The American West and Nozick's Theory of Entitlements

Kaitlyn E. Price
Purdue University, priceke@purdue.edu

Follow this and additional works at: https://docs.lib.purdue.edu/puhistorian

Part of the United States History Commons

Recommended Citation

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.
The American West and Nozick’s Theory of Entitlements

By Kaitlyn Price

Introduction

During the period ranging from 1848 to 1895, the legal systems of the American West developed independently from those of the East. Miners rushed to the western territories in search of gold, cattlemen scouted out grazing lands, and persecuted religious minorities relocated in search of peaceful practice of religion. These complex patterns of movement determined the characteristics that defined the extralegal as well as formal judicial systems of the West. The lack of Federal directives regarding mining and land claims resulted in councils of self-government. Some historians, including Terry and Hill, argue that anarchy engulfed the West due to its chaotic nature. However, due to an intense focus on customary law emphasizing the protection of property rights rather than the authoritative assertion of the law, these legal systems developed in a minarchistic manner that aligned with Robert Nozick’s “theory of entitlements.” This theory asserts that a society built upon customary law with a focus on the protection of individual rights will undoubtedly develop a protective body to safeguard these rights in pursuit of his third principle, the “rectification of justice.” Thus, the chaotic and often disorganized way these extralegal and formal judicial authorities enforced the law was a function of this theory. This paper will explore how these Western extralegal and formal judicial institutions fit Nozick’s theory of entitlements as well as explore the implications of this style of law enforcement on their economic beliefs, complex social environment, and tense relations with the Federal government, all of which result in political decentralization. It explains prominent themes of Western justice including a distrust of the Federal government as their authoritative laws slowly crept westward, the general acceptance of women’s property rights, disputes over slavery, and the proliferation of “mob law.” In addition, the theory forwards the idea that Western legal development strictly focused on the protection of property rights rather than enforcing a targeted political ideology. Such a focus allowed for a certain degree of enhanced rights for underrepresented populations and women compared to their Eastern counterparts. However, the notion of customary law also resulted in extensive racism, wrongful convictions, and corruption.

For consistency’s sake, the following general definition of law will provide the basis for the recognition of valid legal bodies in the West: the law is the system of rules which a community recognizes and follows at risk of punishment. This definition allows for the inclusion of quasi-judicial organizations such as mining districts, vigilance committees, cattlemen’s associations, and mobs because they offer rules that the community upholds and validates.

An Overview of Entitlement Theory

Customary law provides the foundation for the initial creation of quasi-judicial legal institutions in the American West. Hayekian legal theory frames legal development through the lens of customary law. This style of law involves the creation of laws from the bottom-up through experience. Authoritative law, the antithesis of customary law, takes a top-down approach to the formation and application of laws. As the name suggests, customary law adapts to the customs of a group. It depends on a reactionary mechanism, continuously interpreting new events that require legal clarification. According to Hayek, customary law goes through three stages: rule generation, rule content, and dispute resolution. Rule generation refers to the independent interactions between individuals that result in recognized customs. Judges decide on the rule content while applying ex ante judgment to lay out and formalize these customs. Dispute resolution then applies these ex ante interpretations and enforces the customs in a broader context. Hence, customary law often relates to concerns regarding individual liberties rather than hold any political motivations such as the expansion of legal oversight or directives aimed at promoting social justice. The adoption of customary law necessitates the formation of protective bodies to ensure society does not breach these customs, leading to the formation of a night-watchman state.

Richard Nozick’s theory of entitlements uses Hayek’s notion of customary law to explain why and how the “night-watchman state” develops. His theory consists of three principles. The first is justice in acquisition of holdings. This principle outlines the idea that individuals that justly acquire property have the right to the possession of said property. The second principle is justice in transfer of holdings. In other words, individuals have the right to shift the title of their property if this transfer is just. The final principle is the rectification of justice. Essentially, the rectification of justice engenders the creation of a protective body to ensure others do not infringe upon holdings justly received. This explains why and how extralegal authorities arose in the West. However, it is important to note that these bodies existed solely to protect the inherent and recognized rights of the individual rather than create new laws from the top-down as with authoritative law. Extralegal systems developed in the American West to act as this protective body. Many of the early institutions, such as mining districts and cattlemen’s associations, primarily concerned themselves with property rights. They remained disinterested in forwarding political motives, at least initially. Profit maximization was their main undertaking. While some lawlessness proliferated throughout the West due to inherent characteristics such as its sparseness, limited modes of communication, and attraction of criminal personalities, it is incorrect to characterize it as a state of complete anarchy. Rather, as Nozick predicted, the West developed a “night-watchman state” that focused on the protection of basic rights and privileges. The subsequent paragraphs will be spent outlining the various forms of extralegal systems that arose and how Nozick’s theory helps us understand and shape their origins.

