THE COWBOY AND THE LAW

by Philip D. Jordan

Cowboys, in from a long drive, bellied up to a drinkin' bar to leer at gals splendid in spangles or dirty as a littered cantina floor.

They downed dime beers, guzzled two-bit redeye or sipped "deluxe" whiskey made from cut alcohol, flavoring, and coloring. Sometimes the color and bite came from licorice or shredded chewing tobacco. But more frequently the quality of brandy and whiskey drunk throughout the cow country was adequate enough. It may not have pleased eastern dudes or foreign travelers come to see what the Wild West was all about, but it packed a wallop. If a puncher drank enough, he was sure of misplacing his senses, losing coordination, and, within measured time, falling unconscious. All this could result without any chloral hydrate, commonly known as knock-out drops, being surreptitiously slipped into stein or glass by a pug ugly barkeeper or an irate lady whose lures were spurned.

What happened between a tipsy vaquero's last dim, wavering mirage of mirrors and bottles and swaying tables where jacks looked like queens and hearts like spades, and the next morning when he appeared in court, like a bruised Lazarus risen from a jail cell, could not always be recalled with any degree of clarity. The accused felt awful. He was dehydrated, his bowels were "goosey," and his kidneys worked overtime. His head ached and there was more fur on his tongue than on a buffalo hide. He was depressed and frequently scared, for he found himself in the grip of the law and before a bar of justice.

Each was equally distasteful to a defendant, whether his name was Jesus Martinez or Charley Sloan or Sam Larson; whether he hailed from Georgia, Illinois, or the Panhandle; or whether he was young with beard light as corn silk or old with body scars earned at Antietam or even Buena Vista. The remorseful culprit — almost all were temporarily penitent — might find himself charged by the town marshal with being drunk and disorderly, assault and battery, disturbing the peace, or, in some instances, with unshucking an equalizer and shooting to death "son-of-a-bitchin' enimies" or even an innocent stranger who happened to sneeze at the wrong moment.

If a drover, celebrating his release from the rigors of the trail, had only quaffed an overabundance of spirits and was not pugnacious enough to disturb the peace, he might well have been released from the calaboose when sober and sent on his way by an understanding marshal or sheriff. That was common practice. But if a puncher made a nuisance and spectacle of himself, he almost certainly appeared before a justice of the peace to defend himself against a specific charge. Justices' courts were apt to be somewhat informal. The charge was read, the defendant testified as best he could as to what happened. Perhaps witnesses were called. The judge then made his decision. If the verdict was not guilty, the defendant was discharged and perhaps defendant, witness, and judge ambled over to the Star and Garter to celebrate.

If, on the other hand, a guilty verdict was handed down, sentence was an imperative. A convicted rider might be fined. If unable to pay the fine, he might be jailed. He could be both fined and jailed. He could be fined and the fine remitted. It was possible for him to enjoy the blessing of having both fine and jail time set aside, or to be placed on a sort of informal probation: "If this here court sees yuh here agin, I'm goin' tuh hist yuh high. Git out of town and stay out!"

Cowboys, rousted out of town in this manner, must have wondered what the law was all about. It was a natural enough question and one frequently asked by justices of the peace, circuit and district judges, and lawyers. Town marshals, county sheriffs, Indian police, and, among others, United States marshals and the military pondered the same query. Frontier juries argued the matter furiously. All more or less agreed that some actions were more illegal than others and thus carried more severe punishments if violators were caught, tried, and convicted. The best practice, of course, was to violate the law and escape apprehension and conviction.

Outlaw cowboys, with full knowledge they were breaking the law, stuck up stagecoaches, robbed the mails, blasted bank safes, stole cattle and horses, and otherwise made themselves prime candidates for wanted posters in post offices. The difference between the herdsman who was fined or tossed in the pokey for demolishing a saloon's interior as the result of believing he was man enough to drink the bar dry and the rider who blasted a stage and made off with the treasure chest was one of degree. The statutes recognized this and made it

perfectly clear. Even a dimwitted cattle tender knew without benefit of attorney or law book that some offenses were more serious than others. Yet many failed to understand the degrees of difference among various categories of illegal behavior.

Unfortunately, yarn spinners of the wild, wild West themselves appear at times unable to distinguish between a misdemeanor and a felony. Indeed, now and again one finds an author who on paper strings up enough pony-riding miscreants to earn for himself a macabre two-step at the end of a rope. A misdemeanor, generally speaking, is an offense punishable by fine or imprisonment in a local or county jail or both. A felony is a crime punishable by fine or incarceration or both in state or federal penitentiaries. A felony, such as first-degree murder, may carry the death penalty.

Ordinances of town councils defined misdemeanors and stipulated punishments. A rider jogging into any cattle community of the driving and grazing country could, for example, be arrested for swimming naked in a river or stream within the limits of a corporation. He could be picked up if he drank too much, if he got into a fight, if he wore a concealed weapon or even if he carried one openly. A peace officer could net a puncher who gambled illegally, threw loaded dice, or dealt from a stripper deck. It was illegal in Dallas, Texas, to play dominoes in public places if bets were placed. The penalty, upon conviction, ranged from ten to 25 dollars. If a cowboy spurred his pony at more than eight miles an hour in Caldwell, Kansas, he could be fined not less than three or more than 25 dollars. Should he fire a pistol, rifle, or shotgun, he was liable to a fine of not less than 25 dollars. Similar ordinances were passed in almost every community.[1]

The flesh-hungry drover in search of female companionship had little, if any, difficulty finding girls of almost any color, background, disposition, or talent. Depending upon taste and urgency, a cowboy could, for a price ranging from twenty-five cents to as much as five dollars or more, closet himself with a mestizo, or Indian girl, a Spanish Chilena, a Mexican Chola, a Chinese celestial, a soft-spoken southern belle whose chimes were as muted as her charms, or a down-to-earth, practical Yankee run out of Chicago after the great fire. Such entrepreneurs aped an economic principle learned from successful financial tycoons and enterprising businessmen: the American system was based upon profits, and they followed strictly the old precept that the buyer beware. Some girls were as unscrupulous as some frontier bankers, and a few knew more law than a good many attorneys.

