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# Getting Away with Murder (Most of the Time): Civil War Era Homicide Cases in Boone County, Missouri

Frank O. Bowman, III\*

## I. MURDER AT THE UNIVERSITY – AN INTRODUCTION

On March 4, 1851, at the State University in Columbia, Missouri, there occurred one of those incidents that from time to time break up the stately progress of the academic year. It seems that young George Clarkson got in a brawl with a fellow student. Upon hearing of this unseemly affair, the faculty convened and docked each of the combatants fifty marks. Professor Robert Grant, coming late to the meeting, encountered Clarkson on the steps and asked how the matter had been resolved. Clarkson replied, “I am very well satisfied but I will give him a whipping yet.”<sup>1</sup> Divining from this remark that Clarkson had not gotten the faculty’s message and that further breaches of the peace might be expected, Professor Grant reported it to University president James Shannon, who reconvened the faculty and summoned Clarkson to return.<sup>2</sup>

Clarkson did not respond gracefully. The outraged scholar confronted Professor Grant on the portico of the college building, accused him of scheming to have Clarkson put out of the University, slashed at him with a whip, and struck him with a cane.<sup>3</sup> President Shannon intervened and told Clarkson to behave himself, to which the young man replied by cursing Shannon and saying “that if he did not mind his business [Clarkson] would cane him.”<sup>4</sup> For his part, Professor Grant exhibited remarkable sangfroid and walked

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\* Floyd R. Gibson Missouri Endowed Professor of Law, University of Missouri School of Law. This article could not have been written without the indefatigable toil of my research assistants Scott Snipkie, Eoghan Miller, Caleb Grant, and Burke Bindbeutel. Special thanks to Professors Alfred Brophy and Chuck Henson for their insightful comments.

1. Letter from Mary Guitar to her brother, Odon Guitar (March 10, 1851) (on file with the Western Historical Manuscript Collection-Columbia, Collection Number 2952) [hereinafter Mary Guitar letter]. Several contemporary sources recount the events that led to George Clarkson’s death at the hands of Professor Grant. The account given here is drawn from Mary Guitar’s letter and the record of the preliminary hearing published in the local newspaper two weeks later. *State vs. Rob’t A. Grant*, MO. STATESMAN, Mar. 28, 1851, at 1 [hereinafter Preliminary Hearing].

2. Preliminary Hearing, *supra* note 1 (testimony of President James Shannon).

3. *Id.* (testimony of Prof. Leffingwell, Prof. Matthews, W.C. Shields, Homer J. Luce, and President James Shannon).

4. *Id.* (testimony of Prof. Hudson).

away.<sup>5</sup> Once Clarkson was restrained, the faculty resumed its conclave and voted to expel him.<sup>6</sup>

Clarkson was enraged and would not be mollified. He armed himself with a pistol, told fellow students that he intended to kill Grant before the night was out, and began searching the town for the unsuspecting academic.<sup>7</sup> Alarmed by Clarkson's threats, several students sought out Professor Grant at a nearby tavern where he was taking a guitar lesson and warned him.<sup>8</sup> In addition, a faculty colleague who encountered Clarkson searching for Grant dispatched a slave to the tavern with a note bearing "six or eight lines apprising [Grant] that I apprehended Clarkson was seeking another conflict with him."<sup>9</sup> Grant responded by scratching out a message to a friend asking him to send "one of his best revolvers" over to the tavern.<sup>10</sup> The revolver arrived. The lesson concluded. Grant stepped out into the street and was confronted by Clarkson, who held a pistol in one hand and a stick in the other and struck Grant with the stick.<sup>11</sup> The professor told his assailant to go away or quit<sup>12</sup> or that "he did not want to have any fuss with him,"<sup>13</sup> and tried to pass on, but Clarkson struck him again.<sup>14</sup> Professor Grant drew his gun, turned, and fired.<sup>15</sup> Nearly simultaneously, Clarkson's pistol discharged.<sup>16</sup> Clarkson

5. *Id.* (testimony of Prof. G.H. Matthews) (Prof. Matthews reported that, after Clarkson's attack on Grant, "I expressed my sentiment as to Mr. Grant's self-control – remarked to him that I would not have so commanded my temper. That I had never seen a person that exhibited so much self-possession or restraint.").

6. *Id.* (testimony of W.C. Shields).

7. *Id.* (testimony of Cornelius Small, Edward Stark, and John McBride); Mary Guitar letter, *supra* note 1.

8. Preliminary Hearing, *supra* note 1 (testimony of W. Alexander, H.C. Cockerill, and Charles Jeffries); Mary Guitar letter, *supra* note 1 (Ms. Guitar's letter asserts that Professor Grant was taking a drawing lesson; however, the testimony at the preliminary hearing makes it clear that the instruction was musical.).

9. Preliminary Hearing, *supra* note 1 (testimony of Prof. Hudson).

10. *Id.* (testimony of John W. Watson); Mary Guitar letter, *supra* note 1.

11. Preliminary Hearing, *supra* note 1 (testimony of Mr. Pierpoint, Mr. Broadhead, James H. Walker, John McBride, William P. Richardson, and Robert Barber).

12. *Id.* (testimony of Mr. Pierpoint and Robert Barber).

13. Mary Guitar letter, *supra* note 1.

14. Preliminary Hearing, *supra* note 1 (testimony of Robert Barber).

15. *Id.* (testimony of Mr. Pierpoint, Dr. Spotswood, R.L. Todd, James H. Walker, and John McBride).

16. There was some initial disagreement about whether Clarkson also fired his weapon. Robert L. Todd and Joseph A. Brown described only one shot, while John Pierpoint, George C. Kimbrough, John McBride, and John Corbit each heard two. *Id.* However, after the shooting, Pierpoint inspected Clarkson's pistol and found it was "was empty and had an exploded cap on it." *Id.* Even Clarkson's father later conceded that his boy fired, though he maintained that the shot probably resulted from a muscle spasm caused by receiving Grant's bullet. H.M. Clarkson, Public Letter, MO. STATESMAN, Aug. 22, 1851. Likewise, there was considerable uncertainty about why

missed. Grant did not.<sup>17</sup> Mortally wounded, Clarkson lingered a few days, but ultimately expired.<sup>18</sup>

Professor Grant immediately surrendered himself to the sheriff.<sup>19</sup> At a preliminary hearing before a justice of the peace held on March 14, 1851,<sup>20</sup> Grant was released after a finding of self-defense.<sup>21</sup> The circuit attorney nonetheless presented the case to the grand jury in August, but it refused to indict.<sup>22</sup> Free, but perhaps dismayed by the turbulent character of mid-Missouri college life, Grant promptly relocated to California.<sup>23</sup>

Murder always fascinates. It is central to much of the world's most enduringly popular literature, from *Oedipus* to *Hamlet* to *The Sopranos*. In real life, the stories of why and how people kill each other and how the law responds can reveal a great deal about a time, place, and culture. That the Civil War and its aftermath defined modern America is a historical truism.<sup>24</sup> Here in mid-Missouri where I teach law, the truism is a palpable truth, discernible in the names on our streets and buildings, the racial geography of our towns, and the nature of our political and social arrangements.

Grant turned and fired when he did. Mary Guitar says that he fired after hearing Clarkson cock his pistol, Mary Guitar letter, *supra* note 1, but none of the eyewitnesses who testified at the inquest made this connection, and at least one mentioned seeing Clarkson cock the pistol well before he struck Grant the first blow with his stick. Preliminary Hearing, *supra* note 1 (testimony of John McBride).

17. Preliminary Hearing, *supra* note 1 (testimony of Dr. J.B. Thomas, describing track of Grant's bullet as passing through Clarkson's lung and lodging against his spine).

18. NORTH TODD GENTRY, BENCH AND BAR OF BOONE COUNTY MISSOURI 248 (1916) [hereinafter GENTRY, BENCH AND BAR OF BOONE COUNTY], available at <http://digital.library.umsystem.edu> (search text collections for "The Bench and Bar of Boone County, Missouri"; then select "get results details"; finally, under "The Bench and Bar of Boone County, Missouri" select "view first page"); Mary Guitar letter, *supra* note 1 (noting that as of March 10, 1851, Clarkson was still alive, but "there is little hope entertained of his recovery.").

19. Mary Guitar letter, *supra* note 1.

20. *Id.* (stating that the preliminary hearing was delayed until the Friday following Ms. Guitar's March 10, 1851 letter).

21. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 248.

22. *Id.*

23. *See id.* He seems to have returned. At some point after being cleared of murdering Clarkson, Grant reportedly married Sue E. Jones of the Christian College in Columbia and thereafter moved to Canton, Missouri, to assist President Shannon, who was forced out of the presidency of the University of Missouri in 1856, in establishing Christian University (now Culver-Stockton College). MARY K. DAINS, GUIDED BY THE HAND OF GOD: THE HISTORY OF THE FIRST CHRISTIAN CHURCH, COLUMBIA, MISSOURI, 1832-1996, at 35, 38 (1996).

24. *See, e.g.*, BRUCE CATTON, REFLECTIONS ON THE CIVIL WAR 3 (John Leekley ed., 1981) ("The Civil War is probably the most significant single experience in our national existence. It was certainly the biggest tragedy in American history and, at the same time, probably did more to shape our future than any other event.").

In the quarter century centered on the Civil War, 1850-1875, at least fifty-three homicide cases came before the courts of Boone County, Missouri, of which Columbia is the county seat. In addition, during the War, there were at least twenty killings of Boone County civilians that resulted in no legal proceedings.<sup>25</sup> (The War also claimed the lives of several hundred uniformed or irregular soldiers in Boone County outbreaks of the guerrilla conflict that flared across Missouri from 1862 to 1865, but those deaths are not the subject of this Article.<sup>26</sup>) Most of the homicides that reached court occurred within the county. Some were killings elsewhere transferred into Boone County on a motion for change of venue. In many of these cases, the Missouri State Archives retain the complete trial court files. In other instances, we know of the homicide and its legal resolution only through newspaper reports or the reminiscences of lawyers. As a long-time criminal lawyer with a sideline in legal history, I surmised that these cases might open a unique window on Boone County in the Civil War era. I have been gratified to discover that, to a remarkable degree, the story of these killings is a chronicle of the place and period.

But why begin with Professor Grant's fatal encounter with young Clarkson? Perhaps simply because it resonates with me, employed as I am at the same university from which Grant took his hasty leave. Moreover, although disgruntled young scholars armed with whip, stick, and gun are happily now rare, the idea of responding to outbreaks of youthful insubordination by calling for one's best revolver has an undeniable panache sadly absent in modern

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25. North Todd Gentry, *Some Incidents of the Civil War in Columbia and Boone County: Address Delivered to the John S. Marmaduke Chapter, United Daughters of Confederacy* 13 ½ -14 (Oct. 14, 1931), <http://cdm.sos.mo.gov/cdm4/document.php?CISOROOT=/bchscivwar&CISOPTR=54&REC=11> [hereinafter Gentry, *Some Incidents of the Civil War*]. Judge Gentry identifies eight white men as probably killed by Union soldiers, two white Union sympathizers killed by local Confederates, one white man hung by "bushwhackers," one white man shot by some person of unknown loyalties, and nine black people shot or hung by unknown assailants. *Id.* Of these twenty-one killings, only one – the murder of Martin Oldham by a squad of Federal soldiers in September 1863 – resulted in legal proceedings. *State v. Adell*, Case No. 5905 (Boone Cnty. Cir. Ct. 1863), *microformed on* C19733 (Mo. St. Archives) (Microformed cases cited throughout this Article can be located at <https://mospace.umsystem.edu/xmlui/handle/10355/11398>, click on microform number, then locate by case number.). For more on the case, see *infra* notes 356-68, and accompanying text.

26. See, e.g., WILLIAM F. SWITZLER, *HISTORY OF BOONE COUNTY, MISSOURI* 436-39, 445-51, 458-64 (1882) (describing the July 20, 1864 murder of a Union soldier by Confederate bushwhackers at Hallsville, a fight in Gosline's Lane between Sturgeon and Rocheport in which eleven Federal soldiers and "three negroes" were killed by guerrillas, the September 27, 1864, massacre by Bill Anderson's Confederate guerrillas of twenty-two unarmed Federal soldiers taken from a train at Centralia, and the ensuing Battle of Centralia in which Anderson's men killed 123 Federal soldiers).

pedagogy. However, the real reason this Article begins with Grant's case is that it is illustrative of a number of the patterns and themes that emerge from a careful study of Boone County's Civil War era homicides.

The first point on which Professor Grant's case is similar to so many other Boone County killings is that he got away with it. Perhaps that turn of phrase is a little harsh to Grant since the deceased was an enraged undergraduate with a cocked pistol whose dispatch the law of any era might have excused. But the most immediately striking fact about Boone County killings is that, although the homicide rate was not especially high by mid-nineteenth century standards,<sup>27</sup> the conviction rate was very low. Of the fifty-three homicide cases known to have been processed by Boone County courts from 1850-1875, only eleven verifiably resulted in a conviction for any grade of criminal homicide.<sup>28</sup> Two other defendants died while awaiting trial,<sup>29</sup> and

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27. Excluding the period during which active hostilities (including guerrilla attacks) were ongoing in Missouri from early 1861 to May 1865, the homicide rate in Boone County hovered around 10 per 100,000 for the decades before and after the War. (The average population in Boone County from 1850-60 was around 17,000, while the average population from 1865-1875 was around 22-23,000. SWITZLER, *supra* note 26, at 11, 361, 395, 521-22. Seventeen homicides were processed in Boone County courts in the decade before the war and twenty-two in the decade after the war.) This average is roughly on par with the homicide rates in the same period in some northeastern cities, but somewhat higher than that of the non-urban northeast. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 94-98 (2011). It is markedly lower than the homicide rates found in the same period in some southern states and parts of frontier California. *Id.* at 98; CLARE V. MCKANNA, JR., *RACE AND HOMICIDE IN NINETEENTH-CENTURY CALIFORNIA* 101 (2002).

28. John Chapman, Thomas Connelly, and Joe, a slave, were found guilty of first degree murder. *State v. Connelly*, Case No. 7523 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741 (Mo. St. Archives); *State v. Joe, a slave*, Case No. 4180 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19726 (Mo. St. Archives); *A Horrible Murder*, MO. STATESMAN, June 10, 1870; *Chapman Convicted*, MO. STATESMAN, June 25, 1858, at 4; *To Be Hung*, MO. STATESMAN, Oct. 16, 1857. Thomas Colbert, Columbus Field, Herman Illig, Hezekiah McBaine, Harrison Wilkerson, and Richard B. Wilkerson were convicted of second degree murder. *State v. Field*, Case No. 7755 (Boone Cnty. Cir. Ct. 1872), *microformed on* C19742 (Mo. St. Archives); *State v. Illig*, Case No. 5953 (Boone Cnty. Cir. Ct. 1865), *microformed on* C19734 (Mo. St. Archives); *State v. McBaine*, Case No. 4182 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19726 (Mo. St. Archives); *State v. Wilkerson*, Case No. 3081 (Boone Cnty. Cir. Ct. 1855), *microformed on* C19721 (Mo. St. Archives); *Murder - Larceny*, MO. STATESMAN, Oct. 31, 1873; *Sentenced*, MO. STATESMAN, Feb. 19, 1864. Allen Bysfield and John M. Jones were convicted of various degrees of manslaughter. *State v. Jones*, Case No. 7458 (Boone Cnty. Cir. Ct. 1869), *microformed on* C19741 (Mo. St. Archives); *State v. Bysfield*, Case No. 5920 (Boone Cnty. Cir. Ct. 1865), *microformed on* C19734 (Mo. St. Archives). Thomas Smith was found guilty of second degree murder, but that conviction was later reversed, and he was committed to an insane asylum, from which he then escaped. *Escaped*, MO. STATESMAN, July 7, 1871;

we do not know the outcome of four cases, either because the Boone County records are incomplete<sup>30</sup> or because the cases were removed to other counties and further records cannot be located.<sup>31</sup> In short, between 1850 and 1875, a Boone County manslayer had a roughly two-out-of-three chance of avoiding any legal sanction, even if identified by a court as the killer. Comparisons between time periods are difficult, but these odds are far better than those faced by a modern murder suspect.<sup>32</sup>

Moreover, while we may think of the western American frontier of the mid-nineteenth century – of which Missouri was a part – as a time of stern retributive punishments, only three of the eleven Boone County convictions were for first degree murder, which carried an automatic death penalty, and only two of those defendants were hung. The third was spared when the Governor concluded that he was insane and commuted his death sentence to commitment to the state asylum.<sup>33</sup> This aversion to convictions for capital

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*Verdict Set Aside*, MO. STATESMAN, Nov. 25, 1870. Thomas Keene was convicted of second degree murder, but that conviction was later reversed, and he was ultimately acquitted. *State v. Keene*, 50 Mo. 357, 361 (1872); GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 19, at 238.

29. See SWITZLER, *supra* note 26, at 569 (discussing the death of Beverly F. Daniel (a man) in jail awaiting trial); *see also* *State v. Doonah*, Case No. 7452 (Boone Cnty. Cir. Ct. 1868), *microformed on* C19741 (Mo. St. Archives) (noting that defendant Kate Doonah died in August 1868 while awaiting trial). Doonah seems to have been free on bond at the time of her death. MO. STATESMAN, June 12, 1868.

30. *See State v. Zumwalt*, Case No. 7467 (Boone Cnty. Cir. Ct. 1867), *microformed on* C19741 (Mo. St. Archives) (transferred from Callaway County to Boone County; no record of disposition).

31. *State v. Crosswhite*, Case No. 7651 (Boone Cnty. Cir. Ct. 1871), *microformed on* C19742 (Mo. St. Archives) (transferred to Macon County); *State v. Burnett*, Case No. 7271 (Boone Cnty. Cir. Ct. 1865), *microformed on* C19740 (Mo. St. Archives); *State v. Franklin*, Case No. 5941 (Boone Cnty. Cir. Ct. 1865), *microformed on* C19734 (Mo. St. Archives) (motion for change of venue made and apparently granted, but no record of county to which case was transferred).

32. In the United States between 1981-96, the murder conviction rate ranged from less than 40% to around 50%, but these figures represent the conviction percentage for all murders, including those for which no perpetrator was ever identified. *Crime and Justice in the United States and in England and Wales, 1981-96*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/pub/html/cjusew96/cpo.cfm> (last visited Jan. 28, 2012). Given that the clearance rate (broadly speaking, the percentage of cases in which police identify the perpetrator of a crime) for murder and non-negligent homicide is only around 66%, *Offenses Cleared – Crime in the United States, 2009*, FED. BUREAU INVESTIGATION, <http://www2.fbi.gov/ucr/cius2009/offenses/clearances/index.html> (last visited Jan. 28, 2012), a modern homicide case in which the police have identified a perpetrator will result in a conviction roughly 75% of the time.

33. *State v. Connelly*, Case No. 7523 (Boone Cnty. Cir. Ct. 1870), *microfilmed on* C19741 (Mo. St. Archives); *Local and Personal Department*, MO. STATESMAN, Oct. 14, 1870 (reporting that a large crowd assembled for Connelly's execution but

murder seems to have been a well-known and enduring community characteristic. According to one old Boone County practitioner, there were no convictions for first degree murder between 1870 and 1897.<sup>34</sup> At all events, the statistics suggest a community and criminal justice system remarkably indulgent toward killing, a circumstance that itself seemed worthy of exploration.

So my examination of Boone County's murders began with an effort to find adequate explanations for one local behavioral peculiarity. As it proved, finding those explanations required excavation of an economic, legal, and social order now long gone, but which, if it does not rule us, certainly influences us from its grave.<sup>35</sup>

## II. BOONE COUNTY AND CENTRAL MISSOURI IN THE MID-1800S

Missouri joined the Union in 1821.<sup>36</sup> It was then and remained the only slave state west of the Mississippi and north of the Missouri Compromise line of 36° 30' North.<sup>37</sup> Boone County is situated just to the north of and directly across the Missouri River from the state capital of Jefferson City in the agricultural zone created by the flow of the Missouri across the state from Kansas City to its junction with the Mississippi at St. Louis. It is part of an area referred to before the Civil War as the Boonslick or the "Boone's Lick Country"<sup>38</sup> that afterwards became known as "Little Dixie," so called because it was settled primarily by immigrants from the slave south who brought with them their peculiar institution<sup>39</sup> and because of the resultant prevalence of

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went away disappointed when the governor issued a stay); MO. STATESMAN, June 28, 1872 (reporting transfer of "Connelly, the murderer" from "the State Prison to the Lunatic Asylum at Fulton").

34. A first degree murder conviction in 1897 caused attorney Wellington Gordon to recall that the last such conviction had been in 1874 when he had prosecuted an Irishman for killing a woman near Centralia. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 135. Mr. Gordon remembered the case's protagonists and its outcome correctly, but the conviction actually occurred in August 1870. *Circuit Court, the Murderer*, MO. STATESMAN, Aug. 26, 1870; *Donnelly, the Murderer*, BOONE COUNTY J., Aug. 25, 1870, at 3 (It appears as if there was some discrepancy as to whether the defendant's name was Connelly or Donnelly.).

35. With apologies to Maitland. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker eds., 1936) ("The forms of action we have buried, but they rule us from their graves.").

36. SWITZLER, *supra* note 26, at 36.

37. WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 190 (1996).

38. SWITZLER, *supra* note 26, at 128.

39. Walter A. Schroeder, *Populating Missouri, 1804-1821*, 97 MO. HISTORICAL REV. 263, 285 (2003) (noting the suitability of the Boonslick for commercial agriculture and observing that during Missouri's early settlement period, "Wealthier immigrants, those who already owned slaves and could afford the higher land prices, tended to locate in the Boonslick."); Frances Maryanne Jones-Sneed, *The Bottom of*



Confederate sympathies in the region during and after the War.<sup>40</sup> By 1860, Boone County had the third-largest number of slaves among the state's 114 counties, with 5034 slaves<sup>41</sup> out of a total population of 19,486.<sup>42</sup>

Boone County was nonetheless a relatively cosmopolitan place for the time. Columbia, the county seat, is only thirty miles north of the state capitol in Jefferson City, giving it easy access to the institutions of state government. Beginning in 1839, Columbia was home to the state university,<sup>43</sup> and the Christian Female College was chartered in 1851.<sup>44</sup> The county boasted one significant Missouri River port at Rocheport<sup>45</sup> and a lesser one at Providence.<sup>46</sup> Columbia, though some miles from the river, was situated on the Missouri section of the famous Santa Fe Trail.<sup>47</sup> Its merchants for many years made good money supplying western migrants, as well as California gold hunters and doing some trading on their own as far west as Santa Fe.<sup>48</sup>

*Heaven: A Social and Cultural History of African-Americans in Three Creeks, Boone County, Missouri* 10 (Dec. 1991) (unpublished Ph.D. dissertation, University of Missouri) (on file with University of Missouri Libraries Depository) (noting that immigrants to the area came principally from Kentucky, Tennessee, North Carolina, and Virginia).

40. See T.J. STILES, *JESSE JAMES: LAST REBEL OF THE CIVIL WAR* 10-11, 19 (2003).

41. *Slaves in Missouri in 1860*, HOWARD COUNTY ADVERTISER, Jan. 9, 1903, available at <http://www.usgennet.org/usa/mo/topic/afro-amer/slavesinmo.html>. Howard County, which adjoins Boone to the west along the Missouri River, had the second-largest slave population in 1860, with 5886. *Id.*

42. SWITZLER, *supra* note 26, at 395.

43. 3 WILLIAM E. PARRISH, *A HISTORY OF MISSOURI: 1860 TO 1875*, at 82 (2001).

44. SWITZLER, *supra* note 26, at 810-11.

45. *Id.* at 177-78; JOHN C. CRIGHTON, *A HISTORY OF COLUMBIA AND BOONE COUNTY* 132-34 (1987).

46. Providence was the successor to the earlier settlement of Nashville, built on higher ground when Nashville was destroyed by the flood of 1844. SWITZLER, *supra* note 26, at 345-46, 638-39.

47. See CRIGHTON, *supra* note 45, at 94. For commemorative purposes, modern historians of the Santa Fe Trail often place its eastern terminus at Franklin, Missouri, which is on the north bank of the Missouri River twenty-five miles west of Columbia. See, e.g., *Santa Fe Trail Association Interactive Trail Map*, SANTA FE TRAIL ASS'N, <http://www.santafetrail.org/interactive-trail-map/> (last visited Mar. 26, 2012). But nineteenth century travelers would not have made that distinction since Franklin was just another small Missouri town on their western journey reachable either by river or via the road that ran through downtown Columbia. This mid-Missouri portion of the trail was sometimes referred to as the "Boone's Lick Road." MARY COLLINS BARILE, *THE SANTA FE TRAIL IN MISSOURI* 1 (2010) (reproducing Waldo C. Twitchell's "Map of Boone's Lick Road and the Old Santa Fe Trail" which shows the "Boone's Lick Road" running from St. Louis to Franklin, MO).

