RULE OF FLESH AND BONE: THE DARK SIDE OF INFORMAL PROPERTY RIGHTS

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In more recent years the belief that private citizens can structure their economic and social affairs at least as efficiently and effectively as a central authority has gained broad acceptance from commentators and scholars across the political and ideological spectrum. Nowhere has this idea gained more enthusiastic acceptance than in the arena of property law. In particular, commentators have asserted that the use of private control mechanisms in the area of property rights not only produces more secure tenure in those rights, but also generates rules that are cheaper to administer, more efficient, more predictable, more just, and more welfare-maximizing for group members than those promulgated and enforced by central authorities.

In this Article, Professor Clowney sets out to qualify this rosy view of private ordering. He focuses on three canonical examples of successful private ordering regimes: the societies established by gold rush miners, lobster fishermen, and cattle ranchers. Examining each in turn, he shows that each has been plagued by staggering amounts of bloodshed and property destruction. Much of this violence and mayhem has been ignored or unreported in scholarly accounts and commentary on these private ordering regimes. As such, Clowney argues, our understanding of the true virtues and costs of such private ordering has been greatly skewed.

Professor Clowney then attempts to answer the important question of whether violence used by a central authority to impose norms and order society is more or less costly than the violence that attends private ordering. After examining a wide range of literature from across disciplines he concludes that the violence in informal property schemes is more costly, as it generates widespread human rights abuses, imposes psychic costs on innocents, disrupts the efficiency of labor markets, and impedes technological innovation.

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I. INTRODUCTION

The notion that individuals can create orderly communities without resorting to the coercive power of government has attracted much scholarly support.[1] Since at least the bloom of the Scottish Enlightenment, prominent philosophers, religious thinkers, and economists have all pushed the idea that "good order results spontaneously when things are let alone."[2] In more recent years, the belief that private citizens can struc-

1. *See* MURRAY N. ROTHBARD, 1 ECONOMIC THOUGHT BEFORE ADAM SMITH: AN AUSTRIAN PERSPECTIVE ON THE HISTORY OF ECONOMIC THOUGHT 13 (2006) (discussing the history of economic thought from the pre-Socratic philosophers through Adam Smith, including Aristotle's support for an economic system based on private property as opposed to Platonic "communism").

2. ALAN DAVIDSON, THE LAW OF ELECTRONIC COMMERCE 18 (2009) (citing the ancient Taoist thinker, Zhuangzi); *see also* ROTHBARD, *supra* note 1, at 417–18 (discussing the birth of the

ture their economic and social affairs with little or no help from a central authority (i.e., private ordering) has only accelerated. Among commentators on both the right and far left, there is a broad consensus that prosperity would spread if communities simply shifted power away from government bureaucrats and toward the people.[3] And nowhere has the commitment to private ordering become more entrenched than in property law.

In a series of studies conducted over the last thirty years, a group of scholars often identified as the New Chicago School, and sometimes referred to as the Law and Social Norms Movement, have argued that ordinary people can effectively distribute property entitlements and then regulate their enforcement.[4] For instance, academics have detailed how communities of street vendors, armed with nothing more than social sanctions like gossip and shame, allocate access to choice parking spaces along congested sidewalks.[5] Other examples abound: roller derby girls police the use of their pseudonyms,[6] comedians claim property in jokes,[7] and whalers establish rights over their prey—all without the assistance of the state.[8] Legal scholars have insisted that the use of private control

Scottish Enlightenment and the movement's belief in "the harmony of human interaction based on free action and property rights").

3. The push for a smaller government has a conservative valence. Conservatism, after all, is largely defined by its skepticism of government power. *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1142, 1181–1202 (2002) (defining, in self-admittedly cursory sketches, the broad themes of American conservatism). The 2012 Republican Platform stated that one of the party's primary goals was to turn more authority over to the private sector. *See* WE BELIEVE IN AMERICA: 2012 REPUBLICAN PLATFORM 21 (2012), *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf ("We look to government . . . for the things government must do, but we believe those duties can be carried out more efficiently and at less cost. For all other activities, we look to the private sector . . . ."). Thinkers on the far-left have also pushed for less government involvement in social and economic activities. *See* Barbara H. Fried, *Left-Libertarianism: A Review Essay*, 32 PHIL. & PUB. AFF. 66, 67 (2004).

4. For background on the New Chicago School, see Douglas Litowitz, *A Critical Take on Shasta County and the "New Chicago School,"* 15 YALE J.L. & HUMAN. 295, 296 (2003); Mark Tushnet, *"Everything Old Is New Again": Early Reflections on the "New Chicago School,"* 1998 WIS. L. REV. 579, 579; Colloquium, *The New Chicago School: Myth or Reality*, 5 U. CHI. L. SCH. ROUNDTABLE 1, 1 (1998). There is also an extensive literature on the ability of closely-knit groups to manage common pool resources. *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 58–101 (James E. Alt & Douglass C. North eds., 1990).

5. *See* Ryan Thomas Devlin, *'An Area That Governs Itself ': Informality, Uncertainty and the Management of Street Vending in New York City*, 12 PLANNING THEORY 53, 57 (2011); Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 199–200 (2006); Gregg W. Kettles, *Formal Versus Informal Allocation of Land in a Commons: The Case of the MacArthur Park Sidewalk Vendors*, 16 S. CAL. INTERDISC. L.J. 49, 78–85 (2006).

6. *See* David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1121 (2012) ("If a proposed name is identical to an existing registered one, another skater cannot use that proposed name.").

7. *See* Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1814 (2008) ("When a comedian believes that another has taken his bit, often he will confront the alleged appropriator directly, face to face.").

