The Voluntaryist

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Chapter 3: Property and Law in a Free Society

By Carl Watner (1990)

(Continued from our previous issue)

[This chapter first appeared in 1990.]

People are always exchanging what they have for something else they want. Regardless of how complex a free market economy appears to be, it is nothing more than a vast network of such exchanges. The farmer exchanges his wheat for money; the wheat is purchased by a miller to be processed into flour; the flour is transformed into bread and sold to the wholesaler, who in turns sells it to the retailer, who sells it to the consumer. The consumer either eats the bread himself, or offers it to his friends or family at a meal. Every step of this process involves private property. Thus it can be seen why individuals cannot sustain themselves without being able to own things.

It is a fact of man's nature that if he does not produce and trade he will die. Man must take natural resources, apply his brains and muscles to their refinement, and exchange those products for those that will fulfill his needs. It is through such a process that wealth is created. If personal happiness and social harmony are to prevail, man must be able to establish, transfer, bequeath, and exchange property titles. Without that ability, there is no incentive to create, and no security in acquisition and possession.

Men have been taking possession of natural resources from the earliest times to the present on the simple but practicable theory that anyone may appropriate anything from the storehouse of nature, as long as he does not thereby rob another person of his property (that is, so long as he does not appropriate anything which has already been claimed and used by another). It is not stealing to appropriate hitherto unclaimed and unused (i.e., unhomesteaded) property because no one owns it. However, it is stealing to forcibly take from other men and confiscate the product of their labor. This is what we mean by our previously made distinction between "man's exploitation of man" vs. "man's exploitation of nature."

The homesteading principle recognizes the "absolute right in material property of the person who first finds an unused material resource and then in some way utilizes that resource by the use of his personal energy." A set of criteria has evolved over the ages, so that men can determine whether resources are owned or unowned. Property, before it can be owned, must be: 1) claimed, 2) valued, 3) bounded, and 4) utilized. A person must value the property, otherwise there would be no reason to own it. The bounding of property is absolutely necessary, not only so that the owner may know where his ownership begins and ends, but so that others may know that to cross those boundaries entails trespass. The definition of property boundaries is also a protective device to preclude conflict over dual or multiple claims. Bounding can be carried out in many forms: fences, signs, survey markers, earmarking of animals (such as in cattle branding), trademarks, copyright symbols, and written contracts. An owner must do all these things to establish his ownership, for there is no other way for anyone to know that a given resource is his property. His claim must be made publicly and must rest on the fact that he has valued, bounded, and controlled the property in question.

The determination of property titles is highly critical to all of us, because we all require property to live and are all property owners ourselves. The clothes we wear are property. The food we eat is property; the homes we live in; the cars we drive. Ownership is a total concept. Each of us must have full property rights in what we own; otherwise, the precedent has been set to destroy the principle of ownership. We must recognize, however, that ownership does not convey the right of one owner to compel another owner to manage what the latter owns in a way that will make the first owner happy. Each owner is answerable only to himself, so long as he and his property cause no physical harm to others.

There are three ways of determining who owns property and these cover all the possibilities:

1) Each person may have whatever he can grab

2) Some one other than the producer decides who may have the right of possession and use

3) Each person has the right to keep what he produces.

These three methods actually boil down to two: either the producer has the right to keep what he produces, or he doesn't.

The first method is the law of the jungle. It rests on the concept that might makes right. Such a method of determining ownership is highly hazardous, unstable, and unworkable because it promotes violence as a means of acquisition. A producer constantly faces the danger that his property will be taken from him by force. Such threats discourage production, encourage immediate consumption, and destroy the incentive to save and accumulate. An economy built on such a design will remain primitive and short-lived.

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More on Guns and Gold

By Nien Cheng

[Editor's Note: In Issues 157 and 193 I wrote about the insatiable appetite for guns and gold that all governments exhibit. It is has happened in Communist Russia, Nazi Germany, and is now happening in the United States. The following was written by Nien Cheng (1915-2009), who was born into a wealthy family in Beijing and was caught up in the fury of the Chinese Cultural Revolution in 1966. She was confronted by the Red Guards and the Proletarian Revolutionaries because she was Western-educated and her husband had worked for Royal Dutch Shell in Shanghai. In her 1986 book, LIFE AND DEATH IN SHANGHAI (New York: Penguin Books), she recounts the futile search for guns and gold that took place in her house. Excerpted from pages 106-108.]

