are explained, the event itself, the long lingering death, and the efforts made to secure the victim's estate for his heirs. Diary of P. Castleman While Crossing the Plains to California, entries for Sept. 9, 10, & 11, 1849 (ms., Beinecke Library, Yale Univ.). Thanks to a second diary we know that the manslayer was tried and "a jury of emigrants justified him." S. Doyle, Journal and Letters of Simon Doyle, entry for Sept. 10, 1849 (ms., Beinecke Library, Yale Univ.).

While not all offenses mentioned in diaries were defined with the precision a lawyer would expect,[61] there are several categories of crimes that we may readily identify as having been tried and punished on the overland trial. They ranged from homicides,[62] which the emigrants generally called "murder,"[63] to "slandering the company."[64] While the last crime, for which the culprit was expelled, is so vague we can never hope to know what it involved, we would be mistaken to ignore the category in which it belongs. Offenses against companies or violations of company rules were quite numerous. These included refusal to obey orders,[65] "insulting officers,"[66] desertion of duty,[67] and, most common of all,[68] neglect of guard duty.[69] Less frequently charged than might

61. "[W]e found two bad fellows, held a Court Marshal and drove them off." Letter from Thomas B. Eastland to Josephine Eastland (July 9, 1849) (typescript, Cal. Hist. Soc'y, San Francisco).

62. For a discussion of homicide as a punishable offense on the trial, see Langum, *supra* note 13, at 428-29, 433-35.

63. A related crime was attempted murder. *See, e.g.*, Banks, Diary, entry for July 20, 1849, *reprinted in* THE BUCKEYE ROVERS IN THE GOLD RUSH 45-46 (H. Scamehorn ed. 1965).

64. 1 GOLD RUSH: THE JOURNALS, DRAWINGS AND OTHER PAPERS OF J. GOLDSBOROUGH BRUFF 227 (G. Read & R. Gaines eds. 1944) (entry for Oct. 17, 1849).

65. Journal of J. Dutton, entry for June 4, 1850, *reprinted in Across the Plains in 1850,* 9 ANNALS IOWA 447, 461 (1910). This offense was often committed by persons who were dissatisfied with the company and who were thinking of withdrawing. The mere fact of accusation and trial might provide the incentive for a member to seek a separation from the company. Absent a voluntary withdrawal, the offense could be punished by expulsion from the company. In one incident where company orders were ignored, "an Executive Committee" was selected "to enquire into the causes of their violation of Constitution and disobedance [*sic*] of Orders." When the culprit was summoned, he "sent some insulting language back to them & for the two offences his wagon was expelled from the train." THE OVERLAND DIARY OF JAMES A. PRITHCARD FROM KENTUCKY TO CALIFORNIA IN 1849, at 75 & 77 (D. Morgan ed. 1959) (entries for May 29 & 30, 1849).

66. Diary of G. McKinstry, entry for June 2, 1846, *reprinted in* 1 OVERLAND IN 1846, at 210 (D. Morgan ed. 1963).

67. "[H]eld court to try some offenders for deserting post and officers for misdeameanor [*sic*] in their official capacity. Maxon is prosecuting attorney." L. Howell, *Diary of an Emigrant of 1845,* 1 WASH. HIST. Q. 138, 140 (1907) (entry for May 24, 1845).

68. Shaffer, *The Management of Organized Wagon Trains on the Overland Trail,* 55 MO. HIST. REV. 355, 363 (1961).

69. "[H]ard getting the guard for later part of the night—some are to be courtmarshelled [*sic*]." O. Hall, Diary of a Forty Niner 5 (typescript, Cal. State Library, Sacramento). "Second trial of Mr. Moss for not standing guard. Jury could not agree." JOURNAL OF MEDOREM CRAWFORD 11 (1967). One cause of the offense was that, once out on the plains and after discovering there was no danger from Pawnees, Sioux, or Snakes, many emigrants concluded that guard duty was not necessary. An example is David Rohrer Leeper:

> It was alleged that I failed to respond to the call of the sentinel whom I was to relieve. It was at the time raining and blustering forbiddingly without. It was much more inviting beneath the protecting wagon sheets than out upon the bleak, howling plain. Hence the presumption of guilt lay manifestly against me, and I was promptly arraigned and tried on the charge. A witty and brilliant

be expected were the misdemeanors of fighting,[70] assault,[71] and theft.[72]

