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Reciprocal Exchange as the Basis for Recognition of Law: Examples from American History

by Bruce L. Benson*

The literature of American legal history is primarily a history of federal and state governments, creating the false impression that these governments have produced and enforced all relevant law. Indeed, there seems to be a widely held belief that law and order could not exist in a society without the organized authoritarian institutions of the state. But while law can be imposed from above by some powerful authority, like a king, a legislature, or a supreme court, law can also develop "from the ground" (Berman, 1983, p. 274), as a result of a recognition of mutual benefits, through exchanged agreements (explicit or implicit contracts) to obey and participate in the enforcement of such law.

Groups whose law has been contractual, arising as a consequence of recognized reciprocity and exchange, have functioned very effectively throughout history (Benson, 1990).[1] Indeed, American history is full of examples of legal system which were not backed by a state authority. In order to illustrate how legal systems functioned without the backing of state authority, the following presentation is divided into five sections. First, a general "theoretical" discussion of the implications of law based on reciprocity and exchange is provided. Then several examples of non-state-backed legal systems in American history are detailed in light of the theoretical presentation: Various religious, ethnic and "utopian" communities are introduced in section II; American commercial law is discussed in section III; and in section IV, organizations such as land clubs, wagon trains, mining camps, and vigilantes that provided law and order on the western frontier are presented. Section V contains concluding comments.

* Department of Economics, Florida State University, Tallahassee, FL 32306-2045.

I. Reciprocity, Law, and "Social Contracts"

Lon Fuller (1964, p. 30) has defined law as "the enterprise of subjecting human conduct to the governance of rules."[2] Institutions must develop to support a system of rules by creating incentives to accept rules of conduct, facilitating dispute resolution, and supplying legal change when it is desired. Thus, legal systems involve an enterprise or process, and consequently they tend to display very similar structural characteristics (pp. 150–151).[3] Fuller's definition of law is accepted here, in part because it allows the analysis of law to focus on the institutions involved in the production and enforcement of legal rules and on the incentives which both lead to the development, and arise as a consequence, of those institutions.

Individuals can be forced to recognize law, or they can be persuaded to voluntarily avoid the proscribed behavior in recognition of personal benefits. If law is coercively imposed from above, then that law will require much more force to maintain social order than is required when law develops from the bottom, through mutual recognition and acceptance. Such law is recognized not because it is backed by the power of some strong individual or institution, but because each individual recognizes the benefits of behaving in accordance with other individuals' expectations, *given* that others also behave as he expects. That is, individuals "exchange" recognition of certain behavioral rules with one another for their mutual benefit. Individual A must agree (perhaps explicitly as through a contract, or perhaps implicitly through behavioral patterns that establish expectations) to act in a certain way in his relationship with B in exchange for B acting in a certain way in his relationship with A.

Disputes can arise in any legal arrangement, including those formed completely through mutual exchange, particularly as new and unforeseen circumstances arise that are not clearly covered by existing rules. Disputes can be resolved with violence, but that can be a very costly means of dispute resolution. In order to deter violent forms of dispute resolution, individuals have strong incentives to form mutual support groups for legal matters (indeed, there is clearly a simultaneous development of cooperation in law enforcement and other forms of interaction, since most interactions require some degree of certainty about legal obligations (Benson, 1989b)), wherein the group members are obligated to act as (or provide) third parties to adjudicate the dispute and then help enforce the adjudicated ruling. That is, group members exchange support for one another in order to resolve disputes without violence.

Now the question becomes: What conditions are conducive to the evolution of a system of exchange that produces both recognized rules of conduct and third-party support in dispute resolution? Fuller (1964, pp. 23–24) suggests three conditions that make a legal (or moral) duty clear and acceptable to those affected: first, the relationship between the parties immediately affected must be voluntary; second, both parties must gain from the exchange; and third, the relationship must involve repeated contact so that the resulting duty can be reversible (i.e., what one individual is required to do at a particular time can be required of another at a different time).

Clearly, individuals must expect to gain as much or more than the costs they bear for voluntary cooperation to arise. Protection of personal property and individual rights is a very attractive benefit, so private property rights and the rights of individuals have constituted the most important primary rules of conduct in many historical and anthropological examples of legal systems wherein the source of recognition of law has been reciprocity (Popisil, 1971; Friedman, 1979; Peden, 1977; Benson, 1989a, 1990, 1991). In addition, if each contact between people is treated as a one-shot game, then cooperation may be unlikely. For instance, A has little incentive to behave in the desired way at one time, benefiting B, if there is no expectation of future contact when B can reciprocate. And moreover, if a dispute arises, third parties clearly have no incentive to support either A or B, because there is no reason to anticipate that A and/or B will have to reciprocate with support in the future. Beyond that, the loser in the dispute has no incentive to agree to the settlement other than fear of the winner.

If individuals anticipate that they will be in a long-term relationship with many potential future contacts, however, incentives will be quite different. In a repeated game with a finite and uncertain horizon, each individual has some probability of being in a situation in which he will benefit from cooperation at some point and cooperation becomes possible (see Axelrod, 1984). In this case the incentives to behave as expected are much stronger. Each individual never knows if he will be party to a dispute in the future, but each should assign some positive probability to being a disputant. Furthermore, an individual does not know whether the other party in the dispute will be strong enough (physically, politically, or economically) to resist his efforts to prosecute. Thus, individuals have incentives to exchange not only recognition of certain behavioral rules with one another for their mutual benefit, but also obligations to support one another in

resolving disputes. The makeup of such groups (i.e., the institutional setting that produces the repeated-game incentives to cooperate) may reflect implicit contracts arising within a family and/or a religious group (Popisil, 1971; Hoebel, 1954; and Benson, 1989a), or because of geographic proximity (Benson, 1990, chap. 2) or functional similarity (Trakman, 1983; Benson 1989b), or they may result from explicit contractual arrangements (Friedman, 1979; Peden, 1977).

As with most cooperative arrangements, there may be incentives to cheat once the arrangement is established. If an individual can express a willingness to cooperate and obtain benefits from the cooperative arrangements but then not actually accept an adjudicated settlement when he loses, or not reciprocate when called upon to act as a third party, then such an arrangement will break down. The commitments must be credible. In a repeated-game context a commitment can be made credible if there is a credible potential response by the other players. Historical and anthropological evidence indicates that this response is likely to take the form of ostracism. The group members will only be obligated to aid someone else in a legal dispute if that individual is a member in good standing. Indeed, individuals who do not fulfill obligations to support others can be excluded from all future forms of social interaction (like trade, religious rites, and marriage) with other members of the group (Popisil, 1971; Hoebel, 1954; Benson, 1989a, 1989b, 1990, 1991; Trakman, 1983; Friedman, 1979; Peden, 1977). Similarly, individuals in the group will lose support if they do not agree to arbitration or mediation when a dispute arises and yield to a judgment that is acceptable to the other individuals in the group. Fear of this boycott sanction reinforces other self-interest motives associated with maintenance of reputation and reciprocal arrangements. In other words, because each individual has made an investment in establishing himself as part of the community (i.e., established a reputation), that investment can be "held hostage" by the community, a la Williamson (1983), in order to insure that the commitment to cooperate is credible. Thus, rules of conduct and peaceful dispute resolutions can be enforced without the backing of the state.