48. CRIGHTON, *supra* note 45, at 94, 240-41 (describing participation of Columbia merchant Moses U. Payne in the western trade); Mark W. Geiger, *Missouri's Hidden Civil War: Financial Conspiracy and the Decline of the Planter Elite, 1861-*

The retail trade in Columbia involved merchants buying local agricultural products, selling them for cash, and then using the proceeds to buy finished goods from wholesalers on the east coast for sale in Columbia.<sup>49</sup> Accordingly, Boone's leading citizens were not unaware that the state's economic future was tied just as closely to the opening West and the urbanizing and industrializing northern states as to the slave South.<sup>50</sup>

Because of Boone County's slave-based economy and its position astride a main western trade and migration route, its inhabitants were keenly interested in the controversy ignited by the 1854 Kansas-Nebraska Act over whether Kansas would enter the Union as a free or slave state.<sup>51</sup> Turbulent public meetings were held at which abolitionists were excoriated, but sharp differences emerged about how to respond to events in Kansas.<sup>52</sup> Some, like University President and pro-slavery firebrand James Shannon,<sup>53</sup> endorsed "war" and "revolution" as means of extending slavery's reach.<sup>54</sup> Indeed, Boone County sent an armed contingent to help suppress free staters in Kansas in August 1856.<sup>55</sup> Others, though equally disparaging of abolitionism,

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1865, at 53 (May 2006) (unpublished Ph.D. dissertation, University of Missouri), available at <https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/4423/research.pdf?sequence=3> (describing Missouri's two main industries before the Civil War as "providing for the material needs of western settlers passing through the state and producing support commodities for the plantations of the cotton South").

49. Geiger, *supra* note 48, at 56-57 (describing how wholesale merchants in Missouri "acted as conduits through which agricultural products made their way east and finished goods made their way west"). For a description of Columbia's business community in the period and a sampling of representative advertisements for goods imported from the east, see *Economy*, WAR & RECONCILIATION: MID-MO. CIV. WAR PROJECT, <http://www.warandreconciliation.com/community/economy.html> (last visited Jan. 28, 2012).

50. CRIGHTON, *supra* note 45, at 140-41.

51. For a summary of the controversy over the Kansas-Nebraska Act and of the resultant "Border War" along the Kansas-Missouri boundary, see *Border War*, WAR & RECONCILIATION: MID-MO. CIV. WAR PROJECT, [http://www.warandreconciliation.com/hatts/john\\_brown/border\\_war.html](http://www.warandreconciliation.com/hatts/john_brown/border_war.html) (last visited Jan. 28, 2012).

52. CRIGHTON, *supra* note 45, at 142; SWITZLER, *supra* note 26, at 377-82. Those few brave souls who exhibited abolitionist tendencies were sometimes assaulted in addition to being insulted. Suzanna Maria Grenz, *The Black Community in Boone County, Missouri, 1850-1900*, at 13 (May 1979) (unpublished Ph.D. dissertation, University of Missouri) (on file with University of Missouri Libraries Depository).

53. SWITZLER, *supra* note 26, at 382 (describing Shannon's statements at 1855 meeting on the Kansas question).

54. BARRY C. POYNER, *BOUND TO SLAVERY: JAMES SHANNON AND THE RESTORATION MOVEMENT* 113-16 (1999); see also, DAINS, *supra* note 23, at 36-37 (describing Shannon's proslavery activities somewhat more obliquely).

55. SWITZLER, *supra* note 26, at 384-85.

decried violence. The latter faction was probably the larger, and its influence ultimately secured Shannon's resignation from the university presidency.<sup>56</sup>

When the secession crisis broke in 1861, the governor, Claiborne Fox Jackson, and the state legislature tried to take Missouri into the Confederacy. After a series of pitched battles between pro-Union and pro-Confederate citizen armies, the secessionist governor and legislators were run out of the state, and Missouri's allegiance to the Union was precariously upheld.<sup>57</sup> Boone County's position during the war years was a bit anomalous. On the one hand, its white population was overwhelmingly pro-slavery and predominantly pro-southern in its emotional attachments. For many, these sentiments led to enlistment in southern regular or irregular forces<sup>58</sup> or to a war spent covertly supporting the Confederacy.<sup>59</sup> On the other hand, the county was home to a number of influential Unionists who owned slaves themselves but opposed secession – men like James S. Rollins, lawyer, leader of the old Whig Party, and U.S. Congressman for the district including Boone County during the War; William F. Switzler, lawyer and influential newspaper editor; and Odon Guitar, lawyer and Union military commander in central Missouri.

After a war which in Boone County was notable principally for the episodic small-bore violence of guerilla conflict, Boone's captive black population emerged emancipated, but impoverished and adrift,<sup>60</sup> while its whites

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56. DAINS, *supra* note 23, at 36-38; POYNER, *supra* note 54, at 118-21; *President James Shannon (1850-1856)*, ARCHIVES U. MISSOURI, available at <http://muarchives.missouri.edu/c-rg1-s1.html> (last updated Jan. 18, 2007).

57. This two-sentence summary of the events in Missouri at the outset of the Civil War is a tremendous oversimplification of a complex history. For the full story, see 3 PARRISH, *supra* note 43, at 1-58.

58. See, e.g., *Second Diary of Henry Cheavens*, WAR & RECONCILIATION: MID-MO. CIV. WAR PROJECT, [http://www.warandreconciliation.com/Second\\_Diary/JournalPage1.html](http://www.warandreconciliation.com/Second_Diary/JournalPage1.html) (last visited Jan. 28, 2012) (relating the experiences of a Boone County tutor who fought with Southern regular and irregular forces in Missouri and elsewhere).

59. See Geiger, *supra* note 48, at 28-30, 37-38 (asserting that pro-Southern inhabitants of the Boonslick area not only enlisted in Confederate military units, but engaged in a widespread covert financial conspiracy to fund the Confederate war effort).

60. See generally, WILLIAM WILSON ELWANG, THE NEGROES OF COLUMBIA, MISSOURI: A CONCRETE STUDY OF THE RACE PROBLEM (1904), available at <http://digital.library.umsystem.edu> (search text collections for "The Negroes of Columbia Missouri: A Concrete Study of the Race"; then select "get results details"; finally, under "The Negroes of Columbia Missouri: A Concrete Study of the Race" select "view first page"); Grenz, *supra* note 52. Elwang's little pamphlet, published with evident pride by the University of Missouri sociology department, combines careful data collection about the objective realities of life for African-Americans in Columbia forty years after emancipation with breathtakingly racist analysis of the causes and potential cures for the prevailing poverty and degradation. ELWANG, *supra*, at III-IV, 3; cf. CRIGHTON, *supra* note 45, at 189-91 (painting a rosier picture).

began reknitting the fabric of a community whose political allegiances had been sharply split, but which retained a consensus about its proper social organization: Culturally southern. Economically agrarian, but with a strong mercantile class and a westward-looking entrepreneurial spirit. Eager to retain its place as a seat of learning in a still-raw state. White ruling black. White men of property ascendant over white men without, albeit with the respect for success by self-made men characteristic of a place only recently on the edge of the frontier.<sup>61</sup> As we will see, all of these aspects of Boone County's history and character are reflected to a remarkable degree in the stories of the homicides that occurred there from 1850-1875.

### III. THE LEGAL CULTURE AND INFRASTRUCTURE OF MISSOURI AND BOONE COUNTY

To understand homicide cases in Civil War-era Missouri, one must begin with an understanding of the structure and culture of the courts and law enforcement authorities of the time.

#### A. Criminal Investigation

We are accustomed to rely on institutional police forces to conduct criminal investigations and to apprehend suspects identified by those investigations. Mid-nineteenth century Missouri had officers bearing the titles that we associate with police investigation – sheriffs and constables – but those officials appear to have had only limited investigative roles. Their legal powers were restricted, their training was limited or nonexistent, and, perhaps most importantly, they had no financial incentive to investigate crime.

#### 1. Legal Authority

Sheriffs and constables were the only constitutionally-designated peace officers in nineteenth century Missouri outside the large incorporated cities.<sup>62</sup> The principal law enforcement officer in each county was the popularly elect-

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61. See generally Geiger, *supra* note 48, at 61 (observing that even before the War, “[t]here was little old money in the Boonslick, so humble origins were not a drawback to rising socially”).

62. This remained true at least as late as the 1920s. See ARTHUR V. LASHLY, THE MISSOURI ASSOCIATION FOR CRIMINAL JUSTICE, PLAN, SCOPE, PROCEDURE AND PROGRESS OF THE SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN MISSOURI 9 (1925). Coroners seem to have occupied an intermediate status that allowed them to step into the role of sheriff or constable on some occasions. For example, the coroner was directed to assume the duties of the sheriff, or in St. Louis of the marshal, if those officers could not perform their functions and to serve as jailer if the sheriff were imprisoned. See MO. REV. STAT. Ch. 149, § 26 (Charles H. Hardin 1855); see also *id.* Ch. 86, § 28.

ed sheriff.<sup>63</sup> A sheriff's responsibilities were numerous and varied. On the criminal side, his primary statutory duties were to be "a conservator of the peace within his county,"<sup>64</sup> to arrest "felons and traitors,"<sup>65</sup> and to "execute all process directed to him by legal authority."<sup>66</sup> As conservator of the peace, the sheriff had an almost entirely reactive role. He was required to "quell and suppress assaults and batteries, riots, routs, affrays, and insurrections,"<sup>67</sup> a provision that presumably conferred the power to use moral and physical suasion to control outbreaks of violence or disorder.

The sheriff's arrest power was analogous, but not identical, to that of a modern policeman. He could arrest for felonies with or without a warrant, as indeed could any citizen.<sup>68</sup> The statutory basis for the sheriff's felony arrest power seems to have been the provision commanding that, "Every sheriff . . . shall apprehend and commit to jail all felons and traitors . . ."<sup>69</sup> However, the statute must be read as modified by the common law restrictions on the arrest power, namely that an officer was entitled to arrest without warrant for a misdemeanor or breach of the peace committed in his presence,<sup>70</sup> or for a

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63. MO. CONST. of 1865, art. V, § 22 (requiring election of sheriffs in each county for two-year terms, but barring any person from serving more than four of any consecutive eight years).

64. MO. REV. STAT. Ch. 149, § 12 (1855).

65. *Id.* § 14.

66. *Id.*

67. *Id.*

68. HENRY S. KELLEY, A TREATISE ON CRIMINAL LAW AND PRACTICE § 55 (1876) [hereinafter, KELLEY, CRIMINAL LAW]. The principal legal advantage possessed by the sheriff (and other peace officers) was that a private person would be civilly liable in damages if no felony had actually been committed or if the civilian had no reasonable ground to suspect the arrestee, while a sheriff was immune from suit whether a crime had been committed or not so long as he acted in good faith and had reasonable grounds for his suspicion. *Id.*

69. MO. REV. STAT. Ch. 149, § 14 (1855).

70. *Roberts v. State*, 14 Mo. 138, 145 (1851); KELLEY, CRIMINAL LAW, *supra* note 68, § 56. He was also empowered to require "all offenders against law, *in his view*, to enter into recognizance, with surety, to keep the peace, and to appear at the next term of the circuit court of the county." MO. REV. STAT. Ch. 149, § 12 (1855) (emphasis added). The italicized phrase "*in his view*" is problematic. It may be intended to embody the common law restriction on the arrest power noted above, *supra* note 68, namely that an officer was entitled to arrest without warrant for a misdemeanor committed in his presence, or for a felony committed out of his presence, if the officer has probable cause to believe the felony was committed and the arrestee committed it. But if that is the case, it implies that a sheriff could detain, but not require a recognizance, from one who committed an offense out of his presence. Alternatively, "*in his view*" could mean "*in his opinion*." In either case, note that the old Missouri statute conferred on sheriffs a power now reserved exclusively to judicial officers, that of setting of a bail or bond which, when posted, permits the arrestee to be released. Here at least the initial judgment about whether a person offended the

felony committed out of his presence, if the officer had probable cause to believe (or perhaps merely reasonable suspicion) that the felony was committed and the arrestee committed it.<sup>71</sup>

Constables, who were officials selected within the township subdivision of counties, also possessed some criminal justice authority.<sup>72</sup> The law authorized a constable to arrest “on view or warrant . . . all felons and disturbers of the public peace, and violators of the criminal laws,” and could “break open doors and inclosures to execute” warrants.<sup>73</sup> He also possessed the power to “suppress all riots, affrays, and unlawful assemblies, which may come to his knowledge.”<sup>74</sup> But constables’ independent investigative authority seems to have been more circumscribed than that of sheriffs. Professor Henry Kelley, the leading nineteenth century Missouri authority, characterized a constable as “a ministerial officer in a justice’s court.”<sup>75</sup> In practice, constables seem to have been limited to controlling the drunk and disorderly and serving and enforcing the warrants and other civil and criminal processes issued by the justices of the peace.

In any case, nowhere in the law was there a provision directing the sheriff or constable to *investigate* crimes that did not happen right in front of him

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law and the initial judgment about the sureties necessary to prevent continued misbehavior were made by the sheriff without reference to a judicial officer.

71. *Roberts*, 14 Mo. at 141; KELLEY, CRIMINAL LAW, *supra* note 68, § 55; see also *State ex rel. Livingstone v. Williams*, 77 P. 965, 968, (Or. 1904) (quoting *State ex rel. v. Francis*, 95 Mo. 44, 44 (1888) (citing and construing 1879 Missouri statute on arrest power identical to 1855 statute)). The question of the sheriff’s power to arrest for felonies committed out of his presence is a bit muddled by the retention in Missouri law of a relic of old English practice – the “hue and cry.” Missouri statutory law proclaimed that:

Whenever any felony shall be committed, and the offender attempt to escape, public notice thereof shall immediately be given, at all places near where the same was committed, and pursuit shall be forthwith made after the offenders by sheriffs, coroners and constables, and all others who shall be thereto required by any such officer, and the offender may be arrested by any such officer or his assistants, without warrant.

Practice and Proceedings in Criminal Cases, MO. REV. STAT., art. II, § 32 (1835). This is an odd provision. It could be read to imply that peace officers’ warrantless felony arrest power was limited to cases in which felons attempted to escape and notice was posted. The better reading is probably that suspected commission of a felony combined with attempt to escape permitted officers to enlist the public in efforts to apprehend the fugitive, who could then be arrested by either peace officers or their civilian assistants without warrant. See generally KELLEY, CRIMINAL LAW, *supra* note 68, § 58.

72. HENRY S. KELLEY, A TREATISE ON THE LAW RELATING TO THE POWERS AND DUTIES OF JUSTICES OF THE PEACE, CONSTABLES, ETC., ETC., IN THE STATE OF MISSOURI §§ 403, 407 (1890) [hereinafter KELLEY, JUSTICES OF THE PEACE].

73. *Id.* § 407.

74. *Id.*

75. *Id.*

or his deputies. Sheriffs were empowered to execute search warrants in criminal cases.<sup>76</sup> However, the statute authorized search warrants only for stolen or embezzled property,<sup>77</sup> and at common law warrants could be employed only to search for so-called fruits and instrumentalities of crime, and not for what was sometimes dismissively characterized as “mere evidence.”<sup>78</sup> The power of warrantless arrest implicitly conferred a power to make some inquiry into the facts supporting an arrest,<sup>79</sup> but it seems unlikely that sheriffs or their deputies spent much time sleuthing.

## 2. Sheriffs, Constables, and Criminal Investigation

Neither sheriffs nor constables nor their deputies were required to have any experience or training in law enforcement generally or criminal investigation in particular. Indeed, the idea of criminal investigation as a specialized body of expertise was years in the future. Sir Robert Peel established the first regular European police force in London in 1829,<sup>80</sup> but his innovation did not reach into the American interior for many decades thereafter.<sup>81</sup> Moreover, until the twentieth century, even professional police forces focused far more on the preservation of order than the investigation of crime.<sup>82</sup>

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76. MO. REV. STAT. Ch. 127, § 2 (Charles H. Hardin 1855).

77. *Id.* § 1; KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 791. *See, e.g.*, Moore v. Sabourin, 42 Mo. 490, 494 (1868) (discussing property seized pursuant to a search warrant and noting that it was “alleged to have been stolen”); Hemmaker v. State, 12 Mo. 453, 453 (1849) (discussing use of search warrant to recover stolen watch); Miller v. Brown, 3 Mo. 127, 130-31 (1832) (holding that a warrant authorizing the search of a person for stolen property could also properly authorize the arrest of the person upon whom the property was found).

78. Gouled v. United States, 255 U.S. 298, 311 (1921), *abrogated by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967); *see generally*, WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN KERR, CRIMINAL PROCEDURE § 3.4 (5th ed. 2009).

79. The statutory responsibilities of Missouri sheriffs remained essentially unchanged into the 1920s. In 1926, a group of legal luminaries surveyed the Missouri criminal justice system and said of the sheriff’s statutory arrest power: “In cases where a *felony* or *treasonable act* is not committed *in his view*, the sheriff should arrest the guilty person even though he has no warrant directing such an arrest. This quite definitely implies the exercise of *some* initiative on his part.” MO. ASS’N FOR CRIMINAL JUSTICE, THE MISSOURI CRIME SURVEY 62 (1926) [hereinafter 1926 MISSOURI CRIME SURVEY].

80. *See* A.A.W. RAMSAY, SIR ROBERT PEEL 88-89 (1971).

81. *See* ERIC H. MONKKONEN, POLICE IN URBAN AMERICA, 1860-1920, at 53-55 (1981) (detailing adoption of uniformed police forces in cities across the U.S. between 1850-1900).

82. *Id.* at 49-53 (discussing theories regarding reasons for foundation of uniformed police forces in American cities in 1800s).

The lack of police professionalism meant not only that sheriffs and constables lacked investigative training but also that they were innocent of any exposure to regularized record-keeping systems. Justices of the peace (JPs) and clerks of the circuit courts maintained records of cases actually filed, but the police agencies themselves seem to have had no means of archiving and accessing information about criminal incidents and suspects. Deficiencies in record-keeping extended beyond police agencies to other related government functions. For example, by 1900, Boone County and Missouri still had no system for recording births and deaths.<sup>83</sup> As late as 1924, the lack of systematic record-keeping continued to impair Missouri law enforcement.<sup>84</sup>

Even if a mid-nineteenth century Missouri sheriff had possessed both the training and disposition to be a criminal investigator and an uncharacteristic flair for organization, he was charged with a bewildering array of other governmental functions. The sheriff was the county collector of revenue,<sup>85</sup> the census taker,<sup>86</sup> supervisor of elections,<sup>87</sup> the substitute trustee on deeds of trust where a trustee died,<sup>88</sup> and the county jailor.<sup>89</sup> He was responsible for executing civil writs and attachments<sup>90</sup> and for supervising sales of land partitioned between joint tenants.<sup>91</sup> He played a role in the supervision of roads and highways<sup>92</sup> and cases involving salvage.<sup>93</sup> If anyone proposed to build a dam, he was to convene a jury to inquire whether the dam would unduly damage adjoining property.<sup>94</sup> He had duties with respect to slaves<sup>95</sup> and vagrants.<sup>96</sup> He summoned grand<sup>97</sup> and petit juries,<sup>98</sup> transported prisoners to the state penitentiary,<sup>99</sup> and supervised the execution of death sentences.<sup>100</sup>

But the primary reason to think that sheriffs did little investigation is that there was no money in it. Until well into the twentieth century, Missouri

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83. ELWANG, *supra* note 60, at 46.

84. 1926 MISSOURI CRIME SURVEY, *supra* note 79, at 68-69.

85. MO. REV. STAT. Ch. 135, § 1 (Charles H. Hardin 1855).

86. *Id.* Ch. 25, §§ 4-5.

87. *Id.* Ch. 99, §§ 4-5.

88. *Id.* Ch. 162, § 2.

89. *Id.* Ch. 86, § 2.

90. *Id.* Ch. 128, § 28.

91. *Id.* Ch. 119, §§ 28, 32-44.

92. *Id.* Ch. 137.

93. *Id.* Ch. 141.

94. *Id.* Ch. 112, §§ 7-8.

95. *Id.* Ch. 150.

96. *Id.* Ch. 163, §§ 2-5.

97. *Id.* Ch. 88, §§ 2, 4-5.

98. *Id.* § 7.

99. *Id.* Ch. 127, § 14; *see also*, *Sent Away*, MO. STATESMAN, June 10, 1864 (noting that Sheriff Waugh of Boone County was transporting Sydney Kilgore to St. Louis to serve six years in the penitentiary for horse stealing).

100. MO. REV. STAT. Ch. 127, § 16 (1855).



sheriffs received no salary. Instead, they were paid fees for specific services rendered.<sup>101</sup> In the mid-1800s, the sheriff's fee income was of several types. First, statutes enumerated a variety of piece-work fees for the performance of discrete official acts. In 1870, these fees included serving summonses, writs, and injunctions in civil cases (\$1.00 each); making, executing, and delivering sheriff's deeds on real estate (\$2.50 each); summoning petit juries in civil and criminal cases (\$1.00) and grand juries in criminal ones (\$2.50); summoning witnesses (\$.50 each); attending court (\$2.00 per day, plus \$1.00 for every criminal jury trial, plus \$5 for every case, party, or witness called); committing a prisoner to jail (\$1.00); and executing a death warrant (\$25.00).<sup>102</sup> Sheriffs also received \$1.25 per day, plus \$0.08 per mile, for transporting prisoners to the state penitentiary.<sup>103</sup> Second, prisoners in the county jail were entitled by law to secure food, clothing, and bedding from outside sources at their own expense.<sup>104</sup> But if prisoners could not pay for their own maintenance, sheriffs were compensated for feeding them<sup>105</sup> and could often derive a profit by spending less on the prisoners' fare than the county paid for the daily food allowance and pocketing the difference as profit.<sup>106</sup> Third, by statute, sheriffs were paid on a commission basis for some services rendered to the courts. For example, if land or property was levied on and sold, the sheriff received a set percentage of the proceeds.<sup>107</sup> And when a sheriff removed and maintained livestock pursuant to legal process, he received compensation set by the court.<sup>108</sup> Fourth, and critically, until 1872, sheriffs acted as county collectors of revenue<sup>109</sup> and received a commission on the amounts collected.<sup>110</sup> If a sheriff wanted help in performing his multifarious duties, he was allowed to hire deputies but was required to pay them from his fee revenue.<sup>111</sup>

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101. 1926 MISSOURI CRIME SURVEY, *supra* note 79, at 67 (noting that in 1924, "[e]xcept in five counties the sheriff is exclusively upon a fee basis").

102. MO. REV. STAT. Ch. 56, §§ 13-14 (David Wagner 1870).

103. *Id.*

104. MO. REV. STAT. Ch. 86, § 11 (1855).

105. *Id.* at § 9; *see also* MO. REV. STAT. Ch. 56, § 14 (1870) (setting the daily rate to be paid sheriffs for feeding prisoners at sixty cents).

106. 1926 MISSOURI CRIME SURVEY, *supra* note 79, at 67 (noting the persistence of this practice into the 1920s).

107. MO. REV. STAT. Ch. 56, § 13 (1870).

108. *Id.*

109. The offices of sheriff and revenue collector were separated by statute in 1872. MO. REV. STAT. Ch. 118, § 92 (David Wagner 1872). The Act provided that the offices could still be held by the same person, but by necessary implication that a person seeking both jobs would have to run for each one separately. *See id.*

110. MO. REV. STAT. Ch. 118, § 57 (1870); *see also*, MO. REV. STAT. Ch. 135, § 21 (1855) (authorizing a commission payable to the collector of twenty-five cents for each tract of land or town lot upon which property taxes were collected).

111. *See* MO. REV. STAT. Ch. 126, § 9 (1870).