However ripe and luscious the sisters of lust appeared to the cowhand, the law took a different view. State statutes and local ordinances proscribed their activities, characterized them as vagrants, sought to isolate them in red-light districts, and attempted to prevent bona-fide customers from receiving merchandise they believed necessary to health and manhood. Cowtowns, following state statutes, passed, but not always adequately enforced ordinances stipulating that operating houses of ill-fame and practicing prostitution were misdemeanors. Conviction carried relatively small fines, ranging from two to 25 dollars, but magistrates in cities at the end of drives frequently dismissed charges against madames and girls because of "lack of evidence." Generally speaking, punishments in state codes for maintaining a house of ill-repute or prostitution were more severe than those in local ordinances.[2]

Now and again, irate citizens, disgusted with the laxity of local enforcement, posted public notices warning ladies of the evening to stay out of town. At Fort Griffin, Texas, in June, 1876, a bulletin in bold black letters notified peripatetic whores that they were unwelcome and told them to leave "or you will be doomed." All this irritated cowboys who held they should take their fun where they found it and not be obliged to go searching as if they were flushing out a strayed maverick. William Perlstrom, who rode shotgun on stages before he "enlisted my self as a cow nurse" in Texas and Kansas, recalled that not too many cowboys he knew frequented disreputable houses, but that those who did had little difficulty finding a crib lady, dancehall girl, or streetwalker.[3]

If a raunchy puncher, be his name Martinez or Sloan or Larson, was lassoed on a misdemeanor charge, he was relatively well off and sometimes felt his fun was worth the price,

Charlie Bernick, a North Dakota cowboy.
—State Historical Society of North Dakota Collection

[1] *Charter and Ordinances of the City of Dallas, Texas* (Dallas, 1884), 111; *Caldwell* (Kansas) *Post*, August 21, 1879.

[2] See, for example, Cameron H. King, *et al.*, *Revised Statutes of Arizona* (Prescott, 1887), 753-754; *Kansas General Laws* (Topeka, 1862), 333; *Texas Penal Code* (Galveston, 1857), 74; *Revised Codes of North Dakota* (Bismarck, 1896), 1277; for a typical local ordinance, see R.O. Rhillips, *Revised Ordinances of the City of Lincoln* [Nebraska] . . . *April 1st, 1871* (Lincoln, 1871), 33-35.

[3] Interview with author, Minneapolis, Minnesota, March 14, 1951.

even if it meant a few days behind bars. But the rascal who purloined the mails, rustled bawling cattle, or sent a soul spinning to the stars with a smoking six-gun was a different matter. When caught, he was charged with a felony. If convicted, he was apt to take up residence for an extended period in a state or federal prison. If he were convicted of first-degree murder, he might be legally hanged, a ceremonial event which at times attracted enthusiastic crowds and perhaps a band playing a Methodist revival hymn or "When the Saints Come Marching Home," which seems somewhat inappropriate considering the less than angelic character of the traveler about to depart for the heavenly range.

Obviously, not all felonious fractures of the law were discovered. It has long been a bromide that the best of all possible crimes was the one which was never recognized as a crime. An attorney underscored this truism when he commented that he could not relate in his book the most ingenious and remarkable slayings, for "They looked like accidents or natural deaths and were never discovered."[4]

Enough obvious infractions, both small and great, occurred throughout the cattlemen's frontier, beginning shortly after the Civil War and continuing for a quarter century or more, to keep busy scores of peace officers. Their work at times was aided by unofficial or semi-official bounty hunters and vigilante and anti-horsethief organizations. The latter paid little attention to the niceties of local ordinances, state codes, and federal statutes. Self-styled keepers of the peace rationalized their hangings by maintaining the fiction that they acted as they did because regularly constituted officers had not yet reached a territory; because, even if in the territory, officers were too far away to be effective; because even if an accused cowboy was apprehended, a jury of his peers might acquit him when residents of the community knew damn well he was guilty; and because it was possible for an alleged culprit to escape from jail either before or after trial. Somewhere in this ill-assorted maze of motives, another cause stands out: subconsciously and frequently consciously men love to inflict violent punishment and, although denying it, rationalize lynch law and bloodletting by casting themselves in the role of saviour and protector and as pious agents of righteousness.[5]

Yet lynch law, despite notions to the contrary, was not indigenous to the land of bawling longhorns. Foreign travelers for years commented upon the American passion for brutal and impromptu extra-legal punishment. *Niles' Register* editorialized in 1835 that the nation was disgraced by the "awful amount" of punishments and executions imposed by Judge Lynch. A year later, a speaker warned a Baltimore, Maryland, literary society against the national penchant for lawless punishment marked by ferocious passion. Lincoln in 1838 spoke of the "increasing disregard for law which pervades the country," and cited as an example the burning alive of a negro by a St. Louis mob. Thirteen years later, Daniel Webster, distressed by mob activities, declared that

[4]Walter T. Trenerry, *Murder in Minnesota* (St. Paul, 1962), viii.

[5]The question of the role of vigilante activities is a delicate one, and no doubt some historians may disagree in whole or in part with the above comments. The literature on the subject is so extensive that it is impossible to cite even a fraction of it, but the reader may be interested in the comments and conclusions of two distinguished scholars: Richard M. Brown, "The American Vigilante Tradition" in Hugh D. Graham and Ted R. Gurr, eds., *The History of Violence in America: A Report to the National Commission on the Causes and Prevention of Violence* (New York, 1969), chap. 5, and Frank R. Prassel, *The Western Peace Officer* (Norman, 1972), 128-132. In Laurence Veysey, ed., *Law and Resistance: American Attitudes Toward Authority* (New York, 1970), 207, lynching is spoken of as "the protest of society on behalf of social order and the rights of man."

