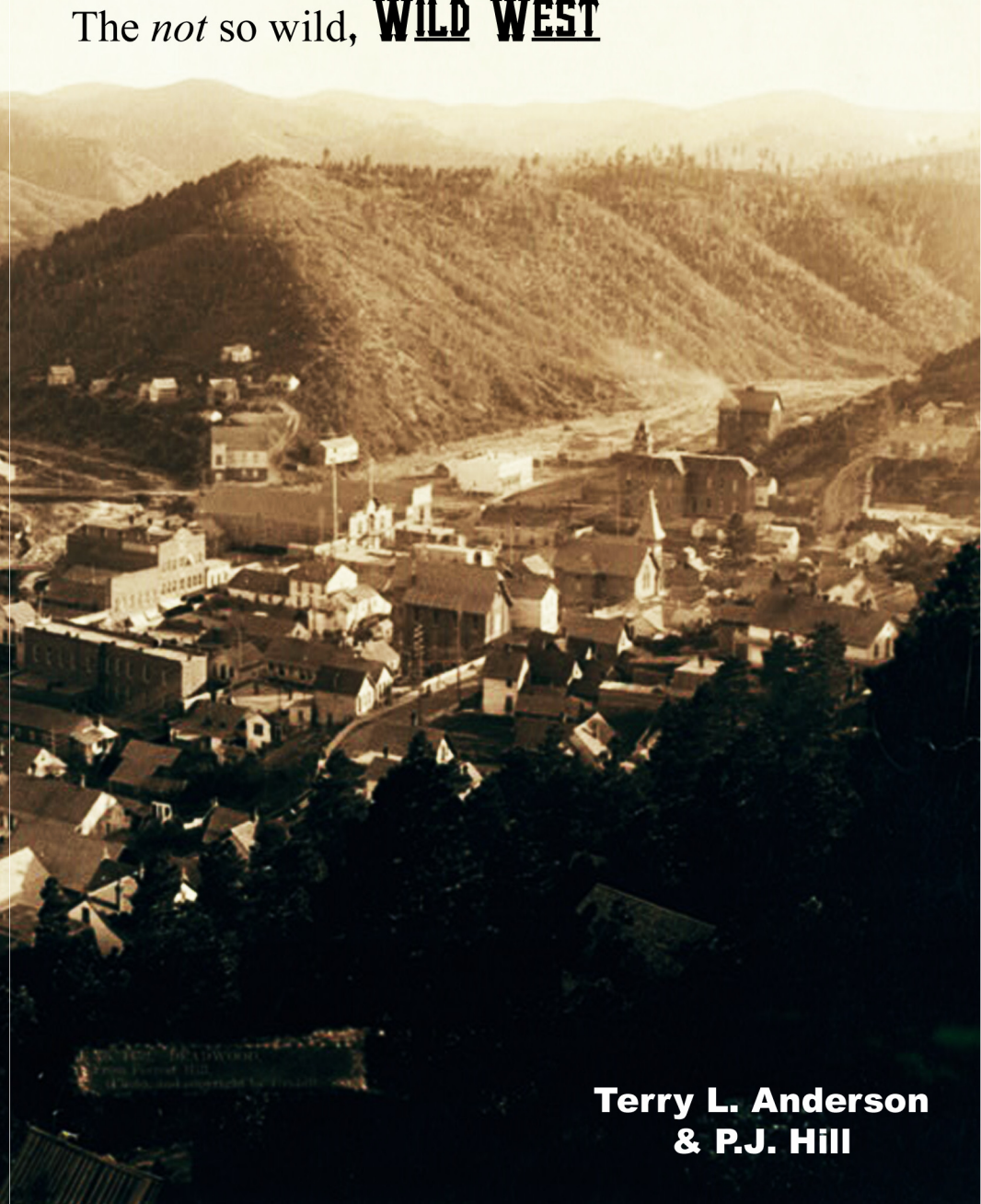


An American Experiment in Anarcho-Capitalism

The *not* so wild, WILD WEST



Terry L. Anderson
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51. Constitution reprinted in Potter, *Trail to California*, Appendix A.
52. Page, *Wagon West*, p. 118.
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54. David J. Langum, "Pioneer Justice on the Overland Trail," *Western Historical Quarterly*, Vol. 5, No. 3 (1974). p. 424, fn. 12.
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57. Quoted in Reid, "Prosecuting the Elephant," p. 330.
58. Quoted in John Phillip Reid, "Dividing the Elephant: the Separation of Mess and Joint Stock Property on the Overland Trail," *Hastings Law Journal*, Vol.28, No. 1 (1976), p. 77.
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60. Reid, "Dividing the Elephant," p. 79.
61. Quoted in Reid, "Dividing the Elephant," p. 85.
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63. See Gard, *Frontier Justice*; Hollon, *Frontier Violence*; and Hugh David Graham and Ted Robert Gurr, eds., *The History of Violence in America: Historical and Comparative Perspectives* (New York: Prager, 1969).
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41. Shinn, *Mining Camps*, p. 168.
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43. Quoted in Shinn, *Mining Camps*, p. 113.
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An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West