James Buchanan (1972, p. 37) has posed the following question: If government is dismantled, "how do rights reemerge and come to command respect? How do 'laws' emerge that carry with them general respect for their 'legitimacy'?" His answer is that a "social contract" or "con-

stitution'' is required in order to define the rights of the people in the first place and to establish the institutions to enforce those rights (Buchanan, 1972, 1977). The production of law, however, can be achieved through the process of *individual* exchange and agreement, with the resulting rules spreading to other members of a group if they are useful rules. Such laws emerge spontaneously as a consequence of cooperation induced by reciprocities. Institutions for enforcement similarly evolve due to recognition of reciprocal benefits. Fuller (1964, pp. 128–129) maintains that law which develops from the bottom up through reciprocity and exchange is appropriately viewed as

> a branch of constitutional law, largely and properly developed outside the framework of our written constitutions. It is constitutional law in that it involves the allocation among various institutions . . . of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them.

Consider the following examples from American history of attempts to establish legal order without the backing of state authority.

II. Contractual Law in American Communities

Kinship, religious beliefs, ethnic cultural norms, and/or close-knit geographic communities frequently provided the basis for the reciprocity among immigrants to the American continent. Jerold Auerbach (1983) documents several such cases. A few are discussed here to provide a view of the general character of these arrangements, but as Auerbach notes (p. 16), the examples in his book ''could easily be multiplied tenfold.''

A. *Colonial Religious Communities*

Some who came to America in the seventeenth century were fleeing religious oppression by the English government; they thus broke all the ties with that government they possibly could. They purposefully moved outside the reach of the English government's law and established their own legal systems. Religion's moral teaching provided their rules of law and the church arbitrated or mediated their disputes. Reciprocity was clearly relevant as individual sacrifices were great, but each individual's eternal salvation was believed to be the ultimate reward. Beyond that, however, incentives for reciprocal protection and law enforcement arose because

these early religious communities (for example, the Massachusetts Bay) were isolated in a hostile environment.

One example of such legal systems was in the Puritan communities. They generally chose mediation when disputes arose. In this regard the role of the church was paramount. The church had jurisdiction over religious offenses like defilement of the Sabbath or heresy, of course, "but churches also resolved a variety of commercial and property disputes. These included questions of business ethics . . .; land title disagreements; and, as late as the beginning of the nineteenth century, allegations of breach of contract and fraud" (Auerbach, 1983, p. 23). Judicial procedure was standardized. The entire congregation typically participated in the dispute-resolution process. Individual members actively provided information, opinion, and admonition. This encouraged a collective congregational judgment, isolating offenders and thereby strengthening the social order.

These congregations employed a very effective threat of ostracism to induce compliance with their laws. "The sanctions of admonition and excommunication were sufficient for this purpose. The church could neither arrest a wrongdoer nor seize his property, but the danger of expulsion, where church and community were virtually co-extensive loomed ominously" (p. 24). Indeed, these communities would not accept into their midst someone who was not, in a sense, "bonded" by church affiliation.[4]

One of the most well-known religion-based legal systems of the colonial period outside of New England was that of the Quakers. Quakers were not only Christians, of course, but Quaker law also required pacifism, so keeping the peace was a predominant religious concern. In this regard, if a dispute arose

> the complainant, "calmly and friendly," spoke to the other party, trying "by gentle means, in a brotherly and loving manner to obtain his rights." If he was unsuccessful, he reasserted his claim in the company of one or two other "discreet, judicious friends," who were expected to act "justly and expeditiously" to resolve all differences. That failing, they were to "admonish and persuade" the parties to accept arbitration by disinterested Quakers. Refusal to arbitrate diverted the dispute to the monthly meeting. . . . The meeting appointed arbitrators; refusal to abide by their judgement was an intolerable affront to the entire community. . . . The penalty was disownment by the society (p. 30).

Clearly the procedures developed by the Quakers were designed to avoid confrontations that might lead to disruption of the society's peace.

Quaker law reached well beyond religious matters despite being enforced through religious institutions. The Quakers also arbitrated business disputes, for example, and the Quaker economic system was very much in the "capitalist" mold, based on private property and free enterprise. Other religion-based legal systems had similar characteristics, though some did not.

B. *Non-State Legal Systems that Failed: Nineteenth-Century Utopian Communities*

Auerbach actually misinterprets some very basic points in his analysis. In particular, he focuses on the observed community order that he attributes to deliberate design in reflection of "strong communitarian impulse" (Auerbach, 1983, p. 19).[5] He does not recognize that such order typically arises from individual motivations interacting through reciprocal recognition of duty. As Fuller (1981, pp. 227–28) has stressed, when law is established without state backing,

> we must not be misled as to the process by which this extension takes place. It has sometimes been thought of as if it involved a kind of inarticulate expression of group will. . . . This kind of explanation abstracts from the interactional process underlying customary law and ignores their ever-present *communicative aspect*.

As a consequence of his failure to recognize this, Auerbach has a difficult time explaining certain events. For instance, several of the episodes of community-based law he discusses concerned nineteenth-century utopian communes. If a communitarian view is the essential ingredient for successful avoidance of state law, then these utopian communes should have succeeded; but if reciprocity is the basis for successful non-state-backed law, then these utopian experiments would fail.

Individualism and private rights were almost totally suppressed in the utopian communes. Tremendous sacrifice was expected. What did the individual get in return? "As intrusive as the scrutiny seems, and surely was, members were reassured of solicitous community concern for their welfare" (Auerbach, 1983, p. 52). It is interesting to note, in terms of this statement, that Fuller (1964, p. 20) predicted that "[w]henever an appeal to duty tries to justify itself, it does so in terms of something like the principle of reciprocity." Clearly, some people initially viewed this exchange as a sufficient reciprocal arrangement, but such feelings must

have quickly faded. One characteristic of effective reciprocity noted above is that the parties must both gain from the exchange. Individuals, no matter how religious or idological, are not likely to be satisfied when they sacrifice something of greater value for something they value less.