A line of riders holds for the photographer on a Dickinson street during the 1890's. While North Dakota cowtowns did not have as rowdy a reputation as others, the presence of ranch hands gave local peace officers cause for concern.

—State Historical Society of North Dakota Collection

perpetrators of public violence should be brought to justice and punished.[6]

Judge Lynch, in seven-league boots and bloody hanging manual in frock-coat pocket, leaped with astonishing speed from frontier to frontier to convene kangaroo courts. From the pineries of Minnesota to the waters of the Gulf and from cultivated eastern urban areas to the raucous streets of San Francisco and squalid diggings along the Yuba River, lynch law left a string of dangling corpses. All this, of course, is no news to those who know, but it is revealing to those who, due to too large an ingestion of pulp yarns and a disastrous diet of television, believe lynching was unique to the cow country. Cowboys' hemp did not hoist sheepherders as a matter of course, and tenders of woolies did not make a habit of joyfully lengthening the distance between a puncher's Adam's Apple and his chin.

When duly appointed officers and extra-legal protectors took the law into their own hands, twisting it to their unique needs and interpreting it as if they were supreme court justices, they loosened a holocaust. Both the innocent and the guilty fled from them. Cowpokes hid in isolated areas or disappeared across the Mexican border. When the law nipped at the hooves of their sweat-stained caballos, riders cursed an old Spanish proverb, "Let the law be obeyed, but not enforced." Many drovers seem to have been of the opinion that the law was a damned nuisance and should be circumvented whenever possible.

They might have agreed enthusiastically with Dickens' Mr. Bumble who said the law was an idiot and an ass. Such a pithy definition of an involved and complicated institution was much easier for ignorant cowhands to comprehend than anything Lord Coke or Blackstone ever wrote; or the statement that the law "is the sum of rules administered by courts in the settling of justiciable controversies" or the equally mysterious explanation that law is a means of "classifying and bringing into order a vast mass of human relations." The average herder would have been equally perplexed had he been able to fanthom a relatively abecedarian account of the law "as an ordinance of reason directed to the common good."[7]

Those who sat the saddle would have been contemptuous — perhaps laughingly hysterical — of the quaint notion that law along the Chisholm Trail or in any town at drive's end bore any relation to justice. Had cowboys themselves possessed the knowledge and talent to put together a book, they might have been more apt to title it *Frontier Injustice,* and such a caption, given the slant of punchers' attitudes, might have been more reflective of a behavioral response than the use of *Frontier Justice* as a title.[8]

The law awed and fascinated. It was as vaporish and deceiving as a dancing desert mirage. Again, it was as stark and substantial as the gallows erected in the square not too far from Judge Isaac C. Parker's chambers. To those who ran afoul of it, the law was a sleight-of-hand performance where fast-talkers called lawyers pulled warrants and writs and subpoenas out of hats while chanting mumbo-jumbo in a tongue that was neither American nor Mexican or any other language a bewildered puncher had ever heard unless, perchance, he was Roman Catholic and attended Mass, but he could not understand church Latin either. What cowboy with stained armpits and bleary eyes knew the meaning of, for example, *res judicata, de pace habenda,* or the simply staggering *crimen animo felleo perpetratum,* which in plain language translated as a crime committed with bitter intentions?

Novelists, dipping pen in purple ink, and riders with six guns and spinning lariats, reflected both in fiction and in real life contempt and antagonism toward the law and all its machinery. In scores of western paperbacks are pictured sheriffs who evade enforcing the law, marshals who are characterized as "whore-monger-son-of-a-bitch liars," and cowboys who could not rest until they settled scores with lawmen who wrecked their lives. "I'd ruther be dead and rottin' on the trail," declared Charley Wittkampt, who rode from Texas to railhead, "than live like a shyster lawyer." Yet in many instances mounted men accused of crime found attorneys so cunningly skilled that they saved the hides of culprit clients.[9]

J. Warren Reed, a black-mustached, debonair West Virginian, earned a reputation as a wizard practitioner at Fort Smith. After wandering through Ohio and California, Reed, during the late 1880's, hung up his shingle and appeared regularly in Judge Parker's court. During Reed's first seven years of legal manipulating, he was active in the defense of 134 persons charged with capital offenses and over a thousand cases involving lesser crimes. Of those charged with capital crimes, Reed rescued from hanging all but two. He saved Cherokee Bill's neck. Bill was gratified, but the editor of the Fort Smith *Elevator* took a less charitable view. He said in his issue of September 13, 1895, that Bill was saved by technicalities — "little instruments sometimes used by lawyers to protect the rights of litigants, but oftener used to defeat the ends of justice." Whether true or not, Reed once again had salvaged an ex-cowboy from a Boot Hill. And, to set the record straight, there was nothing illegal about the mechanics of Reed's defense tactics.[10]

It is of interest to note that qualifications to practice law varied widely from time to time throughout the cattlemen's frontier. During Arizona's territorial period records indicate that no person who applied for admittance to practice was

[6]T.H. Gladstone, *The Englishman in Kansas* (New York, 1857), 99-100; *Southern Literary Messenger* (November, 1836), v. 2, 786; *Niles' Register,* September 26, 1835; Roy P. Basler, *et al.,* eds., *The Collected Works of Abraham Lincoln,* 9 v. (New Brunswick, 1953), vol. 1, 109; Daniel Webster, *Works,* 6 v. (Boston, 1864), vol. 1, 509-510; The standard work on lynching, although old, is James E. Cutler, *Lynch-Law* (New York, 1905). Of particular interest to those concerned in frontier hanging is Lynn White, Jr., "The Legacy of the Middle Ages in the American Wild West," in *The American West,* 3 (Spring, 1966), 77-78, reprinted from *Speculum,* April, 1965.