The man with the tinted spectacles [who was obviously the leader of the Revolutionaries sent to search my house] assumed a severe tone of voice and asked me, "Where have you hidden your gold and weapons?"

"What gold and weapons?" I was surprised by his question until I remembered the lead article of the PEOPLE'S DAILY. It had accused members of the capitalist class of secreting gold and weapons in order to form a fifth column when foreign powers invaded China.

"You know what gold and weapons! You had better come clean."

"I have no gold or weapons. The Red Guards have been here. They went through the entire house. They did not find any gold or weapons."

"You are clever. You hid them. Our Great Leader told us that the class enemies are secreting gold and weapons. He can't be wrong."

"We are going to find the gold and weapons. If you don't come clean, then you will be severely punished," said their leader. "Come along! They must be somewhere in this house."

I wondered whether they really believed the lead article or whether they just had to appear to believe it. The fact was that soon after the Communist takeover in 1949, possession of firearms was declared illegal. Those who had them had to hand them over to the government and were subject to a house search by the police. Former Kuomintang military and police personnel were arrested and "reformed" in labor camps. Their families all had to move out of their homes. Therefore, it seemed utterly absurd to say some Chinese could still have weapons in their homes in 1966.

However, the Revolutionaries took my servants and me all over the house. They ripped open mattresses, cut the upholstery of the chairs and sofas, removed tiles from the walls of the bathrooms, climbed into the fireplace and poked into the chimney, lifted floorboards, got onto the roof, fished in the water tank under the ceiling, and crawled under the floor to examine the pipes. All the while, they watched the facial expressions of my servants and myself.

I had lost track of time, but darkness had long descended on the city when they decided to dig up the garden. The sky was overcast, and it was a dark night. They switched on the lights on the terrace and told Lao-zhao to bring his flashlight. When they came to the coal shed, my servants and I were told to move the coal to a corner of the garden they had already searched. The damp, ash-covered lawn had been trampled into a sea of mud; all the flower beds had been dug up, and spades were sunk into the earth around the shrubs. They even pulled plants out of their pots. But they found nothing, for nothing was there to be found. The Revolutionaries, my servants, and I were all covered with mud, ashes, and sweat.

In the end, physical exhaustion got the better of their revolutionary zeal. We were told to go back to the house. They were fuming with rage because they had lost face by not finding anything. I knew that unless I did something to save their face they were going to vent their anger on me. If only I could produce something in the way of gold, such as a ring or a bracelet. I remembered my jewelry sealed in Meiping's study.

"The Red Guards put my gold rings and bracelets in the sealed room. Perhaps you could open the room and take them and let the Red Guards know," I said to the woman.

"Don't pretend to be stupid. We are looking for gold bars," she said.

We were standing in the hall. The man with the tinted glasses had removed them to reveal bloodshot eyes. He glanced at my servants cowering by the kitchen door, and he looked at his fellow Revolutionaries around him. Then he glared at me. Suddenly he shouted, "Where have you hidden the gold and weapons?" and took a step toward me threateningly.

I was so weary that I could hardly stand. Making

an effort, I said, "There simply aren't any. If there were, wouldn't you have found them already?"

The fact that he had been proven wrong was intolerable to him. Staring at me with pure hatred, he said, "Not necessarily. We did not break open the walls."

He stood very close to me. I could see every detail of his sneering face. Although I found him extremely repulsive and would have liked to step back a pace or two, I did not move, for I did not want him to think I was afraid of him. I simply said slowly, in a normal and friendly voice, "You must be reasonable. If I had hidden anything in the walls, I could not have done it alone. I would have needed a plasterer to put the walls back again. All workmen work for state-controlled businesses. They would have to report to their Party secretary the sort of work they did." I was so tired that it was a real effort to speak.

The man was beside himself with rage, for I had implied that he was unreasonable. His face turned white and his lips trembled. I could see the bloated veins in his temples. He raised his arm to strike me. V

Property and Law in a Free Society

(Continued from page 1)

Authoritarian and collectivist societies embrace the second method of determining property titles (someone other than the producer has a right of use and possession). The fact that the producer objects to such redistribution is beside the point. It makes no difference whether the confiscation is for private or public good. The principle is the same: an owner is denied use of his rightful property.