Over 100 utopian communal societies established their own legal systems in the nineteenth century, primarily in New England and the Midwest. "The framework for resolving disagreements was mutual and consensual. . . . Peer pressure was relentless, ranging from surveillance by neighbors or leaders . . . to ferret out deviance, through moral suasion to guide erring members back to the community (through forms of confession and atonement), to the ultimate sanction of expulsion" (Auerbach, 1983, pp. 50–52). By-and-large they failed because they suppressed private property and individual rights, which generally provide the basis for the reciprocity necessary for recognition and participatory enforcement of such law. Other non-state legal systems were more effective in this regard.

C. *Law in Ethnic Immigrant Communities*

Chinese in urban Chinatowns, Scandinavians in Minnesota and North Dakota, as well as Eastern European and Jewish immigrants to Eastern American cities, all established their own legal order outside the federal, state, or local government that supposedly ruled over the geographic territories encompassing their communities. While commonality of religious beliefs was at times present, more important sources of reciprocal cohesion appear to have been kinship, ethnic cultural norms, and economic relationships. For instance, "American Chinatown were conspicuously insular" (Auerbach 1983, p 74). Law in China was largely kinship-based custom at the time of the large nineteenth-century migrations. Consequently, a system similar to that existing in Chinese villages was exercised through local benevolent associations in American Chinatowns. Merchant elders took on the role as mediators for communities consisting of numerous clans and local associations. Each such group took care of internal conflicts while a Consolidated Benevolent Association provided mediation of disputes between members of different groups. "Ostracism, mixed with shame of public scrutiny (and no doubt an occasional threat), was a strong deterrent" (p 75). The community-based system of law and internal conflict resolution did not begin to yield to state law enforcement until after World War II.

"Among the various immigrant groups for whom internal dispute-settlement procedures were vital for community cohesion, none migrated with as strong a historical commitment to law, and as deep a mistrust of alien legal systems, as the Jews of Europe. Jews were a people whose religion was law; they clung to the Torah to preserve their identity as a people during two millennia in dispersion. . . . In the most literal respects the Torah was their living law" (p. 76). Similarly, there are few groups that are as clearly identified with capitalistic free trade and commerce as are European Jews. Throughout Europe, Jews maintained a strong desire for religious, cultural and economic autonomy. Thus, they enforced their own law through synagogues and the Bet Din (rabbinical courts). The Bet Din adjudicated virtually every kind of dispute among European Jews.

New York Jewry revived the European institution of *Kehillah* (community) in an effort to facilitate economic and cultural interaction. Rabbis did not have widespread followings in America, so they could not serve the strong adjudicative role they had played historically. However, the Jews' European experience led the Jewish *Kehillah* to establish a dispute-resolution system, beginning with a Bureau of Industry around 1910, to mediate and bring a degree of order to the clothing, fur, and millinery industries. Their success in industrial mediation led them, by 1914, to develop a court of arbitration and network of neighborhood arbitration boards to handle the full range of commercial and religious disputes p. 80). This system was dominant in the provision of law and order to the Lower East Side Jewish community until after World War I, and the principles established by the *Kehillah* persisted for some time beyond that.

The post-war period saw the New York Jewish community develop a variety of arbitration tribunals. Again the procedures were informal and disputes were resolved according to Jewish and Yiddish customary law. One important arbitration tribunal—the Jewish Arbitration Court—resolved thousands of disputes during the 1920s and had branch offices throughout the New York Jewish community. It was funded and staffed through philanthropic and professional support. This private court actually faced stiff competition in the market for disputes from the Jewish Conciliation Court of America (p. 86). As the Jewish Community was assimilated into American society, however, these courts gradually took on characteristics of the public courts and lost their ability to attract constituents.

III. Merchant Production of Commercial Law in America

Many of the more successful non-state legal systems (like the Quaker, Mormon, Chinese, and Jewish) handled commercial disputes as well as religious or cultural issues. This should not be surprising, given that recognition and voluntary enforcement require reciprocity. Indeed, Fuller (1964, p. 24) notes that the kind of society in which the three conditions for optimal recognition of duty under reciprocally based law are most likely to be met is

> a society of economic traders. By definition the members of such a society enter direct and voluntary relationships of exchange. As for equality, it is only with the aid of something like a free market that it is possible to develop anything like an exact measure for the value of disparate goods. . . . Finally, economic traders frequently change roles, now selling, now buying. The duties that arise out of their exchanges are therefore reversible, not only in theory but in practice.

In this light, the historical fact that Auerbach has the most difficulty explaining—because of his emphasis on communitarian values—is the discovery that "commercial arbitration [and law] is the oldest continuing form of non-legal [that is, stateless] dispute settlement in American history. . . . Paradoxically, the pursuit of self-interest and profit generated its own communitarian values, which commercial arbitration expressed" (Auerbach, 1983, pp. 43–44). This is a paradox, of course, only when one views the necessary catalyst for law without the state to be a communitarian spirit. When the catalyst is recognized to be reciprocity, then the ability of the merchant community to make and enforce its own laws is not at all surprising. After all, reciprocity, in the sense of mutual benefits and costs, is the very essence of trade. Each party enters into an exchange because he or she expects to obtain something more valuable than what is given up. And most merchants expect to be in business for a long time, trading with many of the same people over and over again.

Commercial law was firmly established by the merchant community in Europe (though not by European state governments) centuries before colonies were settled in America (Trakman, 1983; Berman, 1983; Benson, 1989b). Merchants in America quickly moved to establish their own systems of law and dispute resolution; commercial arbitration was settling disputes in and between the New York and Philadelphia business communities soon

after these settlements developed. Commercial law reflected business practice and custom, and its enforcement in America was dominated by private institutions through the eighteenth century.

Merchants established arbitration for several reasons. First, merchants wanted to be sure that commercial law would reflect business practice and custom. In addition, resolution of commercial disputes at times had to be achieved after consideration of relatively technical issues. Arbitrators were generally merchants from the relevant merchant community. Thus when technical issues were involved, the disputants used judges who were experts in that particular area of commerce, unlike government court judges who could adjudicate disputes about which they knew nothing. Furthermore, arbitration tended to be relatively speedy and informal. This characteristic is of course desirable to merchants—a dispute had to be settled quickly to minimize disruption of business affairs, and this speed and informality could not have been equitably achieved at the time without arbitration. Merchants avoided state judges and courts because those institutions did not apply commercial law in what the merchant community considered to be a just and expeditious fashion: "Not only did courts, according to one New York merchant, dispense 'expensive endless law'; they were slow to develop legal doctrine that facilitated commercial development" (Auerbach, 1983, p. 33).