Early Nozickian Extralegal Authorities

Mining districts were the first forms of extralegal government in the West that reflected the night-watchman style of law enforcement. The gold rush prompted vast swaths of westward movement, particularly toward Colorado, Nevada, and California, beginning

---


4 Nozick, 150-153.
officially in 1848. The rapidity with which this movement occurred posed difficulties for the mining communities. Formal governments could not be established quickly enough to accommodate their legal needs. Hence, mining districts established their own extralegal bodies. They also could not rely on kinship and communal norms by themselves to protect property interests due to the rapid rise in population. According to Blume and Brown, when the miners discovered a new gold field, they hastily formulated a new constitution, defined the borders of the gold field, allocated land claims amongst themselves, limited the size of these claims to ensure efficiency in production, set rules restricting the transfers of claims, and formulated a system with which they could record claims. The lack of Federal directive regarding mining rights necessitated these actions. In addition, the only presence of the Federal government in the West was their military presence to prevent high-level unrest, but even then, generals limited soldiers’ direct exposure to mining districts to prevent desertion by those soldiers aspiring the riches they offered. Most of the initial laws established by these districts solely related to the establishment and protection of property rights rather than the assertion of political influence, which aligns with Nozick’s third principle. In addition, the fact that mining districts regulated the transfer of holdings implies that they also practiced Nozick’s second principle, emphasizing “justice in the transfer of holdings.” The absence of a large-scale prison system best displays where they placed their priorities, as “…no one could be persuaded to leave his claim to guard a prisoner.” They only occupied themselves with material holdings. Although the development of a night-watchman state was novel for the United States, this does not mean it was ineffective.

Despite the rapid nature with which these extralegal mining laws arose, they efficiently achieved their purpose. Bayard Taylor, a contemporary poet and travel journalist, noted that “the capacity of a people for self-government was never so triumphantly illustrated.” He particularly referenced the Mokelumne diggings, which reflected how miners discovered new gulches and quickly elected officials and enacted laws. In addition, in California, the influx of miners positively correlated with a decrease in crime. Crimes were tort-based, meaning that it was the plaintiff’s responsibility to lodge a complaint against the defendant. Popular modes of punishment included flogging, hanging, and banishment. The emphasis of tort-based law also displays the development of customary law in the West and its reactionary nature. Hence, despite common notions that the Wild West attracted lawlessness, the mining districts provided the minimum degree of justice necessary to maintain order. This enabled them to fully devote themselves to the reason for which they were there in the first place: the accumulation of material wealth. Another important item of note is that the passage of the Act of May 10, 1872 by Congress further legitimized regulations put in place by mining districts, even after the implementation of formal territorial and Federal

7 Ibid., 605.
8 Bayard Taylor, Eldorado, Or, Adventures in the Path of Empire (New York: George P. Putnam, 1850), 74.
10 Morriss, 605.
Their success suggests that the “night-watchman state” was an effective form of legal organization in societies focused on these property-driven priorities even after new sources of authority entered the scene. It also shows how Western political culture developed from and depended upon this highly specialized role of law enforcement. Mining districts set the tone for the development of the night-watchman state within other subsets of Western society as well.

The formation of cattlemen’s associations throughout the West reflected a similar emphasis on property rights and further supported the idea that these extralegal bodies embraced Nozick’s entitlement theory. Cattlemen migrated West in search of adequate grazing lands, which also necessitated adequate protection of property rights. In Montana and Wyoming, for example, cattlemen grouped together and created “private systems of rules” that governed various aspects of the business, including when roundups of cattle occurred, who received unbranded calves, the obligations of ranchers, disease control, and outlined rights to cattle and grazing lands. Hence, their laws similarly emphasized property rights over any authoritarian assertion of the law. They even implemented laws concerning fence repair and the return of lost animals. The incidence of a broken fence itself likely anteceded the related law concerning its repair, indicating a process of law formation based on customs in these institutions. Like mining districts, cattlemen’s associations existed alongside formal legal bodies. Many cattlemen’s associations such as the Wyoming Stock Growers Association persist to the present day. Although their law enforcement capacity lessened as the Federal and territorial governments replaced them, they still effectively lobbied to ensure their continued influence on laws regarding their trade. Hence, we again see Nozick’s theory reflected in the early extralegal systems of the West. Cattlemen designated range rights to individuals in a similar legal manner that miners used to designate rights to mining tracts. They also disfavored any encroachment upon their property, going so far as to discourage large-scale immigration of Easterners when companies built new railroad terminuses within their grazing lands in Texas. This further shows how cattlemen wanted nothing less than the complete protection of their property. Cattlemen created laws that secured the efficient and fair generation of profits, acting as the “protective body” over property rights that Nozick’s theory demanded.