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The growth of government during this century has attracted the attention of many scholars interested in explaining that growth and in proposing ways to limit it. As a result of this attention, the public choice literature has experienced an upsurge in the interest in anarchy and its implications for social organization. The work of Rawls and Nozick, two volumes edited by Gordon Tullock, *Explorations in the Theory of Anarchy*, and a book by David Friedman, *The Machinery of Freedom*, provide examples. The goals of the literature have varied from providing a conceptual framework for comparing Leviathan and its opposite extreme to presenting a formula for the operation of society in a state of anarchy. But nearly all of this work has one common aspect; it explores the “theory of anarchy.” The purpose of this paper is to take us from the theoretical world of anarchy to a case study of its application. To accomplish our task we will first discuss what is meant by “anarcho-capitalism” and present several hypotheses relating to the nature of social organization in this world. These hypotheses will then be tested in the context of the American West during its earliest settlement. We propose to examine property rights formulation and protection under voluntary organizations such as private protection agencies, vigilantes, wagon trains, and early mining camps. Although the early West was not completely anarchistic, we believe that government as a legitimate agency of coercion was absent for a long enough period to provide insights into the operation and viability of property rights in the absence of a formal state. The nature of contracts for the provision of “public goods” and the evolution of western “laws” for the period from 1830 to 1900 will provide the data for this case study.

The West during this time often is perceived as a place of great chaos, with little respect for property or life. Our research indicates that this was not the case; property rights were protected and civil

felt very much that they were acting appropriately under the existing laws of that time.⁽⁶⁶⁾ Thus this incident sheds little light on the efficacy of market arrangements for maintaining order.

In conclusion, it appears in the absence of formal government, that the western frontier was not as wild as legend would have us believe. The market did provide protection and arbitration agencies that functioned very effectively, either as a complete replacement for formal government or as a supplement to that government. However, the same desire for power that creates problems in government also seemed to create difficulties at times in the West. All was not peaceful. Especially when Schelling points were lacking, disorder and chaos resulted, lending support to Buchanan’s contention that agreement on initial rights is important to anarcho-capitalism. When this agreement existed, however, we have presented evidence that anarcho-capitalism was viable on the frontier.

escalated until it involved a significant number of people in a large area of east Texas. In 1839 a loosely organized band, later to be known as the Moderators, was issuing bogus land papers, stealing horses, murdering, and generally breaking the “law” of Shelby County, Texas. To counter this lawlessness a vigilance committee was formed under the name of Regulators. Unfortunately, “bad elements soon infiltrated the Regulators, and their excesses in crime later rivaled those of the Moderators. The situation evolved into a complexity of personal and family feuds, and complete anarchy existed until 1844.”(64) One citizen described the situation in a letter to a friend:

Civil war, with all its horror, has been raging in this community. The citizens of the county are about equally divided into two parties, the Regulators and Moderators. It is not uncommon sight to see brothers opposed to each other. Every man's interest in this county is seriously affected.(65)

During the period eighteen men were murdered and many more wounded. Only when President Sam Houston called out the militia in 1844 did the feuding stop. Thus, for whatever reasons, in this case it appears that dependence upon non-governmental forms of organization was not successful.

Another major civil disruption that should be considered is the Johnson County War in Northern Wyoming in 1892. A group of stockgrowers and their hired guns entered Johnson County with the express purpose of wiping out the rustlers they believed to be prevalent there. The citizens of the county, feeling they were being invaded by a foreign army, responded *en masse* and for a short period of time a “war” did result. However, in this case the disorder seems to have been more a battle between two “legitimized” agencies of coercion, the state and the local government, than between strictly private enforcement agencies. The invaders, while ostensibly acting as a private party, had the tacit approval of the state government and used that approval to thwart several attempts by the local authorities to secure state or federal intervention. Those who responded to the invasion were under the leadership of the Johnson County sheriff and

order prevailed. Private 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 summary, this paper argues that a characterization of the American West as chaotic would appear to be incorrect.

Anarchy: Order or Chaos?

Though the first dictionary definition of anarchy is “the state of having no government,” many people believe that the third definition, “confusion or chaos generally,” is more appropriate since it is a necessary result of the first. If we were to engage seriously in the task of dismantling the government as it exists in the U.S., the political economist would find no scarcity of programs to eliminate. However, as the dismantling continued, the decisions would become more and more difficult, with the last “public goods” to be dealt with probably being programs designed to define and enforce property rights. Consider the following two categories of responses to this problem:

1) The first school we shall represent as the “constitutionalist” or “social contractarian” school. For this group the important question is “how do rights reemerge and come to command respect? How do ‘laws’ emerge that carry with them general respect for their ‘legitimacy?’”(1) This position does not allow us to “‘jump over’ the whole set of issues involved in defining the rights of persons in the first place.”(2) Here collective action is taken as a necessary step in the establishment of a social contract or constitutional contract which specifies these rights. To the extent that rights could be perfectly defined, the only role for the state would be in the protection of those rights since the law designed for that protection is the only public good. If rights cannot be perfectly well defined, a productive role for the state will arise. The greater the degree to which private rights

cannot be perfectly defined, the more the collective action will be plunged into the “eternal dilemma of democratic government,” which is “how can government, itself the reflection of interests, establish the legitimate boundaries of self-interest, and how can it, conversely carve out those areas of intervention that will be socially protective and collectively useful?”(3) The contractarian solution to this dilemma is the establishment of a rule of higher law or a constitution which specifies the protective and productive roles of the government. Since the productive role, because of the free rider problem, necessarily requires coercion, the government will be given a monopoly on the use of force. Were this not the case, some individuals would choose not to pay for services from which they derive benefits.

