



1983

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### Recommended Citation

William H. Rehnquist, *Isaac Parker, Bill Sikes and the Rule of Law*, 6 U. ARK. LITTLE ROCK L. REV. 485 (1983).  
Available at: <https://lawrepository.ualr.edu/lawreview/vol6/iss4/1>

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UNIVERSITY OF ARKANSAS AT LITTLE ROCK  
LAW JOURNAL

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VOLUME 6

1983

NUMBER 4

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“ISAAC PARKER, BILL SIKES AND  
THE RULE OF LAW”\*

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Asked about a recent increase in murders within his jurisdiction, a trial judge said:

I attribute the increase to the reversal of the Supreme Court. These reversals have contributed to the number of murders in the [jurisdiction]. First of all, the convicted murderer has a long breathing spell before his case comes before the Supreme Court. Then, when it does come before that body, the conviction may be quashed. And whenever it is quashed, it is always upon the flimsiest technicalities. The Supreme Court never touches the merits of the case.<sup>1</sup>

These comments might sound contemporary. Yet, they were made by Judge Isaac C. Parker, who sat in Fort Smith, Arkansas, as the district judge for the Western District of Arkansas from 1875 until 1896. Judge Parker had a distinguished career administering justice, largely in what was then the Indian Territory, and some remarks upon that career will provide a useful introduction to a discussion of several different models of criminal justice. I first became interested in Judge Parker some thirty years ago, at the time I was serving as a law clerk to Justice Jackson. While doing research for

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\* From an address delivered for the Ben J. Alzheimer Lecture Series at the University of Arkansas at Little Rock School of Law on September 23, 1983.

\*\* Associate Justice, United States Supreme Court.

1. W. GARD, *FRONTIER JUSTICE* 289 (1949).

an opinion, I came across a footnote in Dean Wigmore's Treatise on the Law of Evidence which discussed some of Judge Parker's legal rulings, noted that a number of them had been reversed by the Supreme Court of the United States, and went on to observe that in many of these instances Judge Parker had been right and the Supreme Court wrong. These observations by a noted legal scholar sufficiently piqued my curiosity that when I left Washington, bound for a job in private practice in Phoenix, I stopped in Fort Smith for four or five days in the summer of 1953 to examine what old court records there were, and to go through the newspaper morgues which dealt with the era in which Judge Parker had sat in Fort Smith. I gathered some fascinating minutiae with a view to eventually writing a biography.

During that summer, however, I began work for a Phoenix law firm and got married; somehow free time was in short supply for several years. When I was finally ready to rework my notes, I discovered that several books about Judge Parker had recently come on the market, and that what had once been a novel idea would now merely swell the tide. The book-length treatments of Judge Parker's career vary in quality and character. A simple survey of titles suffices to show their tenor. A contemporary "biography," using that term loosely, was called: *Hell on the Border: He Hanged Eighty-eight Men*;<sup>2</sup> and from that the other books have taken their tone. Homer Croy's biography is entitled *He Hanged Them High: An Authentic Account of the Fanatical Judge Who Hanged Eighty-eight Men*.<sup>3</sup> Fred Harrington's book, printed in 1951, is called simply *Hanging Judge*,<sup>4</sup> and so they go. The impression conveyed, at least by the subtitles, is that Isaac Parker was the Indian Territory's equivalent of Roy Bean west of the Pecos in Texas, with the important exception that Judge Parker had the authority to impose a death sentence; and that the authority was exercised with unbecoming zeal.

This picture of Judge Parker is totally one-sided, and, to the extent possible, the record should be set straight. Isaac Parker was not an American version of England's "Bloody Jeffreys."<sup>5</sup> Nor was

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2. S. HARMAN, *HELL ON THE BORDER: HE HANGED EIGHTY-EIGHT MEN* (1953).

3. H. CROY, *HE HANGED THEM HIGH: AN AUTHENTIC ACCOUNT OF THE FANATICAL JUDGE WHO HANGED EIGHTY-EIGHT MEN* (1952).

4. F. HARRINGTON, *HANGING JUDGE* (1951).

5. George Jeffreys, 1st Baron Jeffreys of Wem, 1645-89, was in charge of executing the unpopular religious policy of the Roman Catholic King James II of England.

he simply a frontier rustic who happened to be elected justice of the peace, in the tradition of Roy Bean, Wyatt Earp, and the like.