8. *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 89–90 (1989) (describing the informal rules that are used to resolve disputes over ownership of whales).

mechanisms not only produces secure tenure; it also generates rules that are cheaper to administer,[9] more efficient,[10] more predictable,[11] more just,[12] and more welfare-maximizing for group members.[13] This view of property—that neighbors acting independently of the formal law can successfully cooperate to mutual advantage—is optimistic, appealing, and now widely accepted by the legal academy.[14] It is also incomplete.

In this Article, I contend that the rosy view of private ordering needs qualification. Specifically, proponents have largely ignored the amount of violence that occurs in the absence of a centralized enforcement mechanism. Evidence from history, sociology, and anthropology demonstrates that property systems governed by informal social controls inevitably rely on force—often ferocious displays of force—to safeguard the right to exclude. Across cultures and in different eras, individuals outside the reach of the state have fought with fists, blades, and guns in defense of their property entitlements. They routinely break bones and stab deviants, and occasionally fight to the death against committed rule breakers. Despite the bloodshed in regimes controlled by social norms, accounts of mayhem rarely appear in the legal literature. As a result, commentators have dramatically overstated the appeal of informal property systems and the virtue of private ordering.

The discussion of surfing communities among property theorists encapsulates the fundamental weakness of the current paradigm. No formal

9. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 888 ("Norms may be cheaper in the long run than constant litigation, even if people have to incur some initial costs to get them going."); *see also* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 67–88 (2008).

10. Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2097–98 (2001) ("One of norm scholarship's principal contributions to date lies in showing that over a wide range of human activity, informal norms provide more efficient mechanisms to govern conduct than legal rules."); Joseph Blocher, Note, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L.J. 166, 173 (2006) ("Indeed, property theorists have come to accept that community norms, operating independently of formal law, can lead to efficient resource allocation.").

11. Georgios I. Zekos, *Maritime Arbitration and the Rule of Law*, 39 J. MAR. L. & COM. 523, 528 (2008) ("Norms are more predictable than law."); *see also* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2283–89 (2003) (arguing that norms often obstruct rule of law efforts); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719, 719 (1973) (arguing that social norms diminish the impact of legal reform on social change).

12. Paul R. Tremblay & Judith A. McMorrow, *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS L.J. 568, 586 (2011) (stating that norms have the potential to be "more just" than formal legal rules).

13. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167–83 (1991) (arguing that the workaday norms of individuals in close-knit communities are welfare-maximizing).

14. Pammela Quinn Saunders, *A Sea Change Off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323, 1352 (2011) (arguing that it is "well accepted" that groups can use social norms to privately resolve disputes); *see also* Blocher, *supra* note 10, at 173 ("Indeed, property theorists have come to accept that community norms, operating independently of formal law, can lead to efficient resource allocation.").

law regulates surfing.[15] Rather, surfers around the world have developed a set of informal guidelines that dictate how individuals claim "ownership" over specific waves at crowded surf breaks.[16] In place of state intervention, surfers collectively respect the rights of the first person up on a wave and, in case of a tie, the rider closest to the break has the right of way.[17] Legal scholars have declared these norms "a massive success story," and repeatedly cite surfers as an example of a community that has efficiently allocated property rights outside the grip of a coercive state actor.[18] As Professor Ellickson notes, the informal rules "prevent squabbles, reward skillful preliminary maneuvering, and allocate waves to those in the best position to enjoy a ride."[19]

The trouble with these upbeat assessments is that commentators generally fail to consider the presence and subsequent cost of the violence needed to regulate the surfing commons. Surfers around the globe quickly deploy physical force against outsiders and novice riders who fail to understand community customs.[20] Violent acts have become common-

15. *See* Daniel Nazer, *The Tragicomedy of the Surfers' Commons*, 9 DEAKIN L. REV. 655, 656 (2004) ("Despite the popularity of surfing and the high value that surfers place on waves, there is almost no state intervention in how waves are distributed among surfers."); *see also* Paul Caprara, Comment, *Surf's Up: The Implications of Tort Liability in the Unregulated Sport of Surfing*, 44 CAL. W. L. REV. 557, 557 (2008) ("Surfing has long been a sport free from legal consequences and legislative intervention.").

16. *See* LOUISE SOUTHERDEN, SURF'S UP: THE GIRL'S GUIDE TO SURFING 151–63 (2005) (discussing the norms that govern surfing); Brian Fitzgerald & Joanne Harrison, *Law of the Surf*, 77 AUSTL. L.J. 109, 114 (2003) (same); Nazer, *supra* note 15, at 665–73 (same).

17. *See, e.g.*, SOUTHERDEN, *supra* note 16, at 152 ("So surfing got its first and most important rule: The surfer closest to the breaking part of the wave has the right-of-way.").

18. *See, e.g.*, Sarah E. Hamill, *Private Property Rights and Public Responsibility: Leaving Room for the Homeless*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 91, 95 n.23 (2011); *see also* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1386–87 (1993); Byron Kahr, *The Right to Exclude Meets the Right to Ride: Private Property, Public Recreation, and the Rise of Off-Road Vehicles*, 28 STAN. ENVTL. L.J. 51, 101 n.151 (2009).