2) The second school can be labeled “anarcho-capitalist” or “private property anarchist.” In its extreme form this school would advocate eliminating all forms of collective action since all functions of government can be replaced by individuals possessing private rights exchangeable in the marketplace. Under this system all transactions would be voluntary except insofar as the protection of individual rights and enforcement of contracts required coercion. The essential question facing this school is how can law and order, which do require some coercion, be supplied without ultimately resulting in one provider of those services holding a monopoly on coercion, i.e., government. If a dominant protective firm or association emerges after exchanges take place, we will have the minimal state as defined by Nozick and will have lapsed back into the world of the “constitutionalist.” The private property anarchist’s view that markets can provide protection services is summarized as follows:

The profit motive will then see to it that the most efficient providers of high quality arbitration rise to the top and that inefficient and graft-oriented police lose their jobs. In short, the market is capable of providing justice at the cheapest price. According to Rothbard, to claim that these services are “public goods” and cannot be sold to individuals in varying amounts is to make a claim which actually has little basis in fact.(4)

Concluding Remarks

From the above descriptions of the experience of the American West, several conclusions consistent with Friedman’s hypotheses appear.

- 1) The West, although often dependent upon market peace keeping agencies, was, for the most part, orderly.
- 2) Different standards of justice did prevail and various preferences for rules were expressed through the market place.
- 3) Competition in defending and adjudicating rights does have beneficial effects. Market agencies provided useful ways of measuring the efficiency of government alternatives. The fact that government’s monopoly on coercion was not taken as seriously as at present meant that when that monopoly was poorly used market alternatives arose. Even when these market alternatives did become “governments” in the sense of having a virtual monopoly on coercion, the fact that such firms were usually quite small provided significant checks on their behavior. Clients could leave originate protective agencies on their own. Without formal legal sanctions, the private agencies did face a “market test” and the rate of survival of such agencies was much less than under government.

The above evidence points to the overall conclusion that competition was very effective in solving the “public goods” problem of law and order in the American West.

However, this does not mean that there were no disputes that would cause one to doubt the efficacy of such arrangements. Two examples of civil disorder are often mentioned in Western history and they must be dealt with.

The first is the very bitter feud between the Regulators and the Moderators in the Republic of Texas in the 1840’s.(63) What started as a disagreement between two individuals in Shelby County

The fact that Abbott joins in with the 3 men does not alter in our opinion the matter of the case - for the dissolution being mutually agreed upon, all the parties stand in the same relation to each other which they did, before any contract was entered into. And Abbott might or not just as he chose unite with either party. If he chose to unite with neither party, then clearly neither could claim of the other. If he united with a foreign party then who could think of claiming anything of such a party.(61)

The important point of this example is that when the Boone County Company could not renegotiate its initial contract the members did not resort to force, but chose private arbitration instead. The many companies which crossed the plains “were experiments in democracy and while some proved inadequate to meet all emergencies, the very ease with which the members could dissolve their bonds and form new associations without lawlessness and disorder proves the true democratic spirit among the American frontiersmen rather than the opposite.”(62) Competition rather than coercion insured justice.

While the above evidence suggests that the wagon trains were guided by anarcho-capitalism, it should be noted that their unique characteristics may have contributed to the efficacy of the system. First, the demand for public goods was probably not as great as found in more permanent communities. If nothing else, the transient nature of these moving communities meant that schools, roads, and other goods which are publicly provided in our society were not needed, hence there was no demand for a government to form for this purpose. Secondly, the short term nature of the organization meant that there was not a very long time for groups to organize to use coercion. These were “governments” of necessity rather than ambition. Nonetheless, the wagon trains on the overland trails did provide protection and justice without a monopoly on coercion, did allow competition to produce rules, and did not result in the lawless, disorder generally associated with anarchy.

Hence, the anarcho-capitalists place faith in the profit seeking entrepreneurs to find the optimal size and type of protective services and faith in competition to prevent the establishment of a monopoly in the provision of these services. There are essentially two differences between the two schools discussed above. First, there is the empirical question of whether competition can actually provide the protection services. On the anarcho-capitalist side, there is the belief that it can. On the constitutionalists or “minimal state” side, there is the following argument.

Conflicts may occur, and one agency will win. Persons who have previously been clients of losing agencies will desert and commence purchasing their protection from winning agencies. In this manner a single protective agency or association will eventually come to dominate the market for policing services over a territory. Independent persons who refuse to purchase protection from anyone may remain outside the scope of the dominant agency, but such independents cannot be allowed to punish clients of the agency on their own. They must be coerced into not punishing. In order to legitimize their coercion, these persons must be compensated, but only to the extent that their deprivation warrants.(5)

The second issue is more conceptual than empirical, and hence, cannot be entirely resolved through observation. This issue centers on the question of how rights are determined in the first place; how do we get a starting point with all its status quo characteristics from which the game can be played. Buchanan, a leading constitutionalist, criticizes Friedman and Rothbard, two leading private property anarchists, because “they simply ‘jump over’ the whole set of issues involved in defining the rights of persons in the first place.”(6) To the constitutionalist the Lockean concept of mixing labor with resources to arrive at “natural rights” is not sufficient. The contractarian approach suggests that the starting point is determined by the initial bargaining process which results in the constitutional contract. Debate over this issue will undoubtedly continue, but even Buchanan agrees that “if the distribution or imputation of the rights of persons (rights to do things, both with respect to other persons and to physical

things) is settled, then away we go. And aside from differences on certain specifics (which may be important but relatively amenable to analysis, e.g., the efficacy of market-like arrangements for internal and external peace-keeping), I should accept many of the detailed reforms that these passionate advocates propose.”(7)