Isaac Parker was born in Ohio in 1838, and after studying law was admitted to the Ohio Bar in 1859. Later that same year he moved to St. Joseph, Missouri, where he opened a law office, and served, successively, as city attorney, circuit prosecutor, and state circuit judge. In 1870, he was elected to Congress from the district comprising the northwestern part of Missouri, and served two terms in that body. Then, in 1875, President Grant named him to the post of United States District Judge for the Western District of Arkansas.

The judicial post to which Parker came in May, 1875, was a remarkable one. Federal courts in those days had virtually no criminal business, because Congress had enacted few criminal statutes. The staple of almost every federal district court was diversity jurisdiction—lawsuits between people who lived in different states—and months could go by without a criminal case coming to trial. But the Western District of Arkansas, while it had the civil jurisdiction possessed by its sister district courts throughout the country, also had criminal jurisdiction over the length and breadth of the Indian Territory. And in 1875, the Indian Territory comprised virtually all of what would later become the State of Oklahoma; throughout this territory Isaac Parker sat as a criminal court trial judge. He had jurisdiction over all offenses not triable by the Indian courts—and the Indian courts were generally restricted to matters that involved only Indians.

Another peculiarity of Judge Parker's court was that for the first fifteen years of his career in Fort Smith, no appeal from his criminal decisions was authorized; not even to the Supreme Court of the United States. The typical appeals provision in the statutes at those times simply did not contemplate a federal trial judge with the criminal jurisdiction exercised by Judge Parker in the Western District of Arkansas.

The upshot of this, so far as those who appeared before Parker in Fort Smith were concerned, is reminiscent of the old story about the argument between the bishop and the judge as to who was more powerful. The judge insisted that he was more powerful, because in

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During the "Bloody Assizes" that followed the collapse (July 1685) of the insurrection of James Scott, duke of Monmouth, Jeffreys prosecuted the rebels with ferocity, executing perhaps 150 to 200 persons and ordering hundreds of others sold into slavery in the colonies. At the same time, he profited by extorting money from the victims.

THE NEW ENCYCLOPAEDIA BRITANNICA, Vol. 5, 537 (1974).

extreme cases he could say to a defendant "you be hanged." The bishop responded that he was more powerful, because *he* could say to a man or woman "you be damned." To this the judge retorted, "Yes, but when I say 'you be hanged,' you *are* hanged." Unlike the long, drawn-out process of appeal accompanying the imposition of a death sentence today, when Judge Parker said "you be hanged," you *were* hanged, unless you were one of those rare defendants who was able to obtain executive clemency from the President of the United States. And while the President of the United States and his Attorney General were not as busy in those days as are their present counterparts, one may nonetheless assume that they did not devote a great deal of their time to clemency applications from the Western District of Arkansas.

The statement made earlier that the characterization of Judge Parker as an ignorant zealot was entirely one-sided does not mean that Judge Parker was not a "hanging judge." As that term is normally understood, there can be little doubt as to its applicability. The following account of Parker's first two months on the bench should give some indication of this:

The courtroom in which Judge Parker took up his gavel, on May 10, 1875, was on the first floor of a two-story brick building, situated inside the military garrison and previously used as a barracks. Offices of the court attaches [sic] were on the same floor. The musty, dungeon-like basement served as a jail. By the time his first term ended, late in June, Parker had tried ninety-one criminal cases. Of eighteen murder cases, fifteen had resulted in conviction. The judge sentenced eight of the killers to be hanged on September 3rd. The number dropped to six when one was killed while trying to escape and another, because of his youth, had his sentence commuted to life imprisonment and later was pardoned.

The multiple hanging made a big day in Fort Smith. Newspaper reporters from Little Rock, Kansas City, and St. Louis were on hand. Farmers and their families began pouring into town early in the morning, crowding the streets by ten o'clock. Many brought their lunches and went early to the courtyard to have a favorable spot from which to view the major event. The *Western Independent*, which issued an extra edition with the history of the condemned men and their crimes, estimated that five thousand witnessed the hanging.<sup>6</sup>

The same author offers a statistical summary of Parker's tenure.

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6. W. GARD, *supra* note 1, at 283-84.