One need not dig far into the overland records to find that homicide was the offense commanding the greatest attention. Certainly, it received the most lengthy descriptions in diaries. What we know about trials on the California and Oregon trails comes largely from accounts of prosecutions against men accused of deliberate homicide. One basic generality can be gleaned from these cases—the emigrants did not attempt to create sui generis institutions. Instead, they duplicated or imitated the courts and judicial procedures remembered from back home. If two lawyers were present, one might be appointed to prosecute, the other to defend.[73] Someone served as prosecutor for minor as well as major offenses.[74] A defendant might be permitted to hire a lawyer, even a stranger passing by in another train.[75]

Most telling of all was the emigrants' insistence that the triers of fact duplicate the function of the jury in American criminal law. To the untrained eye of the nonlawyer, it might on first glance appear that emigrants had a different model in mind. In noncapital cases the whole company sometimes decided guilt or innocence,[76] and it was not unknown for a murder prosecution to

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attorney from Columbus, Ohio, volunteered to defend me. The counsel laid much stress on my unsophisticated make-up, and thus in a serio-comic vein affected to appeal to the sympathy of the court. But the court nevertheless remained inexorable, and a double stent [*sic*] of guard duty was the finding. Whether or not that judgment was ever carried into effect, is a matter that does not appear of record.

D. LEEPER, THE ARGONAUTS OF 'FORTY-NINE 20 (1894).

70. H. Shombre, Diary, entry for June 3, 1849 (ms., Kansas State Hist. Soc'y, Topeka).

71. Note 57 and accompanying text *supra*; 2 GOLD RUSH: THE JOURNALS, DRAWINGS, AND OTHER PAPERS OF J. GOLDSBOROUGH BRUFF 598 n.142 (G. Read & R. Gaines, eds. 1944) (entry for Oct. 17, 1849). J. Goldsborough Bruff made the following journal entry for July 9, 1849: "A guard-sergeant struck one of the men violently in the face, upon which I immediately convened the Company into a drum-head court, tried the offender, broke him of his office, and inflicted 4 extra-guards on him." *Id.* at 36.

72. J. Thorniley, Diary of Overland Journey in 1852, entry for June 12, 1852 (ms., Cal. State Library, Sacramento). One such crime was described as "Theft in anticipassion." *Arthur M. Menefee's Travels Across the Plains, 1857,* NEV. HIST. SOC'Y Q., Spring 1966, at 17 (entry for Aug. 10, 1857).

73. W. Sullivan, Crossing the Plains in 1862, at 5 (typescript, Huntington Library, San Marino, Cal.). *See also* J. Burroughs, 1911 Reminiscences of 1856 Overland Journey 47 (typescript, Cal. Hist. Soc'y, San Francisco).

74. *See, e.g.,* note 67 *supra.*

75. A. DELANO, *supra* note 33, at 125; TRAIL TO CALIFORNIA, *supra* note 46, at 135 n.7.

76. The wife of R.S. Dickinson, the lieutenant or second officer of the Fear Not Company, was thrown from a wagon and hurt her ankle.

be settled by vote of every emigrant present—whether witnesses, companions, or strangers.[77] In a sense these trials depart from the Anglo-American norm, but not as much as they might have, and the departure is not basic. The overland emigrants did not do what logic might have dictated—*i.e.*, they did not go back to the early English pattern and entrust the decision to those who knew the facts. With a small population, no regular tribunals, no police, no rules of evidence, and an uncertain supply of lawyers, it would have made sense to have asked the truth of those possessing the truth. Instead, the general rule—especially in homicide situations—was to select a jury of twelve men and, after presenting evidence through witnesses, entrust the decision to them.[78]

That overland juries were close copies of commonlaw juries should be greeted with surprise, not dismissed as inevitable. Not only were overland jurors not required to know the circumstances of the alleged crime, they did not have to come from the company of the accused. Legal theory on the trail took for granted that "stranger emigrants"[79] could render a fair verdict, much as in an established American court of law, by hearing evidence from witnesses, weighing arguments, and reaching decisions. Thus one caravan tried a homicide accusation with "a jury of men out of another train and witnesses out of our train."[80] Another man-

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> When Lieut. Dickinson was called on watch this morning he refused to serve, in consequence of his wife being unable to help herself. Some of the company found fault with him and the matter was brought before the company at 12 o'clock. The decision was in Dickinson's favor. Some other difficulties arose, one being that the Captain drove too fast to suit Dickinson and his associates, and they asked the privilege of withdrawing from the company. . . . [T]his privilege was granted by a vote of the company.