Our purpose in this paper is to discuss, in a historical context, some of the important issues that Buchanan says are amenable to analysis. We do not plan to debate the issue of the starting point, but will be looking at the “*efficacy of market-like arrangements for internal . . . peacekeeping.*”(8) It does seem, for the time period and the geographical area which we are examining, that there was a distribution of rights which was accepted either because of general agreement to some basic precepts of natural law or because the inhabitants of the American West came out of a society in which certain rights were defined and enforced. Such a starting point is referred to as a Schelling point, a point of commonality that exists in the minds of the participants in some social situation.(9) Even in the absence of any enforcement mechanism, most members of the western society agreed that certain rights to use and control property existed. Thus when a miner argued that a placer claim was his because he “was there first,” that claim carried more weight than if he claimed it simply because he was most powerful. Tastes, culture, ethics, and numerous other influences give Schelling point characteristics to some claims but not to others. The long period of conflicts between the Indians and the settlers can be attributed to a lack of any such Schelling points. We concentrate, however, on arrangements for peace-keeping and enforcement that existed among the non-indigenous, white population.

In the following pages we describe the private enforcement of rights in the West between the period of 1830 and 1900. This description does allow one to test, in a limited fashion, some of the hypotheses put forth about how anarcho-capitalism might function. We qualify the test with “limited” because a necessary feature of such a system is the absence of a monopoly on coercion. Various coercive agencies would exist but none would have a legitimized monopoly

the need to divide the property. In at least one case this problem was solved by dividing all of the property and reorganizing into messes.

When the original joint stock company of sixty men dissolved, there was no mention of individual ownership. The property was parcelled by assigning it to traveling units already in existence. However, in executing the second division, the smaller group found it possible - perhaps even necessary - to utilize the concept of personal property. In order to accomplish their purpose, the men first transmuted the common stock from “company” or partnership property into private property. Then, by negotiating contracts, goods they briefly had held as individuals, were converted back into partnership or mess property.(60)

All of this occurred in the absence of coercion.

Perhaps an even more revealing example of anarcho-capitalism at work is found in the dissolution of the Boone County Company. When the eight members of the company fell into rival factions of 3 and 5, dissolution became imminent. Negotiations continued for some time until all the company property (note that none of the private property was divided) was divided between the two groups. When negotiations appeared at an impasse because of the indivisibility of units and differences in quality, prices were assigned to units and the groups resolved the issue by trade. However, a \$75 claim of the majority group proved even harder to resolve. The claim resulted from the fact that a passenger who owned two mules and a horse and who had been traveling with the company chose to take his property and go with the minority. The disadvantaged majority demanded compensation. Unable to settle the dispute, arbitration came from a “*private court*” consisting of “3 *disinterested men*,” one chosen by each side and a third chosen by the two. Their decision follows.

[W]e can see no just cause why the mess of 3 men should pay anything to the mess of 5 men. It being . . . a mutual and simultaneous agreement to dissolve the original contract.

differed from the partnership where property was concurrently owned. Since mess property was available for use by all members of the mess, the potential for conflict was great. When the conflicts occurred, renegotiation of the contract was sometimes necessary. When new agreements could not be reached, the mess would have to be dissolved and property returned to individual owners. Since ownership remained private, division was not difficult. Moreover, since there were gains from trade to be obtained from combining inputs, it was usually possible to renegotiate when violations in the contract occurred. There were, however, cases where renegotiation seemed impossible, as in the following example of a mess which found one of its members unwilling to do his share of the chores.

[W]e concluded the best thing we could do was to buy him out and let him go which accordingly we did by paying him one hundred doll[ar]s. He shoulder[ed] his gun, carpet bag, and blanket and took the track to the prairie without saying good by to one of us.(58)

While other cases of dissolution of messes occurred, there is no evidence that coercive power was used to take property from rightful owners. If an individual left one mess he could usually join another.

The other common type of organization on the overland routes was the joint stock company. In this organization members contributed capital and other property which was held concurrently. The Charlestown, Virginia, Mining Company provides an example of such a company and its constitution attests to the establishment of rules governing use of concurrent property.(59) Again it should be emphasized that these rules were voluntary though coercion was used within the organization to enforce them.

Like the mess, when disagreements occurred within the joint stock company, renegotiation was necessary. However, since the property was held concurrently this process was more complicated. In the first place, an individual could not simply leave the company. Most often withdrawal could only occur with the consent of a percentage of other members. But even then withdrawal was complicated by

on the use of such coercion.(10) The difficulty of dealing with this proposition in the American West is obvious. Although for much of the period formal government agencies for the protection of rights were not present, such agencies were always lurking in the background. Therefore, none of the private enforcement means operated entirely independent of government influence. Also, one has to be careful in always describing private agencies as “non-government” because, to the extent that they develop and become the agency of legitimized coercion they also qualify as “government.” Although numerous descriptions of such private agencies exist, it is often times difficult to determine when they are enhancing competition and when they are reducing it.

Despite the above caveats, the West is a useful testing ground for several of the specific hypotheses about how anarcho-capitalism might work. We use David Friedman’s *The Machinery of Freedom* as our basis for the formulation of hypotheses about the working of anarcho-capitalism because it is decidedly non-utopian and it does set out, in a fairly specific form, the actual mechanisms under which a system of non-government protective agencies would operate. The major propositions are:

- 1) Anarcho-capitalism is not chaos. Property rights will be protected and civil order will prevail.
- 2) Private agencies will provide the necessary functions for preservation of an orderly society.
- 3) Private protection agencies will soon discover that “warfare” is a costly way of resolving disputes and lower-cost methods of settlement (arbitration, courts, etc.) will result.
- 4) The concept of “justice” is not an immutable one that only needs to be discovered. Preferences do vary across individuals as to the rules they prefer to live under and the price they are willing to pay for such rules. Therefore, significant differences in rules might exist in various societies under anarcho-capitalism.