19. Ellickson, *supra* note 18, at 1386–87.

20. *See, e.g.*, DOUGLAS BOOTH, SURFING: THE ULTIMATE GUIDE 7 (2011) (reporting that "[n]ot infrequently, disagreements" on the water "erupt in violence"); BENJAMIN MARCUS, EXTREME SURF 82 (2009) (stating that violence at crowded surf breaks has become "predictable"); MATT WARSAW, THE HISTORY OF SURFING 263–64 (2010) (discussing how locals use violence and the fear of violence to police surf breaks around the world); Emily Friedman, *Wave Wars: Surfing's Violent Subculture*, ABC NEWS (June 26, 2008), http://abcnews.go.com/Sports/story?id=5246486 (noting that surfing violence is "not altogether uncommon"); Brian W. Ludeke, *Malibu Locals Only: "Boys Will Be Boys," or Dangerous Street Gang? Why the Criminal Justice System's Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 315 n.22 (2007) ("Violence at breaks deemed by local surfers as 'locals only' breaks is not at all uncommon."); Matt Higgins, *Rough Waves, Tougher Beaches*, N.Y. TIMES, Jan. 22, 2009, http://www.nytimes.com/2009/01/23/sports/othersports/23surfing.html (discussing violence on Hawaii's North Shore); Paul McHugh, *Surfing's Scary Wave: 'Localism' Intensifying at Ocean Breaks*, S.F. CHRON., May 15, 2003, http://www.sfgate.com/sports/article/Surfing-s-scary-wave-Localism-intensifying-at-2616870.php (explaining that violence has been used to enforce surfing norms for decades); Adam Wright, *Region Loses Surfing Event After Threats of Violence*, S. COAST REG., Apr. 17, 2011, http://www.southcoastregister.com.au/story/1013254/region-loses-surfing-event-after-threats-of-violence/# (detailing how surfing competition canceled after local surfers threatened violence against organizers who threatened to reveal their hidden surf breaks); THE SWELL LIFE (Shorts International 2003) (discussing recurring violence at prominent California surf breaks).

place,[21] and the cruelty takes many forms. At crowded breaks, surfers throw punches, torch cars, steal, and make terroristic threats.[22] As one expert noted, "[e]verything from graffiti to murder . . . has spread across the surfing world from Angourie to Zihuatenejo."[23] Stated most rashly, the purpose of this Article is to bring the costs of physical aggression firmly back on-screen and recalibrate how commentators evaluate property systems that depend on nonstate actors to enforce entitlements.

This Article proceeds in three parts. Part II briefly considers what, exactly, constitutes violence. Part III demonstrates that the private ordering scholarship has either overlooked or markedly whitewashed the presence of violence in property systems enforced by nonstate actors. As evidence, I reexamine three canonical examples of "successful" private ordering arrangements presented in the property scholarship—the societies established by gold rush miners, lobster fishermen, and cattle ranchers.[24] In each case, private individuals—and not a central government authority—assigned and regulated property entitlements. And, in each instance, communities needed more physical force and aggression to regulate the behavior of deviants than scholars have previously reported. Group members in all three case studies routinely engaged in savage acts of violence to control opportunists and rule breakers.

Finally, in Part IV, I survey the costs of this violence. There is little doubt that the bloodshed entrenched in private ordering systems results in some quantum of human suffering and material destruction. However, this fact—standing alone—does not undermine the case for property systems enforced by social norms. Formal law, too, has a violent base.[25] The use of billy clubs by riot police, the execution of convicted felons, and the deployment of lethal weapons during wartime are all vivid examples of the state's power to create "a field of pain and death."[26] In assessing the merits of informal property rules, the relevant inquiry is whether the sum of the violence in a community governed by social norms outweighs the force that would be imposed on the same polity if it organized itself into

21. *See supra* note 20.

22. MARCUS, *supra* note 20, at 82.

23. *Id.*

24. I consider these the canonical examples because they are repeatedly discussed and cited in the legal literature. *See infra* notes 49–51, 148–57, 216–17 and accompanying text.

25. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 302 (Alan Sheridan trans., Vintage Books ed. 1979) (1975) (noting that imprisonment is a form of nearly invisible state violence); Austin Sarat, *Introduction: On Pain and Death as Facts of Legal Life*, *in* PAIN, DEATH, AND THE LAW 1, 5 (Austin Sarat ed., 2001) (noting the central role of violence in the law's discourse); Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

26. Cover, *supra* note 25, at 1601; *see also* WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 232 (1990) [hereinafter MILLER, BLOODTAKING] ("Only the most complacent assume that rule application is not violent. Law never eschews violence . . . ."); Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS ASS'N AM. GEOGRAPHERS 121, 130 (2003) (discussing the relationship of law to violence).

a hierarchical state.[27] Although comparisons across time and between places are fraught with methodological difficulties, the available evidence suggests the violence in private ordering systems is quantitatively and qualitatively worse. The use of force not only imposes significant direct costs on victims, but also inflicts harms across multiple layers of the social order. More precisely, the violence in informal property schemes generates widespread human rights abuses, imposes psychic costs on innocents, disrupts the efficiency of labor markets, and impedes technological innovation.

II. WHAT IS VIOLENCE?

Before wading into the historical sources, it is useful to pause and briefly explore what actions constitute "violence." What does it mean to claim that violent behavior stalks informal property systems? Certainly, the presence or absence of violence is often easily discernible—mashed bodies and broken noses confirm our strongly visceral notions about what violence looks like. At the margins, however, pinning down a precise definition has become a knotty problem for scholars.[28]

In the literature, two conceptual problems have made violence a hotly disputed category.[29] First, commentators cannot agree what brand of harms amounts to violence. Most recognize that the core of violence is the intentional infliction of physical injury on the body—the prototypical meeting of fist and face.[30] But, outside of the intuitively familiar category of direct force, claims about violence become enormously contestable. On the far end of the spectrum, academics saturated in critical theory see violence in any act that denies the "uniqueness or even existence of the 'other.'"[31]

Such broad definitions have some theoretical support. Measures that inflict pain through psychological distress or economic threat—so the argument goes—are no less coercive, chastening, or destructive than

27. WILLIAM IAN MILLER, HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 79 (1993) [hereinafter MILLER, HUMILIATION].

28. *See, e.g.*, ALEX ALVAREZ & RONET BACHMAN, VIOLENCE: THE ENDURING PROBLEM 6–13 (2008) (discussing some of the problems with defining violence accurately).

29. *See, e.g.*, Vittorio Bufacchi, *Why is Violence Bad?*, 41 AM. PHIL. Q. 169, 169–70 (2004) (examining some of the varied definitions of violence).