The third method is the mark of a free society. "Mine" and "thine" are determined according to the rule that the producer shall have the right to the products of his labor. If the producer is working in conjunction with others (co-workers and employers who provide the tools and materials necessary for the work), then "the product of his labor" is determined according to the terms of the agreement under which he works. Ownership and distribution are not two different processes. Resources are owned as they are worked upon, and title remains with the owner until he chooses to consume the product or transfer its ownership to another person, through exchange, gift, or inheritance. The right to produce a thing is the first step in the right of owning it.

The concept of ownership describes the moral jurisdiction that people have over physical resources in the world, that is, the manner in which they may use resources free from physical interference by others. This moral jurisdiction must be recognized and respected by other people so long as private property is to exist. Private property does not depend upon government declaration and enforcement. Rather, private property can only exist to the degree that people honor others' property boundaries. Historically, in this country, the overwhelming majority of people have respected one another's property rights. It is this fact, rather than the government's threat to use force to punish trespassers which has insured the existence and continuance of private property as a social institution.

Thus, we claim that private property existed in the past, not because of political government, but in spite of it, and that the homesteading principle provided a perfectly sound, non-governmental method of defining property rights. In no place was this more evident than in the settlement of the American frontier during the 19th Century. The settlement of the American West preceded the establishment of political government there. The American pioneers found it necessary to generate their own rules, which depended on voluntary agreement among the settlers, not on coercion exercised by the government. On the frontier, the homesteading principle was usually recognized as the basis for property ownership. (It should be noted that we are not referring to the government Homestead Act of 1862, under which land was distributed by the United States government to settlers. Rather we are discussing the free market method by which the first claimant and first user becomes the legitimate owner of the land or resource in question.) The first person to work a mine, graze a herd on a meadow, or divert water from a stream, acquired a prior right and assumed ownership. The production of property rights and property titles was not dependent on political government during the development of the American frontier.

In an article subtitled, "The Not So Wild West," authors Terry Anderson and P. J. Hill note 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."[1] Their research indicates that during the period from 1830 to 1900, property rights were protected and civil order generally prevailed on the Western frontier of America. "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 government 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."[2]

Although the wild West has been characterized by the absence of formal government and the presence of gunfights, horse-thievery, and a general disrespect for property, other scholars have questioned the accuracy of these perceptions. Violence was not rampant on the frontier. W. Eugene Hollon in his book, FRONTIER VIOLENCE: ANOTHER LOOK, concludes "that the

Western frontier was a far more civilized, more peaceful, and safer place than American society is today." Frank Prassel, in his book subtitled "A Legacy of Law and Order," states that crime statistics do not indicate that the West was any more violent than parts of the country where political government exercised the full majesty of the law. Watson Parker, in a chapter entitled, "Armed and Ready: Guns on the Western Frontier," concludes that the ordinary frontiersman did not hanker after violence: "the frontier American was the mildest of men, to be so well armed and to shoot so few people."[3]

Law and order prevailed in the West, not because of political government but in spite of it. Frontier settlers took up land where the Constitution had not yet penetrated. In many instances, these people were looked upon as illegal squatters or trespassers by Washington officials because there was no Congressional legislation to confirm their land titles. In order to protect themselves and their property, many settlers formed extra-legal organizations to register their land claims, provide protection, and settle disputes. Such 'land clubs' or 'claim associations,' as they became known, were commonly found throughout the Middle West. These squatter associations represented an excellent example of the "power of the newly arrived pioneers to join together for a common end without the intervention of governmental institutions. ..."

Each claim association had its own rules, constitution, and by-laws. Most associations elected officials, including judges who could settle disputes. Normally, the constitution would specify the procedure whereby property rights in land would be defined, as well as procedures for arbitrating other types of disputes. The land clubs did not shy away from the use of violence to enforce their decisions (many had marshals appointed for that purpose), but usually community ostracism and the trade boycott were sufficient to convince those who failed to honor their decisions.

Another similar form of local protection on the frontier took place concurrent with the development of large cattle herds. As early as 1868, two years after the first cattle drive in the mid-West, small groups of cattle owners organized themselves into protective associations and hired stock-detectives. The purpose of these voluntary groups was to insure that ownership rights to animals in large, grazing herds would be preserved. These stock associations helped inaugurate the use of cattle brands and provided means whereby the brands could be registered. Although these groups relied on violence to ward off rustlers and thieves, there is little evidence that such violence was ever used to ride rough-shod over legitimate property rights.