Journal of J. Dutton, entry for June 4, 1859, *reprinted in Across the Plains in 1850,* 9 ANNALS IOWA 461 (1910). For a case in which the "jury consisted of the whole company," see L. HASTINGS, THE EMIGRANT'S GUIDE TO OREGON AND CALIFORNIA 6 (1845).

77. W. Sullivan, *supra* note 73, at 5.

78. *See, e.g.*, Diary of Robert Eccleston, entry for Nov. 29, 1849, *reprinted in* OVERLAND TO CALIFORNIA ON THE SOUTHWESTERN TRAIL 1849, at 217 (G. Hammond & E. Howes eds. 1950); J. Burroughs, *supra* note 73, at 47; *Diary of E. W. Conyers, a Pioneer of 1852,* TRANSACTIONS OF 23D ANNUAL REUNION OF ORE. PIONEER ASS'N JUNE 15, 1905, at 423, 459 (1906) (entry for July 5, 1852); DIARY OF JAY GREEN 14 (5th Publication of San Joaquin Pioneer & Hist. Soc'y, 1955) (entry for June 13, 1852). For example, one participant recorded: "This evening at four oclock I with eleven other emigrants were [*sic*] called upon by the crowd en mass to serve as a jury in a case of murder . . . ." *Alexander Ramsay's Gold Rush Diary of 1849,* 18 PAC. HIST. REV. 437, 452 (1949) (entry for July 4, 1849).

79. "A jury was selected, mostly from the stranger emigrants." W. MAXWELL, CROSSING THE PLAINS DAYS OF '57, at 152 (1915).

80. Samuel Chadwick's Travels to California in 1852, entry for July 15, 1852 (ms., State Hist. Soc'y of Wis., Madison), *reprinted in* H. EATON, THE OVERLAND TRAIL TO CALIFORNIA IN 1852, at 225 (1974).

slayer was tried by "[t]ribunal representatives of over 200 wagons in the neighborhood,"[81] while a third panel was selected from fifty men "collected from both front and rear trains."[82]

Size more than judicial theory may have determined practice. Larger companies picked triers of fact from among their own membership; no notion of judicial fairness required them to select strangers to settle their controversies. Some smaller companies thought the selection of strangers imperative. One killing that appeared to be premeditated in all aspects occurred in a company that "was composed of eleven men and three wagons."[83] An ox train of thirty members was just behind, and the smaller group "concluded to await their arival [*sic*][.] [T]hey came up[,] buried the murdered man and after a short counsil [*sic*] took the murderer into custody."[84] The next day it was decided there still were not enough men to resolve the matter. More advice was needed. "A council being held upon the best way of disposing of the prisioner [*sic*] and it being agreed upon that wee [*sic*] travel on about thirteen miles . . . whare [*sic*] we expected to overtake a large train—in doing so our object was to get more council."[85] Once having gathered "about one hundred men," they were satisfied. "After dinner the trains and companys [*sic*] were respectfully invited to meet and attend the tryal [*sic*] of Balsley for the murder of Beel."[86]

If we fail to mark the willingness of emigrants to stop and conduct these trials, it is because we forget conditions on the overland trail. One man who as a stranger emigrant participated in a hearing lasting a whole day thought it a sacrifice—a civic duty that had to be performed, but a sacrifice nonetheless.

> You must know it was no small matter, hundreds and hundreds of miles from anywhere, with no certain knowledge of just when you can get there, and every dollar you are worth invested in what you have with you, and in many, yes in most, instances, that year, families, women and children, that from the day they leave the borders of civilization until they reach them again are

81. J. Verdenal, Journal Across the Plains 1852, at 22 (typescript, Bancroft Library, Univ. of Cal., Berkeley) (entry for July 6, 1852).

82. J. Burroughs, *supra* note 73, at 47.

83. DIARY OF JAY GREEN, *supra* note 78, at 11 (entry for May 31, 1852).

84. *Id.* at 13 (entry for June 12, 1852).

85. *Id.* (entry for June 13, 1852); Samuel Chadwick's Travels to California in 1852, entry for June 13, 1852, *reprinted in* H. EATON, *supra* note 80, at 221-22.

86. DIARY OF JAY GREEN, *supra* note 78, at 13-14; Samuel Chadwick's Travels to California in 1852, entry for June 13, 1852, *reprinted in* H. EATON, *supra* note 80, at 222.