Around the beginning of the nineteenth century, state courts began to apply the merchants' law as the merchants had established it, and the commercial arbitration system began to disappear. However, the potential for such a system always remained. When the public system became unwilling or unable to adjudicate as the merchant community demanded, commercial arbitration developed again in the United States. Thus there was a significant reemergence of commercial arbitration around the end of the nineteenth century. One factor in the reemergence was clearly the growing problem of court congestion and trial delay, but in addition, "the stronger the regulatory state, the stronger the desire for spheres of voluntary activity beyond its control. The growth of the regulatory state unsettled advocates of commercial autonomy who turned to arbitration as a shield against government intrusion" (p. 101).

The New York Chamber of Commerce established arbitration committees in 1768, and following a period of relative inactivity it evolved into a per-

manent tribunal just before the end of the century. The main area of rapid redevelopment of commercial arbitration, however, was in the trade associations. Reciprocal benefits within trade associations, backed by the use of boycott sanctions against any member refusing to comply with arbitration, proved sufficient to elicit recognition of legal obligation. By the end of World War I, arbitration was the preferred practice among many of these groups, and it has since "grown to proportions that make the courts secondary recourse in many areas and completely superfluous in others" (Wooldridge, 1970, p. 101).

The American Arbitration Assocaition (AAA), the largest single group of arbitrators with twenty-five regional offices and 23,000 associates around the country in 1970, helped settle some 22,000 disputes that year. By 1978 the number of disputes settled through the AAA had increased by 118.2 percent, to 48,000 (Poole, 1978, p. 54). The fact is that since the Association's founding in 1926, entire classes of legal disputes have been removed from the courts altogether (p. 54). But the growth of AAA activity reflects only a relatively small portion of private sector arbitration. A study conducted in the mid 1950s, for example, found that the AAA conducted only 27 percent of all commercial arbitration (Mentschikoff, 1961, p. 857). Indeed, the main area of rapid redevelopment of commercial arbitration has continued to be in the trade associations. Statistical information as to the extent of arbitration today by non-AAA affiliates is not available (Landes and Posner, 1979, p. 250), but by the 1950s it was estimated that almost 75 percent of all commercial disputes were being adjudicated before arbitrators rather than public courts (Auerbach, 1983, p. 113); estimates in 1965 indicated that the use of commercial arbitration was increasing at about 10 percent per year (Lazarus, et al., 1965, p. 20). But commercial law is not the only example in American history of non-state law motivated almost exclusively by economic self-interest.

IV. The American West: Where Government Failed to Provide Law

Miners, farmers, ranchers, and many others moved westward much more rapidly than the government of the United States could expand its law enforcement system, particularly during the period from 1830 to 1900.[6] The American West, according to Elliot (1944, p. 189), lacked effective government, and this encouraged a sense of individualism that supposedly

produced frequent violent confrontations, particularly on the mining and cattle frontiers. Similar arguments abound. Mondy (1943, pp. 167–77), for instance, argues there was no stable social order in the frontier; this presumably forced frontiersmen to act independently and establish social relationships on their own, without the framework of an existing order, leading to frequent violent confrontations and deaths. Mondy also cites the physical and cultural isolation of the frontier communities as contributing to violence.

Interestingly, writers like Elliot and Mondy provide no proof of the existence of widespread violence on the frontier. Rather, they simply assert that violence was prevalent and then proceed to explain why. In this same vein, Geis (1967, p. 357) writes that "[w]e can report with some assurance that, compared to frontier days, there has been a significant decrease in [crimes of violence]." But Geis provides no evidence. This same unsubstantiated claim is made by others. Frantz (1969, pp. 127–54) even suggests that American violence today reflects our frontier heritage.

Is there any evidence to support the assumption of frontier violence? A number of historians have focused on particular notorious individuals and/or events that were violent in character, and it has been assumed that they represent the general character of the Western frontier (McGrath, 1984, pp. 270–71). For example, the literature on gunfighters in the West is very large (it is also contradictory[7]), and clearly, some gunfighters were involved in a number of killings. The reasons for such violent behavior by specific individuals, according to these historians, correspond to the reasons given by authors cited above for generally high levels of violence in the West (for example, see Rosa, 1968).

Others have focused on specific events. Drago (1970), for instance, studied specific historical cases where violence broke out over the use of range lands. He actually points out in his introduction that such violent confrontations were not really very common (p. v). However, his subsequent chapters recount a series of violent disputes.

In addition to studies of specific violent acts and individuals, there are historical accounts of regions that have, for some reason or another, featured a particularly notorious event or individual. In this light, it is interesting to note that these studies end up finding a good deal of social order. Holden (1940, pp. 188–203), for example, studied the Texas frontier for the 1875–90 period and found that many kinds of crime were simply non-

existent. In particular, burglary and robberies of both homes and businesses (except, on occasion, banks) did not occur. On the other hand, shootings did occur, although they typically involved what the citizenry considered to be "fair fights"; fighting was common, and stage and train robberies appeared to be fairly frequent occurrences. Apparently these incidents were isolated from most citizens, however, and largely caused them little or no concern (p. 196). This suggests that violence might not have been as widespread a problem as many of the authors cited above have assumed.

In addition to the problems noted above regarding the assumption of violence on the American frontier, there is a growing literature that is reaching precisely the opposite conclusion. Hollon (1974, p. x), for instance, concludes that the Western frontier "was a far more civilized, more peaceful and safer place than American society today." Violence, he claims, became a problem in the West only *after* urban development; and while Hollon did not emphasize it, we might note that such development generally included establishment of the law enforcement institutions of local governments, and frequently of state and/or federal governments. This view is supported by Prassel (1972, p. 27) who concludes that in general, the Westerner "probably enjoyed greater security in both person and property than did his contemporary in the urban centers of the East" (where, let us add, public law enforcement institutions were well established by this time). Despite finding that the West was really quite orderly, however, both Hollon (1974, p. 125) and Prassel (1972, p. 23) are at a loss to explain why, given the presence of the factors suggested by the authors cited above as causes of assumed violence.

Other historians have also begun to recognize that the frontier West was not the lawless, violent society of popular fiction or of academic assumption.[8] However, in much of this relatively recent literature, there is a general inability to explain the social order that actually was the norm. McGrath (1984, pp. 270–71) suggests that these writers, "while contending that there was relatively little violence on the frontier, nevertheless indicate that the unique frontier conditions . . . *should* have caused violence. That those conditions did not do so suggests that they might have actually promoted peacefulness—though none of the frontier-was-not-so-violent authors proposes such a connection." The conclusion proposed by McGrath, that no one has provided an explanation for the order that evolved on the frontier, is not quite accurate, however. For example, Anderson and Hill (1979, p. 10) have explained that in the American West

> [p]rivate agencies provided the necessary basis for an orderly society in which property was protected and conflicts were resolved. These agencies often did not qualify as governments because they did not have a legal monopoly on "keeping order." They soon discovered that "warfare" was a costly way of resolving disputes and lower cost methods of settlement (arbitration, courts, etc.) resulted.