Taken together, these fees and commissions made the office of sheriff a very lucrative post, with the tax collection function providing the most lucre. For example, in 1859, Sheriff John M. Samuel of Boone County was paid a commission of \$3388.44 for collecting state and county fees, licenses, and taxes, a sum equal to roughly \$79,957.11 in 2009 dollars.<sup>112</sup> In 1866, Sheriff John F. Baker was paid \$27,443.38 in revenue collection commissions, or a breathtaking \$397,253.87 in 2009 dollars.<sup>113</sup> These amounts did not include income from the fees and commissions due the sheriff for his work as an officer of the circuit court. Indeed, the disproportionately large amounts to be made from collecting taxes seem to have diverted sheriffs even from performance of these other compensated, but less remunerative, functions. In 1873, shortly after sheriffs were divested of their revenue collection function, they lobbied to change the fee statute to authorize payment of mileage for service of process, arguing that, "Since the separation [sic] of the offices of Collector and Sheriff it is of the utmost importance . . . to see that [sheriffs] have pay for all services rendered."<sup>114</sup> The unmistakable implication of this appeal was that, so long as sheriffs were also tax collectors, they either did not need to be paid much for their other duties or, perhaps, had not been all that diligent in performing them in the first place. Perhaps because of the obvious opportunities for self-enrichment, sheriffs were term-limited, barred from serving more than two two-year terms in any consecutive eight-year period.<sup>115</sup>

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112. Records of the Boone County Court (1859-61), *microformed on C22522*, Book N, p. 248 (Mo. St. Archives). Being sheriff seems to have become more and more lucrative over time. In 1850, Sheriff Joseph B. Douglass received \$938.30 in commissions for collecting state and county taxes, or approximately \$23,901.17 in 2009 dollars. Records of the Boone County Court (1849-51), *microformed on C22519*, Book I, p. 636 (Mo. St. Archives).

113. Records of the Boone County Court (1866-68), *microformed on C22523*, Book Q, p. 118 (Mo. St. Archives). Baker was paid for collecting state, county, military, and railroad taxes. The 1866 payment may have included unpaid arrearages from the war years of 1864-65. *Id.* Even if so, the sum was very large.

114. Form letter from Hugh M. Cooper, Sheriff of Sullivan County, to Louis Benecke, Missouri State Senator (1870-74), (on file with Western Historical Manuscript Collection, Collection Number C 3825, Benecke Family papers, folder 1506). In a fascinating preview of modern lobbying techniques, someone prepared preprinted form letters arguing that separation of the collector and sheriff function made revision of the fee statute essential. These letters had blanks for the names of state legislators and for the name and county of the signatory sheriff. *Id.* So far as can be determined, the sheriffs' pleas fell on deaf ears. By 1877, the statutory fees for transporting a prisoner to the penitentiary or from one county to another to face charges were increased over the rates prevailing in 1870, but there does not seem to have been an allowance for mileage for service of process. *See* MO. REV. STAT. Ch. 56, § 14 (Myers Supp. 1877).

115. *See* MO. CONST. of 1865, art. V, § 22 (setting two-year terms for sheriff, but barring any person from serving more than four of any consecutive eight years).

In sum, sheriffs were short-term occupants of a highly remunerative office who had neither training nor a direct statutory obligation to *investigate* crime, nor the slightest financial incentive to do so. Any time the sheriff spent on investigation himself was a donation. Any expenditure on deputies to investigate was an increase in overhead.<sup>116</sup> Town constables were also paid on a fee basis, and though their opportunities for fee income were more restricted than sheriffs, their incentives to spend time investigating crime were also de minimis.<sup>117</sup> The fee system obviously subverted the criminal investigative function, but it proved immune to complaint throughout the nineteenth century.<sup>118</sup>

### 3. The Investigative Function of Justices of the Peace and Coroners

The real investigative authority, particularly in serious cases like homicides, rested with justices of the peace or coroners. JPs were elected judicial officers<sup>119</sup> (though they need not have been lawyers) empowered to try minor civil cases<sup>120</sup> and criminal matters involving breaches of the peace<sup>121</sup> – essentially the class of cases we would now characterize as misdemeanors. In fel-

116. See generally J.G. Heinberg, *Law Enforcement Agencies*, in MISSOURI: ITS RESOURCES, PEOPLE, AND INSTITUTIONS 410, 412-14 (Noel P. Gist et al. eds., 1950).

117. See MO. REV. STAT. Ch. 90, § 14 (Charles H. Hardin 1855) (allowing constables fees for services rendered in assisting jury trial in justice of the peace court); Fees, MO. REV. STAT. § 11 (1835) (enumerating short list of services for which constables could receive fees). It appears that constables, like sheriffs, may have received fees based on collections and levees arising from court actions, but the civil jurisdiction of justices of the peace was limited to low-value cases. MO. REV. STAT. Ch. 90, § 2 (1855) (limiting civil jurisdiction of JPs to actions in contract for \$90 or less and tort actions seeking not more than \$20). Therefore, the profit potential was much lower than for a sheriff acting on behalf of the circuit court.

118. In 1926, exasperated members of the Missouri Association for Criminal Justice wrote:

This is no place to reiterate the arguments against the fee system. The facts are common property. Applied to the sheriff's office it means that we are paying the sheriffs of the state an annual amount which is sufficient to purchase adequate police protection but on account of the method of payment are actually making it impossible to get protection. The fee system is a direct obstacle in the way of improvement of criminal justice.

1926 MISSOURI CRIME SURVEY, *supra* note 79, at 68. And this observation came more than fifty years after sheriffs lost the tax collection function with all its potential for self-enrichment. *Id.*

119. MO. REV. STAT. Ch. 89, § 1 (1855) (providing for election of up to four justices of the peace in each municipal township); Justice of the Peace, MO. REV. STAT. § 1 (1835) (same).

120. MO. REV. STAT. Ch. 90, §§ 2-3 (1855); Justices' Courts, MO. REV. STAT. §§ 2-3 (1835).

121. MO. REV. STAT. Ch. 91, §§ 1-2 (1855); Justices' Courts in Cases of Breach of the Peace, MO. REV. STAT. §§ 1-2 (1835).

any cases, if a criminal suspect was caught in the act – was a “manifest criminal” in common law terms<sup>122</sup> – he could be arrested by officers or citizens who witnessed the crime or, once the witnesses raised the “hue and cry,” by any interested citizen while pursuit was fresh.<sup>123</sup> In any case not involving detention of a manifest criminal, an arrest warrant had to be obtained from the JP, whose duty it was to issue warrants on receipt of a sworn, written complaint.<sup>124</sup> It is unclear how much supporting detail the complainant was required to provide before the JP issued a warrant.<sup>125</sup> However, once a suspect was brought before the court, the JP was obliged to conduct an immediate factual examination (unless the suspect agreed to waive examination and be bound over for trial to the circuit court).<sup>126</sup>

The scope and nature of the JP’s examination are a bit surprising to the modern American practitioner because the procedural rights conferred on defendants were, if anything, more extensive than would be enjoyed by a modern defendant in a preliminary hearing.<sup>127</sup> The prisoner was entitled to a reading of the charges against him, and he enjoyed the right to counsel and a right of reasonable time to confer with that counsel.<sup>128</sup> The JP was required to examine the complainant and the witnesses for the prosecution, under oath,

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122. See generally GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 76-81, 115-118 (1978) (discussing the concept of manifest criminality and its effect on the development of substantive common law doctrine).

123. KELLEY, *JUSTICES OF THE PEACE*, *supra* note 72, § 788.

124. *Id.* § 774.

125. For example, the sample complaint provided by Professor Kelley in his 1890 treatise, is nothing more than a sworn declaration that the suspect did, on a particular date, commit a particular offense. *Id.* Examples of actual complaints found in court files of the period seem to follow this minimalist model. See, e.g., *State v. Douglass*, Case No. 7307 (Boone Cnty. Cir. Ct. 1866) *microformed on* C19740, at 2665 (Mo. St. Archives) (Complaint of Ezekiel and Morton Woods, July 15, 1866). On the other hand, the 1835 Missouri statute governing arrests states that, upon receipt of a complaint, “it shall be [the magistrate’s] duty to examine the complainant, and any witnesses who may be produced by him, on oath.” Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 2 (1835). The magistrate was commanded to issue a warrant “[i]f it appear on such examination, that any criminal offence has been committed.” *Id.* § 3. Thus, it seems that some exercise of judgment was required.

126. See Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 13 (1835); KELLEY, *JUSTICES OF THE PEACE*, *supra* note 72, § 776.

127. For discussion of the rights accorded a defendant in a modern preliminary hearing, see LAFAYE, ISRAEL, KING, & KERR, *supra* note 78, § 14.4 (noting that defendants at preliminary hearings are entitled to counsel, cross-examination (which may be circumscribed due to the screening function of the proceeding), presentation of their own witnesses, and a right to challenge some procedural rulings of the presiding officer).

128. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 13 (1835); KELLEY, *JUSTICES OF THE PEACE*, *supra* note 72, § 776.

in the suspect's presence.<sup>129</sup> Witnesses were to be sequestered,<sup>130</sup> and the evidence given by the witnesses was to be written down by or at the direction of the judge and signed by the witnesses.<sup>131</sup> The defendant had the option of remaining silent or giving a sworn statement.<sup>132</sup> The rules governing the examination, including the "order of conducting the trial or hearing, with respect to the introduction of the evidence, and the examination of witnesses [were] the same as govern in the trial of causes in courts of record, as far as practicable."<sup>133</sup> Suspects enjoyed the right of cross-examination,<sup>134</sup> and contemporary records show that the right was often vigorously exercised.<sup>135</sup> Indeed, JP preliminary examinations often seem to have assumed the character of mini-trials. Newspaper accounts commonly referred to them as "trials,"<sup>136</sup> and they sometimes lasted for days.<sup>137</sup>

129. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 13 (1835); KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 776.

130. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 16 (1835); KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 781.

131. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 20 (1835). *But see* KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 781 (stating that recording of witness testimony was required in justice of the peace courts only in homicide cases).

132. KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 785; *see, e.g.*, State v. Holland, Case No. 7536 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741 (Mo. St. Archives) (record of Justice of Peace examination stating that "The prisoner having been informed of charge against her declines by advice of counsel to answer any questions or make a statement.").

133. KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 780.

134. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 14 (1835) (establishing right of counsel for prisoner to be present and to cross-examine the complainant and prosecution witnesses).

135. *See, e.g.*, State v. Douglass, Case No. 7307 (Boone Cnty. Cir. Ct. 1866), *microformed on* C19740 (Mo. St. Archives) (record of testimony taken before Justice of the Peace J.W. Hickam, recounting results of cross-examination of prosecution witnesses).

136. *See, e.g.*, *A Fatal Shooting Affray*, MO. STATESMAN, Jan. 7, 1870 (referring to defendant Thomas Keene being "on trial" before two justices of the peace); *Fatal Shooting Scrape*, BOONE COUNTY J., Jan. 7, 1870 (stating that Thomas Keene "underwent a preliminary trial" that had been in progress for "several days" at time of going to press); *see also Committed for Murder*, MO. STATESMAN, July 21, 1865 (reporting that defendant in State v. Burnett, Case No. 7271 (Boone Cnty. Cir. Ct. 1865), *microformed on* C19740 (Mo. St. Archives), "was on last Friday tried before Justice Daly at Rocheport and committed to the county jail, to await his trial for murder").

137. *See, e.g.*, *A Fatal Shooting Affray*, *supra* note 136 (describing preliminary examination in State v. Keene as lasting several days). Similarly, the preliminary examination in the murder case against Andrew McQuitty, State v. McQuitty, Case No. 3109 (Boone Cnty. Cir. Ct. 1853), *microformed on* C19721, at 4138 (Mo. St. Archives), lasted "several days." *Case of Stabbing at Rocheport*, MO. STATESMAN, July 29, 1853. The examination in the murder case against Humphrey Norman ran

The JP's obligation at the close of the evidence was to determine if a crime occurred and whether probable cause existed to believe the defendant committed it. If so, the magistrate was to bind the accused over for trial to the circuit court.<sup>138</sup> If the JP did not find probable cause, the suspect was to be discharged.<sup>139</sup> However, then as now, no jeopardy attached in consequence of the JP's ruling, so a suspect might be charged again despite the JP's discharge.<sup>140</sup> The JP set bail for all defendants bound over except those charged with capital offenses in which "the proof is evident or the presumption great,"<sup>141</sup> although defendants who could not meet the bail conditions would be detained.<sup>142</sup>

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four days, from October 16-19, 1867. *State v. Norman*, MO. STATESMAN, May 29, 1868; see *State v. Norman*, Case No. 7442 (Boone Cnty. Cir. Ct. 1867), *microformed on C19741* (Mo. St. Archives).

138. KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 782. Interestingly, the JP was also required to bind the *complainant* and all prosecution witnesses to appear and testify through the execution of a "recognizance." *Id.*; see also Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 23 (1835). It is unclear whether this recognizance required an actual posting of collateral or signatures of sureties, or whether it might be a pure unsecured promise to appear. However, a witness who refused to enter into a recognizance could be imprisoned. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 25 (1835).

139. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 21 (1835); KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 782; see, e.g., *State v. Douglass*, Case No. 7307 (Boone Cnty. Cir. Ct. 1866), *microformed on C19740* (Mo. St. Archives) (reflecting discharge by justice of the peace of Silas Hysinger and several other defendants for failure of proof by prosecution).

140. See *infra* notes 221-34 and accompanying text, describing case of a slave named Hiram who was arrested on suspicion of raping a white girl in August 1853 and first brought before justices of the peace John Ellis and Walter C. Maupin of Cedar Township, who found insufficient evidence and discharged him. However, Hiram was rearrested several days later on a warrant from a different justice sitting in Columbia Township, and subsequently brought before Justice David Gordon and recorder Francis T. Russell for further proceedings. Unfortunately, these proceedings were interrupted by a lynch mob which seized Hiram and hung him. The lynching was obviously illegal, but pursuing a prosecution following release by JPs was perfectly permissible. For a more complete description of the case, see Frank O. Bowman, III, *Stories of Crimes, Trials, and Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349, 349-51, 354-56 (2009) [hereinafter Bowman, *Crimes, Trials, and Appeals*]. Similarly, when Dr. Benjamin Austine killed Dr. Thomas Keene in 1876, the investigating justice found Austine's actions justifiable and discharged him, but the circuit attorney nonetheless presented the matter to the grand jury (which declined to indict). GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 237-38.

141. KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 783; see also *Committed and Bailed*, MO. STATESMAN, May 12, 1865 (reporting that George Sharp was bound over for trial on a charge of shooting Mrs. Farthing, but released on bail of \$2500).

142. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 27 (1835); KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 784.

The JP's preliminary examination was not, as such a thing would now be, a judicial review of the prior investigative work of police filtered through the charging discretion of a prosecuting attorney and possibly further filtered through the citizen's-eye-view of a grand jury.<sup>143</sup> It was instead the primary means of evidence-gathering for serious crimes, the results from which would then be considered by a prosecuting attorney, grand jury, and perhaps trial court. The role of a JP in old Missouri is most closely analogous to the investigating magistrates of modern continental European practice.<sup>144</sup>

In cases of homicide where the cause of death was unknown, the initial investigation might be undertaken by the county coroner.<sup>145</sup> Like JPs, coroners were elected officials<sup>146</sup> not required to have either investigative or legal training. Moreover, coroners, though charged with determining the cause of death of persons in their counties, need not have had any medical knowledge. The coroner was empowered to convene a coroner's jury, to issue summonses for witnesses, and to preside over an inquest.<sup>147</sup> If the inquest concluded that the death was a felony homicide, the coroner referred the case to a JP for further proceedings.<sup>148</sup>

In sum, the task of investigating homicides was shared by sheriffs, constables, JPs, and coroners, none of whom necessarily had any real training, or much of any incentive other than public-spiritedness, to do a thorough professional job.

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143. In modern practice, a preliminary hearing in a criminal case will be conducted by either a judge of the court of general jurisdiction or an inferior judicial officer bearing a title like magistrate, see, for example, FED. R. CRIM. P. 5.1 (assigning preliminary examinations to magistrate judges), or county court judge, see, for example, COLO. R. CRIM. P. 5(a)(4) (prescribing process by which county court judges hold felony preliminary hearings in which defendants are bound over for trial to the district court). The hearing is held after an information has been filed by the prosecutor, or after a grand jury has returned a true bill on an indictment drafted by the prosecutor. The judicial officer is charged with determining whether probable cause exists to send the case to trial. See, e.g., COLO. R. CRIM. P. 5(a)(4)(iii).

144. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1075 n.313 (2010) (describing an investigating magistrate, or "juge d'instruction," as "a judicial branch figure responsible for directing investigation at trials in the French criminal justice system; the position is noteworthy for its independence from both the prosecutors and the defendant"). JPs also possessed the power to require those who were found to pose a future threat to breach the peace to post bond for their good behavior. See, e.g., *State v. Ben L. Douglas, et al.*, Case No. 4216 (Boone Cnty. Cir. Ct. 1857), *microformed on C19726*, at 3757 (Mo. St. Archives) (ordering defendant to post bond to assure no breach of the peace).

145. MO. REV. STAT. Ch. 80 (Charles H. Hardin 1855).

146. See *id.* Ch. 59, § 50.

147. *Id.* Ch. 80, app. at 1660 (showing forms for jury and witness summonses for coroner's juries and verdict form for coroner's inquest or "inquisition").

148. *Id.* Ch. 80, § 1.

### B. The Problem of Fugitives

The second drag on Boone County's conviction rate was the light-footedness of local suspects. Between 1850 and 1875, eight of Boone County's fifty-three homicide suspects (roughly 15%) either were never captured or, once captured, escaped from jail and were never seen again.<sup>149</sup> It is, if anything, surprising that the number was not higher. Sheriffs and constables received little or no compensation for chasing fugitives (\$1.00 for committing a prisoner to jail, but no added fee for tracking down a fugitive who eluded the initial hue and cry<sup>150</sup>), and the legal and practical impediments to a sustained manhunt were immense.

Sheriffs' arrest powers had some tricky territorial restrictions. Missouri sheriffs and constables could arrest felons with a valid warrant or without warrant on probable cause. Warrants issued by the Missouri Supreme Court or by judges of the circuit court were valid anywhere in the state, but warrants issued by justices of the peace, coroners, or other inferior judicial officers could be legally executed only in the part of the county in which the issuer was an officer.<sup>151</sup> If the subject of a warrant issued by an inferior judicial officer fled to or was found in a place outside the jurisdiction of the issuing judicial officer, the sheriff or constable could not rely on the original warrant as authority for an arrest but was obliged to bring the original warrant before a judicial officer in the new location and obtain from that officer a locally valid warrant.<sup>152</sup> Beyond the state line, Missouri sheriffs had no official arrest power at all. We do not know whether old Missouri peace officers always, or even very often, complied with these legal niceties. Perhaps they simply nabbed suspects when and where they found them and did the paperwork afterward, but the localized patchwork jurisdiction of those endowed with police and judicial powers would, at the least, have been an impediment to the apprehension of criminals.

If, despite everything, a sheriff decided to pursue a fleeing killer, tracking a fugitive with even a modest head start was a nearly insuperable task. A central Missouri fugitive might run most anywhere, but for most of the period bracketing the Civil War, the law could neither pursue nor send word ahead

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149. For an account of an 1841 escape of a prisoner on his way from nearby Audrain County to Boone County for trial on a change of venue, see NAT'L HISTORICAL CO., HISTORY OF AUDRAIN COUNTY, MISSOURI (1884), available at <http://audrain.mogenweb.org/chapter10.htm>.

150. MO. REV. STAT. Ch. 56, § 14 (Myers Supp. 1877).

151. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 4 (1835); KELLEY, CRIMINAL LAW, *supra* note 68, § 72.

152. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 5 (1835); KELLEY, CRIMINAL LAW, *supra* note 68, § 72; KELLEY, JUSTICES OF THE PEACE, *supra* note 72, § 775. Alternatively, a judicial officer in the new location could, if presented with an appropriate complaint, issue a warrant on his own authority. Practice and Proceedings in Criminal Cases, MO. REV. STAT. § 6 (1835).



faster than a horse could run. The Missouri transportation network scarcely deserved the name. Water transport by canoe, barge, and intermittent steamboat was available, but only on the Missouri River, accessible at the river towns of Providence<sup>153</sup> and Rocheport, each about fifteen miles from the county seat of Columbia.<sup>154</sup> Beginning in 1858, a railroad cut through the northeast corner of the county, with a stop at the town of Centralia, but no spur reached Columbia until 1867.<sup>155</sup> To travel to or from most parts of Boone County or elsewhere in most of central Missouri, one walked or took a horse or wagon along dirt roads. The telegraph reached St. Louis from the east coast in 1847, but service to the towns of central and western Missouri developed irregularly over the next several decades.<sup>156</sup> And three days' hard ride from Boone County was the Kansas border and the great lawless western wilderness. In short, this was Mark Twain's Missouri, where Huck or any other fugitive really could "light out for the Territory."<sup>157</sup>

### C. *The Lawyers*

It is, of course, possible that the notable success of homicide defendants stemmed from some persistent imbalance in the bar that favored defense counsel over the prosecution. This suggestion may strike modern lawyers as improbable, accustomed as we are to the consistent plaint that powerful prosecutorial agencies overwhelm impoverished defendants and their overworked appointed counsel. Nonetheless, while it probably overstates the case to say that old Missouri defense lawyers enjoyed an invariable structural advantage over the prosecution, the parties in criminal cases of the period were on a much more even footing than is now often the case.

We have already seen that the police agencies of mid-nineteenth century Missouri offered weak investigative support in criminal cases. The office of prosecutor was comparably underdeveloped. Until 1873, the chief prosecutive officer for felonies was the elected Circuit Attorney for the Second Judi-

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153. Providence was the successor to the earlier settlement of Nashville, built on higher ground when Nashville was destroyed by the flood of 1844. SWITZLER, *supra* note 26, at 345-46.

154. *Id.* at 366-67 (describing the construction of a plank road from Columbia to the river town of Providence in 1854, and also the commerce that moved through Rocheport by river).

155. See CRIGHTON, *supra* note 45, at 258, 279, 447.

156. John E. Sunder, *St. Louis and the Early Telegraph, 1847-1857*, 50 MO. HIST. REV. 248, 248 (1956); see generally John E. Sunder, *The Early Telegraph in Rural Missouri, 1847-1859*, 51 MO. HIST. REV. 42 (1956).

157. MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* (Stephen Railton ed., Broadview Press 2011) (1884) (last sentence: "But I reckon I got to light out for the Territory ahead of the rest, because Aunt Sally she's going to adopt me and sivilize me and I can't stand it. I been there before.").

cial circuit,<sup>158</sup> a jurisdiction embracing Boone, Macon, Randolph, Howard, and Callaway Counties.<sup>159</sup> Thereafter, each county selected its own Prosecuting Attorney.<sup>160</sup> By the 1880s, the prosecuting attorney was salaried,<sup>161</sup> but during the period we consider here, the office of circuit attorney was compensated on a piece-work fee basis. For example, by statute, as of 1868, the circuit attorney received \$25 for conviction in a capital case, \$12.50 for conviction in a non-capital homicide, \$10 for conviction in a case where the penalty imposed was a sentence to the penitentiary, and \$5 for most other cases,<sup>162</sup> whether or not a conviction was obtained.<sup>163</sup> The office could scarcely have been a highly remunerative one. Before the War, Boone County records reflect only a handful of felonies each year.<sup>164</sup> Even aggregating the work of five counties, it seems unlikely that a circuit attorney earned more than a few hundred dollars in an average year, an amount that would translate to perhaps ten or fifteen thousand 2011 dollars.<sup>165</sup> It appears that the prosecutor could secure co-counsel in a difficult case, though perhaps only with the consent of the court.<sup>166</sup> But there seems to have been no funding for investigators beyond what might be begged from the sheriff or constable, no secretarial help, and the prosecutor did not even receive compensation for maintaining an office until 1871.<sup>167</sup>

Defense counsel was customarily privately retained.<sup>168</sup> However, by statute, if a felony defendant appeared at arraignment without counsel and

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158. Gentry, Bench and Bar of Boone County, *supra* note 18, at 53-54.

159. THE BENCH AND BAR OF ST. LOUIS, KANSAS CITY, JEFFERSON CITY, AND OTHER MISSOURI CITIES 50 (1884) [hereinafter BENCH AND BAR OF MISSOURI CITIES].

160. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 53-54.

161. See SWITZLER, *supra* note 26, at 175 (listing the salary for the Boone County prosecuting attorney in 1881 as \$750). A salary of \$750 in 1881 would equal about \$21,000 in 2011 dollars. See *Tom's Inflation Calculator*, HALF HILL.COM, <http://www.halfhill.com/inflation.html> (last visited Jan. 29, 2012).