> day by day exposed to suffering, danger and death, or worse. I say it is no small thing for train after train to stop and voluntarily loan themselves and their all, and in most instances possibly not for their own good either.[87]

Some emigrants thought the duty too heavy. A train of thirty-two wagons with a guard list of seventy men[88] was traveling close to a smaller company in which a man named Gadson killed a fellow emigrant. The second group asked the larger "to let them pick a jury from [its] train to try Gadson for the murder, but [it] declined having anything to do with the business."[89] The request was made because the company of the manslayer, or so it believed, had too few men for such responsibility.[90] It is, however, not clear why the larger group did "not choose to be mixed with it in any way."[91] Delay could not have been a factor. While the larger company did move ahead,[92] the two groups were caught up when the trial ultimately took place, for members of the larger company witnessed both it and the subsequent punishment.[93]

IV. Imitating Rights and Defenses of the Remembered Judicial Process

Selecting jurors who were strangers—who were not witnesses to the homicide and who had no knowledge of the facts—was only one of several procedural steps remembered of trials in the States and employed by emigrants intent on giving a defendant what they called a "fair" trial. If we accept what they themselves tell us, trials were often models of American criminal justice. Just consider this description written by a man who unfortunately was not present. Although hearsay perhaps, this account does represent the standard of procedural competency one emigrant believed possible on the overland trail, and which his informants wanted him to believe they had followed.

> The company chose a judge to preside over the trial, and a sheriff, who empaneled a trial jury of twelve men, who heard all

87. J. Burroughs, *supra* note 73, at 57.

88. H. Powell, Diary of 1849-1852, at 106 (ms., Bancroft Library, Univ. of Cal., Berkeley) (entry for Sept. 7, 1849).

89. *Id.* at 101-102 (entry for Sept. 4, 1849).

90. "Their train is so small that they do not like to take the responsibility of punishing him." *Id.* at 103 (entry for Sept. 5, 1849).

91. *Id.*

92. *Id.* at 102 (entry for Sept. 4, 1849).

93. *Id.* at 106 (entries for Sept. 7 & 8, 1849).

> the evidence, after which the judge charged the jury. The jury retired a short distance from camp, under the charge of the sheriff chosen by the company for the emergency, for their deliberation. In about twenty minutes they returned and informed the court that they had decided on a verdict. The foreman then handed their written verdict to the court which read as follows: "We the jury, do find the defendant guilty of murder in the first degree as charged." Signed by all the jurors. The court immediately passed sentence on the defendant, "to be hanged by the neck until dead, dead, dead, and may God have mercy on your soul."[94]

One possible procedural step beneficial to the defendant was overlooked. Since "two graves were dug, one for the murdered man, the other for the murderer," and both bodies were buried together,[95] it is evident the accused had little time to prepare a defense. Trials were seldom delayed on the overland trail.[96] When they were, it was usually for reasons the emigrants would have classified under the heading of "judicial fairness." Defendants, for example, were sometimes transported for two or three days while their captors looked for jurors.[97] One company had a constitutional prohibition against forcing trial "within three days."[98] Another company buried a homicide victim "right off and then the train started out and the murderer along and he is to have a trial tomorrow after the excitement is over."[99] There seems even to have been one occasion when the jury, after receiving the familiar warning that the accused be tried only by evidence heard from witnesses in open court, was allowed ample time for deliberation. A trial for murder had

> consumed the entire day until dark, and the Jury were given 'til next morning to bring in their verdict. Of course, they returned to their respective camps to sleep, the judge charging them to

94. Diary of E.W. Conyers, *supra* note 78, at 459 (entry for July 5, 1852).

95. *Id.*

96. "Last night there was a man kill[ed] or shot by one of his own men[. T]he man was arrested tried and [sentenced] to and hund [*sic*] all within 12 hours[. I]t was a short time for him to have his neck streached." J. Compton, Diary, entry for May 14, 1853 (ms., Bancroft Library, Univ. of Cal., Berkeley).

97. H. Powell, *supra* note 88, at 101-105.

98. The second constitution of this 1845 emigration contained the following provision: "Anyone guilty of wilful Murder shall be punished by death and shall not be forced into trial before three days." By-laws of Oregon Society Constitution (May 5, 1845), *reprinted in* Lockley, *supra* note 53, at 377.