In his twenty-one years on the federal bench at Fort Smith, during fourteen of which no appeal could be taken from his decisions, he tried more than thirteen thousand persons. More than nine thousand of them were convicted. Of three hundred and forty-four men convicted of crimes punishable by death, the Judge sentenced one hundred and seventy-two to be hanged. Fewer than half of the latter escaped the noose by dying in jail or by obtaining commutation or Presidential reprieve.<sup>7</sup>

But the statistics tell only part of the story. To understand Parker it is necessary to understand the Indian Territory in those days. The Five Civilized Tribes had followed the "Trail of Tears" from the southeastern part of the United States to establish separate tribal governments in the eastern portion of what is now the State of Oklahoma. After the Civil War, with all the dislocation and lawlessness which inevitably follows such a conflict, fugitives, desperadoes, and ne'er-do-wells drifted into the Indian Territory. Because it was difficult, if not impossible, to extradite them from this jurisdiction, it became known as "Robber's Roost." These criminals preyed on Indians and whites alike, throughout the territory, and they did so with impunity until, as the statistics indicate, they began to furnish grist for Judge Parker's mill. After he had served less than a year, one of the Fort Smith newspapers had this to say of him editorially:

The certainty of punishment is the only sure preventive of crime, and the administration of the laws by Judge I. C. Parker has made him a terror to all evildoers in the Indian country. The determination shown by the Judge that the law shall be faithfully and fearlessly administered and the firmness he has displayed during the less than twelve months he has sat on the bench have won for him the confidence and respect of the members of the Bar and our citizens, as well as of the law-abiding men of all races in the Indian Territory.<sup>8</sup>

When the right of appeal to the Supreme Court of the United States from the decisions of Judge Parker was first provided in 1890, and broadened a few years later, many of his decisions were reversed on the basis of what laymen are wont to call "legal technicalities," that is, considerations unrelated to the ultimate question of whether or not the defendant committed the crime with which he was charged. It could be argued from the very fact of these reversals

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7. *Id.* at 285.

8. *Western Independent* (Fort Smith, Arkansas), Sept. 8, 1875.

that Parker was wrong and that the Supreme Court was right; that, at least, is the presumption in which lawyers are required to indulge about a court of last resort. But in this connection, it may be well to remember a comment of my one-time mentor, Justice Jackson. He said of himself and his colleagues: "We were not declared to be final because we are infallible, but we are declared to be infallible because we are final."

It should be noted, also, that the Supreme Court some twenty years after reversing one of Judge Parker's judgments in a case called *Crain v. United States*,<sup>9</sup> said of that case:

Technical objections of this character were undoubtedly given much more weight formerly than they are now. . . . But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion . . . was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain* case. . . .

Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we are now constrained to hold that the technical enforcement of formal rights in criminal procedures sustained in the *Crain* case is no longer required in the prosecution of offense under present systems of law. . . .<sup>10</sup>

Dean Wigmore, in his monumental work on evidence, also criticized several other opinions of the Supreme Court which had reversed decisions of Judge Parker, saying: "These cases, on the point of presumption, were ill advised in their attempts to assume the position of monitor over a great and experienced trial judge."<sup>11</sup>

Where might Judge Parker's court—let us say prior to its right of appeal to the Supreme Court of the United States—fit within the spectrum of varying modes of administration of a system of criminal justice? In that court, the procedures were admittedly summary by today's standards; but one still had a judge appointed by the President of the United States and confirmed by the Senate, a jury of twelve persons, and generally the services of an attorney. How does that stack up with other modes of administering criminal justice reflected in literature and history?

Charles Dickens, in his novel *Oliver Twist*, presents a profitable

9. 162 U.S. 625 (1896).

10. *Garland v. Washington*, 232 U.S. 642, 646-47 (1914).

11. J. WIGMORE, WIGMORE ON EVIDENCE § 276, at 116 n. 3 (2d ed. 1940).

comparison with his description of how a character named Bill Sikes met his death. Bill Sikes was a sordid criminal in nineteenth-century London, vividly brought to life by Dickens. He was always accompanied by his dog, and the dog was even uglier than Bill Sikes. Bill's culminating act of depravity is the brutal murder of his paramour Nancy, whom he first pistol whips and then clubs to death. He flees London, but returns to hide out in a house in Jacob's Island, a bad part of town along the Thames. Ensnared there with his fellow cutthroats from a London housebreaking ring, Sikes learns that his presence has been discovered by a mob of outraged citizens. In Dickens' words:

There were lights gleaming below, voices in loud and earnest conversation, the tramp of hurried footsteps—endless they seemed in number—crossing the nearest wooden bridge. One man on horseback seemed to be among the crowd; for there was the noise of hooves rattling on the uneven pavement. The gleam of lights increased; the footsteps came more thickly and noisily on. Then, came a loud knocking at the door, and then a hoarse murmur from such a multitude of angry voices as would have made the boldest quail.<sup>12</sup>

Sikes throws up the sash of a window and tells the crowd, "Do your worst! I'll cheat you yet!"<sup>13</sup> Then, again in Dickens' words:

Of all the terrific yells that ever fell on mortal ears, none could exceed the cry of the infuriated throng. Some shouted to those who were nearest to set the house on fire; others roared to the officers to shoot him dead. Among them all, none showed such fury as the man on horseback, who, throwing himself out of the saddle, and bursting through the crowds as if he were parting water, beneath the window, in a voice that rose above all others, "Twenty guineas to the man who brings a ladder!"

The nearest voices took up the cry, and hundreds echoed it. Some called for ladders, some for sledge-hammers; some ran with torches to and fro as if to seek them, and still came back and roared again; some spent their breath in impotent curses and execrations; some pressed forward with the ecstasy of madmen, and thus impeded the progress of those below; some among the boldest attempted to climb up by the waterspout and crevices in the wall; and all waved to and fro, in the darkness beneath, like a field of corn moved by an angry wind: and joined from time to

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12. C. DICKENS, *OLIVER TWIST* 504 (Dodd, Mead & Co., N.Y. 1941).

13. *Id.* at 505.



time in one loud furious roar.<sup>14</sup>

Sikes, determined to cheat both the crowd and law, decides to lower himself into a ditch at the back of the house, on the side away from the crowd. He climbs out onto the roof with a length of rope, fastens one end to a chimney, and makes a running noose of the other. But just as he stands at the edge, lifting the rope over his head, he sees a terrifying vision of Nancy's eyes, tumbles over the parapet with the noose around his neck and hangs himself.

The denouncement is splendid; but it neatly avoids the jurisprudential problems that inhere in the situation. That's probably why Charles Dickens was a novelist and not a lawyer. But the reader knows all there is to be known about Bill Sikes, after reading more than four hundred pages of *Oliver Twist*. A man with scarcely a redeeming virtue other than his affection for his dog—and he was even willing to kill his dog when he thought that the dog might give him away to his pursuers—a confirmed housebreaker and petty criminal of the London underworld, fresh from the premeditated killing of the woman who had shared his bed and board for a number of years. What if as Bill Sikes stood on that roof of the house in Jacobs Island, the reader was presented with two alternative futures for him; either the mob would succeed in breaking into the house and lynching him, or he would succeed, once he dropped into the ditch, in sailing away from England and escaping punishment altogether? Which alternative is better?

The question, of course, is a bit too hypothetical. Only the reader of a Dickens novel can know with certainty that Bill Sikes has the blood of Nancy on his hands; that there can be no case of mistaken identity; and that there are no mitigating circumstances that might have been presented in his defense at trial. No person would prefer lynching by a mob to a trial under the law of the land; but if there was a choice between lynching or escape for Bill Sikes, at least some of us may ponder. Lawyers will say, of course, that it is not enough for a defendant merely to be "known"—whatever that word may mean in this context—to be guilty; he must be proven guilty in accordance with the requirements of established law. But that answer doesn't fit this case. In the scene from *Oliver Twist* the persecutors are not some "Bloody Jeffreys" wrongly condemning a man to death under the forms of the law, but rather a mob of pri-

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14. *Id.*

vate individuals. To put it in terms of fourteenth amendment analysis, there does not appear to be any "state action."

In considering this episode from *Oliver Twist* and the questions it raises, it is important to recall the history of vigilante justice in the United States. The term "vigilante," the dictionary states, comes from the Spanish word meaning watchman or guard.<sup>15</sup> Such "watchmen" appeared in many western states during frontier times. But unlike mere "lynch mobs," who go about their mission contrary to the organized course of the law, most of these vigilante groups operated at a time when there almost literally was no "law" in the area involved.

Take for example, the vigilante movement in California during and shortly after the Gold Rush. Improvised courts were present at many of the early California diggings. They were initially formed to handle civil problems, such as the size of claims, rules governing abandonment, and the like. Soon, however, crime became a serious problem in the camps, and the miners' courts of necessity expanded their jurisdiction.