In other words, the West was not lawless, it was just "stateless." Let us briefly consider some of the "private agency" legal systems of the American West that Anderson and Hill and others have found.

A. *Land Clubs*

Private citizens began moving into the Western lands that were "owned" by the U.S. government long before this "public domain" was surveyed or available for sale. These "squatters" had no claim to the land under federal law; thus disputes over the possession and use of the land or its product could not be settled under state law even if courts had been available. "The result was the formation of 'extra-legal' organizations for protection and justice. These land clubs or claim associations . . . were found throughout the Middle West" (Anderson and Hill, 1979, p. 15).

The land clubs and claim associations each adopted their own written contracts setting out the laws that provided the means for defining and protecting property rights in land. They established procedures for registration of land claims, as well as for protection of those claims and adjudication of the internal disputes that arose. Anderson and Hill do not discuss how these organizations could have successfully generated compliance with their rules and judgments, but by now the method should be obvious. The reciprocal arrangements for protection would be maintained only if a member complied with the association's rules and its court's rulings. Anyone who refused would be ostracized. Boycott by a land club meant that an individual had no protection from aggression other than what he could provide himself.

B. *Wagon trains*

After gold was discovered in California in 1848, large numbers of people began moving across the continent in wagon trains. Members of these trains "created their own law-making and law-enforcing machinery before they started" (Billington, 1956, p. 99). In many cases the members of a wagon

train agreed to adopt a formal contract laying out a basic set of rules that would govern them during the journey. These laws varied from train to train, but there were several general tendencies. Most trains waited until they were out of the jurisdiction of state law and then selected officers with responsibility for enforcing their own rules. The previously agreed-upon contract generally included rules regarding voting eligibility and decision rules. They also typically provided for means of amending the contract, for the banishment of law breakers from the train, and for the dissolution of jointly held property should the train split or reach its destination. More specific rules often included a procedure for organizing jury trials, laws regarding gambling, intoxication, and Sabbath breaking, and penalties for the failure to perform certain tasks like guard duty. But most important, the negotiated contracts "included a very well-accepted set of private rights especially with regard to property" (Anderson and Hill, 1979, p. 22). Respect for rules of private property was paramount.[9]

If a train's contract did not suit someone, he was free to join another, and considerable choice was often available at embarkation points. Furthermore, if a group on a train found, after departing, that the majority's interpretation of the contract was different than what they expected, the train members were free to opt out of the contract and to form a new arrangement with others who were similarly dissatisfied. In fact, most contracts formally recognized procedures for the dissolution of jointly held property in the event of a breakup (p. 19).

There were few instances of violence on the wagon trains, even when food became extremely scarce and starvation threatened. When crimes against persons or their property were committed, the judicial system as detailed in a train's contract took effect. The actual adjudication process varied, but most wagon trains specified some type of arbitration proceeding. The offender did not necessarily have to be threatened with violence from the members of the train itself, since ostracism in the form of banishment from the group would often be sufficient.

C. *Mining Camps*

Gold was discovered in California in 1848, attracting hundreds of thousands of people to the area within a very short period of time. Umbeck (1981, p. 67) explains that "[a]t the territorial and federal level there were no legal institutions restraining the behavior of miners . . . even if there had

been such institutions, they could not have been enforced. By the end of 1848, or the beginning of 1849, the miners began forming contracts with one another to restrain their own behavior."[10] While there was some representation of federal authority in the form of military posts, the primary function of these posts apparently was to take care of Indian troubles, and they did not exercise any authority over the mining camps. But if they had, they clearly would have been enforcing a very different set of laws than those which governed the mining camps. In fact, it is questionable as to whether any state or federal government law existed that could have been applied to the camps, since as Umbeck (p. 70) explains, "from 1848 to 1850 California was without any mining law, Mexican or American. From 1850 to 1866 the only federal law made all miners trespassers on California's public mineral lands."

California state law defining rights to mineral lands could not be applied after 1850 because all the land in question belonged to the federal government. The state did pass a law in 1851 regarding mining disputes (Section 621 of the Civil Practices Act, quoted in Umbeck, p. 71), but it declared that evidence in a mining case before the state courts would include "the customs, usages, or regulations established or in force at the bar or diggings embracing such claims, and such customs, usages, and regulations, when not in conflict with the Constitution and laws of this state, shall govern the decision of the action." Thus, the state approved and agreed to enforce the miners' voluntarily achieved agreements. It may appear that this statute put the state government's power behind the private laws of the mining camps, but the fact is that these camps enforced their own laws. (Prior to 1852 the state government did not even enforce laws against murder and robbery, let alone private laws regarding illegal—from the perspective of federal law—mining claims.)

The earliest contractual arrangements that developed (primarily before 1850) involved small groups of miners. The only contractually controlled activities related to gold mining, and the agreement typically involved equal shares of all gold found. Agreements among larger groups generally were not needed, since gold deposits were so widespread and relatively few miners were in the area. This was not to last. The Harbor Master's Office in San Francisco reported the arrival of almost 40,000 people from throughout the world in 1849; the population of California was estimated at 107,000 by the end of 1849 and reached 264,000 by the end of 1852 (p. 89).

As the size of the mining population grew and the mineral lands became relatively more scarce, contractual arrangements began to change. Rather than sharing the gold from a joint production effort, each individual was given the exclusive rights to a specific piece of land, and "[o]wnership of the gold went with the land" (p. 90). These property rights were assigned and enforced by the miners themselves. The first step in this process of contractual law and order was a "miners' meeting" for the purpose of setting up a "mining district." Such meetings were apparently organized when the need arose—that is, when minable land became scarce enough to create the potential for disputes and violent confrontations. The laws set by miners' meetings were always chosen by majority rule, but individuals who did not agree with the majority were not forced to accept its rules. They were free to move to a new location, or to opt out of the contract for reciprocal protection of rights. If a minority disagreed with a majority they could set up their own separate district. Thus, those governed by a particular set of laws actually unanimously agreed to be so governed (Anderson and Hill, 1979, p. 19).

One result of these meetings was specification of the geographic boundary of the mining district—the area over which the laws of the group would apply—and the size of the piece of land each miner could claim within that area. Claims were allocated on a first-come-first-served basis. In order to retain rights to a claim a miner was required to work it a specified number of days out of each week. Then, as long as a miner complied with these rules, the entire community of miners was obliged to defend his rights under the privately contracted set of laws of the district. "If the miner failed to comply with the terms of the contract, his claim was considered by others to be nonexclusive and open to any jumpers" (Umbeck, 1981, p. 93). Thus the reciprocal arrangements for protection were backed by ostracism.