99. Samuel Chadwick's Travels to California in 1852, entry for July 14, 1852, *supra* note 80, at 225. The company's plan was to continue to drive "that day untill the excitement is over and have a trial of it tomorrow." *Id.*

> discuss the matter with no one and to return in the morning, get together and make up their verdict.[100]

It would not do to leave the impression that all overland trials were conducted with a decorum that would have done honor to Westminster Hall. Our problem is that too many of our tales come from reminiscences recounting the nobility of emigrants, not their failings. There were undoubtedly many trials closer to lynchings than to the commonlaw model. Also, there were some that took unusual turns. Alonzo Delano, writing for contemporary publication, reported a particularly bizarre incident. A man named Williams, suspected of killing a fellow emigrant back at the Devil's Gate, was "arrested" beyond the Green River and put on trial. "At the commencement, as much order reigned as in any lawful tribunal of the States. But it was the 4th of July, and the officers and lawyers had been celebrating it to the full, and a spirit other than that of '76 was apparent."[101] The officers were members of the Army's regiment of mounted riflemen bound for Fort Hall, and among the lawyers was Williams' defense counsel. He,

> in a somewhat lengthy and occasionally flighty speech, denied the right of the court to act in the case at all. This, as a matter of law, was true enough, but his remark touched the pride of the old [chief justice], who gave a short, pithy and *spirited* contradiction to some of the learned counsel's remarks. This elicited a *spirited* reply . . . . From taking up words, they finally proceeded to take up stools and other belligerent attitudes. Blows, in short, began to be exchanged, the cause of which would have puzzled a *"Philadelphia lawyer"* to determine, when the emigrants interfered to prevent a further ebullition of patriotic feeling, and words were recalled, hands shaken, a general amnesty proclaimed, and this spirited exhibition of law, patriotism *"vi et armis,"* was consigned to the "vasty deep."[102]

The defendant was forgotten. "[S]eeing that his affair had merged into something wholly irrelevant, with a sort of tacit consent, [he] withdrew, for his innocence was generally understood, and no attempt was made to detain him."[103]

Unfortunately, Delano, following a common practice among overland authors writing for contemporary publication, strove

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100. J. Burroughs, *supra* note 73, at 47.
101. A. DELANO, *supra* note 33, at 125-26 (entry for July 4, 1849).
102. *Id.* at 126.
103. *Id.* at 126-27.

more for humor[104] than for accuracy.[105] One point made by him, however, that can be taken seriously was the defendant's innocence,[106] a fact "generally understood" by the assembled emigrants.[107] If true (and there is evidence some eyewitnesses thought the outcome a miscarriage of justice),[108] then we have one explan-

104. For another example of making light of what may have been a serious trial, see L. HASTINGS, *supra* note 76, at 6.

105. Although Delano's account is basically accurate, its embellishment for the reading public is indicated by the diary of a second emigrant who was a participant in the events Delano described, and who wrote his entry on the day of the event without thought of publication:

> This evening at four oclock I with eleven other emigrants were called upon by the crowd en mass to serve as a jury in a case of murder which had been committed about a week since back at the Devils gate and the criminal was apprehended a short distance beyond this [place] & brought back here for trial[. B]ut the trial failed in consequence of the inability of General Simonson of the U.S. army and his officers [of the regiment of Mounted Riflemen, bound for Fort Hall] to whom the emigrants looked for a fair investigation of the case[. B]ut soon after the trial commenced they quarreled among themselves and came [to] blows, when the court broke up in a rowe, and the prisoner recrossed the river & went on his way rejoicing.

Alexander Ramsay's Gold Rush Diary of 1849, 18 PAC. HIST. REV. 437, 452 (1949)(entry for July 4, 1849).

Delano attributes Williams' arrest to the fact that the emigrants were pursuing the perpetrator of another homicide that occurred at the Green River ferry. A. DELANO, *supra* note 33, at 124-25 (entries for July 3 & 4, 1849). Delano reports that the pursued killer, a man named Brown, was not captured. *Id.* at 125 (entry for July 4, 1849). According to the second account, which was not written for later publication, but was entered in a private journal at the Green River, the killing had occurred four days earlier and Brown was not pursued; he was arrested on the spot. Given the choice of a trial or expulsion from the emigration,

> he said he was ready to walk the plank but some objecting to his choosing this mode lest he should escape, demanded that he should have a trial at once. A sheriff was appointed but no one would act as judge or jury as we were now in Oregon territory [today's western Wyoming]. He said he would not stand trial but would go on to Oregon and take his trial or if he got to the states would deliver himself up to the proper tribunal. It being difficult to conduct a prisoner to Oregon or Fort Hall he was set at liberty and his things were thrown out of the waggons [*sic*].