In the smaller camps, guilt and punishment might be determined by the whole assembly of miners. In the larger mining communities, this responsibility was usually delegated to a jury; sometimes the defendant was even assigned counsel. But the trials were always swift and informal. Because there were no jails, penalties were usually limited to banishment, whipping, or hanging. Technicalities were dispensed with, and punishments were carried out without delay or appeal. In general, summary justice of this sort met with approval, even in the East, as necessary to save the mining camps from anarchy.

In camps without even a miners' court, maintenance of order often depended on a voluntary "committee of vigilance." In some instances the committee was one of long tenure. In others, it disbanded as soon as its immediate task was completed, and a new one formed when the next emergency arose.

The vigilance committees had their highest development in San Francisco, the chief point of entry for the gold seekers and center of miners' outfitters, saloons, and gambling halls. By the end of 1850, San Francisco had nearly fifty thousand inhabitants and attracted criminals from the world over.<sup>16</sup>

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15. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2551 (4th ed. 1976).

16. "More than a hundred persons were murdered within a few months; yet not one of the killers was punished. Local officers and courts seemed helpless. The few thugs arrested

Finally, a vigilance committee was formed by the leading citizens. The constitution and bylaws of the committee were published in local newspapers. The same day, June 13, 1851, the committee caught, tried and hanged its first victim to almost universal acclaim. Local officials made no effort to dissolve the growing organization, and the hangings continued. One newspaper, taking what appeared to be the general view, asked: "Whenever the law becomes an empty name, has not the citizen the right to supply its deficiency?"

As a result of the committee's activities many criminals left the city. Others were banished on threat of hanging. And the committee tried to prevent the immigration of criminals by boarding each incoming vessel to examine passengers and check their records. Soon city and county officials were able to keep order by themselves, and there was less need for the vigilantes. The committee still retained jurisdiction over more serious offenders, even to the point of taking them by force from local officials. But activities diminished until, in early 1853, the committee went out of existence, as did committees in other California communities patterned after the one in San Francisco.

By the spring of 1855, however, crime and corruption were again prevalent. When one machine politician murdered a United States Marshal and then "fixed" the ensuing legal proceedings, and another murdered a newspaper publisher, the committee rebounded with a double hanging. It remained in action for three months, during which there were only two murders in San Francisco, as compared with more than one hundred during the six months before the committee was formed. Desperadoes were hanged or deported until a semblance of order was restored. Again, the committee gradually went out of business as statutory courts became more effective.

The Gold Rush experience was by no means unique. "Prairie necktie parties" were common throughout the western territories, where a horse thief was considered as bad as, if not worse than, a murderer and where formal justice was ineffective if not nonexistent. The work of these vigilantes made orderly settlement possible and paved the way for effective courts and enforcement agencies. In the words of one commentator:

As a rule, the vigilantes, especially those in organized groups, got

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promptly hired shyster lawyers, who usually kept them out of jail. It was almost impossible to find witnesses to a crime who dared to testify against the culprits. If prosecution witnesses were in prospect, defense lawyers sometimes had the trial delayed until they could be killed." W. GARD, *supra* note 1, at 154.

out their ropes only in cases in which guilt was clear. Most of the committees disbanded quickly when law enforcement officers and formal courts became able to preserve order and to protect lives and property. They had served their purpose in discouraging crime in the interim before statutory law caught up with the frontier. In much of the West, that catching up came in slow and halting steps.<sup>17</sup>

Most would agree that statutory law has by now caught up with, if not wholly eliminated, the frontier. But vigilante justice is still with us in some parts of the country. Last August, the *Wall Street Journal* ran an editorial entitled "Vigilante Justice,"<sup>18</sup> in which it recited several recent incidents. In Buffalo, a man kidnapped and raped a ten-year old girl. The girl's enraged father, leading a mob of two dozen others, captured the rapist, beat him, and plunged a knife into his stomach, wounding him. In Greenwich Village, the citizens, following the lead of other anti-crime groups throughout the city, have organized to drive transvestite prostitutes out of their neighborhood. And in California, 62,500 voters signed a petition urging cancellation of a parole award to a man convicted thirteen years ago of murdering a boy and raping three other people. The Governor overruled the parole board's decision, only to have his own decision set aside by a California appeals court which likened the petition process to a "Roman circus, where the roar of the crowd would determine the life or death of the gladiator."<sup>19</sup>