[7]David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill, 1969), 43; A.C. Germann, *et al., Introduction to Law Enforcement and Criminal Justice* (Springfield, 1968), 22.

[8]The above observation infers or implies no adverse criticism of Wayne Gard, *Frontier Justice* (Norman, 1949).

[9]Interview with author, Chicago, Illinois, July 8, 1936.

[10]Quoted in Glenn Shirley, *Law West of Fort Smith* (Lincoln, 1968), 156; James M. Murphy, *Laws, Courts & Lawyers Through the Years in Arizona* (Tucson, 1970) 42.

denied the privilege and that many were admitted to practice "who never made any pretense of being attorneys or even attempted to practice." In Solomonville, Arizona, an attorney characterized himself as "a Prospector when I could find a deposit or even a stringer; a promulgator of the doctrines of Blackstone; and expounder of Kent when my friends fall out and resort to law; and finally a jack of all trades."[11]

Even a learned and well-intentioned attorney and an equally intelligent and competent magistrate might be partially or totally ignorant of the law. Copies of codes and statutes were both expensive and scarce. Tales abound of justices who never had seen, much less read, a copy of the statutes. It is said, although the story may be apocryphal, that some decisions in misdemeanor cases were determined by reference to a Bible or on the turn of a card. It is true that Governor William A. Richardson told the Nebraska Legislative Assembly in 1858 that the only law under which crime could be punished in the territory was the common law of England because "All other criminal laws have been abolished by the act of the previous Legislature." Eleven years later a Nebraska editor complained that the published laws contained bills which never were passed and omitted statutes which were approved. The high price for which volumes of the Texas statutes sold in 1874, said the *Dallas Weekly Tribune* on July 25, "amounted to a prohibition on the people knowing what the laws are."[12]

Whether it was "instinct," as some maintained, or traumatic experience which caused men of the ranges to distrust courts, judges, lawyers, and the law itself is difficult to demonstrate. Perhaps it was a mixture of each. The same antagonistic suspicion extended to some who wore the star. Wyatt Earp, marshal of Wichita in 1874, so infuriated punchers with picayunish regulations that a group of riders moved into town determined to kill him. Earp, gun in hand, almost literally glared down his would-be assassins. Two years later, when Earp was "keeping order" in Dodge City, he again earned the wrath of cowboys by ordering that they check their guns. Earp was within his rights, and the cowboys were wrong, but this did not prevent them from sneering at the law. In 1899, Jeff Milton, a deputy United States marshal in Arizona, arrested and disarmed every puncher he believed to be a friend of the infamous train robber, William E. Walters, alias Broncho Bill. The litany of grievances by those unaccustomed to restraint was summed up in a pithy bit of advice: "Keep away from police, prostitutes, and preachers." It was, when one ponders it, not an altogether useless axiom.[13]

Trigger-happy lawmen earned such an unenviable reputation that newspapermen throughout the cattle country now and again complained bitterly against the practice of shooting down without provocation wanted men, or those whom an officer had a hunch were wanted. Editors made the point that a peace officer himself was bound by the law and could not legally act as judge, jury, and executioner. Sheriffs usually excused such unexcusable slayings by pleading that they shot their quarry when he attempted to escape. They seldom, if ever, bothered to point out that a high-powered slug travels a lot faster than does a cowboy hip-hopping along on feet chained with leg irons, or that a handcuffed or roped drover, deserted by his captor and handed over to a mob, had less chance than the proverbial snowball in hell to save his neck from a vigilante noose. When it was done and over and the twitching body stilled, it was small comfort to the man hanging dead for a coroner's jury to discover and report a case of mistaken identity. No wonder cowboys, innocent or guilty, had reason to fear gun law and lynch law about as much as they dreaded hanging judges and the whole, awesome machinery of justice.[14]

Despite antagonism toward the law and fear of the judicial process, cowboys, in many instances, brought the wrath of the law upon them selves. They knew which guardians of the peace were weak or strong and took advantage of this knowledge. Had, for example, Wichita's officers in June, 1874, performed their duties properly, it would have been unnecessary for citizens to petition the city fathers. They complained that cowboys, "some natives of Texas," created disturbances and prayed such activities be curbed. The carrying of weapons, said petitioners, was the primary cause of "such disgraceful conduct." In 1881, Wichita residents again complained. This time they objected to the "breaking and the driving of herds of Wild Horses and Ponies upon our Public Thoroughfares, Thereby Jeopardizing the Lives of our Wives and Children."[15] Such irritants, common enough to cattle towns, could be handled easily enough, but both city councils and the police felt that too strict enforcement would cause punchers to go elsewhere to trade and thus reduce the volume of local business. Thus, economics took precedence over enforcement.

The solving of murders and the apprehending of horse thieves was an entirely different matter and far more difficult. Those punchers who, as self-righteous, pietistic missionaries were fond of mouthing, "strayed from the straight and narrow to ride to death in the canyon of mortal sin," were relatively few in proportion to the entire cowboy population. No hard statistics are available to prove how many cowhands were killers or horse thieves. A suspect's previous employment, unless it was of paramount importance, seldom was listed in court records. But cowhands did kill one another and did slay an assortment of miscellaneous persons.

Some murders were premeditated. Others resulted from spur-of-the-moment passion. More, it appears, were killings in self-defense as claimed so frequently by defendants. But a charge of manslaughter or murder is not as elementary as some yarn spinners and pseudo-historians make it. To mislead the public by writing that murder is murder and that's that, and that the remedy is an eye for an eye and a life for a life is

[11]Murphy, *Laws, Courts & Lawyers*, 11, 161-162.

[12]*Council Journal, Legislative Assembly, 5th Sess.*, 1858 (Omaha, 1858), 12; *Plattsmouth* (Nebraska) *Herald*, August 12, 1869.

[13]William D. McVey and R.N. Mullin, "Wyatt Earp — Frontier Peace Officer," in Chicago Corral, *The Westerners Brand Book*, 6-9 (November, 1949), 65-67, 69-73; Lorenzo D. Walters, *Tombstone's Yesterday* (Glorieta, 1968), 223.