5) There are not significant enough economies of scale in crime so that major “mafia” organizations evolve and dominate society.

6) Competition among protective agencies and adjudication bodies will serve as healthy checks on undesirable behavior. Consumers have better information than under government and will use it in judging these agencies.

Cases from the West

Before turning to specific examples of anarcho-capitalistic institutions in the American West, it is useful to examine the legendary characterization of the “wild, wild West.” The potential for chaos is a major objection to trust in the market for enforcement of rights and many histories of the West seem to substantiate this argument. These histories describe the era and area as characterized by gunfights, horse-thievery, and general disrespect for basic human rights. The taste for the dramatic in literature and other entertainment forms has led to concentration on the seeming disparity between the westerners’ desire for order and the prevailing disorder. If the Hollywood image of the West were not enough to taint our view, scholars of violence contributed with quotes such as the following: “*We can report with some assurance that compared to frontier days there has been a significant decrease in crimes of violence in the United States.*”(11)

Recently, however, more careful examinations of the conditions that existed cause one to doubt the accuracy of this perception. In his book, *Frontier Violence: Another Look*, W. Eugene Hollon stated that he believed “*that the Western frontier was a far more civilized, more peaceful, and safer place than American society is today.*”(12) The legend of the “wild, wild West” lives on despite Robert Dykstra’s finding that in five of the major cattle towns (Abilene, Ellsworth, Wichita, Dodge City, and Caldwell) for the years from 1870 to 1885, only 45 homicides were reported - an average of 1.5 per cattle-trading season.(13) In Abilene, supposedly one of the wildest of the cow

weapons to force their way through. While a few of those who were destitute may have employed tricks to obtain food, most begged, and those who were “too proud to beg” got along the best they could or employed someone to beg for them. If they could not beg, they borrowed, and when they could not borrow they depended on their credit.(55)

The emigrants were property minded. The fact that the constitution contained few references to individual property rights may well reflect the significance of private property Schelling points. When crimes against property or person did occur, the judicial system which was specified in the contracts was brought into play. “*The rules of a traveling company organized at Kaneshville, Iowa, provided: ‘Resolved, that in case of any dispute arising between any members of the Company, they shall be referred to three arbiters, one chosen by each party, and one by the two chosen, whose decision shall be final.’*”(56) The methods of settling disputes varied among the companies, but in nearly all cases some means of arbitration were specified to insure “*that the rights of each emigrant are protected and enforced.*”(57)

In addition to the definition and enforcement of individual rights, the overlanders also were faced with the question of how to solve disputes involving contractual relations for business purposes. For all of the same reasons that firms exist for the production of goods and services, individuals crossing the plains had incentives to organize into “firms” with one another. Scale economies in the production of goods such as meals and services such as herding and in the provision of protection from Indians provided for gains from voluntary and collective action. Again markets seemed to function well in providing several types of contractual arrangements for this production and protection.

A common form of organization on the overland trail was the “mess.” Similar to sharecropping arrangements in agriculture, the mess allowed individuals to contribute inputs such as food, oxen, wagons, labor, etc. for the joint production of travel or meals. In this way, the mess, which allowed the property to remain privately owned,

The specific rules included organization of jury trials; regulation of Sabbath breaking, gambling and intoxication; and penalties for failing to perform chores, especially guard duty. In certain cases there were even provisions for the repair of road, building bridges, and protection of other “public goods.”(53)

It has been argued that “*these ordinances or constitutions . . . may be of interest as guides to pioneers’ philosophies about law and social organization, [but] they do not help answer the more essential question of how, in fact, not in theory, did the overland pioneer face problems of social disorder, crime, and private conflict.*”(54) Nonetheless, it is clear that the travelers did negotiate from Schelling points to social contracts without relying upon the coercive powers of government. And these voluntary contracts did provide the basis for social organization.

The Schelling points from which the individuals negotiated included a very well accepted set of private rights especially with regard to property. One might expect that upon leaving the legal jurisdiction of the U.S. with its many laws governing private property that the immigrants would have less respect for other’s rights. Moreover, since the constitutions and bylaws seldom specifically mentioned individual property rights, we might infer that these were of little concern to the overlanders. In his article, “*Paying for the Elephant: Property Rights and Civil Order on the Overland Trail,*” John Phillip Reid convincingly argues that respect for property rights was paramount. Even when food became so scarce that starvation was a distinct possibility, there are few examples where the pioneers resorted to violence.

Indeed, it is no exaggeration to say that the emigrants who traveled America’s overland trail gave little thought to solving their problems by violence or theft. We know that some ate the flesh of dead oxen or beef with maggots while surrounded by healthy animals they could have shot. Those who suffered losses early in the trip and were able to go back, did so. The disappointment and embarrassment for some must have been extremely bitter, but hundreds returned. They did not use