The last major extralegal system that formed through westward expansion was the vigilance committee, which again exhibited the characteristics of a night-watchman state. There were certain instances of crime that forced individuals to form such committees. For example, John Todd described the issues resulting from the construction of a road from Missouri to Sacramento after the passage of the Pacific Railroad Bill of 1862. Workmen building this railroad were “…beyond laws and magistrates, civil officers, and restraints of civilized society.” Once they marked a new terminus for the railroad, the problematic workmen rushed to the new terminus to establish their own regulations for the area, with top priority going to the cre-

15 John Todd, The Sunset Land, Or, the Great Pacific Slope, 1871, 227.
ation of gambling halls and hell-houses. The more civilized workmen disliked this dynamic. In response, they formed vigilance committees. Vigilance committees were common throughout the West, and they evolved from the concerns of private citizens regarding the Federal government’s inability to properly administer justice. Common tradesmen, in this case railroad workmen, again facilitated another form of extralegal justice that mirrored the mining districts and cattlemen’s associations. These committees were notorious for swift and violent justice, although they still permitted trial by jury. They also were just as organized as any other form of government, engaging in official correspondence with one another. The Stephens correspondence, in which committee secretary Isaac Bluxome banishes John Stephens from California, shows that these organizations displayed professionalism and systematic communication to some degree, despite their violent means of justice. As with the mining districts, vigilance committees were effective law enforcers. The San Francisco Vigilance Committee of 1856 successfully reduced the murder count to two in the three months after its formation compared to one hundred murders in the six months prior. The public also checked their powers if deemed necessary. For example, in Leadville, Colorado, a disgruntled public disfavored the current vigilance committee. As a result, they formed their own Anti-Vigilance Committee and were even more successful at keeping the peace than its predecessor. The main function of these committees, as demonstrated, was to keep the peace in their communities. They expanded the protection of personal liberties beyond property rights to include freedoms from theft, violence, and other injustices to satisfy their role as the “protective body” under the third principle of entitlement theory.

The mining districts, cattlemen’s associations, and vigilance committees of the West were hastily built in the absence of more formal legal infrastructure. They were informal and emphasized the quick execution of justice. This foundational structure affected the subsequent implementations of mob law, lynch law, quasilegal law enforcement agencies, and territorial courts. These institutions similarly involved casual, swift justice, and a hesitancy to accept Federal assertions of the law due to their longstanding tradition of customary law devoid of political influence. The development of a night-watchman state held implications for future forms of Western law enforcement beyond the mining district, cattlemen’s association, and vigilance committee.

Entitlement Theory and Mob Law

Mob law developed from these principal organizations into an even more informal, collective, and emotional assertion of customary law throughout the West. It is important to begin with its sociological origins to completely understand the role mobs held in Western society. Schweingruber, a sociology professor at Iowa State University, stated that populations form mobs through “…leadership, organization, a common action, emotion, and irrationality.” The “crowd mind” absorbs new individuals as leaders become more convincing, eventually resulting in violence and destructive action. Schweingruber lists multiple characteristics that define a mob, but those most applicable to the West are

---

16 Ibid., 229.
18 Anderson and Hill, 22.
emotionality, homogeneity, and novelty: emotionality due to the West’s quick escalation of violence, homogeneity due to the overwhelming whiteness of these mobs, and novelty due to the expeditious expansion of law into unprecedented territory.