[14]*Dallas* (Texas) *Herald*, October 22, 1870; Raymond H. Gardner and B.H. Monroe, *The Old Wild West: Adventures of Arizona Bill* (San Antonio, 1944), 77.

[15]Copies of petitions from Kansas State Historical Society.

far too simplistic. It is also false. The world of the cowboy was a real world. When blood spilled, it was not the crimson theatrical fluid used on stage. When a neck broke it snapped, and no magician's wand could unite disjointed bone. No crooked deck could deal out life, although many a marked card resulted in death.

No more realistic or easier to understand definition of the various degrees of murder ever was put down than that written by Blackstone. Its essential features went into American jurisprudence and, generally speaking, was the law to which cowboys were subject. Blackstone said:

> Of crimes injurious to the persons of *private* subjects, the most principal and important is the offense of taking away the life which is the immediate gift of a great Creator, and of which, no man can be entitled to deprive himself or another but in some manner expressly commanded in or evidently deducible from those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation . . . Now, homicide, or the killing of any human creature is of three kinds: *justifiable, excusable,* and *felonious.* The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing.[16]

Essentially, Blackstone's principles were incorporated into the statutes of territories and states, including those of the cattlemen's frontier. Arizona's code was as typical as any. It defined murder as the unlawful killing of a human being with malice aforethought. It explained that malice aforethought might be either expressed or implied. Then it defined expressed and implied. *Express* was present when a killing perpetrated by means of poison or lying in wait, or by torture or any kind of willful, deliberate, premeditated killing or when there was a deliberate intention unlawfully to take a life.

Arizona's code defined *implied* when a killing was done in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, "when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart." The statute also clearly defined manslaughter: "The unlawful killing of a human without malice." Manslaughter was divided into two categories: voluntary and involuntary. The former resulted from a sudden quarrel of heart or passion. The later resulted from the commission of an act "which might produce death in an unlawful manner, or without due caution and circumspection."[17]

Yet homicide was justifiable in certain cases and certain areas throughout the land where roamed the herds. It was justifiable in Kansas when resisting any attempt at murder, when committed in the lawful defense of a person when there was a reasonable cause to "apprehend a design to commit a felony, or to do some great personal injury, and there shall be immediate danger of such design being accomplished," and when homicide was necessarily committed, by lawful ways and means, to apprehend a person charged with a felony, or while lawfully suppressing a riot or insurrection, or while lawfully preserving the peace. The Kansas statute, like those in other states, opened the Pandora's Box of self-defense, a common plea throughout the Southwest.[18]

A puncher, pleading self-defense, was obliged to prove that danger to him was so urgent and pressing that, in order to save his own life or to prevent him from receiving great bodily harm, his action was imperative. Furthermore, he must prove that the individual killed was the assailant, or that he had "really and in good faith endeavored to decline any further struggle before the mortal blow was given." In short, a person

Rugged country and long distances from towns made the North Dakota cowboy's life a lonely one. The hard work in isolated areas led many to "kick up their heels" when they visited towns.

—State Historical Society of North Dakota Collection

[16]William Blackstone, *Commentaries on the Laws of England,* 2 vol., ed. with introduction and notes by George Sharwood (Philadelphia, 1872-1873), vol. 2, bk. 4, 176-178.

[17]King, *Revised Statutes of Arizona,* 702-703.

[18]*Kansas General Laws,* 287.

Even tiny prairie towns probably seemed oases to riders who spent their working lives in ranch country. These cowboys, perhaps typical of an era in North Dakota history, posed in front of the 75 Ranch headquarters about 1906. Located near Keene, the ranch was owned by Frank Keogh (right). *—State Historical Society of North Dakota Collection*

assaulted may repel force by force, but it does not follow that he may without necessity use a deadly weapon for the purpose. The action was more unjustifiable if the weapon was concealed. Such stipulations in state statutes again reflected Blackstone.[19]

At times, of course, murder turned out to be an open-and-shut case. Take one example. William Whittington spent a Sunday in the Chickasaw Nation drinking with John Turner, an old friend. While riding back to the Texas border, Whittington clubbed Turner from his saddle, slit his throat with a bowie knife, and robbed him of $100. When Whittington was apprehended, the money was found in his pocket and his knife still dripped with his victim's gore. After trial in Judge Parker's court, Whittington was hanged. At the same time, Edmund Campbell, also by order of Parker, swung. Campbell, a black rider, had gone to a farm and killed Lawson Ross and his mistress in cold blood in revenge because of a fancied insult. "Your fate," Parker told Campbell, "is inevitable. Let me, therefore, beg of you to fly to your Maker for that mercy and that pardon which you cannot expect from mortals . . . and endeavor to seize upon the salvation of His Cross."[20]

Difficulty arose when cowboys, to whom the law was a cryptic puzzle, heard or talked about or were actually concerned in cases concerning reasonable doubt. Many of these involved the carrying of weapons, either openly or concealed, and the doctrine of self-defense. Who was the assailant? Was it Martinez or Larson? Was the threat by Martinez sufficient to make Larson unholster his gun and kill Martinez? What, if after Larson finished his bloody work and Martinez lay lifeless, it was discovered that Martinez carried no weapon, but was only reaching under his coat to fetch a wallet in order to pay Larson the debt which had provoked a quarrel between them in the first place?