Rights to mineral lands were not the only laws in the mining camps. Canlis (1961, p. 2), in his examination of the evolution of law enforcement in California, found that miners possessed a strong desire for organization and law. Consequently, they established and enforced a full range of private property law.

Umbeck (1981, p. 114) points out that miners generally could hire an enforcement specialist, or they could enforce their laws through group action. Some camps appointed or elected an *alcalde* or justice of the peace

to act as arbitrator in mining disputes. In such cases, given that decisions were acceptable to the majority of miners, the arbitrator was backed by the community at large. When the majority disagreed, a new *alcalde* was appointed. Most districts, however, did not elect any arbitrator. More typically, when a dispute arose each party appointed a representative and these two picked a third party. Then the three would arbitrate the dispute. The decision was affected if acceptable to the other miners in the district. Another alternative for dispute resolution was the "miners' court." By this method, a subset of the miners in the district would be summoned when a dispute arose. A presiding officer or judge would be elected and a jury selected. The ruling of the arbitrators or miners' court was rarely disputed, but if it were, a mass meeting of the camp could be called where a dissatisfied party could plead his case and possibly get the decision reversed (Anderson and Hill, 1979, p. 20).

Now, how effective was mining camp law and law enforcement? Reid (1980, pp. 3–4) notes that "[a]pparently one need only state the proposition that America's mining frontier was lawless to prove the fact . . . [but] [c]ontemporaries who experienced that 'rampant' lawlessness in California would have been amazed by the descriptions written during the twentieth century about their society. They thought it was more law abiding than lawless." The fact is that there were very few robberies, thefts, or murders (Reid, 1980, p. 5; Canlis, 1961). Property rights apparently were very secure (Canlis, 1961).[11] Violent crimes occurred occasionally and if sufficient illegal activity arose miners would arm themselves for protection. Even so, the violence was minimal. The contractual systems of law effectively generated cooperation rather than conflict, and on those occasions when conflict arose it was, by-and-large, effectively quelled.

D. *Vigilante Justice in Response to the Failure of the Public Sector's Law Enforcement*

Local governments were established fairly rapidly in some places in the Western frontier. State and federal officials also appeared on the scene. However, in several instances the resulting law enforcement was so ineffective or so corrupt that private citizens had to reestablish law and order through vigilante organizations. Perhaps the two most well-known cases of this kind both occurred in San Francisco, so they will be briefly examined

(although there were at least 300 historical vigilante movements in the United States and its Western territories (Brown, 1975)).[12]

By the late 1840s anyone in San Francisco accused of a crime and caught was arrested by the publicly employed sheriff and tried in the next Court of Sessions, which met every two months at the county seat. But with the swelling of San Francisco's population during the early period of the gold rush the situation began to get out of hand. The public law enforcement apparatus simply could not handle the rising tide of crime. Even those criminals who were caught frequently escaped or were released before a trial could be arranged. The city's press was urging drastic action by early 1849, but the citizens of San Francisco held back until February 1851.

On February 19, 1851, the owner of a San Francisco clothing store was robbed and beaten. The sheriff arrested two men and charged them. A large number of people gathered the next day before the city offices, demanding quick action against the accused. A committee of fourteen prominent citizens was chosen to take charge of the case. The government authorities were invited to participate but declined, although they offered no resistance and handed over the prisoners. The gathering adjourned, and the committee impaneled a jury and appointed three judges and a clerk. Two "highly regarded" lawyers were appointed to represent the prisoners. The jury, after hearing the case, voted nine guilty and three for acquittal. Some in the crowd that had gathered demanded that they be hung anyway but the committee refused. The prisoners were turned back over to the authorities. However, the impetus for a vigilante organization was now in place.

Some 3,000 citizens gathered in early June during the trial of a suspected arsonist, and during the next few days separate small groups of businessmen spontaneously began meeting and discussing the possibility of forming a "committee of vigilance." These groups did not merge for several days, however. Finally, a "selected group of responsible citizens" was called together and a committee was formed on June 10, 1851. The San Francisco *Alta* for June 13 printed a statement from the committee. It read (quoting from Valentine, 1956, p. 28) as follows:

> Whereas, It has become apparent to the citizens of San Francisco that there is no security to life and property, either under the regulations of society as it at present exists, or under the laws as now administered, therefore, the citizens whose names are hereunto attached, do unite themselves into an

> association, for the maintenance of the peace and good order of society and the preservation of the lives and property of the citizens of San Francisco, and do bind themselves each unto the others, to do and perform every lawful act for the maintenance of law and order, and to sustain the laws when faithfully and properly administered. But we are determined that no thief, burglar, incendiary or assassin shall escape punishment either by the quibbles of the law, the insecurity of prisons, or laxity of those who PRETEND to administer justice.

This statement was followed by the committee's regulations and a list of its members.

The committee had taken its first action even before the statement in the newspaper had appeared. On the night after it had organized, John Jenkins was caught stealing a safe from an office. Two of the vigilantes assisted in the capture and took the prisoner to their headquarters instead of the sheriff's office. A trial was immediately organized, and since Jenkins had been caught in the act, he was easily convicted. The verdict was to hang Jenkins immediately (the statutory penalty under California law for grand larceny at that time was death, so the committee's punishment was consistent with the state's law).

One of the biggest sources of criminals moving into California was the British penal colonies in Australia. The vigilantes began boarding every ship that entered the port from Australia to examine the papers of anyone wishing to disembark. If someone did not have a permit to land issued by the U.S. Consul in Sydney he was not allowed to enter San Francisco. The committee paid the cost of having several sent back to Australia, while others were allowed to go on to other ports. The committee also invoked an old Mexican "ostracism" law that forbade admission to the territory of anyone previously convicted of a crime in some other country. Thus, many residents of the city were examined by the committee (each was allowed to offer evidence on his own behalf) and several were expelled from the city. Many others simply left to avoid the process.

The committee offered a $5,000 reward for the capture of anyone found guilty of arson, and committee members patrolled the streets at night to watch for fires. After these actions were taken, fires in San Francisco diminished noticeably.

"There was no question that the vigilantes had become the most powerful force in the city and had the support of most of the citizens" (p. 74).

Apparently the only opposition was from those who saw their political power in the city slipping away. Indeed, California's Governor yielded to the pressure of local politicians and on August 20, he issued a proclamation calling on all citizens "to unite to sustain public order and tranquility, to aid the public officers in the discharge of their duty, and by all lawful means to discountenance any and every attempt to substitute the despotic control of any self-constituted association, unknown and acting in defiance of the laws, in the place of the regularly organized government of the country" (quoted in Valentine, 1956, p. 75). Then, on August 21 the vigilance committee was preparing to hang two previously tried and convicted criminals when the sheriff and a small group of police arrived at committee headquarters with a warrant of habeas corpus procured at the request of the Governor. There were sufficient numbers of vigilantes to resist but the prisoners were turned over to the sheriff's authority. No action was taken against the criminals by the public authorities, however, so two days later an organized group of thirty-six vigilantes went to the jail and removed the two prisoners. The two men were hanged seventeen minutes later. The Governor was not heard from again on the vigilante issue.