Some would say, with the California appeals court, that because vigilante action takes place wholly outside the legal framework, it is not really a mode of administering criminal justice at all. But it may be useful to regard vigilante justice as standing at one end of a broad spectrum. And even at that end, distinctions must be made. At the pole, lies spontaneous mob action, such as that in Buffalo. The dangers of such action, without even the semblance of a trial, are clearly portrayed by Walter van Tilburg Clark in the classic western novel *The Ox-Bow Incident*.<sup>20</sup> In that book, a group of cowboys captures three men believed guilty of cattle rustling and murder. Relying on strong circumstantial evidence, the cowboys refuse to wait even for the few hours that it would take to corroborate the implausible exculpatory story offered by the suspects. They

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17. W. GARD, *supra* note 1, at 213.

18. *Vigilante Justice*, *Wall St. J.*, Aug. 5, 1983, at 20, col. 1.

19. *In Re Fain*, 139 Cal. App. 3d 295, 306, 188 Cal. Rptr. 653, 661 (1983) (quoting the trial court).

20. W. CLARK, *THE OX-BOW INCIDENT* (1942).

hang the three men only to discover, half an hour later, that they were innocent.

The miners' courts and vigilance committees scattered throughout the western territories provided surer procedures for determining guilt and innocence. They constituted the transition to a formal system of justice such as prevailed in Judge Parker's court in the Western District of Arkansas for the twenty years in which he sat there. Judge Parker's trials were swift, and there was no appeal, but the fundamentals of due process were undoubtedly present.

Dickens neatly portrays this transition, capturing both the similarities and distinctions between the two modes of administering criminal justice. In the chapter following Bill Sikes' death, Dickens describes the trial of Fagin, who operated a notorious school for pickpockets. Unlike Sikes, Fagin was tried before an English judge and jury; but in England in the time of Dickens, just as in the United States in the time of Isaac Parker, there was no right of appeal from a judge's sentence of death based upon a jury verdict. And the time between verdict and sentence was short, as may be gathered from the following passage:

At length there was cry of silence, and a breathless look from all towards the door. The jury returned, and passed him close. He could glean nothing from their faces; they might as well have been of stone. Perfect stillness ensued—not a rustle—not a breath—Guilty.

The building rang with a tremendous shout, and another, and another, and then it echoed loud groans, that gathered strength as they swelled out, like angry thunder. It was a peal of joy from the populace outside, greeting the news that he would die on Monday.<sup>21</sup>

The other end of the spectrum is fairly represented by the judicial history of a man named Jimmy Lee Gray, who was executed by the State of Mississippi on September 2, 1983, after the Supreme Court of the United States denied a last minute stay by a vote of six to three. In October, 1976, Gray was indicted for capital murder. At trial, the state proved that in that year Gray had abducted a three year old girl, carried her to a remote area, and after sexually molesting her, suffocated her in a muddy ditch and threw her body into a stream. He was found guilty by a jury and sentenced to death.

On appeal to the Supreme Court of Mississippi, however,

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21. C. DICKENS, *supra* note 11, at 527.

Gray's conviction was reversed and he was awarded a new trial.<sup>22</sup> The new trial took place in 1978, and he was again convicted of capital murder and again sentenced to death. This time the Supreme Court of Mississippi affirmed the conviction and sentence.<sup>23</sup> The United States Supreme Court refused to review the case in 1980.<sup>24</sup>

One might think the case would end there. But as anyone familiar with modern habeas procedures will know, there followed a series of collateral attacks on both the conviction and sentence that lasted over three years.<sup>25</sup> When the final plea for a last minute stay reached the United States Supreme Court,<sup>26</sup> judicial action reviewing the case had been taken eighty-two times by twenty-six different state and federal judges. And in none of those proceedings was the guilt of Jimmy Lee Gray ever called into question.

Many will sympathize with the view expressed by Chief Justice Burger in explaining his vote to deny the stay application. "This case," he wrote, "illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality."<sup>27</sup> This article does not intend to suggest that there should be a return to the days of Dickens or Judge Parker, when one man had such unchecked control over the fate of others. But one question should be raised: At what point should there be finality? Where along the spectrum of possible systems of administering criminal justice should our system come to rest?