The Gold Rush and Property Rights

The discovery of gold at Sutter's mill near Sacramento, California nearly coincided with the end of the Mexican War in January, 1848. Although California became an American territory, there was little evidence of American control except for the presence of about 1000 American soldiers. When the discovery of gold was announced in San Francisco in mid-May 1848, the Sacramento region was invaded by nearly 10,000 people within the space of seven months. These people rushed to mine gold on property to which no one had exclusive rights. Although nearly every miner carried a gun, little violence was reported. In July, 1848, when the military governor, Colonel Mason, visited the mines, he reported that "crime of any kind was very infrequent, and that no thefts or robberies had been committed in the gold district ... and it was a matter of surprise, that so peaceful and quiet a state of affairs should continue to exist."[4]

The real gold rush commenced in 1849. More than 20,000 people departed from the east coast in ships bound for California. By the end of the year, the population in California had reached about 107,000, mostly miners. As land became relatively scarce with this influx of emigrants, there was an incentive to assign exclusive rights to mine a given piece of land. This gave birth to the miner's meeting and the development of miner's law which was based on generally accepted mining customs and practices. When a meeting of miners was called in a specific area, one of the first articles of business was to specify the geographic limits over which their decisions would govern. In some cases, the mining district would be as large as 3 miles long and 2 miles wide. If a large group of miners was dissatisfied with the proposals regarding claim size, or jurisdiction, they would call for a separate meeting of those wishing a division of the territory. "The work of mining, and its environment and condition were so different in different places, that the laws and customs of the miners had to vary even in adjoining districts." This necessitated the right to secede and form new districts as circumstances dictated.

By the end of 1849, some miners committed their agreements on property rights to writing. Typical agreements had a definite structure, which included 1) Definition of the geographic boundaries over which the agreement would be binding on all individuals. 2) Assignment to each miner of an exclusive claim. 3) Stipulations regarding the maximum size of each claim. 4) Enumeration of the conditions which must be met if exclusive rights to the claim were to be maintained. These might include staking the claim boundaries with wooden stakes, recording the claim at the miner's meeting, and working the claim a certain amount of time. 5) An indication of the maximum number of claims which any individual could hold, either by preemption or purchase, and what evidence was needed to substantiate a claim purchase. 6) Provision for some means of enforcement, such as calling upon a jury of five persons to settle disputes.

The purpose of the miner's meeting was to recognize and sanctify the right of the miner to locate a mining claim and to hold it against all comers. This was the traditional and customary right of the miner the world over to homestead the mining claim that he worked, provided it had not been claimed or worked by anyone else. Contemporary observers were startled that the miners could maintain the peace and avoid violent property disputes among such a large population. If ever there was an opportunity for "anarchy to run wild" it was in California; but such was not the case. One contemporary observer noted, after visiting the camps:

> The first consequence of the unprecedented rush of emigration from all parts of the world into a country almost unknown, and but half reclaimed from its original barbarism was to render all law virtually null, and bring the established authorities to depend entirely on the humor of the population for the observance of their orders. ... From the beginning, a state of things little short of anarchy might have been reasonably awaited.
>
> Instead of this, a disposition to maintain order and secure the rights of all, was shown throughout the mining districts. In the absence of all law or available protection, the people met and adopted rules for their mutual security - rules adapted to their situation, where they neither had guards nor prisons, and where the slightest license given to crime or trespass of any kind must inevitably have led to terrible disorders.
>
> Small thefts were punished by banishment from the placers, while for those of large amounts or for more serious crimes, there was the single alternative of hanging. These regulations, with slight change, had been continued up to the time of my visit to the country. In proportion as the emigration from our own States increased, and the digging community assumed a more orderly and intelligent aspect, their severity had been relaxed, though punishment was still strictly administered for all offenses. ...
>
> In all the large diggings, which had been worked for some time, there were established regulations, which were faithfully observed. ... When a new placer or gulch was discovered, the first thing done was to elect officers and extend the area of order. The result was that in a district five hundred miles long, and inhabited by 100,000 people, who had neither government, regular laws, rules, military protection, not even locks or bolts, and a great part of whom possessed wealth enough to tempt the vicious and depraved, there was as much security to life and property as in any part of the Union, and as small a proportion of crime. The capacity of a people for self-government was never so triumphantly illustrated. Never, perhaps, was there a community formed of more unpropitious elements; yet from all this seeming chaos grew a harmony beyond what the most sanguine apostle of Progress could have expected. (emphasis added)[5]