towns, “*nobody was killed in 1869 or 1870. In fact, nobody was killed until the advent of officers of the law, employed to prevent killings.*”(14) Only two towns, Ellsworth in 1873 and Dodge City in 1876, ever had five killings in any one year.(15) Frank Prassel states in his book subtitled “*A Legacy of Law and Order,*” that “*if any conclusion can be drawn from recent crime statistics, it must be that this last frontier left no significant heritage of offenses against the person, relative to other sections of the country.*”(16) Moreover, even if crime rates were higher, it should be remembered that the preference for order can differ across time and people. To show that the West was more “lawless” than our present day society tells one very little unless some measure of the “demand for law and order” is available. “*While the frontier society may appear to have functioned with many violations of formal law, it sometimes more truly reflected community customs in conflict with superficial and at times alien standards.*”(17) The vigilance committees which sprang up in many of the mining towns of the West provide excellent examples of this conflict. In most instances these committees arose after civil government was organized. They proved that competition was useful in cases where government was ineffective, as in the case of San Francisco in the 1850’s,(18) or where government became the province of criminals who used the legal monopoly on coercion to further their own ends, as in Virginia City, Montana Territory in the 1860’s. (19) Even in these cases, however, violence was not the standard modus operandi. When the San Francisco vigilante committee was reconstituted in 1856, “*the group remained in action for three months, swelling its membership to more than eight thousand. During this period, San Francisco had only two murders, compared with more than a hundred in the six months before the committee was formed.*”(20)

To understand how law and order were provided in the American West, we now turn to four examples of institutions which approximated anarcho-capitalism. These case studies of land claims clubs, cattlemens’ associations, mining camps, and wagon trains provide support for the hypotheses presented above and suggest that private rights were enforced and that chaos did not reign.

Land Clubs

For the pioneer settlers who often moved into the public domain before it was surveyed or open for sale by the federal government, definition and enforcement of property rights in the land they claimed was always a problem. “*These marginal or frontier settlers (squatters as they were called) were beyond the pale of constitutional government. No statute of Congress protected them in their rights to the claims they had chosen and the improvements they had made. In law they were trespassers; in fact they were honest farmers.*”(21) The result was the formation of “extra-legal” organizations for protection and justice. These land clubs or claims associations, as the extra-legal associations came to be known, were found throughout the Middle West with the Iowa variety receiving the most attention. Benjamin F. Shambaugh suggests that we view these clubs “*as an illustrative type of frontier extra-legal, extra-constitutional political organization in which are reflected certain principles of American life and character.*”(22) To Frederick Jackson Turner these squatters’ associations provided an excellent example of the “*power of the newly arrived pioneers to join together for a common end without the intervention of governmental institutions. . . .*”(23)

Each claims association adopted its own constitution and bylaws, elected officers for the operation of the organization, established rules for adjudicating disputes, and established the procedure for the registration and protection of claims. The constitution of the Claim Association of Johnson County, Iowa offers one of the few records of club operation. In addition to president, vice president, and clerk and record, that constitution provided for the election of seven judges, any five of whom could compose a court to settle disputes, and for the election of two marshals charged with enforcing rules of the association. The constitution specified the procedure whereby property rights in land would be defined as well as the procedure for arbitrating claims disputes. User charges were utilized for defraying arbitration expenses.

that of the US. The preamble of the constitution of the Green and Jersey County Company provides an example.

We, the members of the Green and Jersey County Company of Emigrants to California, for the purpose of effectually protecting our persons and property, and as the best means of ensuring an expeditious and easy journey do ordain and establish the following constitution.(50)

From this and the other constitutions which have survived it is clear that these moving communities did have a basic set of rules defining how “the game would be played” during their journey. Like the rules of the mining camps, the wagon train constitutions varied according to the tastes and needs of each organization, but several general tendencies do emerge. Most often the groups waited until after they have been on the trail for a few days and out of the jurisdiction of the United States. One of the first tasks was to select officers who would be responsible for enforcing the rules. For the Green and Jersey County Company, which was not atypical, the officers included a Captain, Assistant Captain, Treasurer, Secretary, and an Officer of the Guard. The constitutions also included eligibility for voting and decision rules for amendment, banishment of individuals from the group, and dissolution of the company. Duties for each officer were often well specified as in the case of the Charleston, Virginia, Mining Company.(51) In addition to these general rules, specific laws were enacted. Again, the introduction of the Green and Jersey County Company is illustrative.

We, citizens and inhabitants of the United States, and members of the Green and Jersey County Company of Emigrants to California; about starting on a journey through a territory where the laws of our common country do not extend their protection, deem it necessary, for the preservation of our rights, to establish certain wholesome rules and regulations. We, therefore, having first organized a constitution of government, for ourselves, do now proceed to enact and ordain the following laws; and in so doing we disclaim all desire or intention of violating or treating with disrespect, the laws of our country.(52)

The civil courts promptly assumed criminal jurisdiction, and the year 1860 opened with four governments in full blast. The miners' courts, people's courts, and "provisional government" (a new name for "Jefferson") divided jurisdiction in the mountains; while Kansas and the provisional government ran concurrent in Denver and the valley. Such as felt friendly to either jurisdiction patronized it with their business. Appeals were taken from one to the other, papers certified up or down and over, and recognized, criminals delivered and judgments accepted from one court by another, with a happy informality which it is pleasant to read of. And here we are confronted by an awkward fact: there was undoubtedly much less crime in the two years this arrangement lasted than in the two which followed the territorial organization and regular government."(47)

This evidence is consistent with Friedman's hypothesis that when competition exists, courts will be responsible for mistakes and the desire for repeat business will serve as an effective check on "unjust" decisions.