30. HUGH WATERS ET AL., WORLD HEALTH ORG., THE ECONOMIC DIMENSIONS OF INTERPERSONAL VIOLENCE 2 (2004) (discussing the definition of violence); Austin Sarat & Thomas R. Kearns, *Introduction*, *in* LAW'S VIOLENCE 1, 9 (Austin Sarat & Thomas R. Kearns eds., 1992) (same); Lynne M. Andersson & Christine M. Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, 24 ACAD. MGMT. REV. 452, 455–57 (1999) (same); Bufacchi, *supra* note 29, at 169–170 (same).

31. Sarat & Kearns, *supra* note 30, at 9 (quoting Peter Fitzpatrick, Violence and Legal Subjection 1 (1991) (unpublished manuscript)); *see also* MILLER, HUMILIATION, *supra* note 27, at 77 (noting that violence may be "little more than a rhetorical play in the game of self-legitimation or the delegitimation of the Other").

sanctions that act on the body.[32] In this vein, some scholars claim that taunts, emotional indifference, pornography, and racial slurs all amount to a form of violence akin to a slap in the face.[33] On the other side of the debate, however, the majority of commentators strenuously resist the amoeba-like creep of the definition of violence. At base, this expansive interpretation threatens to overwhelm and consume any scholarly study of the topic. That is, if every act of cruelty or coercion is considered violent, the word loses its meaning and normative kick.[34]

Even if we confine the study of violence to purely physical harms, a second problem arises; the concept of violence is inherently perspectival.[35] Scholars have demonstrated that an individual's cultural background and position in the social structure affect what physical acts they recognize as violent.[36] In certain communities, for example, a father striking his unruly son would not be viewed as violent, but as imparting good discipline. In other neighborhoods, the same parent may face social opprobrium or criminal penalties. Academics have also shown that the identity of the antagonists, the amount of blood spilled, the cause underlying the physical aggression, and the suddenness or regularity of the deed all affect one's perceptions of whether an act amounts to violence.[37]

Given these subjectivities, is it possible to fashion a definition of violence that still retains any scholarly rigor?[38] In this Article, I define violence as the vigorous physical abuse of a person (either actual or attempted) or the highly incendiary destruction of property. This approach has several advantages, and should leave us with enough basis to draw broad conclusions about the level of violence in different jurisdictions. First, it hews closely to the definitions articulated by the World Health

32. Some, like Foucault, think that the move from violence on the body to indirect forms of control has increased human misery. *See generally* FOUCAULT, *supra* note 25.

33. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 43 (1982) (advancing an extremely broad conception of violence as any act that creates a fracture of connectivity of failure of relationships); RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 79 (2003) (citing Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 65 (1985) (arguing that pornography is an act that causes physical harm to women); Alastair Nicholson, *Choose to Hug, Not Hit*, 46 FAM. CT. REV. 11, 34–35 (2008) (discussing broad definition of violence that includes insults).

34. *See* Sarat & Kearns, *supra* note 30, at 8–10 (discussing the expanding definition of violence).

35. *See, e.g.*, Israel Nachshon & Mordechai Rotenberg, *Perception of Violence by Institutionalized Offenders*, 68 J. CRIM. L. & CRIMINOLOGY 454, 457 (1977); Renée L. Jarusinsky, Note, *Gender Difference in Perceiving Violence and its Implication for the VAWA's Civil Rights Remedy*, 27 FORDHAM URB. L.J. 965, 965 (2000) (explaining that women generally perceive more acts as violent than men).

36. Miller's extended discussion is excellent. *See* MILLER, HUMILIATION, *supra* note 27, at 55–80.

37. *Id.*

38. Criminologists who engage in cross-cultural studies have resigned themselves to using homicide rates to gauge the relative levels of violence. *See infra* notes 90–95. The appeal is obvious. Homicide is almost uniformly condemned across cultures and defined consistently across time. However, the measurement of killings is an extremely crude measure of violence, as it fails to account for individuals' differential access to deadly weapons and does not capture people's lived experience with pain, assaults, and threats. I argue that something less mechanical is needed.

Organization,[39] U.S. federal law,[40] and some prominent scholars of violence.[41] Second, it narrows the scope of study to physical acts, while acknowledging that not all corporeal abuses amount to violence. The act of jostling in line at an amusement park should be distinguished from the act of breaking an arm in a bar fight. Similarly, humiliating or shaming a person—while potentially callous and cruel—ought not to be considered an act of violence for all the reasons canvassed above. Finally, it recognizes that some acts of property destruction contain inherent potential for physical harm to others. The torching of an occupied home, for example, threatens the body in the same manner as a gunman who shoots at a victim. Both actions are violent, and both will be considered as this Article turns toward the historical and anthropological materials.

III. UNMISTAKABLY VIOLENT: THE USE OF FORCE IN INFORMAL PROPERTY REGIMES

With definitional problems set to one side, this Article now turns and begins to confront the supporters of private ordering. The theory that informal norms produce a satisfactory quantum of order—rooted in Hayek's work on self-organization,[42] built upon by game theorists,[43] and canonized in a seminal 1991 book by Professor Robert Ellickson[44]—remains a pillar of modern legal thought. Some of the most compelling recent works of property scholarship have explored how private communities dole out entitlements, adjudicate disputes, and enforce claims without the aid of governmental law.[45] This Article suggests that scholars have overlooked the violence in informal property regimes and argues that the regular appearance of force undermines some of the broader claims made by proponents of private ordering.

Methodologically, the most rigorous test of any claim about human behavior in the "state of nature" would permanently maroon individuals on a far-flung island and then observe their appetites for violence and cooperation.[46] It takes little imagination to realize that establishing such a

39. *See* WATERS ET AL., *supra* note 30, at 2.

40. *See* Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (2012).