162. See, e.g., State v. Rummons, Case No. 7514 (Boone Cnty. Cir. Ct. 1868), *microformed on* C19471 (Mo. St. Archives) (bill of costs reflecting payment of \$5 to Circuit Attorney J.H. Overall, for his services in convicting defendant of careless shooting).

163. MO. REV. STAT. Ch. 56, § 14 (Wagner 1870). Pre-war rates seem to have been lower, at least in cases involving slaves. See, e.g., State v. Joe, a slave, Case No. 4180 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19726 (Mo. St. Archives) (bill of costs reflects payment of \$20 to Circuit Attorney J.F. Williams for his services in convicting the defendant of murder).

164. See *Boone County Missouri Circuit Court Records 1842-1903*, MOSPACE, <https://mospace.umsystem.edu/xmlui/handle/10355/11398> (last visited Jan. 29, 2012).

165. See *Tom's Inflation Calculator*, *supra* note 161.

166. KELLEY, CRIMINAL LAW, *supra* note 68, § 165.

167. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 206-07.

168. For an example of the relatively high cost of retained counsel in a nineteenth century Missouri murder trial, albeit from another county and a slightly later period, see J.A. STURGES, ILLUSTRATED HISTORY OF McDONALD COUNTY, MISSOURI 100

was “unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two.”<sup>169</sup> Professor Kelley, circuit judge and lecturer on criminal law and practice at the University of Missouri, wrote in 1876 that taxpayers were to pay for appointed counsel for indigent defendants.<sup>170</sup> It is unclear whether Professor Kelley’s statements on this point are descriptive or aspirational because he goes on to discuss contrary authority from other states and the obligations of prosecutors and judges in cases where the defendant has no counsel.<sup>171</sup> In any event, whether counsel for the indigent were paid from the public fisc or served pro bono, homicide defendants, including defendants who were slaves when accused,<sup>172</sup> do not appear to have gone unrepresented in Boone County from 1850-1875. Indeed, of the twenty-eight defendants as to whom we can be sure of the names of defense counsel, nineteen had two or more lawyers. In the one trial that resulted in an execution, the defense had *four* lawyers.<sup>173</sup>

Whatever the compensation arrangements, the best lawyers in Boone County – who were also among the county’s most prominent public men – often represented homicide defendants.<sup>174</sup> James S. Rollins, defense counsel in at least five of the homicides considered here, was born in Kentucky in 1812, and educated in Kentucky, Pennsylvania, and Indiana.<sup>175</sup> He entered

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(1897), *available at* <http://www.archive.org/stream/illustratedhisto00stur#page/100/mode/2up> (noting that the defendant in a locally famous 1884 murder case funded his defense by turning over to his lawyers a “farm on the river” and other property).

169. MO. REV. STAT. Ch. 127, § 4 (Charles H. Hardin 1855).

170. KELLEY, CRIMINAL LAW, *supra* note 68, §168 (stating that “[t]he defense of the poor being essential to a proper administration of the law, it has been held to be legally just that the expense of such defense should be borne by the people as a part of the general burden of supporting the poor, and not by the legal profession alone,” citing cases from Wisconsin and Iowa).

171. “If the defendant has no counsel, the court and prosecutor should see that he is not irregularly or unjustly convicted; and, any attorney as *amicus curiae*, may call the attention of the court to points of law or errors in the proceedings.” *Id.*

172. *See, e.g., State v. Joe*, a slave, Case No. 4180 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19726 (Mo. St. Archives). The defendant, a slave charged with murder, could not afford counsel himself nor would his owner retain counsel for him, so the judge appointed attorneys Odon Guitar and Lewis H. Robinson to represent him. *Id.* The bill of costs in the case reflects a payment to the Circuit Attorney for prosecuting the case, but no payment to defense counsel, suggesting that the lawyers did their work pro bono. *Id.*

173. Bowman, *Crimes, Trials, and Appeals*, *supra* note 140, at 362-63 (describing case of *State v. John Chapman*).

174. Portions of this paragraph and the following paragraph previously appeared in Bowman, *Crimes, Trials, and Appeals*, *supra* note 140, at 351-54.

175. Rollins attended Washington College, Pennsylvania, for three years, transferred to and graduated from Indiana University in Bloomington, Indiana, in 1830, read law for two years with a practitioner, and then attended and graduated from

practice in Columbia, Missouri, in 1834, was elected to the state legislature as a representative in 1838 and 1840, and served as state senator from 1846 to 1850.<sup>176</sup> He was the (unsuccessful) Whig candidate for governor in 1848, and the leading (though again unsuccessful) Whig candidate for U.S. Senate in the same period.<sup>177</sup> In 1854, Rollins was again elected state representative, and in 1857, he lost the race for Missouri governor by only 230 votes.<sup>178</sup> In 1860, Rollins, a slave-holding Unionist Whig, was elected to the first of two terms in the U.S. House of Representatives, serving from 1861 to 1864.<sup>179</sup> After the Civil War, he returned to civic activism and state politics, securing election to the Missouri State Senate in 1868.<sup>180</sup> While there, he was instrumental in ensuring that the University of Missouri, which opened in 1841 but had fallen on hard times during the War,<sup>181</sup> would remain in Columbia.<sup>182</sup> As a result, Rollins is known as the “Father of the University of Missouri.”<sup>183</sup>

Odon Guitar defended at least sixteen of the homicide cases examined here. Guitar was fifteen years younger than Rollins, having been born in Madison County, Kentucky, in 1827.<sup>184</sup> His parents moved to Boone County, Missouri, when he was two, and Guitar lived in central Missouri for the rest of his life. He graduated from the University of Missouri in 1846, departing even before his degree was conferred to join American forces in the Mexican War.<sup>185</sup> Upon his return, Guitar read law with his uncle, John B. Gordon,<sup>186</sup>

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Transylvania Law School in Lexington, Kentucky, in 1834. SWITZLER, *supra* note 26, at 934.

176. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 51, 53.

177. SWITZLER, *supra* note 26, at 935. At the time, U.S. Senators were selected by the state legislature and not by popular vote. See Senators – United States, MO. REV. STAT. Ch. 147, § 1 (Charles H. Hardin Supp. 1856). Rollins’ candidacy for the Senate occurred within the legislature and indicated his stature in the legislative wing of the Whig party.

178. WILLIAM BENJAMIN SMITH, JAMES SIDNEY ROLLINS 28 (DeVine Press 1891); SWITZLER, *supra* note 26, at 935. Another source puts the margin of defeat at 334 votes. *The Late Election in Missouri*, N.Y. TIMES, Sept. 10, 1857, at 4.

179. SWITZLER, *supra* note 26, at 935, 937.

180. *Id.* at 937; see also GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 53.

181. See JAMES OLSON & VERA OLSON, THE UNIVERSITY OF MISSOURI: AN ILLUSTRATED HISTORY 6-7 (1988).

182. SWITZLER, *supra* note 26, at 937.

183. OLSON & OLSON, *supra* note 181, at 3 (describing Rollins’ contributions to the rescue of the university and noting that in 1872, the board of curators of the university recognized him formally as “*Pater Universitatis Missouriensis*”).

184. SWITZLER, *supra* note 26, at 877.

185. *Id.*

186. *Id.* Gordon was a prominent Columbia attorney who served five terms in the Missouri legislature. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 51.

and was admitted to the bar in 1848.<sup>187</sup> Like Rollins, Guitar was both a slaveholder<sup>188</sup> and an ardent Unionist.<sup>189</sup> When the War broke out, the Unionist governor, Hamilton Gamble,<sup>190</sup> commissioned Guitar to recruit a regiment of volunteers for federal service. He became, in effect, the military commandant of central Missouri (and sometimes of other sections), and by the close of the War held the rank of brigadier general of volunteers and of the Missouri State Militia.<sup>191</sup> After the War, General Guitar, as he was ever after called, returned to law practice and served two terms in the Missouri legislature.<sup>192</sup> Guitar's private practice was primarily criminal, and he had a particular affinity for murder cases. He is reputed to have defended over 140 homicides, and several sources claim (erroneously) that only one of his clients was ever hung, and only five ever went to prison.<sup>193</sup>

John B. Clark, who defended at least one Boone County homicide,<sup>194</sup> was a general of militia before the Civil War and Brigadier General in the Confederate Army during the War.<sup>195</sup> He was reputedly "one of the best known criminal lawyers west of the Mississippi."<sup>196</sup>

James M. Gordon, who defended several homicide cases in 1853 and 1854, was a judge of the County Court (the equivalent of a modern county commissioner) from 1835-38,<sup>197</sup> had been Circuit Attorney in the 1840s,<sup>198</sup>

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187. SWITZLER, *supra* note 26, at 877.

188. Guitar is said to have owned seven household slaves in 1860. *Slave Housing in Missouri's Little Dixie*, MISSOURI'S LITTLE DIXIE, <http://littledixie.net/Slave%20Housing.htm> (last visited Jan. 29, 2012).

189. SWITZLER, *supra* note 26, at 877.

190. 3 PARRISH, *supra* note 43, at 31 (describing Gamble's appointment as Missouri governor in 1861 by a state convention).

191. SWITZLER, *supra* note 26, at 877-78; *see also* BENCH AND BAR OF MISSOURI CITIES, *supra* note 159, at 221.

192. SWITZLER, *supra* note 26, at 878.

193. *Id.* at 879; BENCH AND BAR OF MISSOURI CITIES, *supra* note 159, at 221. This version of Guitar's record required some selective counting. We know of at least four men he represented who were hung – John Chapman, *see* Bowman, *Crimes, Trials, and Appeals*, *supra* note 140, at 362-65 (describing Chapman trial and appeal); Joe Robinson, a slave executed for murder in 1857, *see* SWITZLER, *supra* note 26, at 388; and the Underwood brothers, tried and executed in Macon County in 1873, *see* 4 WALTER BARLOW STEVENS, CENTENNIAL HISTORY OF MISSOURI (THE CENTER STATE): ONE HUNDRED YEARS IN THE UNION 1820-1921, at 279 (1921). Still, Guitar's success rate was impressive.

194. Clark was co-counsel with L.W. Robinson and F.F.G. Triplette for defendant Humphrey Norman in 1867. *State v. Norman*, MO. STATESMAN, May 29, 1868.

195. BENCH AND BAR OF MISSOURI CITIES, *supra* note 159, at 311.

196. *Id.* at 227.

197. SWITZLER, *supra* note 26, at 1144.

198. *Id.* at 215-16, 341-42 (describing Gordon's prosecution of one homicide case in 1843 and his participation in the prosecution of a number of Mormons in 1840).

was elected to the state legislature in 1852,<sup>199</sup> and by 1858 was one of the wealthiest men in Boone County.<sup>200</sup>

The prosecutors in Boone County homicides were solid, capable men. Guitar and Rollins occasionally appeared for the prosecution.<sup>201</sup> Charles H. Hardin, Circuit Attorney from 1848-52,<sup>202</sup> was thereafter elected to the Missouri House of Representatives three times, to the Missouri Senate twice, and won election as governor of Missouri in 1874.<sup>203</sup> John F. Williams, Circuit Attorney from 1856-1860, was a Colonel commanding the 9th Missouri Cavalry during the Civil War,<sup>204</sup> ran as the unsuccessful Democratic candidate for state school superintendent in 1866, and was later elected Missouri State Insurance Commissioner.<sup>205</sup> John H. Overall, Circuit Attorney from 1869-72, was a Harvard Law School graduate (Class of 1867)<sup>206</sup> who left the prosecutor's job to become the first professor of the new University of Missouri law department, which would later become the MU School of Law.<sup>207</sup> John A. Flood, Circuit Attorney from 1872-73, became a curator of the University of Missouri in 1875 and was elected to the state senate in 1876.<sup>208</sup>

Nonetheless, the defense does seem to have enjoyed an edge in trial experience. Perhaps because neither the circuit attorney position nor the later office of county prosecuting attorney was immensely lucrative, lawyers tended to seek it early in their careers and it often functioned more as a springboard to public life than as an indication of dedication to a career at the criminal trial bar.

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199. *Id.* at 1143.

200. Gordon was eleventh on the list of Boone County's largest taxpayers in 1858. *Id.* at 392.

201. Guitar was co-counsel with Wellington Gordon and Circuit Attorney R.T. Prewitt in the unsuccessful 1869 prosecution of Humphrey Norman. *State v. Norman*, *supra* note 194. Rollins assisted Circuit Attorney Charles H. Hardin in the 1851 proceedings against university student Robert F. Grant. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 248.

202. SWITZLER, *supra* note 26, at 1144.

203. *Missouri Governor Charles Henry Hardin*, NAT'L GOVERNORS ASS'N, [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_missouri/col2-content/main-content-list/title\\_hardin\\_charles.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_missouri/col2-content/main-content-list/title_hardin_charles.html) (last visited Jan. 29, 2012).

204. BENCH AND BAR OF MISSOURI CITIES, *supra* note 159, at 228; SWITZLER, *supra* note 26, at 1144.

205. SWITZLER, *supra* note 26, at 138 n.1, 357, 428, 1144.

206. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18 at 149; BENCH AND BAR OF MISSOURI CITIES, *supra* note 159, at 50.

207. BENCH AND BAR OF MISSOURI CITIES, *supra* note 159, at 50-51. Overall apparently only held the appointment briefly before becoming ill and leaving Missouri for the Rocky Mountains for his health. *Id.*; WILLIAM F. FRATCHER, *THE LAW BARN: A BRIEF HISTORY OF THE SCHOOL OF LAW, UNIVERSITY OF MISSOURI-COLUMBIA* 2-3 (2d ed. 1978).

208. *See* GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 54; SWITZLER, *supra* note 26, at 229-31, 505-06, 1143.

The final notable procedural fact about Boone County practice is that, while plea bargaining was a reasonably common practice in many parts of the country by the mid-1800s,<sup>209</sup> in Boone County homicides it seems to have been virtually unknown. Only two of fifty-three homicide defendants entered guilty pleas. One pled guilty to first degree murder (thus consenting to his own execution, about which more later<sup>210</sup>), and the other was charged with first degree murder and pled to second.<sup>211</sup> A judge or jury resolved every other case through the adversary process. The prosecution was not using leverage to bargain away trial risk.

What strikes the modern observer is the degree to which Missouri homicide cases of the mid-nineteenth century have the feel of private litigation.<sup>212</sup> To be sure, the State initiated the prosecutions, but, as noted above, it lacked modern forensic evidence, a professional investigative and prosecutorial bureaucracy, and the structural resource advantages we now assume as a matter of course. Particularly if we concede a slight edge in legal talent to the defense, it is unsurprising that old Missouri defendants operating in a legal culture that eschewed plea bargains and tried virtually all homicides to a neutral fact finder were more successful than their modern counterparts. Still, period differences in legal practices and institutions cannot entirely explain Boone County's strikingly low homicide conviction rate. For a full understanding, one must examine the broader culture of the place and time.

#### IV. THE EFFECTS OF SLAVERY AND RACE ON BOONE COUNTY HOMICIDE PROSECUTIONS

Since pre-Civil War Boone County was home to one of the largest slave populations in a slave-holding state and thus became home to a correspondingly large population of freedmen after the War,<sup>213</sup> it excites no surprise to find that race affected the community's administration of the criminal law.

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209. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 32-35 (2003) (describing homicide plea bargaining in Massachusetts from the 1840s through the 1890s); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910, at 175-78 (1981) (describing plea bargaining practices in California in late 1800s).

210. See *infra* notes 244-53 and accompanying text.

211. See *State v. Field*, Case No. 7755 (Boone Cnty. Cir. Ct. 1872), *microformed on* C19742 (Mo. State Archives).

212. Or at least the feel of private litigation as it existed before the modern era of the vanishing trial. See generally Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENUMBRA 226 (2007).

213. The overall black population of Boone County declined slightly after the War, dropping from 4574 in 1860 to 4038 in 1870. ELWANG, *supra* note 60, at 8. However, the black population of the towns increased, and African Americans remained a large fraction of the total population. *Id.* at 9.

What is surprising (and quite gratifying to the historian, if dismaying to modern moral sensibilities) is the uncanny degree to which the relatively few homicide cases involving black victims or defendants illustrate the nature and course of race relations before, during, and immediately after the Civil War.

### A. The Pre-War Slave Cases

From 1850 until abolition in January 1865, four slaves were prosecuted in Boone County for murder.<sup>214</sup> Perhaps the most striking feature of these cases is one that may pass unremarked by the twenty-first century observer, namely that slaves were subject to the ordinary criminal justice system at all. One of the many paradoxes of American chattel slavery was that in Missouri and elsewhere throughout the South the legal system insisted that black people were property not essentially different from livestock,<sup>215</sup> but afforded them due process rights in criminal cases nearly as extensive as those guaranteed free whites, including the right to counsel and to a jury trial.<sup>216</sup> This is not to say that blacks, free or slave, were on equal legal footing with whites. For example, after 1825, by statute black persons were legally incompetent to testify in cases against white persons.<sup>217</sup> Nonetheless, most criminal procedural rules applied to slave and free defendants alike and, in at least one respect, slaves accused of crime were sometimes better situated than their white counterparts. Slaves were valuable property who belonged in law to relatively affluent whites with the resources and incentive to ensure that their property was not damaged or destroyed by hanging, castration, imprisonment, or excessive flogging. Consequently, slaves had not only a theoretical right to counsel but often may have been better represented than poor whites. Of the four known Boone County slave homicide defendants, at least three were

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214. *State v. Alfred, a slave*, Case No. 4211 (Boone Cnty. Cir. Ct. 1859), *microformed on C19726* (Mo. State Archives); *State v. Joe, a slave*, Case No. 4180 (Boone Cnty. Cir. Ct. 1857), *microformed on C19726* (Mo. State Archives); *State v. Pete, a slave*, Case No. 7795 (Boone Cnty. Cir. Ct. 1857), *microformed on C19742* (Mo. State Archives); GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 254 (describing the prosecution of a slave named Sam; no case file was found for this case).

215. HARRISON ANTHONY TREXLER, *SLAVERY IN MISSOURI: 1804-1865*, at 60 (1915) (noting that the Code of 1804 and all succeeding Missouri statutes until emancipation made slaves personal property).

216. *See, e.g.*, MO. CONST. of 1835, art. III, § 27 (providing that “[i]n prosecutions for crimes, slaves shall not be deprived of an impartial trial by jury” and “courts of justice before whom slaves shall be tried, shall assign them counsel for their defence”); *see also* SWITZLER, *supra* note 26, at 206-07 (describing the 1835 trial of Conway, a slave charged with murdering a white man, in which the defendant was represented by a young James S. Rollins).

217. *The Slave Experience: Legal Rights & Government*, PBS, <http://www.pbs.org/wnet/slavery/experience/legal/feature2b.html> (last visited Jan. 29, 2012); *see also* TREXLER, *supra* note 215, at 76 (dating the prohibition to territorial laws of 1804).



represented, two by Odon Guitar, arguably the best criminal defense lawyer in central Missouri,<sup>218</sup> and the fourth needed no lawyer because he escaped before being brought to trial.<sup>219</sup> Slave access to the forms of procedural justice was not limited to Boone County<sup>220</sup> or to the trial level. Appeals on behalf of criminally convicted slaves were reasonably common and at least ten made their way to the Missouri Supreme Court between 1822 and 1860.<sup>221</sup>

Nonetheless, while some slaves certainly benefitted from the forms of procedural regularity prescribed by law, for many others the law's forms either provided no protection or served only as an ornamental veneer masking white society's adamant resolve to keep its human property subjugated and docile. For black people, the law was allowed to operate neutrally only when white interests were not implicated.

For an example of the law's impotence against white racial feeling, consider the 1853 prosecution of Hiram, a slave charged with attempted rape based on the improbable accusation that he jumped naked from a bush and tried unsuccessfully to ravish a fifteen-year-old white girl riding home from a funeral with her adult sister and niece.<sup>222</sup> Hiram was arrested, discharged for lack of evidence by a pair of justices of the peace, rearrested on a warrant issued by another justice from a different township, and tried before two other local minor judicial officers.<sup>223</sup> Hiram's owner retained two attorneys, James S. Rollins and Samuel A. Young, to represent him, but in the middle of the inquest, a mob stormed the courtroom, seized Hiram, and dragged him out to

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218. See *infra* notes 247 (discussing *State v. Joe*, a slave, represented by Guitar), and 243 (discussing *State v. Sam*, a slave, also represented by Guitar). Alfred, a slave charged in the 1858 murder of another slave named Mark, was represented at the J.P. inquest, as indicated by the cross-examination of witnesses by the defense, but the record does not reflect the name of the attorney. *State v. Alfred*, a slave, Case No. 4211 (Boone Cnty. Cir. Ct. 1859), *microformed on* C19726 (Mo. State Archives).

219. See *State v. Pete*, a slave, Case No. 7795 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19742 (Mo. State Archives) (warrants issued, never executed).

220. See, e.g., MELTON A. MCLAURIN, CELIA, A SLAVE 70-74 (1991) (describing the 1855 trial in Callaway County, which adjoins Boone County, of a slave accused of murdering her master and noting that the judge appointed three lawyers, including a former congressman, to represent the defendant).

221. *State v. Gilbert*, 24 Mo. 380 (1857); *State v. Joe*, 19 Mo. 223 (1853); *Nathan v. State*, 8 Mo. 631 (1844); *Lucy v. State*, 8 Mo. 134 (1843); *Fanny v. State*, 6 Mo. 122 (1839); *Mary v. State*, 5 Mo. 71 (1837); *Jim v. State*, 3 Mo. 147 (1832); *Jane v. State*, 3 Mo. 61 (1831); *State v. Henry*, 2 Mo. 218 (1830); *Hector v. State*, 2 Mo. 166 (1829).

222. Bowman, *Crimes, Trials, and Appeals*, *supra* note 140, at 349-50.

223. This third proceeding was a formal inquest in the justice of the peace court to determine the existence of probable cause. Letter from James S. Rollins to the public (on file with the Western Historical Manuscript Collection, Collection Number C 1026) [hereinafter Letter of Rollins] (public letter by Rollins describing the facts of the lynching and decrying the event).

be hung.<sup>224</sup> Rollins and some other locally prominent citizens followed and, remarkably, convinced the mob to return the prisoner.<sup>225</sup>

The following day, a Sunday, the court was in recess and, while in jail, Hiram supposedly confessed. On Monday, the inquest reconvened, as did the mob, which had been informed of the confession. Odon Guitar (who was acting as prosecutor) and defense attorney Young, again addressed the seething crowd, which was moved only to the extent of proceeding with ghoulis formalities.<sup>226</sup> The mob convened outside the courthouse and solemnly elected a chairman, who placed before the meeting a question: not whether Hiram should be killed, but how – should he be hanged or burnt? A vote was taken. The hanging faction having prevailed by a large margin, the mob appointed a committee of ten charged with securing a rope, a cart, and a coffin, and with breaking into the jail to remove the prisoner and hang him “decently and in order.”<sup>227</sup> Over the protest of the sheriff, they seized Hiram, carried him to a nearby grove, and hung him.<sup>228</sup>

There was no abashed community conspiracy of silence regarding the identity of Hiram’s killers. The *Missouri Statesman*, the local weekly newspaper, published their names in the issue following the lynching.<sup>229</sup> The paper identified Eli Bass, one of the largest plantation owners and slave holders in Boone County, as the elected chairman of the lynch mob.<sup>230</sup> And George N. King, named by the *Statesman* as the chair of the ten-man lynching committee,<sup>231</sup> forthrightly provided the names of the other nine to the paper for publication.<sup>232</sup> Although William Switzler, publisher of the *Statesman*, de-

224. SWITZLER, *supra* note 26, at 372.

225. *Id.*

226. *Id.* at 373.

227. *Id.*

228. *Id.* at 374.

229. *Negro Hung for Attempted Rape*, MO. STATESMAN, Aug. 26, 1853, at 3. Switzler republished the list in 1882 in his history of Boone County. SWITZLER, *supra* note 26, at 374.

230. SWITZLER, *supra* note 26, at 373. In his account of the affair, Switzler refers to Bass as “one of our most respectable and influential citizens.” *Id.* Bass owned large tracts of land south of Columbia, considerable livestock, *id.* at 747, numerous slaves, and was in 1858 the largest taxpayer in Boone County. *Id.* at 392. He was arguably the leading citizen of Boone County and of pre-war central Missouri. For example, he was on the first Board of Curators of the University of Missouri in 1839. *Id.* at 261.

231. *Negro Hung for Attempted Rape*, *supra* note 229. We know little about Mr. King other than that he left Boone County to join the California gold rush in 1850, SWITZLER, *supra* note 26, at 361-62, but he had apparently returned by 1853. *Id.* at 373-74. Given the prevalence of vigilantism in the gold camps, perhaps King brought his enthusiasm for mob law back with him from California.