Or, what, if for some reason, Martinez called Larson a bastard, and the latter cut him down? Or, what if a storekeeper, sleeping peacefully during the dead of night in a room above his shop, heard someone break a front window? He grabbed a scattergun, leaned out the window, saw a shadowy figure, and blew the burglar's guts half way across the street. Then investigation revealed that the "burglar" was only a drunken puncher, whose teetering had lurched him against the shop window and shattered it. Could a cowboy legally shoot a professional gambler whom he believed showed a crooked deck, or who actually used a sleeve-fix or other devious devices? Finally, could a ranch manager cut down a hired hand because he had heard from "reliable" sources that the hand had been misbehaving in town, thus giving the spread a bad reputation?[21]

The cowboy, like many Americans, believed he was entitled under the Constitution and all the other documents he had heard of or not heard of to self-defense. All too frequently, he believed he was entitled to determine what self-defense was. In many ways, such a view was unfortunate if only for the fact that many riders were most unhandy with handguns. They were not particularly skilled in the use of knives either. Among the more outstanding and rather generally quoted arguments directed against statutes stipulating that an individual could act in self-defense only to save his own life or to prevent bodily harm was one heard during the 1830's in a Kentucky court.

S.S. Prentiss, a brilliant attorney in a famous murder trial which was reported in newspapers throughout the nation and which a half century later was quoted with approbation

[19]E. Estabrook, comp., *Statutes of Nebraska* (Chicago, 1867), 596; S. Garfielde and F.A. Snyder, comp., *Compiled Laws of the State of California, 1850-53* (Benicia, 1853), 642; also *Western Law Journal* (January, 1851), new series, vol. 3, 145-153, published in Cincinnati.

[20]Shirley, *Law West of Fort Smith,* 36-37.

[21]These and other examples, although fictional as set down, are taken from a variety of actual events extracted from newspapers and records.

throughout the cattlemen's frontier and elsewhere, told a breathless court audience that:

> The principle of self-defense, which pervades all animated nature, and acts toward life the same part that is performed by the external mechanism of the eye toward the delicate sense of vision, affording it, on the approach of danger, at the same time, warning and protection, do not require that action shall be withheld till it can be of no avail. When the rattlesnake gives warning of his fatal purpose, the wary traveler waits not for the poisonous blow, but places upon his head his armed heel, and crushes out, at once, "his venom and his strength." When the hunter hears the rustling in the jungle, and beholds the large green eyes of the spotted tiger glaring upon him, he waits not for the deadly spring, but sends at once through the brain of his crouching enemy the swift and leaden death.

Another attorney, during the same trial, although not as dramatic as Prentiss, echoed his colleague's view, argued that the right of self-defense was "a principle of our nature, born with us, and has grown with us . . . It is the most important right which belongs to man by the law of nature." Self-defense was man's birthright, human nature could not deprive him of it. When men entered into a social compact, they reserved the right of self-defense to themselves and to posterity.[22]

Such oratory appealed to cowboys more than did the splitting of legal hairs. They put Prentiss' figures of speech into western vernacular: "Why wait until a skunk lifts his tail before you plug him?" Sometimes, perhaps too frequently, they executed a possum instead of a skunk. They killed upon suspicion rather than upon evidence. Their punishments, as will be seen, were more severe than those prescribed by statutes. Horse theft to men hunkered down at night by chuckwagons and by those who risked their lives quieting stampedes was a cardinal sin. Riders believed that a human being was expendable, for God made many no-accounts. But a spirited, well-trained horse, although few punchers would have phrased it quite this way, was truly a winged Pegasus, sprung from the blood of Medusa. The horse was a treasure, a friend, a companion, and as essential a part of the rider's life as blankets, boots, or saddles. A vaquero without his mount was not a vaquero. Sheep herders walked like peasants. Cowboys rode like kings. To steal a horse was to snatch a man's livelihood. Good horses were worth more than black freedmen or poor white trash.

The theft of horses, contrary to impressions received from overindulgence in reading western fiction and watching television, was an accomplished art long before the cattlemen's frontier opened. In February, 1700, for example, Massachusetts passed an act designed to prevent horse theft. The practice was a felony in 1815 in the Ohio country. If a horse thief were caught and convicted in Tennessee or North Carolina, he might stand in the pillory for an hour, be publicly whipped on the bare back with 39 lashes, or lose both his ears, or be branded on the right cheek with the letter H and on the left with the letter T. A second conviction carried the death penalty without benefit of clergy.[23]

By the time cow pokes were firmly established on the ranges of the Southwest, organized political units had their books stiff penalties for convicted purloiners of horses. Thus, both the practice of stealing and the punishments for the crime were carried from east to west, following each successive frontier in much the same manner as the moving missionary stuffed his saddlebags with tracts, the carpenter carried his tools, and the gambler his manipulative fingers.

What exactly was horse theft? How was it defined by law?

Nebraska statutes offers as typical an example as any. Horse theft was larceny, and larceny, in this instance, was the stealing, taking and carrying, leading, riding or driving away the personal goods of another. Conviction carried a term in the penitentiary of not less than one or more than ten years. But this was not all. The law stipulated that every person who marked or branded or altered or defaced the mark or brand of any horse, mare, colt, jack, jenny, or mule other than those belonging to him with the intention to steal the stock or prevent identification by the true owner, was liable, upon conviction, to a term in the state prison of not less than one or more than three years, provided "That no person shall be condemned to the penitentiary unless the value of the property affected shall amount to $25.00."[24]

Despite current belief that hanging by the neck until dead was standard punishment for making away with stock, not a single state in 1890 had such a statute upon its books. This undoubtedly comes as a surprise to those whose knowledge of the cow country is derived from the media. Delaware, however, still maintained corporal punishment — an hour in the pillory, 29 lashes, and a fine not exceeding $20.00. In contrast, Texas set a prison term from five to fifteen years, Montana one to 14 years, New Mexico one to ten years, Nebraska one to ten years, and Kansas no minimum years, but a maximum of ten years. This, once and for all, should set the record straight and erase the impression that hundreds of western wranglers dangled legally from gallows upon conviction as horse thieves.[25]

Despite this large numbers of horses were stolen and a good many men — innocent or guilty and whether or not cowboys — were strung up. Newspapers abound with stories of individuals who dangled because they were thought to be stealers. The Plattsmouth *Nebraska Herald* editor commented on May 26, 1870, that regular bands of horse thieves infested the area and asked, "Will horse thieves never learn that Cass County is almost certain death to them?" A posse of Choctaw citizens in 1873 captured 16 "thieves" and shot six. No one is certain even today of their guilt or innocence. In Summer County, Kansas, three alleged thieves were removed from jail one July night in 1874 and hanged. A disguised mob hanged an alleged thief a year earlier in Waco, Texas. During

[22]A.B. Carlson, *The Law of Homicide, Together with the Trial for Murder of Judge Wilkinson, Dr. Wilkinson, and Mr. Murdaugh* (Cincinnati, 1882), 150-151, 103; W. Browne to Elizabeth J. Galt, Louisville, Kentucky, January 11, 1839, in Galt Family Papers, October, 1838-March, 1841, Colonial Williamsburg, Virginia, Microfilm M 1131-4.