Diary of J.C. Buffum 1847-1854, entry for June 30, 1849 (ms., Cal. State Library, Sacramento). For another manuscript diary, disagreeing with Delano and corroborating Buffum in every detail, see J. Stitzel, Overland Diary, Mar. 20—Aug. 26, 1849, at 145-49 (microfilm, Bancroft Library, Univ. of Cal., Berkeley) (entries for June 29 & 30, 1849).

106. Delano made the point in a rather interesting context: "Had he known it, there were witnesses enough in the crowd to have justified him, but as he did not, he was disposed to take advantage of any technicality, and therefore employed counsel." A. DELANO, *supra* note 33, at 125.

107. *Id.* at 127.

108. An emigrant who served as a juror was annoyed by the outcome, and claimed to be reflecting the views of many others: "There is a general expression of disapprobation amongst the people at the result[,] and in this case we believe we see a fair sample of the protection that we may expect of lives and property during our residence in Califor-

ation why Williams was suffered to ride away unhindered. The overland emigrants did not seek vengeance; they did not desire to convict and punish an individual for an act that would not have been a crime back home. As we have seen, defendants tried on the overland trail could be "honorably acquitted."[109] In one trial there were seven defendants accused of cattle stealing. Six were convicted and sentenced to death. The seventh was acquitted on the testimony of the condemned men, even though one was his older brother who might have been suspected of partiality.[110] It was believed he had been coerced into joining the gang[111] and had been a party to crime without either intent or free will.

A somewhat common verdict on the overland trail was justification—a killing, it would be said, had been "justified."[112] As far as can be determined, justified meant the defendant had convinced the court that he had acted either in self-defense or as a result of sufficient provocation. Self-defense was universally recognized as an excuse for homicide, although we cannot be certain how liberally it was interpreted. There seems, however, to be little doubt the overland definition was broader than that of the common law. Certainly the legal meaning of "provocation" was extended. In one representative case occurring at Shinn's Ferry on the Platte River,

> [a]n emmigrant [*sic*] with some loose stock had crossed in his turn, but was unable to get all of his stock on the ferry, being compelled to leave one cow. So he returned to get his cow. It so happened that a man who conducted a ranch[113] somewhere on the South side of the Platte was registered for that trip. He was loaded with supplies for his ranch, principally liquors, and in all probability was somewhat under the influence of his stock in trade at the time. He had no loose stock and there was plenty of room on the ferry for the emmigrant's cow; so he led her on the boat. The ranchman told him he could not take the cow across on that trip and ordered him off the boat. The emmigrant paid no attention and stood holding the rope by which he led

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nia." *Alexander Ramsay's Gold Rush Diary of 1849,* 18 PAC. HIST. REV. 437, 452 (1949) (entry for July 4, 1849).

109. *See* note 59 *supra.*

110. J. Burroughs, *supra* note 73, at 48-49.

111. *Id.* at 49-50.

112. S. Doyle, *supra* note 60, entry for Sept. 10, 1849. For a verdict of "justifiable homicide," see note 58 *supra.*

113. A "ranch" was a sort of overland or emigrant trading post and road house. Ranches sprang up along the Platte during the Colorado Gold Rush of 1859. M. MATTES, *supra* note 12, at 46, 129, 151-52, 270-80.

> the cow. The ranchman rushed at him and knocked him down. Mr. Emmigrant lying on the bottom of the boat pulled his pistol and shot the ranchman directly through the heart.[114]

Halting service, the ferryman pressed all willing emigrants into a court. This emigrant jury was apparently expected to answer but one question—"justification." "The killing was either justified or not justified. If justified the emmigrant was entitled to be cleared. If not he should be punished."[115] Every man present could serve on the jury, lawyers participated on both sides of the contest, and about half a dozen eyewitnesses testified. "All those believing the prisoner guilty of murder will step to the East of the road," the judge instructed. "And all those believing him not guilty will step to the West side."[116] Everyone went west. "The verdict is Not Guilty, and the prisoner is free to go his way," the judge announced.[117] There is no explanation why the emigrants voted as they did, but the one hint we have—that the test of provocation decided the issue[118]—provides a likely answer, as long as we keep in mind the probability that there were as many definitions of "sufficient provocation" as there were emigrants voting.