The difficulty with the question, of course, is that a system of criminal justice must simultaneously satisfy conflicting demands. At a minimum, the goal of any rational system must be to vindicate the rule of law by apprehending and punishing the guilty and by exonerating the innocent. This goal requires careful consideration of each individual case to ensure that fair procedures were used to reach a sound result. But it also requires that a final decision be reached in each case as expeditiously as is reasonably possible. If

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22. *Gray v. State*, 351 So. 2d 1342 (Miss. 1977), *aff'd* 375 So. 2d 994 (Miss. 1979), *cert. denied*, 446 U.S. 988 (1980), *reh'g denied*, 448 U.S. 912 (1980).

23. *Gray v. State*, 375 So. 2d 994 (Miss. 1979), *cert. denied*, 446 U.S. 988 (1980), *reh'g denied*, 448 U.S. 912 (1980).

24. *Gray v. Mississippi*, 446 U.S. 998 (1980), *reh'g denied*, 448 U.S. 912 (1980).

25. *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), *reh'g denied*, 685 F.2d 139 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1886 (1983), *reh'g denied*, 103 S. Ct. 3099 (1983), *reh'g denied*, 710 F.2d 1048 (1983), *reh'g denied*, 714 F.2d 137 (1983), *cert. denied*, 104 S.Ct. 211 (1983).

26. *Gray v. Lucas*, 104 S.Ct. 211 (1983).

27. *Id.* at 213.

the sole virtue of a system of administering criminal justice were its capacity for examining and reexamining the fairness and the adequacy of the process by which a defendant were found guilty, there could be little quarrel with present-day delays and the lack of finality in criminal judgments. But such examination is not, and cannot be by the only concern of a criminal justice system; another concern, at least as important, is to ensure that offenders against the laws of society will be punished, and punished without unreasonable delays.

The frequent resort to vigilante justice, not only in frontier days, but also in the recent examples cited in the *Wall Street Journal*,<sup>28</sup> suggests the importance of this societal imperative. The spectacle of an angry mob impatient of the "law's delays," is not a pleasant one; particularly if the "law's delays" about which they complain are merely the rudimentary requirements of a trial in some manner authorized by law. But interminable delays in the criminal justice process, or final decisions, issued many years after the initial trial, that set free a criminal defendant for reasons other than doubt about his established guilt are spectacles equally unpalatable to many members of society.

Most laymen can understand why the law requires that a criminal defendant be tried before an impartial jury and an impartial judge; that he be chargeable only with a violation of the law as it existed at the time he acted; and that he have a lawyer to assist him in defending against the charges. These requirements have been written into the United States Constitution by the process of amendment, and therefore bespeak the views of the majority of the people of the country at the time the amendments in question were enacted. The heat of passion which occasionally motivates people within our system to demand some form of justice more summary than this should be resisted not merely by judges and lawyers, but by every thinking citizen. But the view that our system of criminal justice exists merely to safeguard the rights of the defendant, whatever the cost in delaying or frustrating justice, is equally one-sided and ultimately, equally dangerous.

There must, of course, be concern with the right of an accused defendant to a fair trial. Such a right is fundamental in any civilized society. Equally important, however, is the principle that the moral imperatives embodied in enacted criminal laws be obeyed, and that their transgressors be apprehended and punished. While this principle extends to all enacted laws, it has particular force with

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28. *Vigilante Justice*, *supra* note 16.

respect to the laws punishing murder. Such laws have an authority all their own; they reflect more than the transient views of a particular legislature. The laws against murder embody moral judgments common to almost every major religion on the face of the earth. To the extent that any legislative judgement may be said to have independent moral sanction, the judgment against the unlawful taking of the life of another human being has such sanction.

Whether one views the nature of society as essentially contractual, after the manner of some political philosophers, or as organic, after the manner of others, makes little difference to this point. If it be true, as Hobbes said, that life in the state of nature is "nasty, brutish, and short," surely one of the prime reasons people enter into the social contract is to attain a higher degree of personal security than they had without any government. If, on the other hand, government is thought to have a more organic basis, society is eminently justified in punishing those who breach a canon of conduct which has endured for centuries.

In sum, it is wholly inaccurate to say that a government or a society ought to be measured primarily by the way in which it accords due process of law to its criminal defendants. This is undoubtedly a very important measure; but equally important is the extent to which a society succeeds in vindicating the moral judgments of its members as they are embodied in its criminal laws. A breakdown in the criminal justice system leads eventually to a state of anarchy, and no society will long tolerate anarchy. The careers of Isaac Parker, Bill Sikes, and Fagin all testify to this indisputable fact.