Western Water Rights

Obviously, water was a necessity to the western settler. Miners often required water to work their claims. Western farmers needed large amounts for irrigation purposes. These demands led to the development of "Western water rights." Such rights were based on the homesteading principle: that the first user of a given flow of water became the owner of "right." Western water rights differed from "riparian" rights, which were recognized in the eastern United States. Under riparian law, the rights to flowing water belonged to those whose property bounded the running water. The use of riparian ownership rights in the West meant that water could not be diverted for mining or irrigation and created insuperable problems in a region where commerce depended on the availability of water.

The conflict between riparian doctrine, which included such concepts as reasonable and beneficial use, and the needs of the Westerners gave way to the development of an "arid region" or appropriation doctrine. The underlying principle that evolved in Western water rights was that the first appropriator received an exclusive right to the water, and latter appropriators had their rights conditioned on the prior rights of those who had gone before. Thus, "first in time" gave "first in right." The law that evolved reflected the greater scarcity of water in the West. The appropriation or homesteading doctrine slowly evolved to permit the diversion of water from waterbeds so that it could be used on non-riparian lands; forced the appropriator of water to forfeit his right if the water was not used; and allowed for the transfer, sale, and exchange of rights in water between individuals (something that was unheard of under the riparian system).

The appropriation doctrine, though novel in frontier America, was based on much of world's the traditional system of allocating property rights in water. These, in turn, were based on the protection of the eldest rights, which rested on the homesteading principle. In some places, the idea of appropriating water by the first user could be traced back to antiquity. Blackstone, at the time of the American revolution, claimed that "whoever possessed or made use of water first had a right to it." One of the most

frequently cited authorities on water law, Samuel Wiel, contended that riparian doctrine was an innovation on the common law, introduced into England by way of the Code Napoleon of 1804. Riparian doctrine was not embraced in English judicial decisions until 1833, and it was not until 1849, that the term 'riparian' was used by the English courts. Wiel also claimed that the idea of a common right to water flow (such as held by riparian owners) was simply socialism. "To carry out the idea of common right consistently, newcomers would have to be admitted to the use of the common supply, even though the supply is already in full use by others. The others would have to give up pro rata, and apportion some to the newcomers. ... It would be bare socialism if it were extensively done."[6]

Riparian doctrine developed in the East where land, not water, was of major importance. Water rights in the riparian system were attached to the land and the emphasis at law was to protect the property rights of land owners. When rivers and streams were used primarily for navigation and water power, the major concern of the users was to conserve the flow of water. The riparian system was not functional in arid areas where water, not land, took on the principal importance in such places. Land in the West only became important in proportion to its irrigation rights. As water grew scarce, water attained an independent status and gradually developed into an object of ownership, independent of land titles.

The appropriation doctrine made it possible to establish property rights in water and this made it possible to establish a buying and selling price for water. If water rights could not be owned, it would be impossible to transfer them via the market. It was only through the arid water doctrine based on "first user, first owner" that water could be priced, and then used in the most economic manner. The ownership of water rights in the West permitted the development of ditch, canal, and irrigation companies which charged for the delivery of water to specific points. As our examination of the law of supply and demand and competition demonstrated, when the price of anything, from whiskey to water, is kept artificially low, shortages and mis-allocations occur. The appropriation doctrine made it possible to establish water prices by allowing water to be a commodity which could be owned, traded and exchanged.

The appropriation doctrine was often carried to the extreme, as when travelers crossed the Great American Basin and the Overland Trail during the 19th Century. The emigrants often found themselves confronted with men "selling" water. In one of the surviving pioneer diaries it is recounted that during one of the more perilous moments on the Death Valley route of 1849, a man named Hall either had the foresight or luck to possess plenty of water. He would not share it with anyone, but instead gave it to his oxen. His actions caused plenty of ill-feelings and censures, but his exclusive ownership of the water was not violated. Those pioneers understood that respect for property was distinct from respect for avaricious owners. While they might have overpowered Hall and forcibly taken his water, it was his right, not his person that they were respecting.

