TERRY L. ANDERSON AND PETER J. HILL (2004). *The Not So Wild, Wild West: Property Rights on the Frontier*. Palo Alto, CA: Stanford University Press. Pp. 263. $24.95.

Rival tobacco executives resolve their disputes with litigation, not with guns. The reverse is true for rival cocaine vendors. What explains these very different strategies for dispute resolution? Some explanations rely upon differences in the nature of the good. Other explanations appeal to differences in the nature of the seller – drug dealers are violent but cigarette sellers are peaceful. The law and economics scholar finds an explanation in differing property rights. Unlike their cousins who sell legal drugs, sellers of illegal drugs cannot lawfully possess or transfer their goods, and thus lack recourse to legal avenues for dispute resolution. There is good circumstantial evidence that violent trade disputes are the product of missing property rights. Upon the repeal of Prohibition, for example, a violent liquor industry quickly became more peaceful. The grant of legal rights to possession and transfer made many bootleggers into respectable businessmen, and hired lawyers replaced hired guns.

This is not to say that those skilled in the violent arts are not drawn to the opportunities illegal markets offer them. They are. Nor does this claim that fuller rights to property will remove all opportunities for those skilled in the violent arts – gangsters still extort protection money from sellers of lawful goods. But it does claim that trade bans – the restriction of legal rights to possess and transfer – do not end trade. And, because trade bans force markets underground, they have the effect of increasing violence, and other adverse effects, such as corruption and tainted products. So, the lawlessness of illegal markets, such as illegal drug markets, comes from the lack of law – incomplete rights to property.

Economic analysis of law, reasoning by analogy, invokes incomplete property rights to explain other social harms. Open-access resources, such as a fishery or grazing land, are

rivalrous in consumption – a caught fish or an acre grazed means less for others. And, by definition, open-access resources make exclusion illegal. Because nobody owns the commons, nobody can lawfully exclude others who want access to fish or pasture, and new entrants eventually impose costs upon incumbents that exceed their own gains. Open-access resources thus tend to be overexploited. Like the tragedy of trade bans, the tragedy of the commons – manifest in the destruction of seemingly inexhaustible resources such as the carrier pigeon, the North Atlantic cod, the American bison – is the product of too little law, here the missing right to exclude.

So, fuller property rights can reduce violence and resource destruction. But will they? Are more complete property rights necessary and sufficient for realizing such gains? Property rights, Harold Demsetz pointed out forty years ago, can be costly. Transactions costs – the costs of establishing, monitoring, enforcing, and trading (formal and informal) property rights – may exceed the benefits of property rights. Even if it is lawful to claim ownership to a bison via means other than killing it (say, by branding it, fencing in its rangeland, and policing the fence), it may well be too costly to do so. So legal rights to property are not, of themselves, sufficient to forestall the tragedy of the commons.

An even more interesting claim says that legal property rights are not *necessary* to forestall the tragedy of the commons. Robert Ellickson (1987) finds that some communities successfully devise reasonably efficient extra-legal means for managing property disputes. And, similarly, Elinor Ostrom (2000) has shown that many communities devise reasonably efficient extra-legal means for preserving open-access resources. When extra-legal rules – norms, conventions, and other institutions – enable cooperation, we have what Ellickson calls "order

without law."

Terry Anderson and Peter J. Hill are free-market environmentalists who want to argue that the American West, popular and scholarly accounts notwithstanding, can be understood as a place of order without law. The old West may have been without law – in the sense of having underdeveloped formal property rights and scarce legal institutions – but it was not lawless. To the contrary, say Anderson and Hill, individuals and groups, whom they call "institutional entrepreneurs," devised innovative means for reducing transactions costs. Institutions, not law, tamed the West.

Anderson and Hill begin their tale of transactions costs with a chapter that functions as a primer on new institutional economics. This produces their governing hypothesis, illustrated by many intriguing historical vignettes: lower transactions costs promote cooperation by increasing the returns of peaceful trade relative to violent conflict; while higher transactions costs promote conflict by reducing the relative returns to peaceful trade.

On the cooperation side, Anderson and Hill provide several examples. Cattle owners understood the tragedy of the commons, and formed cattlemen's associations to exclude new entrants and maintain the grazing resource (and the profits from incumbency). Farmers (and miners) devised property rights over water, using the "first-in-time-first-in-right" (a.k.a prior-appropriation) method that was better suited to the arid West than English common-law riparian arrangements. The lawless image of gold-rush mining camps notwithstanding, Anderson and Hill find that California miners, in the absence of government, successfully made rules for establishing mining claims and resolving disputes, some of which still survive, having since been codified into law. The wagon trains that carried emigrants west addressed collective-action

conflicts by writing agreements that "taxed" members to prevent free riding upon the protective services provided by wagon bosses, and that specified dispute-resolution procedures and mechanisms for distribution of common property. American Indians also had property rules that attended to incentive effects: with super-abundant resources, the establishment of property rights was not worth the trouble, but especially valuable resources, such as piñon-tree groves in arid lands, were fully propertized, including rights to inheritance.