41. *See, e.g.*, JOHN HARRIS, VIOLENCE AND RESPONSIBILITY 19 (1980); Robert Audi, *On the Meaning and Justification of Violence*, *in* VIOLENCE: AWARD-WINNING ESSAYS IN THE COUNCIL FOR PHILOSOPHICAL STUDIES COMPETITION 45, 50 (Jerome A. Shaffer ed., 1971); Sarat & Kearns, *supra* note 30, at 8–10.

42. *See, e.g.*, 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 107–32 (1976) (discussing how markets generate spontaneous order).

43. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 182–91 (1990) (summarizing empirical studies and game-theoretic models concerning open access commons and establishing that, under many conditions, private ordering will avert the misuse of resources).

44. ELLICKSON, *supra* note 13.

45. *See, e.g.*, articles cited *supra* notes 5–13 and accompanying text.

46. *See* Paul H. Robinson, *Natural Law & Lawlessness: Modern Lessons From Pirates, Lepers, Eskimos, and Survivors*, 2013 U. ILL. L. REV. 433, 435 (discussing how to test theories about the state of nature).

controlled experiment is both practically and ethically impossible. Instead, this Article takes as its central investigative tool a reexamination of three canonical examples of "successful" informal property systems: the experience by miners during the California Gold Rush, the scheme of fishing rights enforced by Maine lobstermen, and the dispute resolution mechanisms employed by ranchers in the American West.[47] In each of these three instances, individuals acting outside of the boundaries of formal law enforced property rules and successfully punished deviants. As a result, commentators have repeatedly cited these absent-law scenarios to demonstrate that informal property rights can serve as a solid foundation of social order.[48]

The following Sections complicate the prevailing view. The full weight of the historical and anthropological evidence reveals that the societies established by gold rush miners, lobster fishermen, and cattle ranchers churned with acts of violence and aggression that legal scholars have not fully recognized. Once all the bloodshed is accounted for, systems with no centralized enforcement mechanism do not produce stability and prosperity at an acceptable cost.

A. The Gold Rush

1. Background

For those who believe that private citizens can establish order without the help of government, there is no event that captures the imagination like the California Gold Rush. Over 150 years after the first discovery of gold in the Sierra Nevada Mountains, the mining camps endure as "canonical examples of the emergence of secure property rights" without the assistance of coercive state power.[49] Social norms scholars insist,

47. There exist a rich array of instances in which groups have found themselves without a sovereign to enforce rules and punish deviants. *Id.* at 436. These three examples, however, are routinely cited in the property scholarship and used to buttress arguments in favor of private ordering.

48. *See infra* notes 49–51, 144–53, 209–11 and accompanying text.

49. Karen Clay & Gavin Wright, *Order Without Law?: Property Rights During the California Gold Rush*, 42 EXPLORATIONS ECON. HIST. 155, 156 (2005). A growing body of literature addresses the informal rules that structured life in California gold mining camps. *See, e.g.*, Andrea G. McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*, 14 YALE J.L. & HUMAN. 1 (2002) [hereinafter McDowell, *Commons to Claims*] (arguing that miners established egalitarian rules based on their shared cultural understandings); Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771 (2004) [hereinafter McDowell, *Spontaneous Order*] (arguing that the informal system of California gold seekers was a success); Andrew P. Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998) [hereinafter Morriss, *Vigilantes*] (discussing how miners forged order without the presence of a formal legal authority); John Umbeck, *Might Makes Right: A Theory of the Formation and Initial Distribution of Property Rights*, 19 ECON. INQUIRY 38 (1981) (stating that actual violence in the Gold Rush was very rare); John Umbeck, *The California Gold Rush: A Study of Emerging Property Rights*, 14 EXPLORATIONS ECON. HIST. 197 (1977) (observing the limited amount of violence in the Gold Rush); Richard O. Zerbe Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114 (2001) (focusing on the role of norms in establishing order).

again and again, that the '49ers created a society that efficiently protected "miners' lives and valuable property, created property rights, and fostered cooperation."[50] The work of Professors Karen Clay and Gavin Wright is representative of the views expressed within the legal community. They write, "the mining districts of the California gold rush have long [been] celebrated as remarkable examples of orderly institution-formation in the absence of formal legal authority. This renown is fully deserved."[51] The purpose of this Article is to destabilize such sunny assessments of the Gold Rush. Specifically, the following Subsections make two points. First, the gold fields of California were astonishingly—terrifyingly—violent places. And, second, much of the mayhem stemmed directly from the informal property rules adopted by the miners.

Some perfunctory words about the Gold Rush and standard vision of the mining camps are necessary. In January of 1848, while building a sawmill along the banks of the American River, James Marshall discovered gold at Sutter's Mill.[52] Two weeks later, as news of the discovery began to spread, the United States and Mexico signed the treaty of Guadeloupe Hidalgo, ending the Mexican War and terminating Mexico's authority over the lands that now include California.[53] The treaty left the region in legal purgatory: no longer part of Mexico, but not yet a U.S. State or official territory.[54] As a result, in the spring of 1848, Californians

50. Morriss, *Vigilantes*, *supra* note 49, at 619; *see also* J. S. HOLLIDAY, THE WORLD RUSHED IN: THE CALIFORNIA GOLD RUSH EXPERIENCE 317 (1981) [hereinafter HOLLIDAY, CALIFORNIA GOLD RUSH] ("Miners' rights are well protected."); Terry L. Anderson & P. J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9, 10 (1979) ("Our research indicates that [in the West] . . . property rights were protected and civil order prevailed."); Clay & Wright, *supra* note 49, at 157 (arguing that the mining communities offered prospectors effective procedural alternatives to violence); McDowell, *Spontaneous Order*, *supra* note 49, at 772–79 (arguing that rules of the gold fields were stable and created order); Roger D. McGrath, *Violence and Lawlessness on the Western Frontier*, *in* 1 VIOLENCE IN AMERICA: THE HISTORY OF CRIME 122, 123 (Ted Robert Gurr ed., 1989) (arguing that the mining community of Bodie, California was not disorderly); Andrew P. Morriss, *Returning Justice to its Private Roots*, 68 U. CHI. L. REV. 551, 559 (2001) [hereinafter Morriss, *Returning Justice*] (stating "powerful evidence" exists "that the western frontier was not a violent, lawless place"); Lynn I. Perrigo, *Law and Order in Early Colorado Mining Camps*, 28 MISS. VALLEY HIST. REV. 41 (1941) (contesting view of Colorado mining camps as violent and disorderly places); Martin Ridge, *Disorder, Crime and Punishment in the California Gold Rush*, MONTANA, Autumn 1999, at 12, 24 ("[T]here is almost no evidence of an individual on his own using a gun to settle a civil or criminal grievance."); Zerbe & Anderson, *supra* note 49, at 131 (arguing that violence cannot explain the emergence of property rules in the mining camps).