232. They were Henry Wilkinson, John Ballinger, William Breakey, William B. Cato, John Robinett, John Hume, William Hubbard, A. R. Vest, and R. P. Waters. *Id.* at 374; *Negro Hung for Attempted Rape*, *supra* note 229.

plored the killing in his paper's columns,<sup>233</sup> and James Rollins wrote a scathing letter denouncing Eli Bass and the other vigilantes,<sup>234</sup> no legal action was ever taken against any of those who committed what was, even under the laws of the time, uncontestably a murder.<sup>235</sup>

Hiram's case luridly illustrates two patterns that run through the Boone County cases with black defendants or victims before, during, and after the War. On the one hand, a black person suspected of a violent crime against a white person – a murder, rape, or even serious assault – was distressingly unlikely to receive the fair process promised by the law. Conversely, white violence against blacks was often ignored or excused.

The first issue for any black suspect, particularly a slave, was whether the law would be allowed to operate at all. Extrajudicial killings of slaves accused of crimes against whites were fairly common in mid-Missouri before emancipation<sup>236</sup> (though it must be added that lynch law reached white suspects as well<sup>237</sup>), and burning such slaves was apparently the brutal fashion of the time.<sup>238</sup> On August 12, 1853, the same day Hiram supposedly attempted to rape Miss Hubbard, a Columbia newspaper reported that the citizens of Carthage, Missouri, had seized from the sheriff's custody two slaves convicted of killing a white man, taken them into the countryside, and burned

233. See *Negro Hung for Attempted Rape*, *supra* note 229, at 3.

234. Letter of Rollins, *supra* note 223, at 2-3.

235. MO. CONST. of 1835, art. III, § 28 (“Any person who shall maliciously deprive of life, or dismember a slave, shall suffer such punishment as would be inflicted for the like offence if it were committed on a free white person.”). Missouri homicide statutes made no general exception for killings of slaves, though an accidental killing while “lawfully correcting a child, apprentice, servant or slave” was excusable. *Id.* at art. II, § 5. Although killing a slave might be murder, to “cruelly or inhumanly torture, beat, wound, or abuse any slave” was a mere misdemeanor punishable by up to a year in jail and a fine. Crimes and Punishments, MO. REV. STAT. art. VIII, § 36 (1835); see also, Letter of Rollins, *supra* note 223, at 6 (characterizing the hanging of Hiram as “murder”).

236. See, e.g., TREXLER, SLAVERY IN MISSOURI, *supra* note 215, at 72 n.61 (recounting the lynching of a slave named Eli in Franklin County in 1847 for murdering a white woman and the 1850 lynching by a Clay county mob of a white man and slave woman for murdering a white woman); *Atrocious Murder*, MO. STATESMAN, Nov. 2, 1860 (describing murder of white woman in Fulton, Missouri, and the subsequent lynching of a “negro woman” for the killing).

237. See, e.g., *Excitement in Gentry County*, MO. STATESMAN, July 9, 1858 (recounting lynching in Gentry County of one Kesler for the murder of a constable).

238. See, e.g., TREXLER, SLAVERY IN MISSOURI, *supra* note 215, at 73 n.64 (describing the burning of two black men and the hanging of another for a sexual assault in Springfield, Missouri); *id.* at 90 & n.81 (describing the burning of a free black man in St. Louis in 1836 for the stabbing of officers taking him to jail); *id.* at 72 n.61 (describing burning of a slave who murdered his master in a drunken brawl in Lincoln County).

them.<sup>239</sup> And only a few weeks before, a Pettis County mob burned a male slave for allegedly killing a white woman.<sup>240</sup>

Even if a slave accused of violent crime against a white person escaped vigilante justice, his odds of success in Boone County courts were low. We know of four Boone County cases from 1850-75 in which a slave was charged with homicide. Two of the four slaves were charged with murdering a white person and two with murdering a fellow slave. In the slave-kills-slave cases, the law seems to have operated much as it would have if two free whites had been killer and victim. In one case, the justice of the peace and grand jury found insufficient evidence to sustain the charge and the defendant was released from jail (although back into bondage).<sup>241</sup> In another, a slave named Pete was indicted for stabbing a fellow bondsman named Tom, but he evaded capture and was never heard from again.<sup>242</sup> A third case reveals an interesting legal wrinkle. Sam, a slave, supposedly killed a white man when he struck him on the orders of his master. He was represented by Odon Guitar, who secured his acquittal by arguing that, as a slave, Sam had no choice but to follow his master's orders and thus that any liability rested on the master and not the slave.<sup>243</sup>

The fourth Boone County case with a slave homicide defendant is extraordinary on several levels. In 1857, a slave named Joe was loaned or hired by his owner to another white man, James Points, to cut and split fence rails.<sup>244</sup> Joe was given a quota and apparently lied about having met it. When Points found out, he expressed a "determination to chastise" Joe, but did not immediately do so.<sup>245</sup> Shortly thereafter, when Points' back was turned, Joe hit him in the head with the poll (blunt end) of the axe. When Points showed signs of reviving, Joe hit him again and killed him.<sup>246</sup> Joe was

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239. See *Negroes Burnt at Carthage*, MO. STATESMAN, Aug. 12, 1853, at 3.

240. See *Burning a Negro for Murder*, MO. STATESMAN, July 22, 1853, at 3.

241. See *State v. Alfred, a slave*, Case No. 4211 (Boone Cnty Cir. Ct. 1859), *microformed on C19726* (Mo. St. Archives).

242. *State v. Pete, a slave*, Case No. 7795 (Boone Cnty. Cir. Ct. 1856), *microformed on C19742* (Mo. St. Archives).

243. The only record of this case is in GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 254.

244. SWITZLER, *supra* note 26, at 388.

245. *Id.* Missouri law made it a crime to assault a slave without legal justification. From time to time, white persons were charged with this offense, though rarely convicted. See, e.g., *State v. Bass*, Case No. 4154 (Boone Cnty. Cir. Ct. 1859), *microformed on C19726*, at 2425 (Mo. St. Archives) (appeal by white man from conviction in justice of the peace court for whipping a slave that did not belong to him, in which the circuit court jury found defendant not guilty); *State v. Sampson*, Case No. 4245 (Boone Cnty. Cir. Ct. 1859), *microformed on C19726*, at 4293 (Mo. St. Archives) (case of white man charged, but acquitted, of wounding with a shotgun a slave belonging to someone else).

246. MO. STATESMAN, Oct. 2, 1857.

arrested and indicted for murder.<sup>247</sup> His owner, one William M. Robinson, failed to hire counsel for him, so the court appointed Odon Guitar and Lewis W. Robinson to represent him.<sup>248</sup> Counsel retired to consult with their client, returned, and allowed him to plead guilty to first degree murder . . . and thus to the death penalty.<sup>249</sup> Joe was hung on November 13, 1857.<sup>250</sup>

By any standard, this was a remarkable business. One is hard pressed to imagine competent trial counsel permitting a client to plead into his own execution. Yet given what we know about the time, place, and participants, the outcome may be understandable. In the first place, Joe apparently confessed to the killing<sup>251</sup> and the details of his confession provided no legal defense or even recognized ground for mitigation. As a slave, Joe had no right of self-defense against impending, or even actual, "chastisement." Though the law accorded him some right to resist an actual application of potentially *deadly* force not precipitated by his own resistance to lawful authority,<sup>252</sup> Points had not touched Joe when Joe struck him with the axe, and Joe struck the second deadly blow after Points had been disabled by the first. Moreover, while a white man might plead heat of passion aroused by the threat of a future beating as a mitigation of capital murder,<sup>253</sup> the law did not concede to slaves any privilege to defend their outraged dignity.

Beyond the indisputable legal difficulties, two other considerations may help explain Guitar and Robinson's to-us extraordinary collusion in their client's execution. The most obvious is that Joe violated the bedrock taboo of the slave culture and killed a white master. Thus, the defense lawyers might have been acting as conscious agents of the white ownership class in facilitating the rapid extermination of a slave who had done the unthinkable. Without wholly discounting this invidious explanation, it is at least possible that their motivations were slightly more considerate of their client's interests. Recall that Guitar had been the prosecutor in the case that led to Hiram's lynching

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247. *State v. Joe, a slave*, Case No. 4180 (Boone Cnty. Cir. Ct. 1857), *microformed on C19726*, at 2837 (Mo. St. Archives) (indictment).

248. *Id.* (judgment of conviction).

249. *Id.*; see also, SWITZLER, *supra* note 26, at 388.

250. *State v. Joe, a slave*, Case No. 4180 (Boone Cnty. Cir. Ct. 1857), *microformed on C19726* (Mo. St. Archives) (Bill of Costs, showing prisoner held in jail from Sept. 27, 1857 to Nov. 13, 1857); *To Be Hung*, MO. STATESMAN, Oct. 16, 1857 (stating that Joe's execution date was set for Friday, Nov. 13, 1857).

251. SWITZLER, *supra* note 26, at 388.

252. See, e.g., *Dave v. State*, 22 Ala. 23, 34 (1853). But see *State v. Will*, 18 N.C. 121, 172 (1834) (holding that a slave's killing of an overseer while under the influence of fear of impending death was mitigated to manslaughter but not excused); see generally Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1003 (2009).

253. KELLEY, CRIMINAL LAW, *supra* note 68, § 471 (describing law governing heat of passion manslaughter in Missouri).

only four years before and thus had a fresh personal memory of a mob tearing a slave from the hands of the law. Moreover, both counsel were well aware of the propensity of Missouri mobs not merely to hang, but to brutalize and burn, slaves accused of violence against whites. Considered in this light, the decision to facilitate Joe's plea and execution looks at least rational and to Guitar and Robinson might have seemed almost benevolent – a choice to assent to the law's orderly accomplishment of an end that would surely, and perhaps savagely, have come to pass in any case.

### *B. Race and Murder During the Civil War*

In the crisis precipitated by Abraham Lincoln's election, slaveholding Missouri secessionists hoped to retain their human property by leaving the Union, while slaveholding Missouri Unionists hoped to do so by staying in it.<sup>254</sup> The hopes of neither were realized. As William Switzler later observed, "The existence of flagrant civil war practically abolished slavery, despite all constitutions and laws, for the legal ligament which bound the slave to the master became a very brittle and uncertain tenure."<sup>255</sup> As the War progressed and the North began to gain the upper hand, particularly in the western theatre, not only were slaves illicitly slipping away from their owners, but the decision in 1863 to accept black soldiers into the Union Army drew many male slaves to enlist.<sup>256</sup> As the reality of slavery's irreversible disintegration became clear and as Radical Unionists gained a firmer hold on the state political apparatus, the pressure for formal legal abolition grew. In 1863, a state constitutional convention voted in favor of a plan of gradual emancipation.<sup>257</sup> In late 1864, Missouri called yet another convention to consider permanent emancipation. On January 11, 1865, the convention permanently and immediately abolished slavery in Missouri.<sup>258</sup>

Boone County was not in the vanguard of the Jubilee. Its delegates to the July 1863 convention (who included Eli Bass, the chairman of Hiram's lynch mob) voted grudgingly for the gradual emancipation resolution "as the

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254. CRIGHTON, *supra* note 45, at 141 ("There was no abolition sentiment in Boone County in 1861, and the major leaders of opinion were slaveowners. The issue was, which alliance – with the North, or with the South – was most likely to preserve the status quo . . .").

255. SWITZLER, *supra* note 26, at 433.

256. See CRIGHTON, *supra* note 45, at 184 (describing enlistment of black soldiers from Boone County in Union Army); 3 PARRISH, *supra* note 43, at 104-06 (describing enlistments of black soldiers from Missouri in Union Army); SWITZLER, *supra* note 26, at 433; Grenz, *supra* note 52, at 27 (describing Gen. John M. Schofield's General Order No. 135 which authorized provost marshals to recruit black persons in Missouri, whether slave or free).

257. See 3 PARRISH, *supra* note 43, at 96.

258. *Id.* at 116.

wisest and best policy they could adopt under the circumstances.”<sup>259</sup> But James Rollins, William Switzler, and other prominent conservative Unionists decried the activities of the radicals who “strive to keep alive the slavery issue in Missouri,”<sup>260</sup> by which they meant that the radicals persisted in urging immediate and unconditional emancipation. When the ordinance permanently abolishing slavery came before the state convention in 1865, sixty delegates voted aye, but Switzler, the Boone County delegate, cast one of only four nay votes.<sup>261</sup> And when the 13th Amendment was introduced in Congress, Rollins, then the congressman from central Missouri, voted against it<sup>262</sup> before switching his vote upon being convinced that its passage was inevitable.<sup>263</sup>

There are no known cases of black persons in Boone County being accused of murder during the Civil War. However, the disorder of the period claimed black victims. According to Judge North Todd Gentry, writing in 1931 and relying on local sources, at least nine black persons were lynched or shot in the county during 1863-64, all “by unknown parties.”<sup>264</sup> The circumstances and motives for these killings are mostly lost, with the exception of one particularly savage 1864 incident when a group of black people trying to escape slavery were caught by men dressed in Federal uniforms and thought to be disguised bushwhackers. The attackers took the fugitives into the woods, shot or hung the adults, and returned the two young children in the party to bondage.<sup>265</sup>

259. SWITZLER, *supra* note 26, at 432.

260. *Id.* at 433.

261. 3 PARRISH, *supra* note 43, at 145 n.1. The other three nays were from three other Missouri River counties – Callaway, Platte, and Clay. *Id.* Switzler made no mention of this vote in his encyclopedic 1882 HISTORY OF BOONE COUNTY, MISSOURI.

262. 4 APPLETON’S ANNUAL CYCLOPAEDIA AND REGISTER OF IMPORTANT EVENTS OF THE YEAR 1864, at 266 (1866); Michael Vorenberg, *The Thirteenth Amendment Enacted*, in LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENT 183 (Harold Holzer & Sara Vaughn Gabbard eds., 2007).

263. ISAAC N. ARNOLD, THE LIFE OF ABRAHAM LINCOLN 358-59 (1885) (describing meeting between Rollins and President Lincoln regarding final vote on Thirteenth Amendment); CARL SANDBURG, ABRAHAM LINCOLN 644 (1954) (describing rejection of Thirteenth Amendment by House of Representatives on its first presentation and President Lincoln’s successful effort to secure Rollins’ vote); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 181-82, 187 n.42 (2001).

264. Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 14.

265. *Horrible Massacre of Negroes*, MO. STATESMAN, Nov. 25, 1864. A contemporary newspaper account of the event reports that near Sturgeon, Missouri, in 1864, an escaped woman slave belonging to Edward Graves returned to Graves’ premises to free others. *Id.* The group made it about two miles when they were overtaken by men disguised as Federal soldiers, who took them into the woods, hung or shot four, and returned two young children to Graves. *Id.* This account differs from Gentry’s later

In early 1865, bushwhacker Jim Jackson carried out a series of killings of black persons. Apparently in reaction to the January 11, 1865, vote to end slavery in Missouri, Jackson issued a proclamation commanding all black persons to leave the county by February 15 on pain of death, the idea presumably being that if black people were not to be slaves, they could not be permitted in the state at all.<sup>266</sup> During February and March 1865, Jackson hung at least five black men, sometimes leaving notes on their bodies, such as the one that read, "Killed for knot [sic] going into the federal arms [sic] by order of Jim Jackson."<sup>267</sup> These atrocities so frightened the local population of freedmen that one broke down and had to be confined to the local jail to restrain him after he was found raving that bushwhackers were coming to hang him.<sup>268</sup>

No legal action was taken against any of these killers, and the value placed on the lives of African-Americans in the period is illustrated by the fact that, while Judge Gentry was able to name virtually every white victim of wartime violence seventy years later, he could describe the black victims only as the nameless slave of a named white owner or as so many "negroes" hung or shot on a particular occasion.<sup>269</sup> Even the contemporary newspaper articles about the Jackson atrocities and the Sturgeon killings gave no names of the black victims.<sup>270</sup> The only black homicide victim of the war years for whom we have a name or for whose death any legal action was ever instituted was one Telmon, shot by George Blythe on October 18, 1864.<sup>271</sup> Blythe was in-

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version in that Gentry says five people were murdered. Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 14.

266. *Murder by Bushwhackers – A Negro Hung*, MO. STATESMAN, Feb. 24, 1865, at 3 (reporting murder of a former slave of Dr. John W. Jacobs, to whom was pinned the note detailed in the text).

267. *Id.*; *A Career of Murder and Robbery! Five Men Murdered!*, MO. STATESMAN, Mar. 10, 1865, at 2 (reporting a series of depredations by Jim Jackson's group, including a series of robberies, the murders of several white men, and the hanging of a black man in Milton, Missouri); *Three Negroes Hung by Bushwhackers*, MO. STATESMAN, Mar. 24, 1865, at 3 (reporting three murders of black men by Jackson's bushwhackers, two working for Thomas Stone making sugar, and a third hung on the road to Jefferson City, in each case one victim's body bearing a note from Jackson claiming responsibility); *see also* Letter from F.T. Russell to Gen. Fisk (Feb. 21, 1865), in 48 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORD OF THE UNION AND CONFEDERATE ARMIES 934-35 (Ser. No. 1, 1896) (reporting hanging of black man in February 1865); Letter from Capt. H.N. Cook to Lt. W.T. Clark (Feb. 22, 1865), in THE WAR OF THE REBELLION, *supra*, at 949 (reporting killing of a black man by bushwhacker Jim Jackson).

268. *A Crazy Negro*, MO. STATESMAN, Mar. 31, 1865, at 3.

269. *See* Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 14.

270. *See Atrocious Murder*, *supra* note 236; *Horrible Massacre of Negroes*, *supra* note 265 (describing Sturgeon murders).

271. *State v. Blythe*, Case No. 7821 (Boone Cnty. Cir. Ct. 1864), *microformed on* C19742 (Mo. St. Archives) (indictment).



dicted along with his accomplice, a Mr. Culberson, in May 1865, but neither defendant was ever found.<sup>272</sup>

Those who mourned Jim Jackson's black victims would have had this much consolation – Jackson negotiated a surrender of his guerillas to Unionist authorities in Columbia on June 13, 1865; however, a week after his surrender and release, he was caught by citizens of Audrain County, recognized as the perpetrator of the murder of a white man named Mark Young, and summarily shot.<sup>273</sup>

### *C. Race and Murder After the Civil War*

When the War ended in the late spring of 1865, Missouri faced an unsettled future. Almost uniquely among the states of the reunited country, it could neither acclaim with one voice the return of its victorious Union sons, nor close ranks to console the defeated soldiers of a failed rebellion. Virtually every community in Missouri was home to both winners and losers and their families and sympathizers, and, particularly in central Missouri, to a large population of newly emancipated black freedmen, some of whom had fought for the Union. This potentially incendiary mixture presented innumerable difficulties which would take decades to reach equilibrium, and some of which resonate to the present day. But perhaps the most vexing and uncertain question in the War's immediate aftermath was the status of black people, newly free, but excluded by emancipation from their former place in their communities' economic and social arrangements. Certainly Missouri's freedmen hoped for a genuinely new dispensation in which they would enjoy, not only freedom in law, but something approaching equal political status and social opportunity.

It did not happen. Indeed, precisely because Missouri, though remaining loyal to the old flag, had been a slave state, Missouri's black population never enjoyed even the brief flare of political and social influence experienced by their brethren in the reconstructed Confederacy.<sup>274</sup> For some years after the War, those whites who had been partisans of the Confederate cause were disenfranchised in Missouri, which gave a more liberal cast to its poli-

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272. *Id.* (see return on warrant and bill of costs).

273. SWITZLER, *supra* note 26, at 476-77; see also *Murder of M. L. Young*, MO. STATESMAN, Mar. 3, 1865, at 3 (reporting murder of Young by Jim Jackson and others, allegedly for informing on Jackson's gang).

274. Compare Lerone Bennett, Jr., *Black Power in Dixie: Negro Voters Elected Judges, Representatives, Senators During Reconstruction of the South*, EBONY, July 1962, at 84, 84-90 (describing political and social advances of freed African-Americans in the deep South during Reconstruction), with Lorenzo J. Greene, Antonio F. Holland & Gary Kremer, *The Role of the Negro in Missouri History, 1719-1970*, in OFFICIAL MANUAL OF THE STATE OF MISSOURI, 1973-1974 (1973), available at <http://www.duboislc.org/MissouriBlacks/BlackMissouriHistory.html>.

tics.<sup>275</sup> Nonetheless, particularly in Boone County, even the unflinching Unionists like Switzler, Rollins, and Guitar were often former slaveholders who acquiesced grudgingly to the inevitability of emancipation, but never abandoned their views about the essential inequality of white and black or their embrace of the racial hierarchy that had made slavery acceptable. Whatever hopes for a genuinely new social order Boone County's black population may have harbored in 1865, they were rapidly disabused, as two murder cases of the period graphically demonstrate.

On Christmas Day in 1865, a white man named John Payne was drunk in downtown Columbia. Harrison Gentry, a friend of Payne's and a deputy marshal for Columbia,<sup>276</sup> wanted to get Payne home before he drank any more. Wishing to avoid intervening officially, which would have required arresting and fining Payne, Gentry enlisted the aid of William Coleman<sup>277</sup> and Robert P. Reid and asked them to persuade Payne to go home.<sup>278</sup> Reid located Payne in the company of a black man named West Young, but Payne would not agree to go home and walked away with Young. Coleman followed, apparently remonstrated with Payne, and returned with him, Young following. Young stepped up from the street onto the pavement where Reid was waiting and said that Payne should not go home. Reid "shoved him off and told him to go off about his business."<sup>279</sup> Young stepped back up on the pavement. According to Reid, Coleman told Young to stand back several times, but Young said, "By God, I have as good a right to my say as any man."<sup>280</sup> Reid testified that Young "rushed up close" to Coleman,<sup>281</sup> but Verge Russell, the lone black witness, said Young was merely leaning against a tree.<sup>282</sup> Whatever the case, Coleman pulled a knife and stabbed Young just

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275. See generally 3 PARRISH, *supra* note 43, at 116-69.

276. Harrison Gentry was the son of Richard Gentry, one of the founders of Columbia, Missouri, who commanded Missouri troops and was killed in the Seminole War in Florida in 1837. SWITZLER, *supra* note 26, at 869-71. Harrison was sergeant major of his father's regiment and was wounded at Okeechobee. *Id.* at 871. He died in 1871. *Id.*

277. Coleman had probably served as a private in the Unionist militia (Company B, Ninth Cavalry, M.S.M.). *Id.* at 480.

278. State v. Coleman, Case No. 7280 (Boone Cnty. Cir. Ct. 1866), *microformed on* C19740 (Mo. St. Archives) (testimony of Harrison Gentry and R.P. Reid in transcript of inquest conducted by justice of the peace David Gordon).

279. *Id.* (testimony of R.P. Reid).

280. *Id.*

281. *Id.*

282. *Id.* (testimony of Verge Russell). Mr. Russell was the signatory on the complaint against Coleman for Young's killing. *Id.* (complaint). He is identified in the complaint as "Verge Russell (Colored)." *Id.* Moreover, all other witnesses signed their names to the testimony in the justice of the peace court, while Mr. Russell was able to provide only an "X" as his mark on both his affidavit and the later JP transcript, suggesting the illiteracy common to most freedmen of the period. See *id.* (complaint and JP transcript).

above his collarbone. Although the wound did not initially appear serious (Young himself walked over and reported his own stabbing to deputy marshal Gentry), it apparently cut something vital in the chest cavity and Young died on New Year's Day 1866.<sup>283</sup>

Deputy Marshal Gentry arrested Coleman immediately after the assault and seized the bloody knife from his pocket. Coleman denied trying to "hurt" Young but diluted the force of this disclaimer by saying, first, that "if he had it [to] do over again he would not be so easy with the negro or would stick him deeper" and, second, that "if West or any other nigger bucked up against him he would stick him deeper."<sup>284</sup> No one ever claimed that Young was armed or struck or threatened to strike Coleman. The most anyone would say is that, when Young proclaimed his right to an equal say, "he had his arm raised."<sup>285</sup> Justice of the Peace David Gordon found probable cause to charge Coleman with a criminal homicide and the Circuit Attorney presented the case to the grand jury on a charge of manslaughter in the third degree.<sup>286</sup> The grand jury refused to indict. Indeed, in certifying the bill of costs for the case to the State Auditor, the judge described the result with this unique and telling phrase – "the Grand Jury ignored the indictment."<sup>287</sup>

It is plain enough that William Coleman stabbed West Young because he could not abide a black man who presumed a right to share both a sidewalk and his opinion with whites. And it is well nigh impossible to avoid the conclusion that the Boone County grand jurors ignored the indictment because they were in accord with Coleman's view.