Although the appropriation doctrine was eventually undermined by court decisions and state regulations, during the time that it was dominant (1850-1900) it demonstrated that there is a natural law basis for establishing property titles and that we do not need to depend on the State for their definition.

On the Overland Trail

Perhaps the best example of the ability of private property and ownership rights to sustain law and order is found in the experience of travelers on the Overland Trail westward. There was no political law west of Leavenworth, Kansas, but this does not imply that there was social disorder or disorganization. "Realizing that they were passing beyond the pale of the law, and aware that the tedious journey and 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."[7] Large numbers of people traveling together formed voluntary contracts with one another in an effort to establish wholesome rules and regulations. This included organization of jury trials, regulation of gambling and intoxication, and penalties for failing to perform camp chores and guard duty.

The emigrants were property-minded and respect for property rights was paramount. The pioneers seldom resorted to violence, even when food became so scarce that starvation was a distinct possibility. "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."[8] Violence and self-help were not the norm of behavior. Instead, self-control and respect for property rights, even in strained circumstances, was the rule. There was little need for police on the frontier because respect for property was the taught, learned, and accepted custom of the people on the trail.

Indeed, the conception of ownership on the trail was so strong that a finder could lose title to things he had taken up and which were then found by the original owner. Furthermore, a good-faith purchaser for value, from a person in possession, could lose the property if it were claimed by a prior owner who had lost it or from whom it had been stolen. No "finderkeepers" rule existed on the overland trail. People who lost property expected it to be returned. People who took up strays and lost property routinely announced their finds to strangers, in hopes that they might find the true owner. John Reid, a historian of

the Overland Trail, states that "two facts stand out in all extant accounts of retrieving lost or stolen property on the overland trail. First, possession was not the test of title. When emigrants decided if an individual had a right to property they based their judgment on a legal abstraction they called 'ownership,' not on the physical reality of possession. Second, when stolen goods were taken up, the person taking them acted as trustee for the 'owner.' The rule was universal. Emigrants suspecting that something offered for sale had been stolen would not buy it."[9]

Conclusion

The experiences in the American West prove that people can live together in peace and harmony, even where a formal political state is not present. Property rights evolve independently of any state institutions and can be respected in the absence of government courts and legislatures. The principle of homesteading, of "first user, first owner," plays a critical role in defining property rights in the absence of the state.

One contemporary historical example illustrates the ability of the homesteading principle to offer a non-governmental method for establishing property rights. When commercial radio broadcasting began after World War I, there was no Federal Communications Commission, nor any established body of law applicable to the ownership of the air waves. Ship to ship, ship to shore, and overland transmission of radio signals was a new technology that was just being commercialized. In 1926, a Circuit Court decision in Cook County, Illinois held that the operator of an existing radio station "had a sufficient property right, acquired by priority, to enjoin a newcomer from using a frequency so as to cause any material interference" with the signals of the prior station.[10] Up until this time Congress had taken the position that the air waves were the inalienable possession of the people of the United States. When it was feared that such judicial decisions might independently establish private property rights in the air waves, the U.S. Congress passed legislation in July 1926, to thwart this possibility. In 1927, Congress established the Federal Radio Commission. Its primary mission was to nationalize the air waves and prevent private ownership by instituting a licensing system.

It should be clear from this history that the U.S. Government prevented the creation of property rights among radio broadcasters through regulatory intervention. Although the courts sometimes upheld property rights based on homesteading and prior appropriation, as was done in the earliest radio cases, it is not at all certain that rights to the radio spectrum could not have been resolved in a voluntary manner among radio broadcasters themselves. The history of the American West, the history of the Law Merchant, which we shall review in the next chapter, and the general evolution of property rights (when not interfered with by political government) reinforce the "homesteading basis" of property institutions. Neither natural law nor the customary common law require the exercise of compulsion by a political government. They serve effectively as a means of social discipline because they are based on objective standards of reason and historical practice, as the foregoing history has demonstrated. They eliminate the need for the State in the definition and enforcement of property titles.

Footnotes

[1]. T. Anderson and P. J. Hill, "An American Experiment in Anarcho-Capitalism," Vol. III THE JOURNAL OF LIBERTARIAN STUDIES (1979), pp. 9-29, at p. 9.