One derivation of mob law is “lynch law;” as individuals became more frustrated with attacks on the freedom and peace, they created mobs and implemented lynch law as the core stratagem. The typical connotations of lynching imply disordered action facilitated by angry mobs. However, first-hand accounts from the West again show that the rapid influx of individuals meant that such action was the only means by which Westerners could maintain stability in a place without previous institutional order. In Brownsville, Texas, French missionary Emmanuel Domenech stated that “lynch law was in full force” due to concerns over the inhabitants’ own safety.21 It allowed these communities to confront chaos in a calculated manner. Eliza Woodson Farnham, a nineteenth-century novelist and activist, described how vigilance committees and mining districts used “lynch law” to restore “calmness” in their communities. Although some calmness transpired, Farnham also conceded that the mobs were “...very wholesome in their influences, but so far from reaching the root of any disorder.”22 It was a surface-level form of justice that suited their minimum needs but was not as effective as other forms of formal law enforcement that ensured equal enforcement of such laws. On the other hand, formal law enforcement did not garner as much support as mob law from the civilian population. They held the common notion that the courtroom protected guilty parties instead of fostering the proper administration of justice. The trials of Charles Cora and James Casey best demonstrate this sentiment. The sheriff’s office arrested these individuals for murder, but the vigilance committee members in San Francisco feared their escape. Thousands of committee members went to the sheriff, gained custody of the two, promptly tried them, and decided their fates. The public fervor for lynch law resulted in swift justice via hanging, a popular punishment of the time. It is crucial to note, however, that lynch mobs were still somewhat morally reasonable. In the cases of Charles and James, the mob permitted Rev. Father Gallagher to offer them their last rites before death.23 Instinctive action that superseded traditional courtroom procedure was common throughout the West. Mobs, therefore, held a crucial role in these communities. Despite having the appearance of an abstract and subjective assertion of violence, lynching built upon the foundations of customary law. It derived its effectiveness from its reactionary assertions of custom and did not act as a legislating body that invoked political authority.

Although it sufficiently fulfilled the needs of the communities in which it proliferated, there were numerous limitations of lynch law. First, it allowed for the haphazard application of justice. For example, Domenach recollected the time a drunk white man stabbed a Mexican man. Once the mob got ahold of the perpetrator, “one man (the future sheriff) stepped aside a little, and without judicial charge or display or oratory shouted, 'let those who vote for his death step this way. Let the rest remain as they are.'”24 This method of determining one man’s fate promoted unequal and inconsistent punishment between different cases. It was largely dependent on the mob’s

22 Woodson Farnham, 316.
mood at a particular moment in time. The nature of lynch law and the emotion behind it also meant that this mood was often biased in favor of hanging, since many believed this method of punishment to be the most efficient way to deter crime in such a dispersed region. Major Horace Bell recollected another instance of haphazard law enforcement at the hands of lynch mobs. He detailed the trial of a man named Reyes Feliz, who had not yet been adequately proven guilty of the murder of General Bean. In a bout of impatience, a “ferocious-looking gambler mounted a bench and said: ‘I move that Reyes Feliz be taken to the hill and hung by the neck until he be dead.’” The mob favored the motion, sealing his funereal fate. On the opposite end of the spectrum, Bell also noted another instance in which the mob did not oppose the judge’s motion to turn over an actual murderer named Felipe Read, whose father was a Scotchman, to the sheriff. He was eventually freed. Since the emotionality of mobs governed their administrations of justice, unequal punishments such as the ones Bell mentions prove that their harshness depended on their mood. The intersection of passionate emotion and justice also manifested in wrongful lynchings. Abbott recounts a story of such an incidence in which a mob lynched a man wrongfully accused of stealing a horse. He laments the general apathy felt throughout the West, saying, “…I think it does give a fair illustration of the value that the early California pioneers put upon the life of a man even suspected of theft.” These two accounts display the inconsistencies of lynch law and helps characterize Western extralegal institutions as disorganized and strongly tied to emotions.

Another limitation of lynch law and mob violence was its racist tendencies. The West was a diverse scene; whites, Native Americans, Mexican Americans, black Americans, and Asian Americans made up its demographic landscape. According to Matthew Wills, xenophobic white Americans often targeted Mexican Americans for lynching after the Mexican-American War. The aforementioned incident of haphazard justice outlined by Horace Bell also supports this idea. Felipe Read had a white father, while Reyez Feliz was Mexican. The mob hung Feliz and allowed Read to live, despite facing similar circumstances. The Comisión Pesquisidora de la Frontera del Norte also provided an example of this targeted violence. One day in 1873, an armed group of white men raided Mexican lands and murdered 75 individuals. Even the official law enforcement agencies of Texas made no effort to find the assailants; it was almost as if these incidences were common and broadly accepted within the community. Governor Pease deplored this racist application of justice, noting that “Americans have at times committed offenses which in them have been overlooked, but which, if committed by Mexicans would have been severely punished.” The very fact that the Governor himself denounced these racist predispositions supports the idea that the assertion of customary law via lynch mobs was inherently biased in favor of certain demographics during this time. This should not be surprising, since customary law builds upon the customs of society. If a society is inherently racist, then its customary laws will ipso facto exhibit racist tendencies.