51. Clay & Wright, *supra* note 49, at 177.

52. The story of Marshall's discovery is well told by H.W. Brands. *See* H.W. BRANDS, THE AGE OF GOLD: THE CALIFORNIA GOLD RUSH AND THE NEW AMERICAN DREAM 15–16 (2002).

53. The treaty was signed on February 2 but not ratified by Congress until March 10. *See* RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 43–46 (1990). On February 12, evidently without knowledge of the gold strike, the commander of the U.S. Military Forces, Colonel James Mason, declared, "[f]rom and after this date, the Mexican laws and customs now prevailing in California . . . are hereby abolished." JOHN R. UMBECK, A THEORY OF PROPERTY RIGHTS: WITH APPLICATION TO THE CALIFORNIA GOLD RUSH 69 (1981). Mason, however, did not replace the old laws with any new system. *Id.*

54. McDowell, *Spontaneous Order*, *supra* note 49, at 772 (explaining that the U.S. Congress failed to provide new rules and regulations for the region because of a dispute about the status of slavery in the newly acquired territory).

suddenly found themselves with no legislature, no bureaucracy, no police, and few secure jails.[55] Into this void poured an avalanche of gold seekers—nearly 300,000 young men from every corner of the world—lured by newspaper reports of fabulous wealth.[56]

This was as near to anarchy as Americans would ever tread—an almost perfect naturally occurring experiment to test the theories of private ordering scholars. As one scholar bluntly asserted, "[n]ot only were there no institutions to enforce the laws, there were no laws."[57] No government agency or official code regulated the acquisition of mineral rights, enforced private property rights, or removed squatters from public lands.[58] Additionally, most gold seekers had no experience with mining. They had little, if any, knowledge of the industry norms that structured prospectors' behavior in other parts of the globe.[59] Yet, instead of waiting for some central authority to establish a system of property rights, American miners built their own.[60]

The gold seekers devised schemes to allocate mining rights, enforce regulations about claim size and work requirements, and punish deviants—all without the help of government or law enforcement.[61] This occurred largely as proponents of social norms would have predicted. Although the minute details of the process varied from place to place,[62] as the population of the gold districts increased throughout 1849, local miners typically formed ad hoc associations and voluntarily hammered out basic sets of rules and regulations.[63] The agreements—normally memori-

55. The first state prison, a ship named the Waban, opened in 1851. Roger D. McGrath, *A Violent Birth: Disorder, Crime, and Law Enforcement, 1849-1890*, 81 CAL. HIST. 27, 27, 51 (2003). In 1850 there were "no county or state prisons." Donald J. Pisani, *Squatter Law in California, 1850-1858*, 25 W. HIST. Q. 277, 292 (1994).

56. *See* MALCOLM J. ROHRBOUGH, DAYS OF GOLD: THE CALIFORNIA GOLD RUSH AND THE AMERICAN NATION 1 (1997); *see also* WALTER NUGENT, INTO THE WEST: THE STORY OF ITS PEOPLE 55 (1999) ("From 1848 through 1852 about 200,000 migrated to northern California."); Zerbe & Anderson, *supra* note 49, at 119–20 (discussing nationalities of the miners).

57. McDowell, *Commons to Claims*, *supra* note 49, at 2.

58. Congress finally clarified the status of minerals on public lands in 1866. This law opened government land for private digging, declaring "the mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation." An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands, and For Other Purposes, ch. 262, § 1, 14 Stat. 251, 251 (1866) (current version at 30 U.S.C. § 22 (2012)).

59. *See* Sucheng Chan, *A People of Exceptional Character: Ethnic Diversity, Nativism, and Racism in the California Gold Rush*, *in* ROOTED IN BARBAROUS SOIL: PEOPLE, CULTURE, AND COMMUNITY IN GOLD RUSH CALIFORNIA 44, 59 (Kevin Starr & Richard J. Orsi eds., 2000) ("[M]ost of the Americans had no experience in gold mining . . . .").

60. Most of the gold seekers had little experience with mining and ultimately borrowed generously from Mexican mining law. Thus, the rules of the California gold fields were a synthesis of the American cultural values and "the Spanish-American system that had grown up under the ordinances of New Spain." Clay & Wright *supra* note 49, at 161; *see also* GREGORY YALE, LEGAL TITLES TO MINING CLAIMS AND WATER RIGHTS, IN CALIFORNIA, UNDER THE MINING LAW OF CONGRESS, OF JULY, 1866 66 (1867).