Lest it be thought that I am overinterpreting a single case, consider the killing of Rice Woods. On Sunday, July 15, 1866, a party of young white men and boys were swimming in Hinkson Creek near Columbia. They got into an argument with an unidentified black man and exchanged angry words, but no actual violence occurred. Nonetheless, later the same day, some of the whites "resolved to chastise the negro for his conduct" and "when night came a parcel of them got together and began a search for the offending negro."<sup>288</sup> Failing to find their intended target, the crew decided to look for him among the congregants at a church on the banks of Flat Branch Creek at which local blacks were holding a service.<sup>289</sup> When the gang of young white men came up to the church, they found a group of young black men outside the building, but inside a fenced yard in front of it. Exactly how the encounter began is unclear, but it appears from later testimony that words were exchanged and tensions grew as the whites ranged themselves outside the fence and blacks

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283. *Id.* (testimony of Dr. A. Young).

284. *Id.* (testimony of R.W. Gentry).

285. *Id.* (testimony of R.P. Reid).

286. *Id.* (Indictment, dated Jan. 1, 1866).

287. *Id.* (Bill of Costs, dated May 28, 1866).

288. *Fatal Affray – A Negro Shot*, MO. STATESMAN, July 27, 1866, at 3.

289. *Id.*

ventured out to the fence to protect the enclosure from the whites and, one suspects, to show that they would not be cowed by white rowdies.<sup>290</sup>

According to the black witnesses, open warfare broke out when a young black man named Rice Woods, walking out to the fence line, dropped his handkerchief and bent over to pick it up. A white named Boone Reed asked Woods why he picked up a rock. Woods denied picking up any rock, whereupon Reed called him a “damn liar” and hit Woods.<sup>291</sup> Woods hit him back, and the melee began. As the brawlers went after each other with fists and sticks, Reed in particular was getting the worse of the exchange and several of the whites pulled pistols. Thomas Tillery shouted, “Shoot this damn nigger here.”<sup>292</sup> James Hobbs fired, hitting Rice Woods, whereupon the white attackers fled the scene.<sup>293</sup> Hobbs’ bullet hit Woods in the chest, perforated both lobes of the left lung, and lodged in his spinal cord, killing him.<sup>294</sup>

Ezekial and Morton Woods (at least one of whom was Rice Woods’s brother) swore out a complaint alleging the crimes of riot and murder against ten of the whites who had attacked the church gathering.<sup>295</sup> At an inquest before Justices of the Peace J.W. Hickam and David Gordon on July 19, 1866, the county attorney dismissed charges against Silas Hysinger at the close of the prosecution’s case. Defendants Kenard, Newman, and Tillery (the man identified as saying “Shoot this damn nigger here”) produced alibi witnesses from among friends and family and were dismissed from the case. Four defendants, including the shooter, James Hobbs, supposedly could not be found by the sheriff within the county and were also dismissed.

The JPs bound over only Henry Douglass and Edward Camplin, who were immediately released on bond.<sup>296</sup> The bond papers for Douglass stand as perhaps the most eloquent testimonial to the views of the white community about the case. Douglass’s appearance was guaranteed by twenty-five sureties, the list amounting to a Who’s Who of Columbia society, including R.B. Price, Boone County’s leading banker; A.J. Harbison, former Circuit Attorney; James J. Searcy, school teacher and former Confederate officer;<sup>297</sup> William J. Gordon, owner of a substantial business manufacturing and repairing agricultural implements;<sup>298</sup> James S. Hickman, a local grocer;<sup>299</sup> and J.S. Dorsey, druggist, jeweler, and railroad agent.<sup>300</sup> When the grand jury assem-

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290. *State v. Douglass*, Case No. 7307 (Boone Cnty. Cir. Ct. 1866), *microformed on C19740* (Mo. St. Archives).

291. *Id.*

292. *Id.* (testimony of Ezekial Woods and Morton Woods).

293. *Id.*

294. *Id.* (testimony of W.P. Maupin).

295. *Id.* (complaint of Ezekial Woods and Morton Woods).

296. *Id.* (order of J.W. Hickam, J.P., July 19, 1866).

297. *Id.*; SWITZLER, *supra* note 26, at 401, 544, 592.

298. SWITZLER, *supra* note 26, at 716.

299. *Id.* at 860.

300. *Id.* at 852-53.

bled to hear the case in the November term, it refused to indict either Douglass or Camplin.

As for Hobbs, the actual killer, the authorities do not appear to have pursued charges against him or made any effort to locate him after the sheriff's initial determination that he was "not found in Boone County, Missouri."<sup>301</sup> No one would ever be prosecuted for Rice Woods's death.

It must be said that in the two cases between emancipation and 1875 where both deceased and defendant were black, Boone County law appears even-handed, even merciful. For example, on October 25, 1873, Thomas Colbert and Simon Strode, both black, argued over some clothing and Colbert fatally stabbed Strode.<sup>302</sup> Colbert, represented by Odon Guitar and H.C. Pierce, was convicted of second degree murder and sentenced to ten years, a result consistent with the law and what we know of the facts.<sup>303</sup>

More interesting is the 1870 prosecution of Eliza Holland. Mrs. Holland was from the St. Louis area and had always been a free woman of color,<sup>304</sup> as well as a woman of property<sup>305</sup> who owned and operated a haulage business.<sup>306</sup> Much against Eliza's wishes, her daughter Augustine married James Madison,<sup>307</sup> a black man who worked for her as a servant and wagon driver, and left St. Louis with him to return to Madison's former home in Boonville, about thirty miles west of Columbia.<sup>308</sup> Mrs. Holland followed the pair and found them in Rocheport, a Boone County settlement on the east bank of the Missouri River.<sup>309</sup> She called at the house where they were staying, asked for Madison, and when he appeared, stabbed him fatally.<sup>310</sup> At trial, Mrs. Holland retained not only local counsel but the St. Louis firm of Bowman & Davis.<sup>311</sup> They defended on the ground of insanity and adduced expert testimony that the old lady suffered from mental derangement caused by late-stage

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301. *State v. Douglass*, Case No. 7307 (Boone Cnty. Cir. Ct. 1866), *microformed on* C19740 (Mo. St. Archives) (return on warrant).

302. *Murder – Larceny*, *supra* note 28.

303. Mo. State Penitentiary, Register of Inmates Received (Nov. 20, 1874 - Nov. 13, 1875), *microformed on* S215, Vol. E, p. 91 (Mo. St. Archives).

304. *A Tragic Occurrence*, BOONE COUNTY J., June 23, 1870, at 3.

305. *Trial of Eliza Holland*, BOONE COUNTY J., Sept. 1, 1870, at 3.

306. *See State v. Eliza Holland*, Case No. 7536 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741 (Mo. St. Archives) (deposition testimony of Dr. D. Watson Rannels); *A Tragic Occurrence*, *supra* note 304.

307. *State v. Eliza Holland*, Case No. 7536 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741 (Mo. St. Archives) (testimony of Augustine Madison at Justice of the Peace inquest).

308. *Trial of Eliza Holland*, *supra* note 305.

309. *Id.*

310. *Id.*; *Murder Committed in Rocheport*, MO. STATESMAN, June 25, 1870.

311. *Trial of Eliza Holland*, *supra* note 305, at 3.

syphilis and the consumption of large doses of opiates to treat the disease.<sup>312</sup> She was acquitted.<sup>313</sup>

Even this seemingly enlightened result had an unmistakable racial backstory. Both the testimony at trial and the press coverage placed great emphasis on the skin tone<sup>314</sup> and relative social status of Eliza Holland, her daughter, and the victim. Mrs. Holland was a light-skinned woman who had never been a slave, was well-to-do, and as a local paper put it, belonged to “the upper ten of negro society.”<sup>315</sup> Her daughter Augustine was described as a “good-looking mulatto,” an “orange-colored maiden” who had been sent away to school in Baltimore before returning and running away with Madison.<sup>316</sup> It seems fair to infer from the records that Mrs. Holland’s motive in killing Madison stemmed, not from syphilitic insanity, but from anguished disappointment that her beautiful and carefully raised daughter was throwing herself and all chance of upward social mobility away on an ordinary “Negro” laboring man. It is less certain, but entirely plausible, that the racial mores of the time made this reaction intuitively understandable to both blacks and whites and rendered Mrs. Holland a sympathetic figure for whom an insanity verdict became easier to return.

In the end, the outcomes of Boone County homicide cases with black defendants or victims, whether before, during, or after the War, unfailingly reflected the racial landscape of the times. In twenty-five years, at least sixteen blacks died at the hands of whites, but no white person was ever convict-

312. *State v. Eliza Holland*, Case No. 7536 (Boone Cnty. Cir. Ct. 1870), *microformed on C19741* (Mo. St. Archives) (deposition testimony of M.W. Alexander, a druggist who testified about prescribing morphine tablets to Mrs. Holland, and of Dr. D. Watson Rannels, who diagnosed Mrs. Holland as suffering from secondary syphilis and concluded that she was insane).

313. *Circuit Court*, MO. STATESMAN, Sept. 2, 1870.

314. *State v. Eliza Holland*, Case No. 7536 (Boone Cnty. Cir. Ct. 1870), *microformed on C19741* (Mo. St. Archives) (deposition testimony of Marcia M. Graham, describing Mrs. Holland as “colored but not very black”; deposition testimony of Dr. D. Watson Rannels stating that Mrs. Holland’s daughters “are much fairer than the mother”).

315. *Trial of Eliza Holland*, *supra* note 305. The phrase “upper ten” was commonly used before and after the Civil War to refer to better-educated or more economically successful members of black society. See, e.g., RONALD E. HALL, AN HISTORICAL ANALYSIS OF SKIN COLOR DISCRIMINATION IN AMERICA: VICTIMISM AMONG VICTIM GROUP POPULATIONS 117 (2010); *Sabbath in New Orleans – Slaves that Would Not be Free – Carondelet Canal – Local Politics, and Other Matters as Seen by a Louisianan*, N.Y. TIMES, Apr. 12, 1853, available at <http://query.nytimes.com/gst/abstract.html?res=F50B1FFF3855147B93C0A8178FD85F478584F9> (alluding to “free or upper ten-Quadroons, followed by their negro servants”).

316. *Trial of Eliza Holland*, *supra* note 305.

ed of a crime for killing a black one.<sup>317</sup> Two whites were killed by black men. Both killers were slaves. One was acquitted because he acted on his master's orders. The other was advised by counsel to plead guilty, thus becoming one of only two people executed in Boone County for a quarter-century. Four black people were charged with killing other blacks, legal offenses to be sure, but not acts that threatened the existing social order. Two were acquitted, one fled, and the fourth was convicted of second degree murder. But most revealing are the acquittals in the post-War killings of West Young and Rice Woods. With these two verdicts, by the fall of 1866, Boone County's criminal justice system had sent an unequivocal message. Blacks might be free in theory, but pretensions to social equality would be firmly, even brutally, suppressed. The subordination of blacks at the heart of the old racial order would be maintained, with deadly force if necessary, and the law would look the other way.

## V. THE WAR AND THE DISINTEGRATION OF THE RULE OF LAW

The essence of war is killing. But even in war there are permissible and impermissible killings. Missouri's divided allegiance and the persistence of irregular fighting even after the 1861 failure of regular pro-Southern forces to secure Missouri's secession made the boundary between sanctioned and unsanctioned killings especially blurry. Groups of Confederate guerillas like those headed by Jim Jackson operated in Boone and surrounding counties throughout the War.<sup>318</sup> To suppress them and also to disrupt the activities of Confederate recruiters and sympathizers who worked covertly to send men, supplies, and money south, units of federal soldiers, some local, such as Ninth Cavalry Regiment of the Missouri State Militia organized by then-Colonel Odon Guitar,<sup>319</sup> and some from out-of-state, were stationed in the area.<sup>320</sup> Boone County was the site of a number of more-or-less formal engagements between guerilla groups and these federal units,<sup>321</sup> but daily wartime civilian

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317. The same pattern was observable in cases in which whites assaulted, but did not kill, blacks. See, e.g., *A Shooting Affray*, MO. STATESMAN, Dec. 8, 1871, at 3; *Acquitted*, MO. STATESMAN, Dec. 22, 1871, at 3 (recounting incident in which a white man shot and injured a black man after an argument, but was acquitted of all charges).

318. For accounts of most of the notable episodes of the Civil War occurring in Boone County, see SWITZLER, *supra* note 26, at 411-85.

319. *Id.* at 418.

320. *Id.* at 410 (describing entry of Fifth Iowa Infantry into Columbia in 1861); *id.* at 465 (describing participation of 1st Iowa Veteran Cavalry in pursuit of Bill Anderson's guerillas after Battle of Centralia in 1864).

321. Judge Gentry listed ten "battles" as having occurred in Boone County, see Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 14 1/2, but his list leaves out the sanguinary affair at Centralia in 1864, in which Confederate guerillas under Bill Anderson effectively wiped out several companies of federal mounted infantry. SWITZLER, *supra* note 26, at 439-67.

life remained superficially normal. Of course, even normal pre-war life had been punctuated by the occasional homicide, but during the War, the surface calm barely concealed a constant tension between Union and Confederate supporters that occasionally erupted into incidents of small group or individual violence.

Wartime killings, whether war-related or arising from the perennial mundane imperfections of human nature, presented tremendous challenges to the rule of law. As already noted, wartime murders of black persons in Boone County stimulated virtually no legal response from civilian authorities. The picture was not as stark for homicides of whites, but the law remained hobbled. The first problem was one of jurisdiction.

### A. Martial Law and the Provost Marshal

When Governor Jackson and other pro-Confederate state officials decamped for points south after the initial victory of Union forces over organized pro-Confederate military units in the early summer of 1861, a state convention assembled and appointed a provisional state government headed by Hamilton R. Gamble.<sup>322</sup> Gamble's job was to assume the tasks of an ordinary civilian administration and to coordinate with the federal military authorities responsible for Missouri. In August 1861, General John C. Fremont, the Union commander in Missouri, proclaimed martial law,<sup>323</sup> a condition which persisted until March 1865.<sup>324</sup> Civilian courts and authorities continued to operate during the War, but they were subordinate in any matter concerning the war effort to military authorities, in particular to the provost marshal.<sup>325</sup>

The office of provost marshal arose from a series of orders issued by General George McClellan when he assumed command of the Army of the Potomac in 1862.<sup>326</sup> For the duration of the conflict, each division, brigade, and corps of the Union Army included a provost marshal. In September 1862, the federal Adjutant General's office appointed a provost marshal for

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322. 3 PARRISH, *supra* note 43, at 17-32.

323. *Id.* at 36.

324. See *Civil Law to Be Restored – Important Order*, MO. STATESMAN, Mar. 24, 1865, at 2.

325. William F. Switzler, publisher of the *Missouri Statesman*, served as Provost Marshal for the Ninth Congressional District from July 1863 until he was displaced in October 1864 after vocally supporting Gen. McClellan in his bid to unseat President Lincoln in the 1864 election. SWITZLER, *supra* note 26, at 431.

326. *Missouri's Union Provost Marshal Papers: 1861-1866*, MO. DIGITAL HERITAGE, <http://www.sos.mo.gov/archives/provost/> (last visited Feb. 4, 2012); see also 2 BRUCE NICHOLS, *GUERRILLA WARFARE IN CIVIL WAR MISSOURI*, 1862, at 70 (2004) (maintaining that office of provost marshal began as an adaption of unique military police utilized by the Union in Missouri).



each state.<sup>327</sup> A year later, the position was replaced with an assistant provost marshal general for each state, a provost marshal for each congressional district, and a deputy provost marshal for each county.<sup>328</sup> The primary function of the office was to ensure that military discipline and civilian order were maintained.<sup>329</sup> “[P]rovost marshals were assigned regardless of the level of active warfare within a state or district.”<sup>330</sup> In Missouri, where large-scale military operations had ended by the time the provost marshal system was implemented, provost marshals were less focused on maintaining troop discipline and more focused on maintaining civilian order.<sup>331</sup> The provost marshal had the power to regulate public places, such as gambling houses, hotels, and saloons, to record and investigate citizen complaints, and to conduct searches, seizures, and arrests of persons suspected of engaging in pro-Confederate activities.<sup>332</sup> Their powers were extraordinary and included the ability to collect bonds to guarantee good behavior, to levy fines and other financial penalties on southern sympathizers to pay for damage done by Confederate troops or guerilla groups, and to banish persons believed to harbor Confederate sympathies from a district or state, or even to order them completely out of Union-controlled areas and into the Confederacy.<sup>333</sup>

In cases of violent acts by either federal troops or Confederate sympathizers or guerillas, the provost marshal could assert jurisdiction and adjudicate cases under military rules, a process that could produce the full range of punishments from posting a performance bond to fines, imprisonment, and even execution.<sup>334</sup> As might be imagined, the office of provost marshal was central to the wartime administration of the state, and thus only the most politically reliable Unionists were appointed. For example, in the Ninth Congressional District, which included Boone, Callaway, Audrain, and seven other adjoining counties, William Switzler was appointed as provost marshal in July 1863 and served until removed in 1864 because he supported Democratic Party presidential nominee George McClellan in opposition to Presi-

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327. *Missouri's Union Provost Marshal Papers: 1861-1866*, *supra* note 326.

328. *Id.*

329. See generally *The Provost Marshal in Mid-Missouri*, WAR & RECONCILIATION: MID-MO. CIV. WAR PROJECT, [http://www.warandreconciliation.com/law/provost/provost\\_home.html](http://www.warandreconciliation.com/law/provost/provost_home.html) (last visited Feb. 4, 2012).

330. *Missouri's Union Provost Marshal Papers: 1861-1866*, *supra* note 326.

331. See *id.*

332. Holland Thompson, *The Provost-Marshall and the Citizen*, in 7 THE PHOTOGRAPHIC HISTORY OF THE CIVIL WAR: PRISONS AND HOSPITALS 188 (Francis Trevelyan Miller et al. eds., 1911).

333. DANIEL E. SUTHERLAND, A SAVAGE CONFLICT: THE DECISIVE ROLE OF GUERRILLAS IN THE AMERICAN CIVIL WAR 124 (2009).

334. *Id.*; see also SWITZLER, *supra* note 26, at 419 (describing military commission trial of two men for railroad and bridge burning in which defendants were sentenced to be shot, but the sentence was commuted to taking the oath of allegiance and giving a \$2000 bond).

dent Lincoln.<sup>335</sup> William L. Lovelace of Montgomery County held the office for the balance of the War.<sup>336</sup>

### *B. The Travails of Civilian Courts in Wartime*

Even in cases where civilian jurisdiction was uncontested, threats of guerilla interference or reprisals intermittently paralyzed civilian courts.<sup>337</sup> Judge North Todd Gentry, who spoke with many lawyers and judges of the period before writing his 1916 history of the Boone County bench and bar, observed that, "Although it was known that men were being killed, houses burned and property stolen, it was considered best not to indict nor even to investigate."<sup>338</sup> The Circuit Court apparently was out of operation for at least a year during the War.<sup>339</sup> General Odon Guitar insisted that the courts would function despite the threats,<sup>340</sup> and court was resumed, but the mood of the time is suggested by the story that one circuit judge tried cases with two pistols strapped to his waist.<sup>341</sup> The threats were not illusory. On two occasions, Confederate guerillas raided Columbia to release prisoners from the local jail.<sup>342</sup>

Despite the turmoil, which may be reflected in the complete absence of any murder cases filed in or transferred to the county for two years after the May 1861 term of court, by the fall of 1863, Boone County courts were doing something like business as usual. Indeed, between March 1863 and April 1865, the month General Lee's Army surrendered in Virginia and the Confederacy collapsed,<sup>343</sup> the Boone County Circuit Court handled ten homicide cases. Prosecutors experienced their customary low success rate. Only three

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335. SWITZLER, *supra* note 26, at 431.

336. *See id.* Odon Guitar also served as provost marshal for Boone County. *See* North Todd Gentry, *General Odon Guitar*, 22 MO. HIST. REV. 423 (1928).

337. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 266 (relating incident in which court was adjourned to barricade courthouse against threatened raid by guerilla Bill Anderson to free one of his men on trial for horse stealing, and describing how courthouse was defended and garrisoned throughout the War).

338. *Id.*

339. *Id.*

340. Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 14-14 1/2.

341. GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 266; Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 14.

342. SWITZLER, *supra* note 26, at 422-24 (describing raid by 200 guerillas on Aug. 13, 1862, which succeeded in releasing three Confederate prisoners from jail and stealing eighty-one head of government horses); *id.* at 428-29 (recounting unsuccessful raid of Jan. 11, 1863); Gentry, *Some Incidents of the Civil War*, *supra* note 25, at 10-13 (recounting Aug. 1862 and Jan. 1863 raids).

343. 3 SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* 925-56, 100-13 (1974) (Lee surrendered on April 9, 1865, leading to the end of effective resistance by the Confederacy, though some Confederate units did not formally surrender until the following month).

defendants were convicted of any crime, one of whom the governor promptly pardoned because the killing was the inadvertent consequence of a Rocheport town constable striking with a cane a disorderly drunk who was resisting arrest.<sup>344</sup> Two defendants were charged, but disappeared and were never arrested.<sup>345</sup> The justice of the peace dismissed charges against one defendant on the ground of self-defense,<sup>346</sup> the Circuit Attorney dismissed another case after transfer from Macon County,<sup>347</sup> the grand jury refused to indict a third case despite the JP's earlier probable cause finding,<sup>348</sup> and in a fourth the trial jury acquitted.<sup>349</sup> And in one instance, civilian charges were vacated when military authorities preempted the case.<sup>350</sup>

Statistically, these results seem consistent with the conditions of nineteenth century mid-Missouri criminal practice already explored, and most of the wartime homicide cases that made their way into Boone County courts had no obvious connection to the conflict. But several plainly did.<sup>351</sup> At least

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344. *State v. Bysfield*, Case No. 5920 (Boone Cnty. Cir. Ct. 1865), *microformed on C19734* (Mo. St. Archives) (convicted of manslaughter in fourth degree, but pardoned on Nov. 25, 1865); *State v. Illig*, Case No. 5953 (Boone Cnty. Cir. Ct. 1865), *microformed on C19734* (Mo. St. Archives) (stabbing in Fulton, MO, transferred to Boone County on motion for change of venue); *State v. Wilkerson*, Case No. 5911 (Boone Cnty. Cir. Ct. 1864), *microformed on C19733* (Mo. St. Archives) (killing of one Union soldier by another in Providence, MO). The governor received pardon requests for Bysfield from R.L. Todd, the justice of the peace who heard the case; W.C. Barr, the Circuit Attorney who prosecuted the case; G.H. Burkhart, the Circuit Judge who tried the case; and a list of some sixty local worthies headed by Congressman James S. Rollins. See Bysfield, Allen, Nov. 25, 1865, Office of Secretary of State, Commissions Division, Pardon Papers, Record Group 5, Box 20, Folder 38 (Mo. St. Archives).

345. *State v. Blythe*, Case No. 7821 (Boone Cnty. Cir. Ct. 1865), *microformed on C19742* (Mo. St. Archives); *State v. Sexton*, Case No. 7872 (Boone Cnty. Cir. Ct. 1863), *microformed on C19742* (Mo. St. Archives).

346. *State v. Morris*, Case No. 5906 (Boone Cnty. Cir. Ct. 1863), *microformed on C19733* (Mo. St. Archives).

347. See *State v. Davis*, Case No. 7312 (Boone Cnty. Cir. Ct. 1866), *microformed on C19740* (Mo. St. Archives) (bond forfeiture action against John Davis, a witness in the prosecution of Thomas Rummons for murder, in which it is noted that the case was brought in Macon County and transferred to Boone County).

348. *State v. Martin*, Case No. 7460 (Boone Cnty. Cir. Ct. 1870), *microformed on C19741* (grand jury declines to indict Warren Martin for murder of John Austin on December 27, 1864).

349. MO. STATESMAN, Feb. 25, 1870 (reporting not guilty verdict in case tried in Boone County on a change of venue charging Warren Martin with murder of John Robertson in Callaway County on April 19, 1865).