This double hanging was the last major act of the committee. The committee officially made ninety-one arrests during its 100 days of action (Stewart, 1964, p. 319). In addition to the four who were hanged, one was whipped (a not at all uncommon punishment at that time), fourteen were deported to Australia, and fourteen were informally ordered to leave California. Fifteen were handed over to public authorities, and forty-one were discharged (two others for whom no decision is recorded were apparently discharged as well). "The record is eloquent in itself. It speaks of moderation and of the attempt to render justice" (p. 319). But this "moderation" was evidently more effective than the public law enforcement system had been. Crime had declined so rapidly that for a short period, San Francisco was a city of considerable order and safety (Valentine, 1956, p. 78).

The committee announced that it was suspending action as of September 16, 1851. An executive committee was appointed to act as a "watchdog of public order" but it took only two actions, both in support of city officials. The vigilante movement had subsided almost as fast as it had begun, but the precedent had been set.

The deterrent impact of the 1851 actions by the vigilantes was short lived. By the spring of 1855, Valentine writes (p. 87), "the criminals

were making out better than the honest men in the political atmosphere of San Francisco. A machine modeled on Tammany Hall controlled the city government and was also at war with another machine . . . for control of state officers and federal patronage." On April 22, 1855, the *San Francisco Herald* called for "a return of the good and vigorous days of the vigilance committee" (quoted in Gard, 1949, p. 161).

Between November 1855 and May 1856 more than 100 murders were committed in San Francisco (Gard, 1949, p. 165). One occurred on November 17, 1855, when a machine politician, Charles Cora, shot and killed William Richardson, the U.S. Marshall. Richardson was unarmed. Cora was arrested, but he was not very concerned. The sheriff was one of his "cronies" and several of the best lawyers in the city had been retained to defend him. The trial was held on January 3, 1856, but "[t]he jury was fixed, the witnesses were rehearsed in perjury, and the proceedings were a farce. On the seventeenth the jury reported disagreement, as planned by Cora, and was discharged" (p. 162).

On May 14, 1856, James King of William, publisher of the *Bulletin*, noted that James Casey, a city supervisor, had been a convict in Sing Sing. That evening Casey shot the publisher as King was walking home; that night the committee on vigilance was revived, as some 10,000 citizens gathered in the streets demanding action. Within two days 5,500 members were enrolled in the committee while many more sent contributions (p. 163). Casey had been arrested and was being held by the sheriff at the city jail. On May 18 some 500 vigilantes approached the jail and threatened to destroy it with cannon fire if both Casey and Cora were not turned over to the committee.

Cora went on trial on May 20 before the vigilante court for the murder of Richardson. James King died that afternoon and Casey also went on trial. On May 22 both politicians were found guilty of murder and sentenced to be hanged. But "[t]his was no judicial farce or lynching mob" (Valentine, 1956, p. 131). The defendants chose their own counsel and the jury, after hearing evidence from both sides, reached a unanimous verdict. The two men were hung within a few hours of King's funeral.

The committee remained active for another three months, its membership growing to 8,000 (in those three months there were two murders in San Francisco as compared to the more than 100 that took place during the previous six months). During June and July the committee put many of the city's undesirables on outbound ships. On July 29 two more

murderers were hanged. But the 1856 vigilance committee faced a much more difficult task than simply crime control: "The committee had to deal with men like Sheriff Scannell, a former Hound; Ned McCowan, a judge; Billy Mulligan, a sheriff's deputy; Rube Maloney, a governor's handyman; and D.S. Terry, a Supreme Court Justice" (p. 171). Yet the committee, after dealing extensively in the political arena, relinquished the power it had wrested from corrupt politicians. On August 18, 1856, the committee on vigilance disbanded.

Similar stories, generally on a smaller scale, could be told of numerous other communities in the American West.[13] Generally vigilante movements involved law abiding citizens who intended to live and interact in the community for many more years, enforcing law and reestablishing order. Despite this, many historians cite vigilantism as an example of lawlessness in the West.[14] Canlis (1961, p. 13), for example, while agreeing that the San Francisco committees were well organized, orderly, and that they got rid of "some disreputable and despicable characters," nonetheless concludes that "there can never be any justification for [the vigilantes'] overall acts in a society as well organized as San Francisco was at this time." He finds it "strange indeed that the constitutional government of the time did not put down by force . . . this group which had taken the law into its own hands" (p. 13). But who was really outside the law in this case? The government's officials either failed to enforce the law as perceived by the general citizenry, as in 1851, or as in 1856, those officials were themselves in violation of the law.

The view that a vigilante movement under any and all circumstances is an example of lawlessness reflects one of the most serious flaws in the belief that law is only what public courts, legislatures, or others backed by state authority say it is. Under such a view of law, "there is no recognition that . . . a single source of legal power . . . may be so ineptly or corruptly exercised that an effective legal system is not achieved" (Fuller, 1964, p. 157). But the power of a legal authority is not absolute, even when it is in the hands of the state. As Hayek (1973, p. 92) observes, "the allegiance on which this sovereignty rests depends on the sovereign's satisfying certain expectations concerning the general character of those rules, and will vanish when this expectation is disappointed." This fact, that government law is not paramount but rather that there is some implicit constraint on power or authority (an overriding social contract), is probably not widely perceived today. Yet it is a firmly established force in American

history. Revolutionaries chose to break from England and its law to establish their own legal system, and similar "vigilantism" has been a common occurrence ever since. Importantly, however, this does not result in lawlessness. Rather, law still prevails as private law enforcement arrangements arise.

This discussion really tells only a small part of the story of the role stateless law played in the settlement of the American West. The entire westward expansion was based to a large extent on private sector production of law and law enforcement (Valentine, 1956, p. 10). In most cases there was no alternative, since government authorities seldom were able to provide adequate law and order. But beyond that, the fact is that it worked quite well.