Wagon Trains

Perhaps the best example of private property anarchism in the American West was the organization of the wagon trains as they moved across the plains in search of California gold. The region west of Missouri and Iowa was unorganized, unpatrolled, and beyond the jurisdiction of the United States law. But to use the old trapper saying that there was "no law west of Leavenworth" to describe the trains would be inappropriate. "Realizing that they were passing beyond the pale of the law, and aware that the tedious journey and the constant tensions of the trail brought out the worst in human character, the pioneers . . . created their own law making and law-enforcing machinery before they started."(48) Like their fellow travelers on the ocean, the pioneers in their prairie schooners negotiated a "plains law" much like their counterparts' "sea law."(49) The result of this negotiation in many cases was the adoption of a formal constitution patterned after

In such case of the place and time of holding such court and summons all witnesses that either of the parties may require the court made previous to their proceeding to investigate any case require the plaintiff and defendant to deposit a sufficient sum of money in their hands to defray the expenses of said suit or the costs of said suit, and should either party refuse to deposit such sum of money the court may render judgment against such person refusing to do. . . .(24)

As a sanction against those who would not follow the rules of the association, violence was an option, but the following resolution suggests that less violent means were also used.

Resolved, that more effectually to sustain settlers in their just claims according to the custom of the neighborhood and to prevent difficulty and discord in society that we mutually pledge our honours to observe the following resolutions rigidly. That we will not associate nor countenance those who do not respect the claims of settlers and further that we will neither neighbor with them . . . Trade barter deal with them in any way whatever. . . .(25)

That the constitutions, bylaws, and resolutions of all claims clubs were not alike suggests that preferences among the squatters did vary and that there were alternative forms of protection and justice available. The most common justification for the clubs was stated as follows: "Whereas it has become a custom in the western states, as soon as the Indian title to the public lands has been extinguished by the General Government for the citizens of the United States to settle upon and improve said lands, and heretofore the improvement and claim of the settler to the extent of 320 acres, has been respected by both the citizens and laws of Iowa. . . ." (26) Other justification "emphasized the need of protection against 'reckless claim jumpers and invidious wolves in human form,' or the need 'for better security against foreign as well as domestic aggression.'" (27) Some associations were formed specifically for the purpose of opposing "speculators" who were attempting to obtain title to the land. The constitutions of these clubs as evidenced

by the Johnson County document specifically regulated the amount of improvements which had to be made on the claim. Other associations, however, encouraged speculation by making no such requirements. These voluntary, extra-legal associations provided protection and justice without apparent violence and developed rules consistent with the preferences, goals, and endowments of the participants.

Cattlemens' Associations

Early settlement of the cattle frontier created few property conflicts, but as land became more scarce, private, voluntary enforcement mechanisms evolved. Initially *“there was room enough for all, and when a cattleman rode up some likely valley or across some well-grazed divide and found cattle thereon, he looked elsewhere for range.”*(28) But even *“as early as 1868, two years after the first drive, small groups of owners were organizing themselves into protective associations and hiring stock detective.”*(29) The place of these associations in the formation of “frontier law” is described by Louis Pelzer.

From successive frontiers of our American history have developed needed customs, laws, and organizations. The era of fur-trading produced its hunters, its barter, and the great fur companies; on the mining frontier came the staked claims and the vigilance committees; the camp meeting and the circuit rider were heard on the religious outposts; on the margins of settlement the claim clubs protected the rights of the squatter farmers; on the ranchmen's frontier the millions of cattle, the vast ranges, the ranches, and the cattle companies produced pools and local, district, territorial and national cattle associations.(30)

As Ernest Staples Osgood tells us, it was *“the failure of the police power in the frontier communities to protect property and preserve order,”* which *“resulted over and over again in groups who represented the will of the law-abiding part of the community dealing out summary justice to offenders.”*(31)

upon the camps, there is some evidence that they increased rather than decreased crime. One early Californian writes, *“We needed no law until the lawyers came,”* and another adds, *“There were few crimes until the courts with their delays and technicalities took the place of miners law.”*(43)

While the mining camps did not have private courts where individuals could take their disputes and pay for arbitration, they did develop a system of justice through the miners' courts. These courts seldom had permanent officers, although there were instances of justices of the peace. The folk-moot system was common in California. By this method a group of citizens was summoned to try a case. From their midst they would elect a presiding officer or judge and select six or twelve persons to serve as the jury. Most often their rulings were not disputed, but there was recourse when disputes arose. For example, in one case involving two partners, after a ruling by the miners' court, the losing partner called a mass meeting of the camp to plead his case and the decision was reversed.(44) And if a larger group of miners was dissatisfied with the general rulings regarding camp boundaries or individual claim disputes, notices were posted in several places calling meeting of those wishing a division of the territory. *“If a majority favored such action, the district was set apart and named. The old district was not consulted on the subject, but received a verbal notice of the new organization. Local conditions, making different regulations regarding claims desirable, were the chief causes of such separations.”*(45) *“The work of mining, and its environment and conditions, were so different in different places, that the laws and customs of the miners had to vary even in adjoining districts.”*(46)

When disputes did arise and court sessions were called, any man in the camp might be called upon to be the executive officer. Furthermore, any one who was a law-abiding citizen might be considered for prosecutor or defender for the accused.

In Colorado there is some evidence of competition among the courts for business, and hence, an added guarantee that justice prevailed.

drafting the laws. Gregory Gulch in Colorado provides an example.