61. Clay & Wright, *supra* note 49, at 163–68 (summarizing the rules of 147 mining districts).

62. *Id.*

63. *See* Chan, *supra* note 59, at 59 (describing how miners formed mining associations); Clay & Wright *supra* note 49, at 160 ("Soon after the idea of a claim, we see miners meeting to set down rules for a geographic area, the mining district.").

alized in writing—provided that the group would allocate each individual a similarly-sized parcel of land.[64] So long as a miner worked his piece of ground (called a claim) he had absolute rights over the land and all the gold he uncovered.[65] It was also generally stipulated that the group would help enforce each other's claims,[66] that tools left in a hole indicated a claim had not been abandoned,[67] and that miners could not work more than one piece of ground.[68]

The informal rules and social norms that emerged in the mining camps generated some undeniable successes: they allowed prospectors to extract over twelve million ounces of gold between 1848 and 1853—a phenomenal amount of metal. Miners also produced a number of first-hand accounts—especially during the early years of the camps—indicating that California communities contained an acceptable amount of order during the Gold Rush.[69] One miner wrote home, "I think here is less of what is ordinarily called stealing here than any place I was ever in . . . ."[70] Armed with this evidence, legal scholars persistently cite the frontier mining camps as a powerful example that society does not descend into chaos in absence of state-backed rights. Effective property rules, they argue, will emerge to place "the strong and the weak upon a footing of equality."[71]

2. The Problem of Violence

The difficulty for scholars of social norms is that their analysis of the California mining districts does not fully consider the significant costs of the informal property system. Specifically, they disregard the central role of interpersonal violence in shaping the culture of the gold districts. Contrary to the conclusions of the legal literature, the primary sources from the era—the miners' personal letters and contemporary newspaper reports—demonstrate that danger saturated the everyday lives of Californians. Moreover, recently compiled statistical evidence confirms

64. "In the first years of the gold rush, 1849-50, claims were very small, generally no more than 20′ by 20′ and often as small as 10′ by 10′." McDowell, *Spontaneous Order*, *supra* note 49, at 778; *see also* Zerbe & Anderson, *supra* note 49, at 123–31 (discussing claim size).

65. Umbeck, *supra* note 49, at 50. If a miner did not meet the work requirements his claim was "jumpable" by other miners. *See* McDowell, *Spontaneous Order*, *supra* note 49, at 772 ("Claim jumping was not antisocial in itself and did not carry a stigma; it was the normal way to acquire a claim: One of the main purposes of the local mining codes was to specify when a claim became 'jumpable.'").

66. *See* HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 317; Zerbe & Anderson, *supra* note 49, at 123 ("There was, among miners, a willingness to participate in punishing defectors.").

67. Clay & Wright, *supra* note 49, at 160 (calling the tools-left-in-the-hole rule the "most fundamental" norm of the mines).

68. Zerbe & Anderson, *supra* note 49, at 132–33.

69. *See* JOHN BOESSENECKER, GOLD DUST AND GUNSMOKE: TALES OF GOLD RUSH OUTLAWS, GUNFIGHTERS, LAWMEN, AND VIGILANTES 8–9 (1999) (stating that crimes were rare in the early months of the Gold Rush); Umbeck, *supra* note 49, at 50 ("Most of the miners carried guns, yet the reports of violence during the early period are remarkably scarce.").

70. ISRAEL SHIPMAN PELTON LORD, A DOCTOR'S GOLD RUSH JOURNEY TO CALIFORNIA 198 (Necia Dixon Liles ed., 1995).

71. Zerbe & Anderson, *supra* note 49, at 115.

that the gold fields were never fonts of order and secure property rights. The failure to grapple with these sources has allowed legal scholars to misjudge the lessons of the Gold Rush and underestimate the hazards of frontier mining areas. Academic hunches about the virtue of private ordering have been pounded into dogma, while warnings about the dangers of privately enforced property systems remain ignored.

Perhaps no source better captures the mayhem of the mining camps than the letters and diaries penned by the miners, merchants, and travelers who visited California during the Gold Rush years. After bunking down in the gold camps during 1849, Hugo Reid summarized the dangers to life and property that awaited the miners. "Don't go the mines on any account," he wrote, "[t]he mines are, moreover, loaded to the muzzle with vagabonds from every quarter of the globe, scoundrels from nowhere, rascals from Oregon, pickpockets from New York, . . . interlopers from Lima and Chile, Mexican thieves, . . . and assassins manufactured in Hell . . . ."[72] Although Reid's observations may seem embellished, other miners confirm that bloodshed haunted Gold Rush communities—places with names like Hangtown, Garrote, Robbers Roost, Helltown, Dead Shot Flat, and Murders' Bar.[73] Jacob Engle, for example, explained that robbery and murder had become "quite common" in mines of northern California.[74] Frank Marryat, a popular British author, wrote that shootings were "very common, and dueling in particular became quite the rage."[75] Other first-hand accounts recorded incidents of armed robbery,[76] floggings,[77] hangings,[78] violent threats,[79] bodily mutilations,[80] and random

72. Letter from Hugo Reid to Abel Stearns (Apr. 22, 1849), *in* SUSANNA BRYANT DAKIN, A SCOTCH PAISANO IN OLD LOS ANGELES: HUGO REID'S LIFE IN CALIFORNIA, 1832-1852 DERIVED FROM HIS CORRESPONDENCE 164 (1939).

73. BOESSENECKER, *supra* note 69, at 10 (listing some of the more mimetic names of gold rush communities); DAVID T. COURTWRIGHT, VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM THE FRONTIER TO THE INNER CITY 74–75 (1996) (same).

74. ROHRBOUGH, *supra* note 56, at 218.

75. FRANK MARRYAT, MOUNTAINS AND MOLEHILLS OR RECOLLECTIONS OF A BURNT JOURNAL 354 (1855); *see also Affrays with Fire-Arms*, DAILY ALTA CAL., Nov. 26, 1851 (lamenting the popularity of dueling among miners).

76. *See, e.g.*, ROHRBOUGH, *supra* note 56, at 218; s*ee also* BOESSENECKER, *supra* note 69, at 24–25, 47 (discussing infamous robberies in the gold mining districts and then the unjust removal of miner from a claim at gunpoint); BRANDS, *supra* note 52, at 325 ("Robberies and other violent crimes were epidemic in the mining districts, where men carried fortunes . . . on their persons . . . ."); *More Highway Robbery*, DAILY ALTA CAL., July 29, 1851.