V. Conclusion

The primary purpose of this presentation has been to illustrate that the private sector has had a very significant historical role in the production of law and order in America. When state-backed law has been unavailable or undesirable to a particular group, private options have filled the void. Furthermore, law backed by reciprocity and enforced without the authoritarian institutions of the state still supports social interaction and promotes order today, despite widespread beliefs to the contrary. The large and growing role of commercial arbitration, for example, was alluded to above; but as the failure of the public courts becomes increasingly obvious, private arbitration or mediation is becoming increasingly vital in many other areas of law as well, ranging from consumer complaints to insurance settlements, labor disputes, and environmental issues.[15] Indeed, the 1980s have witnessed the rapid emergence of a for-profit adjudication industry (Pruitt, 1982; Koenig, 1984; Meyer, 1987; Benson, 1989b, 1990). But more generally, when we define law as "the enterprise of subjecting human conduct to the governance of rules," as does Fuller (1964, pp. 124–25), "then this enterprise is being conducted, not on two or three fronts, but on thousands. Engaged in this enterprise are those who draft and administer rules governing the internal affairs of clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association. . . . [T]here are in this country alone 'systems of law' numbering in the hundreds of thousands."

Notes

1. For specific examples, see Friedman, 1979, on medieval Iceland; Peden, 1977, on medieval Ireland; Benson, 1990, on Anglo-Saxon England; Benson, 1990, 1989b, or Trakman, 1983, on the medieval Law Merchant; and Benson, 1989a, 1990, 1991, Popisil, 1971, Hoebel, 1954, Barton, 1967, and Goldsmidt, 1951, for examples of primitive legal systems.
2. This is but one definition or "theory" of law, however. For example, Friedman (1951, p. 281) proposed that "the rule of law simply means the 'existence of public order.' It means *organized government*, operating through the various instruments and channels of *legal command.* In this sense, all modern societies live under the rule of law" (emphasis added). The question highlighted below, of course, is whether state coercive power is required for effective law. Thus, in a sense, one purpose of the following analysis is to reject definitions of law which assume such a requirement.
3. A similar view of law is presented by Hayek (1967, p. 69).
4. The similarities between New England Puritan and primitive legal systems are often striking. Excommunication can be seen in the same light as the use of psychological forms of ostracism through magic among primitive societies. See Popisil, 1971, Hoebel, 1954, and Benson, 1989a.
5. Auerbach also considers government paraphernalia of enforcement to be "law" and characterizes non-state-backed law as "justice without law." This problem is not major; once it is recognized it is easily solved by simply reinterpreting Auerbach's terminology.
6. See McGrath, 1984, pp. 207–27, for a more detailed review of much of the literature discussed in this section.
7. Many Western historians, particularly those during the 1920s and 1930s, "tended to exaggerate the exploits of the gunfighters and even to romanticize and ennoble them" (McGrath, 1984, p. 264). For a sampling of such literature, see Burns, 1926, Lake, 1931, and Connelley, 1933. More recent writers have depicted gunfighters as considerably less noble, and "the number of men killed by the gunfighters is also, for the most part, considerably reduced by the revisionist historians of the 1960s" (McGrath, 1984, p. 264). For a sampling of the revisionist historians see Waters, 1960, Steckmesser, 1965, and Rosa, 1968.
8. See, for example, Perrigo (1941, pp. 41–62), who was surprised at how orderly these mining camps were. Similarly, Dykstra (1968) found Kansas cattle towns not to be especially violent or lawless. Furthermore he found little conflict between Texas cattle drives and farmers along their routes. Conflicts that arose were generally resolved without violence through the efforts and programs of cow town businessmen. See also the references discussed in more detail below.
9. See Reid, 1980, for a detailed discussion of the respect for and role of private property on the wagon trains.
10. Very similar situations also arose later in Colorado, Montana, and Idaho, where "in each case, the first to arrive were forced into a situation where they had to write the rules of the game" (Anderson and Hill, 1979, p. 18).
11. As further evidence, consider the obvious confidence that miners had in their privately produced and protected property rights system. Umbeck (1981, pp. 96–97) lists several pieces of historical evidence of this confidence:

1. From 1849 to 1866 scarce resources were used by miners to agree upon and to enforce the contractual provisions. Any individual found guilty of a violation was punished immediately. [If the miners did not have faith in the system why would they devote time, effort and resources to promote it?]
2. By 1849 and throughout the 1850s and 1860s, it was observed that miners were devoting hundreds of thousands of dollars in developing their claims. . . . In other words, the miners behaved *as if* they had some expectation of continued use rights.
3. By 1850 most districts allowed miners to buy and sell claims and shortly thereafter this transfer of mining rights became a common occurrence. Some of the richer claims were exchanged for thousands of dollars. Had exclusive rights to the claim not existed, no one would have paid for them.
4. In 1866 the federal government passed an act allowing miners to acquire fee simple absolute in mineral lands. By 1867 only four claims had been patented and in 1869 and 1870 a total of six claims had been patented. This does not prove that miners already had property rights, but it does indicate that the additional benefits of federally recognized rights were not worth the patenting cost for most miners.
5. The mining act of 1866 legally recognized the rights of miners to the exclusive use of what was previously public land. Yet with this federal recognition and enforcement of property rights, there was no noticeable change in total gold yield. . . .
6. In his report of 1868, government agent J. Ross Browne gives a detailed report on the history and current operations of hundreds of mines in California. I can detect no systematic change in resource allocation after 1866.

When property rights are not clearly assigned, resources tend to be used up more quickly than when clearly delineated private rights exist. Since no distinguishable change in the use of California's mineral lands occurred following governmental recognition of private rights to that land, we can assume that those rights actually existed prior to the government's action.

12. The following discussion draws from Valentine, 1956, Stewart, 1964, and Gard, 1949.
13. For example, Henry Plummer was the sheriff of Bannock, Montana, in 1863. He was also the organizer of "an intricate network of bandits, agents, and hideouts in southwestern Montana" (Gard, 1949, p. 171). He led about 100 "road agents"; his deputies were horse thieves, stagecoach robbers, and murderers. Plummer himself participated in numerous robberies and was responsible for several deaths. When the citizens finally organized their vigilante justice they hanged Plummer and twenty-one of his gang in six weeks, banished several others from the area, and frightened most of the rest off. The Montana vigilante courts were like their San Francisco counterparts in that "[t]hey had good leaership and seldom acted except in extreme cases. Usually they gave the defendant an opportunity to clear himself if he could. . . . [T]he [Montana] vigilance committees were called into existence by frontier necessity. When the need for them passed, they quietly and quickly faded away" (p. 188). Also see the following note.

14. For example, McGrath (1984, pp. 265–66) discusses vigilantism in his section "The Frontier Was Violent", despite the fact that after examining the vigilante activities in the mining camps of Aurora and Bodie California he found that "[i]n each case [the vigilante groups] were supported by a great majority of the townspeople, including the leading citizens; they were well regulated; they dealt quickly and effectively with criminal problems; they left the town in more stable and orderly conditions; and when opposition developed they disbanded. . . . The vigilance committees were organized, not because there were no established institutions of law enforcement and justice, but because those institutions had failed, in the eyes of the vigilantes, to provide justice" (pp. 255–56).
15. For details, see Benson, 1990, chap. 8.

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