[2]. Ibid., p. 10.

[3]. W. Eugene Hollon, FRONTIER VIOLENCE, New York: Oxford University Press, 1974, p. x. Frank Prasse, THE WESTERN PEACE OFFICER, Norman: University of Oklahoma Press, 1953, pp. 16-17. Watson Parker, "Armed and Ready: Guns on the Western Frontier," in Ronald Lora, ed., THE AMERICAN WEST, Toledo: The University of Toledo, 1980, p. 167.

[4]. For this and subsequent quotes see, John Umbeck, "The California Gold Rush: A Study of Emerging Property Rights," Vol. XIV EXPLORATIONS IN ECONOMIC HISTORY (1977), pp. 197-226, at p. 214.

[5]. Bayard Taylor, ELDORADO OR, ADVENTURES IN THE PATH OF EMPIRE COMPRISING A VOYAGE TO CALIFORNIA ..., New York: George Putnam, 1850, pp. 100-101.

[6]. Samuel Wiel, "Theories of Water Law," Vol. 27 HARVARD LAW REVIEW (1913-1914), pp. 530-544, at p. 540.

[7]. Anderson and Hill, op. cit., p. 21.

[8]. See John Phillip Reid, LAW FOR THE ELEPHANT: Property and Social Behavior on the Overland Trail, San Marino: The Huntington Library, 1980. This quote is cited by Anderson and Hill, op. cit., p. 23.

[9]. Reid, op. cit., p. 274.

[10]. R. H. Coase, "The Federal Communications Commission," Vol. II THE JOURNAL OF LAW AND ECONOMICS (1959), pp. 1-40, at p. 31, footnote 56. The case cited is that of The Tribune Company v. Oak Leaves Broadcasting Station, which is reprinted in 68 CONGRESSIONAL RECORD 216-219 (December 10, 1926). The court based its decision on the principle that the "priority of time creates a superiority in right." (ibid., p. 219). V

(To be continued)

Worth Repeating

"Will Rothbard's Free-Market Justice Suffice?"

The anarchism/limited government controversy must be considered in two parts: the moral, and the practical or utilitarian. Morally, which for me is the prime consideration, it seems to me unquestionable that, given the libertarian premise of nonaggression, anarchism wins hands down. For if, as all libertarians believe, no one may morally initiate physical force against the person or property of another, then limited government has built within it two fatal principles of impermissible aggression. First, it presumes to establish a compulsory monopoly of defense (police, courts, law) service over some given geographical area. So that individual property-owners who prefer to subscribe to another defense company within that area are not allowed to do so. Second, the limited government obtains its revenues by the aggression - the robbery - of taxation, a compulsory levy on the inhabitants of the geographical area. All governments, however limited they may be otherwise, commit at least these two fundamental crimes against liberty and private property. And even if one were to advocate the first feature without the second, so as to have only voluntary contributions to government, the first aggressive and therefore criminal feature of government would remain. Anarcho-capitalism advocates the abolition of these two features, and *therefore* the abolition of the State, and the supplying of defense service along with all other goods and services on the free market.

Dr. Hospers maintains that if one private agency should "predominate in a certain area, it would in effect be the government ... there would be very little difference" between that and a single government agency of protection. ... It must be pointed out tl[V] even in these conditions, it makes a great deal of difference, because (a) individuals can always have the right to call in another, competing defense agency; and (b) the private agency would acquire its income from the voluntary purchases of satisfied customers, rather than from the robbery of taxation. In short, the difference would be between a free society and a society with built-in and legalized aggression. Between anarchism and archy.

To sum up, on moral grounds I don't think the limited archists have a leg to stand on: given the libertarian axiom, they must logically end up as dedicated anarchists. What then of the utilitarian arguments? First, I must state that for me the claims of morality and justice are so overwhelming that utilitarian questions are of relatively little moment. But even for those libertarians who would weigh the utilitarian more heavily, I would say this: that usually in human affairs, the moral and the practical go hand in hand; and, second, that at the very least, you should agree that the moral argument sets up, not indifference, but a heavy presumption on behalf of anarchism.

[Excerpts from Murray Rothbard's "Yes" answer. Reprinted with permission from the May 1973 issue of REASON Magazine. Copyright 1973 by the Reason Foundation, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034., pp. 19, 23-25.]

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