Mob law targeted other minority groups as well. Many whites saw the rapidly expand-
ing Asian population throughout the West as an “...‘invasion,’ ‘subversion,’ and unwelcome ‘amalgamation’ that threatened the establishment of European ‘civilization.’”29 This, along with the increasing threat of opium use to Americans, prompted whites in the West to engage in mob action against opium dealers, which largely ostracized the Chinese population. The November 1880 edition of the Virginia City Territorial Enterprise explicitly called for “nonviolent mob action” against opium dealers. The newspaper repeatedly condemned Chinese opium dealers for luring innocent whites into their opium dens, prompting a moral crisis. The author emphasized the need for civilians to take matters into their own hands beyond the boundaries of the law.30 These are just a few examples of racism in mob law that arose throughout the West. They provide further proof that extralegal institutions of the West were based on customs. They also embody Nozick’s principle of a protective body safeguarding the personal liberties of individuals because, even if they were racially motivated, civilians at the time justified mob action against minorities as they believed these groups threatened their freedoms from theft and immoral influence.

Integration with Official Legal Authorities

More formal law enforcement bodies also reflected Nozick’s principles and maintained many characteristics of their extralegal counterparts. The Texas Rangers, for example, promoted peacekeeping along the border of Mexico. Established in 1842 by President Houston, they held extensive judgmental powers due to the sparseness of the frontier and a wanton avoidance of bureaucratic procedures concerning justice.31 At times, the Rangers acted as a regulatory force that limited the irrational instincts behind lynch law. Horace Bell notes a time when the Rangers successfully apprehended a criminal, and he emphasized that the criminal would only be safe in the hands of the Rangers. The U.S. District Attorney himself represented the lynchers and promoted their right to impose justice by their own means.32 Hence, the Rangers had an important role in limiting impulsive behavior among mobs, even if it contradicted warnings from major figures such as the U.S. District Attorney. However, this does not imply that the Texas Rangers did not exhibit similar characteristics as lynch mobs or vigilance committees. Another account by Bell involved the punishment of the Marshal by the Rangers after the Marshal tricked them into thinking a place called Moreno House was overrun by Mexican banditti that had been committing crimes throughout the area. After realizing the Marshal tricked them, the Rangers took him as prisoner, tried him, and sentenced him to “cat-hauling in the public water-ditch.” The hangman of the town, outraged by this speedy and outrageous reaction, called the Rangers to trial as well. However, the Rangers threw such a fit in the court room that they received bail and left without punishment.33 The ability for the Rangers to avoid sentencing by inflicting chaos within the courtroom shows that they also exhibited similar characteristics as lynch mobs, despite being a more formal organization itself. Another instance in which the Rangers embodied certain traits of other extralegal institutions was during the Pourvenir Massacre, during which they rounded up Mexican men and executed them for a se-

32 Bell, 153.
33 Ibid., 44-45.
ries of recent thefts despite a lack of conclusive evidence. This incident implies that, at times, the Texas Rangers also fell victim to their own emotionality in a similar manner as lynch mobs. As these examples show, the informality of western justice went beyond civilian committees and encompassed official law enforcement bodies. It also begins to outline the tensions between that arose between these institutions and formal territorial governments in pursuing the protection of individual liberties.

As the territories developed, the Federal government imposed official territorial courts that also displayed characteristics of the protective body outlined by Nozick’s theory, which would present future conflicts between the extralegal forces, territorial courts, and Federal courts. According to Kenyon, the territorial courts included one supreme court and three district courts. The Federal government essentially outsourced authority to the territorial courts since the long distances posed limitations to their direct presence. For example, Judge Delena Eckels presided over the Utah Territory, only to resign shortly after his appointment “due to the distance, length of travel time, and the sectional crisis looming in the east…” The “Hanging Judge,” Isaac Parker, corroborated this: “It is a matter of great difficulty to administer the law in the Western District of Arkansas, because of the great distances witnesses have to travel to get to court, and of the unwillingness of witnesses in many cases to appear and give evidence.” Hence, the Federal government had a limited role in the assertion of legal authority throughout the West. This isolated the territorial governments from the Federal government, exposing them to greater influence by the extralegal bodies that proliferated. This therefore supports the adaptation of a “night-watchman state” style of law enforcement by the territorial courts, even if this went against what the Federal government desired.