To illustrate the conflict side, Anderson and Hill offer up the horse, the buffalo, and the U.S. Army. When American Indians acquired the horse, they reworked some of their basic institutions. The horse made it much easier to hunt buffalo, and thus shrunk the size and frequency of communal hunting exercises. But the new mobility also created conflict. It dislodged tribes from ancestral territories, which made property rights to land harder to define and defend. Mobility also led to greater competition with other Indian tribes for buffalo, and frequent horse-stealing raids. Anderson and Hill say the military skills thereby acquired also allowed the Indians to resist the invasion of white settlers for longer than would otherwise have been possible.

Once numbering perhaps 30 million, the buffalo was all but extinct by 1880. Why? Anderson and Hill show that property rights were too costly too establish. A viable buffalo herd requires several thousand acres, when the 1862 Homestead Act gave a maximum of 160 acres. And fencing was not available at low enough cost until a workable barbed wire was patented 1873. Most important was the animal itself. Buffalo are ornery and cannot be herded and driven to market like cattle, so the transport of all but the most valuable parts of the animal (robes and hides) was prohibitively expensive.

Before the arrival of the US Army, white settlers typically preferred to trade rather than fight with Indians. Cattlemen paid cows to Indians in exchange for the right to graze on Indian land. But a standing army changed the trade-or-raid calculus. Since the taxpayer rather than settler bore the cost of force, settlers exploited the Army's protection and became more opportunistic, grazing and taking outright Indian lands. The number of conflicts between whites and Indians skyrocketed after the Army's arrival upon the end of the Civil War.

State power creates and enforces legal property, and thus promotes trade by lowering its costs. But this same power, because it creates rents, can also lead to rent seeking, by speculators (such as those who raced to occupy and thus make legal claim to the lands offered by the Homestead Act), and by special pleaders, who lobby government to design property rights in ways that benefit them. New property rights create rents, but allocation of the new rights, done inefficiently, will also dissipate the rents.

Anderson and Hill illustrate this last point in a discussion of Washington's management of Indian lands. The Allotment Act of 1887 set out to give Indians formal title to what land remained to them after the Indian Wars, analogous to what it had done for white settlers with homesteading legislation. But the Indian affairs bureaucracy sold much of the land to white settlers (ostensibly on behalf of the Indians), and also, rather than provide Indians with full property rights (fee-simple ownership), maintained much land in trusteeship, with predictably inferior productivity results.

Traditional historiography of the American West emphasizes "how the West was won." Revisionist historiography emphasizes "how the West was lost." But both genres depict the West as violent and lawless because it lacked the firm hand of the state. Anderson and Hill take

aim at the shibboleth that government is necessary and sufficient for order (and efficiency), and, they regularly hit their target.

Anderson and Hill also want the lessons of the old West they draw to be applied to new frontiers, the Amazon, the internet, and the South American peasants who lack legal title to the land they occupy. (They missed an opportunity to discuss the Russian frontier, a wild, wild west, created by a collapsed state that prohibited property, and, which has, thus far, produced violent oligarchy). But it's unclear exactly what lessons can be applied. That property rights matter, except when their extra-legal equivalents are already doing the job, does not offer much guidance. Anderson and Hill sometimes avert to a stronger claim, if obliquely, when they suggest the superiority of extra-legal institutions to formal legal property. But, as their own example of untitled South American squatters shows, sometimes formal legal title is vastly superior to more informal arrangements.

Governments are better at creating and enforcing property rights to newly valuable things, such as electromagnetic spectrum, than they are at devising efficient means for allocating these rights. The public choice problem thus arises more in the allocation than in the creation of legal property rights, and readers of this journal might see an opportunity for constitutional-level restraint on methods of allocation – new property must be auctioned, or perhaps lotteried.

Anderson and Hill have written a lively, polemical book. Their history establishes the importance of order without law in the American West, and economists, historians, and scholars of property and institutions will all benefit from reading it. Whether the authors receive a royalty payment will depend upon whether the users of their intellectual property pay for it, or, instead, acquire it without paying, thanks to some institutional entrepreneur who has raised the cost of

exclusion.

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