350. SWITZLER, *supra* note 26, at 434.

351. I do not include in this discussion cases like *State v. Wilkerson*, Case No. 5911 (Boone Cnty. Cir. Ct. 1863), *microformed on C19733* (Mo. St. Archives), which related to the war in the sense that it involved a quarrel between two soldiers of the

two of the wartime prosecutions – and one that preceded the War – illustrate three considerations particular to the Civil War as fought in Missouri: the general breakdown of ordinary law enforcement, the effect of the parallel military justice system in cases against federal soldiers who killed, and the difficulties associated with prosecuting killings by rebel guerillas.

### 1. *State v. Yeats*: Missouri as a Haven for Brigands

In 1859, John Yeats murdered his traveling companion Lewis Dougherty, cut up the body, and burned it in a bonfire alongside a road in southwestern Boone County.<sup>352</sup> Yeats was arrested and indicted in a special session of court in June 1860.<sup>353</sup> He successfully petitioned for a change of venue based on the impossibility of finding an unbiased jury in Boone County.<sup>354</sup> The case, and Yeats, were transferred to adjoining Audrain County, where on August 10, 1862, Yeats escaped from jail,<sup>355</sup> but the breakdown of order during the War allowed him to remain in the area. Three days after his escape, Yeats was identified as a member of the party of guerillas who raided Columbia to free Confederates held in its jail.<sup>356</sup> So far as can be determined, Yeats was never recaptured.

### 2. *State v. Odell*: Federal Soldier Killings of Civilians

On the night of September 24, 1863, a squad of federal soldiers arrived at the home of Martin Oldham about four miles west of Columbia. They ordered the occupants out and commanded Martin Oldham and Joseph Gooding to mount and ride away with them. Fifteen minutes later, Gooding returned without Oldham, whose body was found three days later hanging from a tree.<sup>357</sup> The particular reason for the killing remains obscure. A memorandum written years later by Mrs. Warwick Scott of the Marmaduke Chapter, Daughters of the Confederacy, and purportedly based on evidence from Oldham's family, suggests Oldham had been "appointed by the neighbors to order a stranger to leave the country, who was suspected of inciting the negroes to rise against the white people," and that this stranger left, but returned as one

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First Provisional Regiment, but which had no connection to the conflict other than the fact that wars create groups of armed young men who may be prone to quarrel.

352. *State v. Yeats*, Case No. 5697 (Boone Cnty. Cir. Ct. 1859), *microformed on* C19733 (Mo. St. Archives). The defendant's name is spelled Yates or Yeates in some records.

353. *Id.*; *Boone Circuit Court – Special Term*, MO. STATESMAN, June 15, 1860.

354. *State v. Yeats*, Case No. 5697 (Boone Cnty. Cir. Ct. 1859), *microformed on* C19733 (Mo. St. Archives).

355. *Id.* (Attestation of John M. Wilkins).

356. MO. STATESMAN, Aug. 15, 1862.

357. SWITZLER, *supra* note 26, at 433-34; *The Hanging of Mr. Martin H. Oldham*, MO. STATESMAN, Oct. 2, 1863, at 3.

of the federal soldiers who killed Oldham.<sup>358</sup> Regrettably, neither the evidence on which this claim was based nor the identity of the “stranger” accompanies the memo. Regardless, the basic motive seems plain – Oldham was an active Confederate sympathizer.<sup>359</sup>

Somehow the identities of Oldham’s killers were determined and four soldiers belonging to the Ninth Missouri State Militia – George Odell, Asa Leadbetter, John Weddell, and Robert Maples<sup>360</sup> – were arrested by civilian authorities, indicted by a grand jury, and committed to jail in Boone County.<sup>361</sup> The defendants moved for a change of venue on the ground of local prejudice against them,<sup>362</sup> and in June 1864 the case was transferred to Audrain County.<sup>363</sup> However, the civilian case never went to trial. The defendants were transferred to military jurisdiction and the Circuit Attorney apparently entered a *nolle prosequi*,<sup>364</sup> dismissing the action.<sup>365</sup> The case then appears in the records of the Provost Marshal, who in October 1864, initiated court marshal proceedings against the four suspects. However, no hearing seems ever to have occurred and the matter appears to have been quietly dropped.<sup>366</sup>

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358. Memorandum from Mrs. Warwick Scott, “The Murder of Martin E. Oldham Near Columbia, Missouri” (on file with Western Historical Manuscript Collection, Collection Number C 3629).

359. See SWITZLER, *supra* note 26, at 434 (Mr. Oldham was an old citizen of the county, a man of family, and what was then called “a secessionist.”).

360. The defendants’ names are reported with wide variety of spellings in the court records and local newspaper accounts. For example, Odell is referred to as Adell in some court records and as Odle in at least one newspaper story. See *Sent Away*, *supra* note 99. The spellings in the text are my best guess as to their real names.

361. SWITZLER, *supra* note 26, at 434; *The Oldham Murder Indictment of Parties Charged with the Offense*, MO. STATESMAN, Dec. 4, 1863 (reporting indictment of three soldiers, identified as Waddle, Leadsworth, and Marple, for the Oldham murder).

362. *State v. Adell*, Case No. 5905 (Boone Cnty. Cir. Ct. 1863), *microformed on* C19733 (Mo. St. Archives).

363. See *id.*; *Sent Away*, *supra* note 99.

364. See WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008) (“The term *nolle prosequi* is used in reference to a formal entry upon the record made by a plaintiff in a civil lawsuit or a prosecutor in a criminal action in which that individual declares that he or she wishes to discontinue the action as to certain defendants, certain issues, or altogether.”).

365. SWITZLER, *supra* note 26, at 434 (“After much delay the prosecution was *nolle pros’ed*, it is believed by military order, and the prisoners discharged.”).

366. Records of Provost Marshal, File No. 13220, Roll No. 1626, Frame No. 855 (Mo. St. Archives), available at <http://www.sos.mo.gov/images/Archives/Provost/f01626.pdf>; *id.* at File No. 21276, Roll No. 1657, Frame No. 760, available at <http://www.sos.mo.gov/images/Archives/Provost/f01657.pdf>.

We cannot know for certain why the Provost Marshal belatedly assumed jurisdiction or why the case was dropped. However, a case of this sort would have been politically awkward for the state's military authorities and its Unionist provisional government. There would certainly have been some voices in the military espousing the view that the ongoing plague of robberies, arsons, assaults, and killings by Confederate guerrillas (which we will consider in the next section<sup>367</sup>) required or at least should excuse the sort of direct, brutal response meted out to Oldham. And there is one other interesting coincidence. As noted above, William Switzler, the slave-holding conservative Unionist editor, was Provost Marshal in the Boone County district beginning in July 1863, just before the Oldham killing. It is not surprising that he would be happy to allow civilian justice to deal with the killers of a man who may have been hung as retaliation for strong-arming an outsider suspected of fomenting slave rebellion. But Switzler was ejected from office in October 1864 for supporting McClellan against Lincoln,<sup>368</sup> and in that very month, the Odell case was transferred to military jurisdiction. In Missouri, as elsewhere in Unionist circles, the advocates of hard war against the tenacious Confederacy were gaining ascendancy.<sup>369</sup> Odell and his fellows may well have owed their freedom to this trend.

### 3. *State v. Martin*: Confederate Guerilla Killings of Civilians

On December 27, 1864, John P. Austin, in company with several girls, rode away from a farmhouse he had been visiting.<sup>370</sup> He met a group of four men, Warren Martin, William M. Stephens, John Robinson,<sup>371</sup> and Bill Farley,<sup>372</sup> whom he obviously knew, and parted with the young ladies to ride with the men down Rocky Fork Creek.<sup>373</sup> Perhaps half an hour later, numerous witnesses in the neighborhood heard gunfire coming from the direction

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367. See *infra* Part IV.B.3.

368. See *supra* note 335 and accompanying text.

369. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 41-43 (1988) (describing effects of ascendancy of Radical Unionists in Missouri); 3 PARRISH, *supra* note 43, at 114-20 (discussing ascendancy of Radical Unionists in Missouri after election of 1864).

370. *State v. Martin*, Case No. 7460 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741, at 1510 (Mo. St. Archives) (testimony of Susan Warnock).

371. *Id.*

372. Susan Warnock did not identify Farley as the fourth man who met Austin, but William M. Stephens did. *Id.* at 1533 (testimony of William M. Stephens). Also, John Thomas Benton saw Farley with Robinson and two other men later in the morning leading Austin's horse. *Id.* at 1527 (testimony of John Thomas Benton). And J.W. Benton later testified that he saw Austin's saddle in the possession of a group including Martin, Farley, Stephens, and S. Rowland. *Id.* at 1530.

373. *Id.* at 1511 (testimony of Susan Warnock).

the men had ridden.<sup>374</sup> Soon thereafter, according to Elizabeth Jeffrey, then the wife of Thomas Benton, “three or four men,” including Martin, rode up to the Benton farmhouse, Martin dismounted, came to the house, said they had killed John Austin, and asked for slaves belonging to the Bentons to come and bury him.<sup>375</sup> Two slaves, Lewis and John, did so.<sup>376</sup>

At the inquest, William M. Stephens testified that he had been with Martin, Robinson, and Farley on the morning of Austin’s death and that Robinson and Farley expressed an intention to follow and kill Austin, but that Martin said to him, “[L]et’s follow these boys and keep them from killing Austin.”<sup>377</sup> Stephens claimed he went with Martin but left the group as soon as they met Austin and did not see the killing,<sup>378</sup> though he heard gunfire and reencountered Martin galloping toward him shortly thereafter. According to Stephens, and contrary to the testimony of Elizabeth Jeffrey, only he and Martin went to the Benton house and arranged for the slaves to bury Austin.<sup>379</sup> Robinson and Farley were unavailable to confirm or deny Stephens’s story because, by 1869, when the inquest was held, they were dead.<sup>380</sup> And Thomas Benton was unavailable to corroborate Elizabeth Jeffrey, née Benton, because he, too, had since died.<sup>381</sup>

The problem for the prosecution was proving who killed Austin and why. The government needed to show either that Martin did the killing himself, or at least that he was complicit in the crime. Henry Smith testified that Martin later admitted being “with the crowd that killed” Austin, but that Martin would not say more.<sup>382</sup> The government’s best witness, James Wade, came forward and testified that in the summer of 1867 or 1868, Martin told him that he had killed Austin.<sup>383</sup> However, Wade was uncertain on the date of the conversation and the defense responded with a barrage of character witnesses who swore that Wade’s character for truth and veracity was bad.<sup>384</sup>

Given these facts, it may not seem surprising that, while the JP found probable cause, the grand jury declined to indict Martin.<sup>385</sup> However, once one goes beyond the court record to discover who the principals in this drama were, the grand jury’s abstention takes on a rather different cast. It turns out that defendant Martin and the men who met Austin that December day were

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374. *Id.* at 1512 (testimony of Susan Warnock); *id.* at 1529 (testimony of J.W. Benton).

375. *Id.* at 1515-17 (testimony of Elizabeth Jeffrey).

376. *Id.* at 1516.

377. *Id.* at 1533 (testimony of William M. Stephens).

378. *Id.*

379. *Id.* at 1534.

380. *Id.* at 1536.

381. *Id.* at 1515-17 (testimony of Elizabeth Jeffrey).

382. *Id.* at 1523 (testimony of Henry C. Smith).

383. *Id.* at 1518, 1524-25 (testimony of James Wade).

384. *See, e.g., id.* at 1536-40 (testimony of John D. Kemper and John H. Dolan).

385. *Id.* at 1552 (list of JP’s costs, noting failure to indict).

members of the same group of Confederate bushwhackers led by Jim Jackson<sup>386</sup> who, among their other crimes,<sup>387</sup> murdered recently-emancipated black men in 1865.<sup>388</sup> A close friend of Martin's testified that Martin and other members of the Jackson gang later openly stated that the motive for killing Austin was that they believed him to be a Union spy.<sup>389</sup> Moreover, Stephens, who gave the improbable testimony about Martin enlisting him to follow Farley and Robinson to prevent Austin's killing, was one of the officers in Jackson's unit. Indeed, the June 1865 surrender was characterized by contemporary sources as "the surrender of the band of bushwhackers under Capts. Jim Jackson and Wm. Stephens."<sup>390</sup> The idea that Captain Stephens would have taken direction from Martin on the question of whether a suspected spy should be killed, or have been unable to prevent such a killing had he

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386. William M. Stephens and William S. Farley are listed among the fifteen men who surrendered with Jackson on June 13, 1865. SWITZLER, *supra* note 26, at 476. Also listed is "Wm. W. Martin," who was probably the Warren Martin of this case. *Id.* At the trial, Henry C. Smith testified that he did not know Martin "until after the surrender to Capt. Cook." State v. Martin, Case No. 7460 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741, at 1523 (Mo. St. Archives). Captain H.N. Cook was the Union officer to whom Jackson's unit surrendered. SWITZLER, *supra* note 26, at 476. Even if the Wm. W. Martin on the surrender list is a different man, the testimony in the Martin case makes it plain that defendant Martin was a member of Jackson's group. For example, witness John Benton testified about being together with Jim Jackson, Martin, Stephens, Farley, and Robinson when the killing of Austin was discussed. State v. Martin, Case No. 7460 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741, at 1529 (Mo. St. Archives). J.W. Benton testified that he later saw Martin, Stephens, Farley, and "S. Rowland" in a group and one was using victim Austin's saddle. *Id.* at 1530. Samuel T. Rowland was also one of those who surrendered with Jackson. SWITZLER, *supra* note 26, at 476.

And while there may be a coincidence of names, a Warren Martin appears several times in local press accounts of bushwhacker outrages. For example, "Warren Martin, who signs himself the 'Young Hellyan of Callaway County,' and who is getting to be somewhat of a notorious guerilla, shot and killed two negro men" in Boone County in April 1865. *Two Negroes Killed*, MO. STATESMAN, Apr. 14, 1865. A "band of four ruffians, under the leadership of that notorious cut-throat, Warren Martin" is reported to have murdered an elderly, but "out spoken Union man" in April 1865. *Death of John A. Robinson*, MO. STATESMAN, May 5, 1865, at 1. In late May 1865, several weeks before the surrender of the Jackson group, "Warren Martin, the terror of Callaway [C]ounty, and the worst bushwhacker, except Jim Jackson, in North Missouri," was reportedly shot, though not apparently killed, by a farmer in Callaway County. *Desperadoes Shot*, MO. STATESMAN, June 2, 1865.

387. For an account of one rampage by Jackson's group in March 1865 that included a string of robberies and murders, see *A Career of Murder and Robbery*, *supra* note 267.

388. See *supra* notes 266-70 and accompanying text.

389. State v. Martin, Case No. 7460 (Boone Cnty. Cir. Ct. 1870), *microformed on* C19741, at 1528-29 (Mo. St. Archives) (testimony of John T. Benton).

390. SWITZLER, *supra* note 26, at 476.



wished it, or indeed that Stephens would have primly ridden away once the supposed spy had been encountered, beggars belief.

Of course, no one was available to contradict Stephens's tale of Martin's actions before the killing, because, by 1869, when the matter came to court, the other two members of the shooting party, Farley and Robinson, were dead, Farley having been executed in June 1865 by the same group of Union loyalists who dispatched Jim Jackson.<sup>391</sup> Nonetheless, a Boone County grand jury would have been aware of the identities of Stephens and Martin and their place in the Jackson gang of bushwhackers. It would have been as plain to them as it is to us that Austin's killing was the planned execution by Confederate partisans of a suspected Union spy in which Martin was either the killer or at least a willing complicitor. Why would they have given Martin a pass?

We cannot know for certain. But it is fair to surmise that several factors may have been at work. First, in late 1864 when Austin was killed, Boone County and the central Missouri river counties, though pro-slavery and markedly pro-Confederate in their sympathies, were weary of war and sick of the depredations of bushwhackers, who were seen by most as a universal scourge. In Boone County and elsewhere, citizens were arming themselves and forming vigilance committees to deal with the raiders.<sup>392</sup> But by 1869 when the case against Martin finally came to court, things had changed. The War was over. With a few exceptions like the James-Younger gang that continued to plague Missouri and surrounding states until 1882 when Jesse James was killed,<sup>393</sup> the bushwhackers had melted back into the population and were no longer an active threat.

Second, people's views of the War were changing in light of post-war developments. Boone County's surviving Confederate veterans of both regular and guerilla units returned and resumed their places in community life. At the same time, the conservative Unionists who had stood for the old Union despite their slave holdings and emotional ties to the South became increasingly disillusioned with post-war political events. They opposed immediate emancipation, and lost, thus being obliged to surrender abruptly and without compensation a substantial portion of their wealth.<sup>394</sup> Nationally, they favored a soft peace with a rapid restoration of the seceded states to full sovereignty and participation in national affairs, and deplored what they saw as draconian measures by the Republican-controlled federal government to "re-

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391. *Id.* at 477.

392. See, e.g., *Order No. 107 - Public Meeting*, MO. STATESMAN, Jan. 27, 1865 (reporting on Jan. 21, 1865, meeting of citizens of Ashland in Boone County aimed at adopting measures to make "our whole people the avowed and deadly enemies of all marauders, bushwhackers [etc.]" and proposing a county-wide meeting in Columbia on Feb. 6).

393. WILLIAM A. SETTLE, JR., *JESSE JAMES WAS HIS NAME passim* (1966) (detailing the origins and exploits of the James-Younger gang and noting Jesse James death on Apr. 3, 1882).

394. See *supra* notes 257-63 and accompanying text.

construct” the South.<sup>395</sup> Locally, they were outraged by the successful efforts of the Radical Unionist/Republican party controlling state government to maintain power by restricting the franchise to those willing to take a test oath declaring that they had never aided or even been in sympathy with the failed rebellion. This mechanism was applied so vigorously that in the election of 1868, only 411 of perhaps 2500 to 3000 potential voters in Boone County were allowed to register.<sup>396</sup> As a result, in a county where Abraham Lincoln received a total of twelve votes in 1860<sup>397</sup> and lost to George B. McClellan by a margin of over three-to-one in 1864,<sup>398</sup> General Grant was able to carry the county in 1868 by six votes.<sup>399</sup> The popular indignation at this bit of electoral engineering was so great that in January 1870, the Boone County grand jury indicted registrar Lewis O. Clough for his refusal to register assorted well-known conservative Unionists, including A.J. Harbison, who had served as the elected Circuit Attorney during the War.<sup>400</sup>

By 1869-70, the conservative Unionists of Boone County were coalescing politically and socially with the defeated secessionists under the banner of the Democratic Party.<sup>401</sup> As part of this process, at least in some quarters, Confederate guerillas like Warren Martin were losing their taint as murderous thugs and undergoing a transformation in the popular mind to unconquered knights of the Lost Cause, a myth that served the political ends of the resurgent Democracy and sustained a reservoir of support for the James-Younger gang in some sections of Missouri for a decade-and-a-half.<sup>402</sup> In this milieu,

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395. See, e.g., SWITZLER, *supra* note 26, at 493 (describing a public meeting on March 5, 1866, called by A.J. Harbison, at which James S. Rollins, William Switzler, Judge David Gordon, and others endorsed the conciliatory approach to the southern states favored by President Andrew Johnson and condemned “the revolutionary programme of the Sumner-Stevens Radicals”).

396. *Id.* at 496. Switzler claims that 3000 citizens were disenfranchised by the test oath and other registration requirements in 1868. *Id.* That may be a slight overstatement since only about 2600 votes were cast in Boone County in the election of 1860. *Id.* at 394. Nonetheless, given that not all eligible or registered voters would actually have cast votes in 1860, it is fair to estimate that the number of potential Boone County voters in 1868 would have been 2500 to 3000.

397. *Id.* at 396.

398. *Id.* at 427.

399. *Id.* at 496.

400. *Id.* at 508 (describing indictment of Clough); *id.* at 1144 (noting that A.J. Harbison served as Circuit Attorney from 1862-1864).

401. *Id.* at 509-10 (reporting public meeting in Rocheport to extol the virtues of the recently deceased Gen. R.E. Lee, addressed by William Switzler); *id.* at 512-13 (reporting 1872 meeting of Boone County Democratic Party addressed by William Switzler, prominent newspaper editor and conservative Unionist, Squire Turner, who was banished from Missouri for pro-Confederate sympathies during the War, *id.* at 964, F.F.C. Triplett, who had spoken at pro-Confederate meetings before the War, GENTRY, BENCH AND BAR OF BOONE COUNTY, *supra* note 18, at 265, and others).

402. SETTLE, *supra* note 393, at 43-56.

it is not unreasonable to surmise that the grand jury's refusal to indict Warren Martin was, at least for some of the jurors, a political statement. If the Confederates, regular or irregular, were the good guys, then killing a suspected Union informer was nothing more than the necessary execution of a traitor. At worst, it could be viewed as a regrettable incident of a form of warfare in which excesses on both sides were sufficiently common that post-war civilian authorities were best advised to let bygones be bygones.

## VI. A CONSISTENT TOLERANCE OF DEADLY FORCE

The factors considered so far – Missouri's underdeveloped law enforcement infrastructure, the relative equality in resources and talent between prosecution and defense in Boone County, the effects of race, and the general breakdown of legal and social order from 1861-1865 – explain a good deal, but remain inadequate to account for a quarter-century in which only eleven of fifty-three identified killers were convicted of any crime whatsoever. Even setting to one side cases where defendants escaped or were never captured, cases that would have benefited from modern techniques of forensic investigation or a more professional police or prosecutorial approach, and cases influenced by race or the War, there remain a striking number of garden-variety killings in which none of those factors are evident, but where juries nonetheless acquitted on facts that, to a modern eye, seem a near surety for conviction of at least some form of criminal homicide. In short, before, during, and after the Civil War, the citizenry of mid-Missouri seems to have entertained a tolerance for deadly violence far greater than our own.

That tolerance is most starkly evident in this statistic: at least seventeen of the fifty-three homicide defendants considered here raised self-defense, and all but two of them were acquitted at trial or had their cases dismissed when the justice of the peace declined to bind the case over or the grand jury declined to indict.<sup>403</sup> Some of these cases, for example Professor Grant's shooting of university student George Clarkson after the young man cocked his pistol, would be considered legitimate instances of self-defense even under modern law. But even the Grant case illustrates the disposition among men of all classes to carry weapons and use them in rather mundane quarrels. As the Missouri Supreme Court wrote in 1866: "Violence and lawlessness are fearfully prevalent in the land. The almost general habit of carrying concealed and deadly weapons, and the disposition to avenge every affront or grudge with a strong hand, are but too painfully manifest."<sup>404</sup> Though the

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403. One defendant pled guilty to second degree murder and another was found guilty of second degree murder by a jury. See *supra* notes 302-03 and accompanying text. Eight defendants were acquitted by juries at trial, while in seven cases either the justice of the peace did not bind the case over or the grand jury declined to charge the defendant. See *supra* notes 276-301, 343-91 and accompanying text.

404. *State v. Starr*, 38 Mo. 270, 278 (1866).

Court was no doubt thinking of the especially unsettled conditions immediately following the Civil War, the observation fairly described the entire quarter-century under examination here.

More striking than the easy resort to weapons is the fact that, in many of the Boone County self-defense cases, the defendant's life does not seem to have been genuinely in danger. Rather, there was a disagreement, some insults, perhaps some threats, even some scuffling, but little evidence that the defendant used deadly violence as a truly last resort to save himself. Moreover, there is an almost complete dearth of convictions of lesser degrees of homicide in cases where the evidence of genuine self-defense is weak. The clear pattern among JPs, grand juries, and trial juries was to acquit outright. The true rule of decision (whatever the letter of the law) seems to have been that if you became embroiled in a quarrel and made threats, particularly threats to use a weapon, and got killed in consequence, that was your own fault. You asked for it. You got it.

Consider, for example, the prosecution of Major A.J. Harbison, whom we have already met in his roles as sometime Circuit Attorney and prominent local lawyer. On Tuesday morning, March 21, 1871, Harbison shot and killed L.S. Garrett in the street in front of Odon Guitar's law office.<sup>405</sup> Harbison was standing on the pavement and, as Garrett walked toward him, pulled a pistol from a holster on his belt.<sup>406</sup> According to Garrett's deathbed statement, later admitted as a dying declaration, when he saw the pistol, Garrett said, "Stop Harbison. Don't shoot me."<sup>407</sup> Harbison replied, "I'll stop you," and fired.<sup>408</sup> Eyewitness James P. McAfee confirmed Garrett's account, remembering Garrett's words before the shooting as, "Stop. I am not going to hurt you."<sup>409</sup> Garrett was unarmed except for a closed clasp knife found in his pocket when he was being treated for his fatal wound.<sup>410</sup> And, according to all the witnesses, Garrett was at least ten to fifteen feet from Harbison when he was gunned down.<sup>411</sup> Nonetheless, when the case came to trial in

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405. State v. Harbison, Case No. 7901 (Boone Cnty. Cir. Ct. 1872), *microformed on C19742*, at 3458 (Mo. St. Archives).