The official courts exhibited various characteristics that display the influence that previous extralegal institutions had over their development. One such characteristic was the rampant abuse of summary judgment. As previously shown, extralegal law enforcement offered hasty judgments for those accused of crimes. Either the quasi-judicial courts would quickly sentence criminals or impatient mobs would take matters into their own hands. The territorial courts used summary judgment extensively, likely due to these prior expectations of speediness from the Western civilian population. In Eldorado, or, adventures in the path of empire, the court motioned for summary judgment relating to the assault of a white woman by a black man in Stockton and issued this man to lashes and exile. In addition, some of the more educated opposed this type of capital punishment, but they conceded that the absence of a prison system forced them to resort to this type of sentencing. Lockwood also mentions the presence of this style of punishment in Arizona in addition to the refusal by certain judges to allow defendants their right to counsel. The rushed nature of justice reflected that of the earlier extralegal

38 Taylor, 72-73.
institutions and shows the effects they had on more formal authorities.

Another characteristic of the official territorial courts was its disorganization and extreme casualness. The novelty of certain issues throughout the West such as concerns over mining, water, and public lands forced territorial judges to try new issues without precedent.\textsuperscript{40} This further supports the idea that customary law proliferated within the official court system as well. In the wake of these new issues, judges decided on cases in a manner that limited the restrictions of property rights in the West. Property rights were by far the main concern for miners, cattlemen, and other frontiersmen. The territorial courts simply took over the role of the “protective body” previously held by the precedent institutions. In addition to its disorganization, the territorial courts exhibited extreme casualness. Horace Bell notes a particular visit to a courthouse, which was located at “Abbott’s bath house.”\textsuperscript{41} The use of multifunctional buildings for trials was not uncommon. Kenyon also describes the casual nature of the courtroom: judges placed their feet upon their desks, smoked tobacco during trial, and initiated motions to adjourn to consume alcohol.\textsuperscript{42} However, this did not inhibit their ability to adequately administer justice. Davis describes this phenomenon, observing that “some rather violent forces agitated that crossroads frontier on occasion in those days. Yet Judge Carter’s court remained steady and responsible through it all.”\textsuperscript{43} The point stands that, while others may see their behaviors as unprofessional, judges were still able to fulfill their duties. The territorial courts simply took the characteristics of their predecessor organizations and applied them to a more formal arrangement. The adoption of these characteristics further supports the idea that the Western territorial courts formed based on customary law, which differed from their Eastern counterparts.

One drawback of the adoption of such casual, disorganized characteristics is the proliferation of corruption within the territorial courts. Regarding the Mormon militia advances into Utah during the Utah War, Davis shares that “It was apparent that the Black’s Fork jury aspired to a full share in stamping out the ‘rebellion.’”\textsuperscript{44} There were many instances of biased juries throughout the West, which was a function of the casual nature of the courts. In a way, however, these impartial juries furthered the interests of customary law, since the development of laws based on customs relied on public interpretation of these customs. Partial juries were an effect of this tendency toward the public interpretation of customs. Kenyon also mentions that juries were susceptible to influence by their friends, and there was general disrespect toward legal processes by Western communities.\textsuperscript{45} The adoption of customary law instead of authoritative law explains these instances of corruption. In a legal environment governed by authoritative law, there is much more emphasis on strict adherence to predetermined laws and principles created to ensure stability. On the other hand, customary law stems from the bottom-up in the absence of an effective higher authority to judge its proper implementation. The inefficiencies of Federal supervision due to the sparseness of the territories also explain this pattern of corruption. Corruption, therefore, was an integral aspect of Western law enforcement in both informal and formal legal bodies.