Perhaps the most important overland ground for acquittal, at least as a measure of the emigrants' concern that judicial standards match as nearly as possible those of American courts, was failure of the prosecution to carry the onus of proof. If sufficient evidence was not produced, a defendant suspected of crime, even of murder, would be released. "I heard today," a forty-niner wrote in his diary, "that the man who had his trial near the South Pass, for murder, has been acquitted, not [*sic*] positive proof being adduced on the trial, and he is wending his way on to California with the rest of us."[119] In 1859 a Mormon was seized just where the overland trail enters today's State of Nevada. He was accused of shooting a Frenchman in the back and stealing his pony. "The Emigrants were going to Hang the young man but the old Frenchman Refused to Swear positively to his Identity this morning, but

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114. W. Sullivan, *supra* note 73, at 4-5.

115. *Id.* at 5.

116. *Id.*

117. *Id.*

118. "The emmigrant [*sic*] would have been cleared by a regularly organized court. Lynch law metes out justice under such circumstances. But many a man has been lynched whose provocation was as great as in this instance." *Id.* at 5-6.

119. Copy Portion of a Diary of H.R. Mann 1849, at 7 (typescript, Cal. State Library, Sacramento) (entry for July 10, 1849).

he is undoubtedly guilty."[120] The accused was released, even though the event took place shortly after an armed conflict involving the Mormons when feelings were running high.

One of the more interesting cases involving sufficiency of proof arose from a particularly brutal murder. A woman and child were killed by a gang of thieves who dressed as Indians and preyed on overland travelers. A man named Tooly was arrested somewhere near the Sink of Humboldt.[121] There was little doubt he was a member of the gang, and at the trial the husband and father of the two victims identified him as one of the men who attacked his wagon. "Still," if we believe the published account of the trial,[122] "the evidence was not deemed sufficiently positive or complete, the identity being in some doubt. The jury would not convict without conclusive proof. With the view of procuring further evidence, the judge ordered that the person of the prisoner be searched."[123] The wagon attacked had been robbed of a box, containing $1500 in British gold coins. Some of those coins were found hidden in Tooly's buckskin belt. There was no longer any doubt. Tooly was found guilty and shot while trying to escape.[124]

Finally, we should note evidence tending to counter the suggestion that emigrants did not take the criminal process seriously.[125] On occasions, for example, prosecutions were not pursued because either the alleged offense had not yet been made criminal by a company's legislative process, or the majority was persuaded that threats alone were insufficient and held that there had to be an act or there could be no crime.[126] Also, there were times when stranger emigrants asserted the right of an individual to a hearing before delivering him to the company making a criminal charge.[127] In one such case, the defendant was apparently

120. J. Wilkinson, Journal Across the Plains in 1859, at 96-97 (ms., Newberry Library, Chicago) (entry for July 13, 1859).

121. Southwest of today's Lovelock, Nevada, just west of Highway 95.

122. The account was written more than fifty years after the event.

123. W. MAXWELL, *supra* note 79, at 153.

124. *Id.* at 155-57.

125. *See* Langum, *supra* note 13.

126. *See* L. HASTINGS, *supra* note 76, at 6.

127. An instance of this assertion is chronicled as follows:

> About this time two brothers wished to join our train. They had been with us but a few days before one had taken their team and left his brother behind. Two of our company went forward in pursuit, and caught up with a train which he had joined, demanding his return. The company refused to let him go without a trial of the case between the brothers which resulted in both returning to our train.

Ho for California: Personal Reminiscences of William Rowe, Sr. of the Overland Trip from

guilty, but the triers of fact found the equities so much in his favor, they not only freed him, but also passed the hat so he would not be forced to steal again.[128]

V. CONCLUSION

It is important that we do not make more of the evidence than it can sustain. The diaries, accounts, and reminiscences reveal less about how trials were conducted on the overland trail than about how the emigrants thought trials should be conducted. It is their sense of justice, their understanding of judicial fairness, and their respect for the rights of individuals that are delineated by their words and attitudes. Whether they lived up to their own standards is not the same question. Legal ideas should not be confused with legal realities.

Whether the diarists' attitudes toward fairness and their capacity to understand law is reflective of attitudes and capacities of average Americans is also uncertain. Surely we have learned what the average emigrant diarist thought, but perhaps the average emigrant diarist was not the average American citizen. Those who left us their views were literate, usually male, probably middle class,[129] from settled, generally rural communities.[130] Their

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Rochester, Wisconsin to California in 1853 in Company with "Lucky" Baldwin 5 (typescript, copied from narrative as published in the Waterville, Wisconsin, *Post,* May & June, 1905, Huntington Library, San Marino, Cal.).