[23]General Courts, *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay, (1692-1786)*, 21 v. (Boston, 1869-1922), vol. 1, 444; *Ohio Acts, Sixteenth General Assembly, 1817* (Columbus, 1818), 175-176; Edward Brown, comp., *Laws of The State of Tennessee . . . 1715-1820*. 2 v. (Knoxville, 1821), vol. 1, 366.

[24]E. Estabrook, comp., *Statutes of Nebraska, Embracing All the General Laws . . . In Force August 1st, 1867* (Chicago, [1858?], 602-603.

[25]Philip D. Jordan, *Frontier Law and Order* (Lincoln, 1970), 96-98.

February, 1886, Joseph Myers, an ex-cowboy known as "Calamity Joe," was shot while riding on the Missouri slope in western Dakota. It was said that he stole horses. No one probably ever will know how many herders believed to have stolen stock were called upon, as the saying went, "to stand on nothing and kick at the State of Texas," or of Arkansas or Oklahoma or Wyoming. "This state of Affairs," commented a delegate to a sheriff's convention in Corsicana, Texas, in 1874, "must be met firmly. We must vindicate the law."[26]

Peace officers, no matter how zealous or how efficient, could not gather up a posse of cowboys and gallop off along a dusty trail in pursuit of alleged lawbreakers as if the nature of the *posse comitatus* were as uncomplicated as putting a coin into a slot machine and coming up with three oranges. Both officer and cowboy might see the wheel spin only to stop at three nooses. The minute a rider became a lawman, riding as a member of a posse, he no longer was a cow tender, but an officer of the law. If not prudent, the posse puncher could gallop into an ambush of the law as easily as into a bushwacker's trap.

Cowboys did not always understand the possible results of volunteering as a posse member or of being conscripted for such duty. If a cowhand, in a frenzy to help apprehend a rascal alleged to have robbed a stage, volunteered, he was held to knowledge of his right to interfere and acted at his peril. If, on the other hand, he was sworn in or employed merely to aid in making an arrest, or if he responded to the call of a known officer to assist in capturing and arresting a fugitive, he was protected by the call and must necessarily "be by the law, against suits for trespass and false imprisonment if in his acts he confines himself to the order and direction of the officer." Such basic principles were laid down by courts before the advent of the cattlemen's frontier and were upheld and cited by courts within the area.[27]

Moreover, a puncher who responded to the distress call of a sheriff was protected from being sued for rendering necessary assistance even if the officer might not have been acting legally. The puncher who assisted a sheriff, at the latter's request and who relied upon the officer's official character and call, was protected by the law against suits for trespass and false imprisonment. This is worth repetition. In short, as novelists and script writers seem not to have learned, the posse was not a mount-and-ride, hit-and-run institution to be managed any way a stupid peace officer and his colleague chose. Even the slapping on of handcuffs could be fraught with peril, although here the courts held that generally a sheriff or a posse member could handcuff or rope a prisoner, if arrested on a felony charge, even if the prisoner was not unruly, did not attempt to escape, or, indeed, do anything indicating the necessity for the use of manacles or restraints. All that was needed to justify the use of restraints was that the captured individual be of a "notoriously" bad character. That opened the door to handcuffing, by sheriff's definition or discretion, of almost any wanted man, and to some individuals not wanted but whom an officer picked up on suspicion.

One further complication must be mentioned. Normally,sheriffs with a posse in tow handled ordinary situations well enough, but there were occasions when such widespread outbreaks threatened the peace that posses were unable to control them. Until June 18, 1878, elements of the United States Army acted as a *posse comitatus*. But with the signing into law of the act of 1878, popularly referred to as the "Soldiers' Posse Comitatus Act," the military was forbidden to act as a posse. The withdrawal of service by troops provoked both favorable and unfavorable reactions. Some felt that the might of the military was an imperative in times of crisis. Others believed the interference of federal troops was unwise. Still others were of the opinion that the law must be maintained by civil officers, not men with shoulder straps.[28]

One thing was certain. Lawlessness continued after the military withdrew from policing. A complete narrative of the act of 1878 would be long and complicated and need not here be related in detail. But a conclusive point must be made: in the end and without the assistance of the military, enforcement by civil authorities was relatively successful. In addition, cowboys seen to have held scant respect for the military whether or not it served as a law-enforcement agency. It is relatively safe to hazard the guess that most working riders knew little, if anything, about the background statute involving jurisdictional boundaries between civil lawmen and military officers, and if they had known would have pushed the entire matter aside as just another example of legal legerdemain. Nevertheless, no discussion of law enforcement on the cattlemen's frontier can ignore the role of the army.[29]

If range riders and their bosses were relatively indifferent to the retirement of the army, they were quick to interest themselves and to resent the fencing of the open range. Indeed, barbed wire, invented about 1873 and introduced in Texas two years later, was about as dramatic as the invention of the long bow and of gunpowder centuries earlier. Wire fencing revolutionized both the cattle kingdom and the daily lives of cowboys. Indeed, it helped knock Jesus Martinez, Charley Sloan, and Sam Larson right out of their saddles and set them to setting posts and stringing wire like earth-bound clodhoppers and not like knights on prancing steeds. No longer were lariats, Colts, and Winchesters the only tools of their trade. To these were added post augers, hammers, nails, and wirecutters.