The division of jurisdiction over certain issues between the Federal and the territorial courts further proves that the territorial courts focused more on issues relating to the protec-
tion of property, further supporting a pattern of development based on Nozick’s theory. For example, the territorial government presided over slavery until 1862. The Dred Scott v. Sanford decision limited the scope of Federal authority over the territories by emphasizing that, according to the Organic Acts, its authority was limited to the Constitution, and the ability for Congress to make rules over the territories only applied to the former British colonies.46 In addition, most Western states viewed slaves as a class of property. According to the San Antonio Ledger, “...unless something be done to arrest the escape of slaves, this class of property will become valueless in Western Texas.”47 These two considerations essentially pushed all concerns over property, including slaves, to the territorial courts. Bayard Taylor also mentions that the new government of California unanimously prohibited slavery, meaning that the deferral of this authority to the states by the Dred Scott decision did not ensure the total proliferation of slavery in the territories.48 Jurisdiction over slavery was not the only way by which the territorial courts governed property rights. The courts also presided over land claims issues. An example of this also comes from Taylor’s work. California created a “boundary committee” intended to establish the eastern boundary of California. There was vast disagreement surrounding this issue, but the final decision considered issues within the mining industry and the previous customary border (i.e., the traditional Mexican/Spanish boundary line).49 This instance shows that California residents concerned themselves more so with the preservation of property rights rather than the imposition of a taxing authority or other authoritative considerations. The fact that the official territorial government of California followed the historical borders also displays a dependence on customary law in a formal context. Beyond these issues, the territorial courts also held responsibility over divorce matters, segregation, and miscegenation legislation. In a way, miscegenation legislation also acted as a means of excluding property rights from minority groups. Early miscegenation legislation in the American West was far more detailed than Southern legislation, and a lot of these laws targeted South Asian men. According to Nayan Shah, interracial marriage implied the existence of inheritance rights and the legitimacy of interracial children.50 This, coupled with the extensive racism against South Asians along with other minority groups, show that miscegenation legislation was just as much an attempt to protect property rights as it was to further a racist agenda. The matters which fell under territorial jurisdiction closely followed the West’s historical emphasis on the protection of property rights.

The Federal courts oversaw any issues that were too overwhelming for the territorial courts. The territorial governments relied on Federal intervention to remove the Native American population in Oregon, for example. The Federal government also appointed a superintendent of Indian affairs within the state, which was protected by military force.51 The delegation of Federal authority over these types of issues shows that the territories were ill-equipped to handle issues that crossed territorial and national boundaries. As previously mentioned, the pattern in which the territorial courts developed mainly served property

46 Dred Scott v. Sandford (1856).
48 Taylor, 108.
49 Ibid, 110.
50 Shah, 217.
interests. Therefore, in conflicts as politically driven as Native American relations, the authoritative influence of the Federal government proved more effective at handling large-scale cases. Another instance of the failure of the territorial courts to adequately confront interterritorial and international conflict was with the Maxwell Land Grant Case. The Maxwell Land Grant evolved from Spanish origins. The Spanish government granted this piece of land in Colorado and New Mexico to Carlos Beaubien and Guadalupe Miranda in 1841. These individuals subsequently sold the claim to Lucien Maxwell, and from Maxwell to various European investors who promoted the mining and ranching industries within the tract. Due to the complexity of Mexican and Spanish land law and conflict over its ownership, the Colfax County War ensued. After the territorial court’s failure to ease the conflict, the Supreme Court took over the case and affirmed the company’s ownership over the land. The inability of the territorial courts to resolve the issue further displays how the foundations of customary law broke down in the face of unfamiliar customs. The Maxwell Land Grant case was complex in that it relied on Spanish and Mexican customs. The interpretation of these foreign customs through an American lens undoubtedly contributed to their inability to settle the case, substantiating the need for Federal aid. As the territories progressed socially, economically, and technologically, the need for more uniform modes of law enforcement became more relevant. Hence, Federal jurisdiction mostly covered issues unto which customary law failed to adequately confront.

The Federal focus on authoritative law came into conflict with territorial customary law. This conflict fostered a sense of general distrust toward the Federal government throughout the West. Johnson and Thurston best summarized this sentiment: “With shame be it said, however, that while our country owes its greatness to the spirit and energies of the frontier men, their wants and interests are the least looked after by the law-makers of the nation.” This quote shows that Western individuals believed the political motivations of lawmakers in the East did not align with the needs of the frontiersmen. They much preferred a law based on customs. This resentful attitude also resulted from an inability of the Federal government to support the territories when they needed it the most. According to Shearer, Texas saw multiple attacks from Native Americans in 1855 in response to Texan efforts to force Native Americans into reservations. Governor Pease requested Federal troops to protect the Kansas frontier, but the Federal government did not grant this request in time. Pease was forced to call on Callahan to set up a company of troops. This incident emphasizes the frustration that Texans felt toward the East, as they were unable to protect their property. Many saw this as a sort of betrayal, promoting the belief that the Federal government could not meet the needs of the frontiersmen in the West. The Coinage Act of 1873 also contributed to this tension, which marked a shift away from the silver standard toward the gold standard. This dealt a harsh blow to miners in the West because it effectively diminished the value of property purposed for mining silver as well as the value of the metal itself. Most believed that the act was passed to profit wealthy capitalists at the expense of the mining community, which created more resentment toward the Federal government. Hence, many attacks on the Federal government by the West originated from


53 Johnson and Thurston, 264.


55 “Coinage Act of 1873” (1873).
its neglect toward the protection of personal property promulgated by customary law. These tensions resulted from the Federal government’s inability to function as the “protective body” that Western infrastructure historically necessitated.