*A mass meeting of miners was held June 8, 1859, and a committee appointed to draft a code of laws. This committee laid out boundaries for the district, and their civil code, after some discussion and amendment, was **unanimously** adopted in mass meeting, July 16, 1859. The example was rapidly followed in other districts, and the whole Territory was soon divided between a score of local sovereignties.*(39)

The camps could not live in complete isolation from the established forms of government, but there is evidence that they were able to maintain their autonomy. In California, military posts were established to take care of Indian troubles, but these governmental enforcement organizations did not exercise any authority over the mining camps. General Riley in an 1849 visit to a California camp told the miners that “all questions touching the temporary right of individuals to work in particular localities of which they were in possession, should be left to the decision of the local authorities.”(40)

No alcalde, no council, no justice of the peace, was ever forced upon a district by an outside power. The district was the unit of political organization, in many regions, long after the creation of the state; and delegates from adjoining districts often met in consultation regarding boundaries, or matters of local government, and reported to their respective constituencies in open-air meeting, on hillside or river bank.(41)

Moreover, the services of trained lawyers were not welcomed in many of the campus and even forbidden in districts such as the Union Mining District.

Resolved, that no lawyer be permitted to practice law in this district, under penalty of not more than fifty nor less than twenty lashes, and he forever banished from this district.(42)

In this way, the local camps were able to agree upon rules or individual rights and upon methods for enforcement thereof without coercion from U.S. authorities. When outside laws were imposed

Like the claims associations, the cattlemen’s associations drew up formal rules governing the group, but their means of enforcing private rights was often more violent than the trade sanctions specified by the claims associations. These private protection agencies were quite clearly a market response to existing demands for enforcement of rights.

Expert gunmen - professional killers - had an economic place in the frontier West. They turned up wherever there was trouble . . . Like all mercenaries, they espoused the side which made them the first or best offer. . . .(32)

Just why, when, and how he hooked up with the cattlemen around Fort Maginnis, instead of with the rustlers, is a trifle obscure, but Bill became Montana’s first stock detective. Raconteurs of the period seem agreed that Bill’s choice was not dictated by ethics, but by the prospect of compensation. At any rate, he became a hired defender of property rights, and he executed his assignments - as well as his quarry - with thoroughness and dispatch.(33)

The market-based enforcement agencies of the cattlemen’s frontier were different from modern private enforcement firms in that the earlier versions evidently enforced their own laws much of the time rather than serving as simply an extension of the government’s police force. An often expressed concern about this type of enforcement is that 1)the enforcement will be ineffective or 2)the enforcement agencies will themselves become large-scale organizations that use their power to infringe upon individual rights. We have argued above that there is little reason to believe that the first concern is justified.

It also appears that the second concern is not supported by the experience of the American West. Major economies of scale did not seem to exist in either enforcement or crime. Although there are numerous records of gunslingers making themselves available for hire, we find no record of these gunslingers discovering that it was even more profitable to band together and form a super-defense agency that sold protection and rode roughshod over private property

rights. Some of the individuals did drift in and out of a life of crime and sometimes did form loose criminal associations. However, these associations did not seem to be encouraged by the market form of peacekeeping, and in fact, seemed to be dealt with more quickly and more severely under private property protective associations than under government organization.

There were a few large private enforcement organizations, in particular the Pinkerton Agency and Wells Fargo, but these agencies seemed to serve mainly as adjuncts to government and were largely used in enforcing state and national laws. Other large-scale associations, e.g., the Rocky Mountain Detective Association and the Anti-Horse Thief Association, were loose information providing and coordination services, and rarely provided on-the-spot enforcement of private rules.(34)

Mining Camps

As the population of the U.S. grew, westward expansion was inevitable, but there can be little doubt that the discovery of gold in California in 1848 rapidly increased the rate of expansion. Thousands of Easterners rushed to the most westward frontier in search of the precious metal, leaving behind their civilized world. Later the same experience occurred in Colorado, Montana, and Idaho and, in each case, the first to arrive were forced into a situation where they had to write the rules of the game.

There was no constitutional authority in the country, and neither judge nor officer within five hundred miles. The invaders were remitted to the primal law of nature, with, perhaps, the inherent rights of American citizenship. Every gulch was filling with red-hot treasure hunters; every bar was pock-marked with "prospect holes"; timber, water-rights, and town-lots were soon to be valuable, and government was an imperative necessity. Here was a fine field for theorists to test their views as to the origin of civil law.(35)

The early civil law which evolved from this process approximated anarcho-capitalism as closely as any other experience in the US.

In the absence of a formal structure for the definition and enforcement of individual rights, many of the groups of associates who came seeking their fortunes organized and made their rules for operation before they left their homes. Much the same as company charters today, these voluntary contracts entered into by the miners specified financing for the operation as well as the nature of the relationship between individuals. These rules applied only to the miners in the company and did not recognize any outside arbitrator of disputes; they did not "*recognize any higher court than the law of the majority of the company.*"(36)

As Friedman's theory predicts, the rules under which the companies were organized varied according to tastes and needs of the company. "*When we compare the rules of different companies organized to go to the mines, we find considerable variation.*"(37) In addition to the rules listed above, company constitutions often specified arrangements for payments to be used for caring for the sick and unfortunate, rules for personal conduct including the use of alcoholic spirits, and fines which could be imposed for misconduct, to mention a few.(38) In the truest nature of the social contract, the governing rules of the company were negotiated, and as in all market transactions unanimity prevailed. Those who wished to purchase other "bundles of goods" or other sets of rules had that alternative.

Once the mining companies arrived at the potential gold sites, the rules were useful only insofar as questions of rights involved members of the company; when other individuals were confronted in the mining camps, additional negotiation was necessary. Of course, the first issues to arise concerned the ownership of mining claims. When the groups were small and homogeneous, dividing up the gulch was an easy task. But when the numbers moving to the gold country reached the thousands, the problems increased. The general solution was to hold a mass meeting and appoint committees assigned to