But six-guns were not discarded, for fencing brought a whole, new type of illegal offenses. Indeed, fencing of the

[26]*Dallas* (Texas) *Weekly Herald*, August 22, 1874.

[27]See, for example, Pruitt *v.* Miller, 3 Indiana (1851); Charles Main *v.* Owen McCarty, 15 Illinois (1854); Daniel Firestone *v.* Walter J. Rice and Frank Fenn, 71 Michigan 377 (1888); and Frank Kirbie *et al v.* The State, 5 Texas, Opp 60 (1878).

[28]President Arthur in 1882 recommended that the Act of 1878 be amended so as to "allow the military forces to be employed as a *posse comitatus* to assist civil authorities with a Territory" to maintain order. See U.S. Cong., House "Lawlessness in Parts of Arizona," April 26, 1882. 47 cong., 1 sess., *exec. doc. 188*, serial 2030.

[29]See also Henry P. Walker, "Retire Peacably to Your Homes: Arizona Faces Martial Law, 1882," *Journal of Arizona History*, 10 (Spring, 1969), 1-19; David E. Kyvig, "Policing the Panhandle: Fort Elliott, Texas, 1875-1890," *Red River Valley Historical Review*, 1-3 (Autumn, 1974), 222-232. For the role of the town marshal, see Philip D. Jordan, "The Town Marshal: Local Arm of the Law," *Arizona and the West*, 16-4 (Winter, 1974), 321-342.

Riders gather before a round-up in the Badlands about 1883.

—State Historical Society of North Dakota Collection

public domain by ranchers and farmers resulted in bloodletting, feuding, and actions involving both the criminal and civil law. Cattle kings, despite the congressional act of February 25, 1885, which declared unlawful the inclosure of public lands without title, fenced off thousands of acres both to prevent stock from straying and to protect the breeding of blooded animals. Ranchers lectured hired hands on the necessity of fencing, saying, for example, that "aggressive foreigners" had caused "hundreds of millions" of acres in the public domain to be "penned up for grazing vast herds of cattle in defiance of the rights of honest but humble settlers."[30]

A farmer from Butte County, Nebraska, wanted to know in March, 1883, if settlers must fight fencers with a Sharps .45; from Hitchcock County four irate gentlemen complained that cattlemen warned that persons interfering with their fencing "must be bullet-proof": and a United States attorney wrote from Topeka that local land officers were powerless to "arrest and check this sort of thing." A special agent of the General Land Office, writing from Salt Lake City in November, 1883, described the method of withdrawing land from the public domain by large stock growers. Rather than fencing off the land, an expensive procedure, possession notices were posted. "The 'cow-boys' picket the entire line," a land agent reported, "to see that the conditions and provisions of the 'notice' are not violated and the aforesaid 'cow-boy' does not go to the nearest justice and file his complaint in case of a violation, but just points his Henry rifle in the direction where it will do the most good, and if some one is killed it is charged up to the Indians or the highwaymen." When in 1883, a cattleman in the Dakota Badlands fenced his land, the wire was not only cut repeatedly by neighboring ranchers, but also set off a gun fight during which one man was killed and another sustained a fractured leg.[31]

Fence-cutting became so prevalent in Texas in 1884 that Governor John Ireland convened the Legislature in special session to pass a statute making the act a felony. Texas Rangers found the law difficult to enforce. A ranger wrote his captain from Richland in August, 1888, affirming that fence-cutters in his vicinity were "what I would call cowboys, or small cow men that own . . . from 15 head all the way up to 200 head of cattle and a few ponies etc." Most snippers of wire, despite laws in several states, never were apprehended and brought to trial. Litigation under the 1885 statute lay in the area of civil law involving companies and corporations and not individual punchers and thus has no place in an article devoted to the cowboy and the law. Yet, despite law and litigation, wire-cutting continued into the early decades of the 20th century. The practice is not unknown even today.[32]

Large spreads, urgently in need of water to quench the thirst of stock, frequently told cowboy hands to pay little heed to laws regulating the use of water on public domains and to riparian rights. This they did, but, generally speaking, punchers infrequently got into gun-blazing trouble. Water and riparian rights were threshed out by the courts and defined in state and federal statutes. The issues never have been satisfactorily solved, and even today some western attorneys specialize in seemingly never-ending disputes over water.[33]

In short, the individual cowboy, caught in the law's spider web, generally was enmeshed in the trap of misdemeanors, not in the intricacies of civil suits. The point then of the whole matter is that cowboys fractured the law not necessarily because they were cowboys, but because they were human beings. They, like all men, inherited the curse of Adam's rib.

[30]Extensive accounts of fencing and its problems may be found in, among others, Ernest S. Osgood, *The Day of the Cattleman* (Chicago, 1929), 192-193; Walter P. Webb, *The Great Plains* (New York, 1931), 238-239; Webb, *The Texas Rangers* (Austin, 1965), 426-437; *Dallas Weekly Herald*, January 29, 1885.

[31]U.S. Cong., Senate, "Letter from Secretary of Interior Transmitting in Answer to Senate resolution of February 14, letter of the Commissioner of the General Land Office, on the subject of unauthorized fencing of public lands." March 17, 1884, 48 Cong., 1 sess., *ex. doc. 127*, 3, 16, 21-22.

[32]Quoted in Webb, *The Texas Rangers*, 432-433.

[33]For the legal aspect of water and riparian rights, see Clesson S. Kinney, *Law of Irrigation and Arid Region Doctrine of Appropriation of Waters*, 4 v. (San Francisco, 1911). An adequate survey of the law of waters is found in Walter P. Webb, *The Great Frontier* (Boston, 1952).