More Social Considerations

Nozick’s theory of entitlements, as well as the nature of customary legal development in the West, enabled the creation of social conditions which were quite different from the East. For example, many women gained the right to vote in the territories long before 1920. In addition, women in territories such as California retained property ownership even after marriage.56 Hence, the West tended not to discriminate against gender when it came to property ownership. This shows an intense devotion to the maintenance of property rights so they could uphold Nozick’s principles relating to the just acquisition and transfer of holdings. They did not dare threaten its integrity. On the other hand, granting such rights to women went beyond property protection. Women’s suffrage in the West also acted as a social tool with which the interests of various groups could be supported. In Utah, intense feelings of anti-polygamy resonated as the Latter-Day Saint population proliferated. One action taken by opponents of polygamy was an appeal to the woman’s vote. In the November 1880 issue of the Anti-Polygamy Standard, a newspaper based in Salt Lake City, stories of women betrayed by polygamous husbands hoped to instill fear in women within the territory.57 The intention of these doomful stories was to convince women to vote for legislators who threatened to criminalize polygamy. Therefore, while the emphasis on property protection in the West allowed for some degree of women’s suffrage, appeals to attracting their vote also promoted discriminatory ideology toward marginalized groups.

Western legal bodies did not offer private property protections to many minority groups, implying that entitlement theory did not apply to them. As previously mentioned, customary law perpetuated racism through the adoption of customs rooted in racism. Miscegenation legislation was one method by which territorial governments could restrict inheritance rights involving property among minority populations. For example, while white women retained land ownership, territories denied these rights Asian American women. The territories also restricted interracial marriage for Asian American women.58 As Shah mentioned, restrictions on interracial marriage limited the ability for minority children to retain land rights. On the other hand, customary law maintained the integrity of pre-established Spanish traditions. Mexican and Spanish women retained property titles granted to them under Spanish law even after the Treaty of Guadalupe Hidalgo.59 While black women in the West may not have retained similar rights, they worked hard to promote reform through the establishment of black women’s clubs.60 While the pattern of legal development faced by the West predominantly restricted the property rights of minorities to the benefit of whites, it did not go uncontested. In a naturally white and patriarchal society, there is no doubt that the customs of this society would be biased in favor of this demographic. This is yet another limitation of customary law, and while women in general retained more rights than those in the East, minority women faced different burdens.

56 Taylor, 108.
57 “How Wives Are Coerced into Giving Consent for Their Husbands to Enter Polygamy,” Anti-Polygamy Standard, November 1880.
59 Ibid.
to the acquisition of property rights.

Conclusion

The patterns of development within Western legal and extralegal institutions displayed the adoption of a “night-watchman state” in which the law acted as a “protective body” against infringements of personal property rights. This pattern embraced Robert Nozick’s theory of entitlements, in which he argued that societies focused on the protection of property rights required a protective body to ensure the just acquisition and transfer of holdings. Early extralegal bodies such as mining districts, cattlemen’s associations, and vigilance committees embraced customary law. The reactionary mechanism of lawmaking ensured the protection of property rights throughout the West, as these institutions were able to confront new issues with customs that society agreed upon. Although this style of lawmaking fostered informality and casualness even among the official territorial court system, it did not diminish the West’s ability to administer the law in a manner best suited to their needs. However, an emphasis on customs allowed racism and haphazard punishment to proliferate within Western legal procedures. It also fostered discontent with the Federal government, since the Federal government focused primarily on authoritative law based on political motivations rather than the protection of property that the West desired. Finally, customary law expanded property rights for women while diminishing those of certain minority groups, fostering a unique social environment. Overall, Western legal institutions developed in a manner that was drastically different from the East. This created a distinctive legal culture that persisted through statehood and beyond.

REFERENCES

Primary Sources


Bell, Horace. Reminiscences of a Ranger; Or, Early Times in Southern California. Los Angeles: Yarnell, Caystile & Mathes, 1881.


Coinage Act of 1873 (1873).

Comisión pesquisidora de la frontera del norte. Reports of the Committee of Investigation Sent in 1873 by the Mexican Government to the Frontier of Texas. Translated from the Official Edition Made in Mexico, 1873.


Dred Scott v. Sandford (1856).


Todd, John. *The Sunset Land, Or, the Great Pacific Slope*, 1871.


**SECONDARY SOURCES**


Shah, Nayan. *Stranger Intimacy: Contesting Race, Sexuality and the Law in the North*