406. See *id.* at 3471 (testimony of H.C. Pierce, describing seeing Harbison replacing revolver in holster around his waist after shooting).

407. *Id.* at 3463 (dying declaration of L.S. Garrett).

408. *Id.*

409. *Id.* at 3467 (testimony of James P. McAfee).

410. *Id.* at 3475 (testimony of Dr. W.C. Maupin, noting that when treating the victim immediately after the shooting he found only a pocket knife); *id.* at 3462 (dying declaration of L.S. Garrett: "When shot, I had no weapons, more than a pocket knife and that was in my pocket.").

411. *Id.* at 3468 (testimony of Jno. M. Samuel: After the shot, "I immediately turned and saw the Defendant standing on the second step of Guitar's office with a pistol in his hand, and Garrett was sitting on the pavement some fifteen feet from the Defendant."); *id.* at 3466 (testimony of James P. McAfee: "Garrett was about ten feet from the defendant.").

October 1872, Harbison claimed self-defense and the jury acquitted him in minutes in a case submitted without argument.<sup>412</sup>

The story behind this verdict illustrates the expansive view of self-defense entertained by old Missouri juries, and also suggests that in old Missouri, as in other places and times, a man of position might enjoy some latitude not afforded the less fortunate. Some months before his death, Garrett had conveyed to Harbison a black roan mare, ninety dollars in cash, and a wagon.<sup>413</sup> It was later suggested that the property was transferred to pay a legal fee, but Garrett maintained that he signed the property over to Harbison "without consideration" and solely to prevent it from being "taken to Iowa" by "other parties" when Garrett was arrested for some offense or delinquency.<sup>414</sup> Garrett's story, in short, was that he and Harbison arranged a sham transfer to defeat Garrett's creditors. The scheme, if such it was, was successful, because a man from Iowa, one Martin, brought suit in Boone County against Harbison to recover the horse, but lost on the strength of a bill of sale from Garrett to Harbison and Garrett's, possibly perjurious, testimony that he had transferred the horse to Harbison for legal services rendered.<sup>415</sup>

Some time later, Harbison sold the horse.<sup>416</sup> Garrett was enraged by what he saw as Harbison's betrayal.<sup>417</sup> He tried to obtain relief from Harbison, but to no avail. On March 20, 1871, Garrett went to Harbison's house several times in an effort to confront Harbison. Only Harbison's wife came to the door. Garrett told her his grievance. She responded that her husband "was a man of honor and if there was anything between them he would make it right."<sup>418</sup> According to two deathbed witnesses, Garrett said he told Mrs. Harbison that Major Harbison "must make it right by ten o'clock next morning" or Garrett "would fix him or attend to his case."<sup>419</sup> Two other witnesses said that the day before the shooting, Garrett discussed the matter with them and said that if Harbison did not do right in the matter, he and Harbison "could not live in this country together, or could not live quietly together."<sup>420</sup>

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412. See *id.* at 3459 (jury verdict of not guilty signed by foreman Geo. Arnold); *Boone County Circuit Court*, MO. STATESMAN, Oct. 11, 1872.

413. *State v. Harbison*, Case No. 7901 (Boone Cnty. Cir. Ct. 1872), *microformed on C19742* (Mo. St. Archives) (dying declaration of L.S. Garrett, Mar. 21, 1871).

414. *Id.*; *id.* at 3486 (testimony of R.H. Huzza, relating that Garrett said on his deathbed that he made over the property to Harbison, "not for legal fees but to keep other parties who lived in Iowa that claimed the property from getting it").

415. *Id.* at 3487 (testimony of Lewis Sharp); *id.* (testimony of E.J. Nichols).

416. *Id.* at 3489 (testimony of Lewis Sharp).

417. *Id.* at 3485 (testimony of R.H. Huzza that Garrett said Harbison "betrayed or swindled him out of some property").

418. *Id.*

419. *Id.*; *id.* at 3484 (testimony of D.S. Dyson).

420. *Id.* at 3488 (testimony of Lewis Sharp); *id.* at 3490 (testimony of H.S. Benepe: Garrett said "if Harbison did not do him right him and Harbison could not live in this country together").

One witness, a Mr. Benepe, claimed that on March 20, Garrett threatened to kill Harbison if Harbison did not “give up the property.”<sup>421</sup> Benepe testified that on the evening of March 20, he told Harbison’s wife about this threat, and on the morning of March 21, related it to Harbison himself.<sup>422</sup>

Immediately after the shooting, several men asked Harbison why he shot Garrett. According to John Samuels, Harbison replied that “Garrett had been threatening all over town on the day before to kill him and had been to his house some six or eight times, insulting and abusing his family.”<sup>423</sup> The fundamental issue for trial thus became whether Harbison could shoot down an unarmed man standing ten to fifteen feet away begging not to be shot and escape liability on a plea of self-defense based on oral threats made by victim the day before and related to Harbison by third parties. As we have seen, the jury found no difficulty and acquitted him in minutes.<sup>424</sup> This outcome seems, at the least, surprising.

The jury instructions given to the Harbison jury may partially explain the outcome. Under modern Missouri law, deadly force may be used in self-defense only if there is:

(1) an absence of aggression or provocation on the part of the defender, (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death, (3) a reasonable cause for the defender’s belief in such necessity, and (4) *an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life.*<sup>425</sup>

By contrast, Harbison’s jury received two key instructions:

If the jury believe from the evidence that at the time of the killing of Garrett by Harbison as charged in the indictment Harbison had reasonable cause to apprehend a design on the part of Garrett to kill him or to do him some great personal injury and that there was

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421. *Id.* at 3491 (testimony of H.S. Benepe).

422. *Id.* at 3491-92.

423. *Id.* at 3469 (testimony of John M. Samuels); *see also id.* at 3472 (testimony of H.C. Pierce: Harbison said he shot Garrett because “Garrett was around here yesterday threatening my life.”).

424. Indeed, they were not alone in their view. *Id.* at 3499 (findings of James T. Hearn, J.P. and S.G. Berry, J.P.). The two justices of the peace who first heard the case found no probable cause, though the Circuit Attorney nonetheless presented the case to a grand jury which indicted Harbison. *Id.* at 3453-55 (indictment of Andrew J. Harbison for first degree murder signed by J.H. Overall, Circuit Attorney).

425. *State v. Burks*, 237 S.W.3d 225, 229 (Mo. App. S.D. 2007) (emphasis added); *see also State v. Thomas*, 161 S.W.3d 377, 379 (Mo. 2005) (en banc).

reasonable cause to apprehend immediate danger of such design being accomplished, they must find the defendant not guilty.<sup>426</sup>

It is not necessary in order to justify the defendant that the deceased should at the time he was shot, have intended to do the defendant some great personal injury, or that the danger that such design would be accomplished should have been real. It is sufficient if the defendant had at the time he shot reasonable ground to believe and did believe the existence of such design, and the danger imminent that such design would be accomplished, although there may have been neither design to do him personal injury or danger that it would be done.<sup>427</sup>

These instructions, though generally consistent with Missouri law of the period,<sup>428</sup> were nonetheless favorable to Harbison. They focused on whether Harbison thought Garrett had some "design" to harm him, regardless of whether Garrett really intended any such thing. More significantly, while both instructions properly required the jury to consider the reasonableness of Harbison's belief in immediate danger,<sup>429</sup> neither asked the jury to consider whether Harbison had options other than force to protect himself against the supposed threat or examine the necessity of *deadly* force to prevent the supposedly threatened injury. These two considerations are made explicit in the fourth element of modern Missouri self-defense law requiring that the defendant "attempt . . . to do all within his power consistent with his personal safety to avoid the danger and the need to take a life."<sup>430</sup> According to Professor Kelley, they were also germane under the law of Missouri in the 1870s,<sup>431</sup> but they do not seem to have been expressed plainly in self-defense instructions sanctioned by the Missouri courts.<sup>432</sup>

Even under the instructions given, the jury's verdict is arresting. Whatever Harbison may have heard from others about Garrett's threats, the man was unarmed, ten to fifteen feet away, and pleading for Harbison not to shoot

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426. *State v. Harbison*, Case No. 7901 (Boone Cnty. Cir. Ct. 1872), *microformed on C19742*, at 3369 (Mo. St. Archives) (jury instruction number 1).

427. *Id.* at 3372 (jury instruction number 2).

428. *See generally* KELLEY, CRIMINAL LAW, *supra* note 68, §§ 481-88 (discussing the law of excusable homicide in Missouri).

429. Under Missouri case law of the period, the jury was obliged to consider whether a defendant's subjective belief in an impending threat of violence from the victim was "reasonable or probable or not, or whether he have any reasonable grounds to apprehend immediate danger of the infliction of the injury feared." *State v. O'Connor*, 31 Mo. 389, 389-90 (1861); *see generally* KELLEY, CRIMINAL LAW, *supra* note 68, §§ 485-87.

430. *Supra* note 425 and accompanying text.

431. KELLEY, CRIMINAL LAW, *supra* note 68, §§ 485-87.

432. *See, e.g., State v. Sloan*, 47 Mo. 604, 606 (1871).

when Harbison killed him. At a minimum, these facts would seem to have supported a conviction for the lesser offense of either second degree murder or voluntary manslaughter.<sup>433</sup> It is difficult to imagine a properly instructed modern jury giving a complete pass on these facts.

What makes the case even more peculiar is that there are reasons to think that Garrett had a genuine grievance and that Harbison had swindled him. Garrett's fury is powerful evidence in itself. Moreover, although all the witness statements in the record come from the JP inquest, and we therefore do not know what, if anything, Harbison may have testified to at his jury trial, there is no indication that Harbison ever denied Garrett's claim about the horse. Moreover, it appears Harbison was about to skip town, suggesting that he was in dire financial straits at the time of the killing and perhaps providing a motive for an act as desperate as selling goods he knew were not lawfully his. On the morning of the shooting, Harbison told Benepe that if Garrett did not find him by one o'clock, Harbison would not be around because he was leaving for Kentucky on the one o'clock train if he could borrow money for train fare, which Benepe then agreed to lend him.<sup>434</sup> By killing Garrett, Harbison not only scotched the supposed threat to his life but eliminated the man accusing him of professional malpractice.

The Harbison case is similar to the 1857 prosecution of Bill Williams, a Columbia shopkeeper, who shot his employee, Albert Hogan, a journeyman tailor.<sup>435</sup> The two men argued. Hogan insulted Williams, calling him a "damned son of a bitch" and a thief, declaring at one point that "you would climb a tree and steal lightning from the limbs if you were not afraid the thunder would strike you."<sup>436</sup> Later, in a conversation with fellow employee J.G. Melrose, Hogan showed a knife and said he would give \$1000 to run it into Williams, a threat Melrose related to Williams.<sup>437</sup> The next day, Hogan returned to Williams' shop. Williams fired him and told him to leave. Hogan replied that he would leave when he was ready, then rose, took a step toward Williams and said, "I'll cut your damn throat."<sup>438</sup> Whereupon Williams stepped into an adjoining room, retrieved a pistol, returned, said, "You will cut my throat, will you," and shot Hogan, who was standing six to eight feet away.<sup>439</sup> After the first shot, Hogan staggered out of the shop and said words to the effect of "Oh, don't Bill!" or "what are you doing?"<sup>440</sup> Whereupon

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433. KELLEY, CRIMINAL LAW, *supra* note 68, §§ 456, 471. However, we have no record of whether the prosecution argued for conviction on a lesser offense or whether the jury was instructed that this option was available to them.

434. See *supra* notes 413-16 and accompanying text.

435. State v. Williams, Case No. 4210 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19726, at 3577 (Mo. St. Archives).

436. *Killing of Albert B. Hogan*, MO. STATESMAN, June 19, 1857.

437. *Id.* (testimony of J.G. Melrose).

438. *Id.*

439. *Id.*

440. *Id.* (testimony of William H. Tillery).



Williams shot Hogan twice more.<sup>441</sup> Hogan died about fifteen minutes later. Inspection of his body revealed that he did have a knife, but it was in a scabbard in his breast pocket.<sup>442</sup> There was no evidence that he ever removed or flourished the weapon before he was killed.<sup>443</sup> The jury was carefully instructed both on self-defense and on the option of finding Williams guilty of second degree murder or “of manslaughter in any degree which the facts given in evidence justify.”<sup>444</sup> The jury acquitted him of all charges.<sup>445</sup>

Sometimes, Boone County juries would acquit on self-defense even if the defendant started the fight. In May 1856, some men were gathered at the house of William Bledsoe. For reasons unknown, Owen Hickam drew a folding knife, opened it, and announced he could “whip any man in the lot.”<sup>446</sup> Jarett Tuck took exception, declared “confound if you can whip me,” grabbed a stick, and knocked Hickam down with it.<sup>447</sup> Tuck swung again, but his blow was deflected by a clothes line and he lost his stick.<sup>448</sup> The two men then grappled, and when they were pulled apart, Tuck was bleeding from ultimately fatal stab wounds.<sup>449</sup> Despite the fact that this case might have been written as a law school hypothetical illustrating the old common law doctrine – as applicable in nineteenth century Missouri as it is today<sup>450</sup> – that one who begins a fight cannot claim self-defense if the combat turns against him, the justice of the peace acquitted Hickam and the case was dismissed.<sup>451</sup>

It is perilous to infer too much from the outcomes in a relatively small number of cases. Nonetheless, Boone County’s ready acceptance of self-defense claims permits several reasonable conclusions. First, central Missouri in the middle of the nineteenth century was still a frontier region in which self-help was sometimes a necessity. As we have seen, organized law enforcement was embryonic, and even where a sheriff or constable held of-

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441. *Id.*

442. *Id.*

443. *Id.*

444. *State v. Williams*, Case No. 4210 (Boone Cnty. Cir. Ct. 1857), *microformed on* C19726, at 3572-74 (Mo. St. Archives) (jury instructions).

445. *Id.* at 3603 (jury verdict).

446. *State v. Hickam*, Case No. 4177 (Boone Cnty. Cir. Ct. 1856), *microformed on* C19726, at 2803 (Mo. St. Archives) (testimony of Nathan Scaggs).

447. *Id.* at 2803-04.

448. *Id.* at 2803-10 (testimony of Nathan Scaggs, Joseph Tuck, and William Bledsoe).

449. *Id.*

450. KELLEY, CRIMINAL LAW, *supra* note 68, § 488 (“The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party himself – commenced or brought on by any willful act of his, or he voluntarily and of his own free will enters into it – no matter how imminent the peril; the necessity being of his own creating shall not operate in his excuse.”).

451. *State v. Hickam*, Case No. 4177 (Boone Cnty. Cir. Ct. 1856), *microformed on* C19726, at 2814-15 (Mo. St. Archives) (statement of costs).

fice, there existed limited means of summoning official aid promptly. If a man with a gun or knife appeared, one could not simply pick up the phone and call the cops. There were no phones. The “cops” often had no regular office at which they could reliably be found. And, once summoned, law enforcement had no means of getting to the scene faster than shoe leather or a horse’s hooves. Thus, the prudent man stood ready to meet force with force, and juries understood the necessity.

Nonetheless, the community’s sanction of self-help is not entirely explainable by underdeveloped law enforcement. In several of the cases reviewed here, the defendants had ample warning of impending threats, but made no appeal to the authorities before arming themselves and dispatching their antagonists. Recall that Professor Grant, when informed of young Clarkson’s threats sent a message, not for the sheriff, but for his best revolver.<sup>452</sup> Shopkeeper Williams behaved similarly – having been warned the day before the fatal encounter with Hogan of Hogan’s wild talk about stabbing him, his only response seems to have been to place a pistol ready to hand.<sup>453</sup> Attorney Harbison’s conduct is even more telling. He had been told by his wife and Mr. Benepe of Garrett’s claims regarding the horse and the accompanying threats, yet he never contacted sheriff or constable.<sup>454</sup> Moreover, as a lawyer, he would have known about the special provisions of Missouri law that permitted a justice of the peace to issue a warrant for one who threatened future violence and, once the warrant was executed, to secure a bond from the troublemaker requiring him to keep the peace.<sup>455</sup> Yet Harbison sought out neither peace officer nor magistrate, choosing instead to arm himself and kill Garrett when he approached. In these and other Boone County cases, juries manifested a ready acceptance of exercises of masculine self-sufficiency in the face of threatened violence, particularly when coupled with personal insult – not the gentleman’s code duello<sup>456</sup> but a cruder variant observable throughout the nineteenth century American South.<sup>457</sup>

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452. See *supra* note 10 and accompanying text.

453. See *supra* notes 435-43 and accompanying text.

454. See *supra* notes 416-22 and accompanying text.

455. See Justices’ Courts, MO. REV. STAT. art. I, §§ 1-5 (1835) (describing procedure for JPs to issue warrants for persons threatening to commit an offense and to procure from them a surety to keep the peace).

456. See *The History of Dueling in America*, PBS, <http://www.pbs.org/wgbh/amex/duel/sfeature/dueling.html> (last visited Feb. 4, 2012).

457. See, e.g., Erik Monkkonen, *Diverging Homicide Rates: England and the United States, 1850-1875*, in 1 VIOLENCE IN AMERICA: THE HISTORY OF CRIME 94 (Ted Robert Gurr ed., 1989) (noting that in the mid-nineteenth century, homicide was viewed indulgently in the rural south if deemed reasonable, and “most killings . . . in the rural South were reasonable, in the sense that the victim had not done everything possible to escape from the killer, that the killing resulted from a personal dispute, or because the killer and victim were the kinds of people who kill each other”).

Two other factors may well have influenced this general attitude. First, until abolition, Boone County was a slave society in which a large segment of the population was held in bondage by the threat, and not infrequent application, of beatings, mutilation, or even death, either by legal process or mob violence.<sup>458</sup> A society that sanctions violence as a regular method of social control is not unlikely to develop a high tolerance for such behavior. Second, in Missouri, the culture of interracial violence was overlaid by a decade from 1854-65 in which the guerilla warfare and border ruffianism that began with disagreement over slavery in Kansas segued into open civil war, and violence became a common tool employed by whites against other whites who disagreed on the large political questions of the day. Central Missouri was never the site of great slaughter or mass atrocity, but it would be surprising if years of steady, if irregular, eruptions of killing did not affect both individual behavior and social attitudes.

## VII. CONCLUSION

So what is gained from this sesquicentennial excavation of a quarter-century of violent death (beyond the historian's invariable delight in reconstructing any lost time)?

First, researching these cases has reinforced the conclusion I reached when writing several years ago about Missouri's criminal appellate process in the same period.<sup>459</sup> Much of the modern American legal process is dependent, not on particular substantive or procedural rules, but on legal and societal infrastructure that we tend to take for granted. To give the simplest example, appellate practice in Missouri (and elsewhere) was stunted until the late 1880s by the absence of court reporters who could create the verbatim trial records upon which a detailed review for error depends.<sup>460</sup> Similarly, the course of homicide cases in Civil War era Boone County was plainly influenced by the prevalence of comparatively primitive police and prosecution services and the lack of modern transport and communications facilities. In a world of dirt roads, horse-powered transport, and only the first sketch of a telecommunications network, running from the law will often be the best defense. Without professional police or prosecutors and absent modern forensic evidence, homicide cases will be harder to prove. In a society with few police and no squad cars or telephones, the practical limits of the doctrine of self-defense will expand. In short, to understand legal outcomes in any historical period, one must first understand the material and institutional circumstances of the time.

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458. See, e.g., Grenz, *supra* note 52, at 7-13 (detailing instances of corporal and capital punishment of slaves in Boone County in the antebellum period).

459. See Bowman, *Crimes, Trials, and Appeals*, *supra* note 140.

460. *Id.* at 366.

Second, the study of actual cases decided by juries and judges – law in action, rather than law in theory – owes its fascination to the insights it gives into what people really believe about the proper limits of human behavior. In cases of murder, the question is always when shall we condemn and when shall we excuse violation of the most basic human social commandment. If one can map the boundary between condemnation and excuse for killing in any society – not merely the formal legal rules, but the fundamental convictions expressed in actual judgments – one has learned a great deal. Here, I was looking for insights into the Civil War generation in my little college town.

The repeated injustices evident in the homicide cases involving slaves and freedmen, if they do nothing else, provide poignant and particular reminders of why the American Civil War had to be fought and of why Union victory was only the first step in a long and continuing struggle to purge the country of its original sin. Such reminders are necessary, not only for those who purposely distort the War's history and its causes for contemporary political ends, but equally for those who are merely blissfully ignorant. Here in Columbia, now a reliably liberal college town enclave, most of the inhabitants, unless native and well-stricken in years, have no idea of the region's past and thus little appreciation of the historical roots of the community racial striations evident to this day. Perhaps it should not matter. Perhaps the accident of sharing geography with past injustice should impose no special obligation to redress it. But even if no obligation arises, acquaintance with the ghosts of one's immediate surroundings can enhance understanding of the present and, perhaps, a disposition to do better than one's predecessors.

Still, this observation only scratches the surface, because it is hardly news to any thinking person that slavery was an evil and that its effects have not yet been, and may never be, wholly eradicated. And in any event, cases involving slaves, freedmen, or the War make up only a minority of the killings examined here. The great challenge is trying to see the inhabitants of Boone County who appear in these cases as more than caricatures defined only in relation to questions of race. They were, in fact, vibrant, energetic, complicated people. Barely a generation away from hacking Columbia and environs out of wilderness, and thus in certain respects rough and even violent, many were also far more refined in speech, thought, and manners than anyone you would be likely to encounter on a Boone County street today. They were resolutely pious builders and supporters of churches. All of the people of any prominence had their hands in multiple vocations and were perennially embarking on new schemes for personal advancement or community improvement – newspapers, schools, colleges, new roads, telegraph lines, railroads. Slave-owning was common, central to the economy, accepted as either a positive good or unavoidable evil, but only one feature of a complex society.

Studying Boone County murders allows us to see a prominent slice of Boone County's inhabitants as lawyers, judges, sheriffs, constables, and jurymen, rather than as adherents to one side or the other in the War and adds

another dimension to our understanding. Plainly, the law often bent to accommodate the passions and prejudices of the time. Juries, the embodiments of public sentiment, either condemned or absolved killers moved by considerations peculiar to the community and the political moment that sometimes had little to do with the nominal legal rules. What nonetheless stands out is the persistence of the professional men of the law in asserting the primacy of law and legal processes. These men may have lived in a county only recently on the frontier, and one in the midst of a decade of sometimes-vicious civil war, but they believed they were engaged in a civilizing enterprise and believed in the law as essential to the project.

Despite their dismal won-lost record, the sheriffs kept arresting and the prosecutors kept charging Boone County's killers whenever they had probable cause to do so. On the defense side, no homicide defendant ever went unrepresented and the vigor of that representation secured notable results. Even guerilla war disrupted the course of civilian justice only partially, with General Guitar insisting that court would be held, rebels or no, and the judge presiding with pistols in his belt.<sup>461</sup> And despite the wartime exigency of martial law, it is revealing that the primacy of civilian courts began to be restored even before the War ended.<sup>462</sup> Perversely, perhaps the best testimonial to the professional fidelity of Boone County's men of law emerges from the occasion of the community's most disgraceful abandonment of law. Rollins, Guitar, Switzler, and others stood up to the mob that lynched Hiram. Though they could not defeat vigilante passions, their courage during the confrontation and their willingness to publicly shame the killers afterward suggests that their dedication to law was a lodestar which could even overmaster their inextricably retrograde racial attitudes. In his public letter condemning the mob, Rollins passionately asserted that adherence to law was not only a necessary bulwark against anarchy but a patriotic and indeed religious obligation.<sup>463</sup>

Of course, even an impassioned commitment to the rule of law is no panacea. The rule of law did not ensure just outcomes in every Boone County murder case. Nor could dedication to legality avert the Civil War. However, it may be fair to conclude that the tenacious legalism of Boone County's leading figures to some degree mitigated the War's local excesses. Nor was a general affinity for law sufficient to ensure immediate racial justice following the War. Even in that realm, however, one at least likes to think that as the moral arc of Missouri history in the ensuing century bent ever so gradually toward justice, the legacy of Boone County's old lawyers helped prepare the ground for the day when law would be employed to compel general acceptance of the moral imperative of human equality.

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461. See *supra* notes 340-42 and accompanying text.

462. See *supra* note 343 and accompanying text.

463. Letter of Rollins, *supra* note 223, at 8-9.