128. J. Thorniley, *supra* note 72, entry for June 12, 1852:

> [W]here we nooned today were quite a Number of Men holding a Counsel [*sic*] over a youth that had Stolen a Horse from the train that he formally belonged to. [B]y having a Difficulty in Said Train he was turned off and made [to] leave the Train so he helped himself to a horse belonging to the Train and Started ahead on the Journey on his own hook but was followed and Caught[. T]he Men that tried the young man belonged to trains here whare [*sic*] he was Caught[. T]hey Considered his Case and Not only set him at Liberty and also collected him some Money among the crowd Where the Counsel was held so the young man as some of our Boys termed it went on his way Rejoicing.

129. However, many men without funds who hired their way overland also kept diaries or wrote reminiscences. *See, e.g.,* The Diary of Asa Cyrus Call, 1850-52 (typescript, Cal. Hist. Soc'y, San Francisco); P. Murphy, Across the Plains in the Year 1854 (typescript, Cal. State Library, Sacramento); J. Lewis, My Book [Diary of 1852] (ms., Bancroft Library, Univ. of Cal., Berkeley); T. Gill, *Across the Plains in Early Days,* Stanislaus County Weekly News [Modesto, Cal.], Aug. 14, 1903, at 2, cols. 5-6. Not all hired hands, of course, were from under-privileged backgrounds. Some were merely young, and a few even were members of that peculiar American aristocracy—law students:

> The drivers of our ox teams were sturdy young men, all about twenty-two years of age who were driving for their passage to California. They were of good family connections . . . . One a law student, Charles Wheeler, studied all his leisure time, and often could be seen with his open book as he walked beside his team.

attitudes toward the judicial process and the manner in which they applied legal principles, therefore, are not indicative of frontier law. Rather, their views reflect how nonfrontiersmen acted on the frontier. They provide a picture of Americans consciously striving to carry beyond the line of forward settlement a mode of social behavior learned during a remembered youth in towns and cities they had left in body but not in spirit.

One word must be emphasized, and that word is "behavior." Here behavior is the operative concept—the key idea. It is a taught, remembered, respected, and shared legal behavior that we have been studying—not the implementation of specific legal concepts. An emigrant of 1857 made the point differently, when he described the overland trial as crossing an area "[w]here there was no law to govern, other than the character and natural bent of individuals."[131] One manifestation of the "natural bent" of emigrants was legal behavior. It was legal behavior that avoided acts of violence,[132] allocated previous resources according to shared notions of property rights rather than by force,[133] and, when crime occurred, dealt with offenses not with vengeance, but with the trappings of a remembered judicial process.

Leaving Independence, Missouri, as part of the 1846 emigration, Charles T. Stanton told those back home not to worry. There was little danger, he assured them, "as we go in such large crowds that we shall be a law unto ourselves and a protection unto each other."[134] Stanton was correct, not only because of crowds, but because he and his fellow overland emigrants, sharing remembrances of a judicial process, would indeed become a law unto themselves.

C. Haun, A Woman's Trip Across the Plains in 1849, at 28 (ms., Huntington Library, San Marino, Cal.).

130. *See* Goodrich & Davison, *The Wage-Earner in the Westward Movement, reprinted in* 1 PIVOTAL INTERPRETATIONS OF AMERICAN HISTORY 115, 154 n.112 (C. Degler ed. 1966). In truth, there were many city-bred forty-niners who went overland; there were even companies from New York City. *E.g.*, Diary of Robert Eccleston, *supra* note 78; J. AUDUBON, AUDUBON'S WESTERN JOURNAL (1906); C. Gray, An Overland Passage from Independence Mo. to San Francisco, Cal., in 1849 (ms., Huntington Library, San Marino, Cal.).

131. W. MAXWELL, *supra* note 79, at 95.

132. *See* M. MATTES, *supra* note 12, at 76-77. This topic will be explored in an article scheduled for publication later this year by the HUNTINGTON LIBRARY QUARTERLY, entitled *Paying for the Elephant: Property Rights and Civil Order on the Overland Trail.*

133. Reid, *Sharing the Elephant: Partnership and Concurrent Property on the Overland Trail,* 45 U. MO. KAN. CITY L. REV. 207 (1976); Reid, *supra* note 15.

134. Letter from Charles T. Stanton to Philip R. Stanton (May 12, 1846), *reprinted in* 2 OVERLAND IN 1846, at 533 (D. Morgan ed. 1963).