77. *See, e.g.*, LOUISE AMELIA KNAPP SMITH CLAPPE, THE SHIRLEY LETTERS FROM THE CALIFORNIA MINES, 1851-1852, at 137–38 (Marlene Smith-Baranzini ed., 2001) (describing in vivid terms the whipping of two miners); *see also* JAY MONAGHAN, AUSTRALIANS AND THE GOLD RUSH: CALIFORNIA AND DOWN UNDER, 1849-1854 81 (1966) (reporting incident of flogging and hanging of three miners).

78. WILLIAM DOWNIE, HUNTING FOR GOLD: REMINISCENCES OF PERSONAL EXPERIENCE AND RESEARCH IN THE EARLY DAYS OF THE PACIFIC COAST FROM ALASKA TO PANAMA 147–53 (1893) (detailing the notorious and seemingly unjust hanging of a Mexican woman in Downieville, California in the summer of 1851).

79. Threats against black and foreign miners were common. *See, e.g.*, Chan, *supra* note 59, at 68–79. Threats could popup anywhere, however. *See* HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 438 (explaining how boatmen monopolized trade routes along rivers of central California with fear and intimidation).

shootings in the streets.[81] Even San Francisco, the one city with a sustained police presence, hummed with danger. Writing in his diary, William Swain noted that "[r]ows, fights and robberies are the order of the day, and the night too," and that "sin and depravity" filled the streets.[82]

Newspaper stories verify that violence surged through the mining districts. The *Mountain-Democrat* reported that goldseekers—who had no state-backed enforcers to protect their rights—were being "robbed and murdered with impunity."[83] In Sacramento, vigilantes gunned down the mayor in the street.[84] Other newspapermen memorialized widespread slaughter,[85] daylight robberies,[86] and senseless brawling.[87] Death, even violent death, became so commonplace in the gold fields during the 1850s that it no longer merited front page coverage.[88] Put together, the firsthand accounts from the mining camps piece together a coherent mosaic; in absence of the state, prospectors in California readily and willingly imposed exceptional amounts of violence and cruelty upon one another.

Recent work by a group of quantitative historians further buttresses the miners' recollections about of the prominent role of physical aggression in the gold fields. Since the 1960s, a cadre of scholars—led by Clare McKanna, Roger McGrath, Eric Monkkonen, and John Boessenecker—has systematically attempted to reconstruct the amount of violence in the American West. As part of their larger project, these scholars of the West have tried to catalogue every murder that occurred in California during the Gold Rush by combing through court records, newspapers, coroner's inquests, diaries, and recorded oral histories.[89] The statistics they have gathered support, in full, the view that the informal systems of

80. *See* RAMÓN GIL NAVARRO, THE GOLD RUSH DIARY OF RAMÓN GIL NAVARRO 82 (María del Carmen Ferreyra & David S. Reher eds. & trans., 2000); *see also* MONAGHAN, *supra* note 77, at 82 (discussing punishments for thieves).

81. *See* BOESSENECKER, *supra* note 69, at 252–54.

82. HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 412.

83. *Chinaman Killed*, DAILY ALTA CAL., Mar. 23, 1857, at 2.

84. *See Tremendous Excitement!!*, SACRAMENTO TRANSCRIPT, Aug. 15, 1850, at 2.

85. *Terrible Retribution! One Hundred and Eighty Indians Slaughtered!!*, DAILY ALTA CAL., May 4, 1852, at 2; *see also* Kevin Starr, *Rooted in Barbarous Soil: An Introduction to Gold Rush Society and Culture*, *in* ROOTED IN BARBAROUS SOIL: PEOPLE, CULTURE, AND COMMUNITY IN GOLD RUSH CALIFORNIA, *supra* note 59, at 7 (describing "the horror of the genocide leveled against Native Americans in the gold-rush").

86. *See, e.g.*, *Daring Burglary*, DAILY ALTA CAL., Aug. 3, 1851, at 2 (discussing a robbery); *Daring Highway Robbery*, DAILY ALTA CAL., Feb. 15, 1851, at 2 (same); *Sacramento Intelligence*, DAILY ALTA CAL., July 22, 1851, at 2 (same); *see also* HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 401.

87. *See, e.g.*, *A Terrible Affair*, DAILY ALTA CAL., Jan. 31, 1852, at 2; *Chile vs. France*, DAILY ALTA CAL., Aug. 13, 1851, at 2; *Recorder's Court*, DAILY ALTA CAL., Nov. 4, 1851, at 2.

88. JOANN LEVY, THEY SAW THE ELEPHANT: WOMEN IN THE CALIFORNIA GOLD RUSH 72 (1992).

89. *See* Randolph Roth et al., *Homicide Rates in the Old West*, 42 W. HIST. Q. 173, 173 (2011). Scholars freely admit that they cannot unearth every killing that occurred in the mining districts. They can, however, "create useful minimum counts of the number of willful, non-negligent assaults that ended in death." *Id.*

Mother Lode country failed to establish order and protect the miners from harm.

Mining communities, for example, suffered from startlingly high rates of homicide.[90] The rate of killing simply dwarfs anything witnessed in contemporary America. To put the death toll in context, it may help to know that in 1985, at the height of the crack epidemic, Detroit suffered nearly fifty-eight murders per 100,000 residents[91]—this is the standard measurement of intentional deaths employed by criminologists and epidemiologists.[92] In comparison, in the period between July 1850 and October 1851, Los Angeles County, California, experienced nearly 414 murders per 100,000 persons.[93] The urban core of Los Angeles was even more violent. Between September 1850 and September 1851 the city and its suburbs produced a titanic death rate of 1240 killings per 100,000.[94] As John Boessenecker notes, "[t]his is by far the highest known homicide rate ever reported in the United States."[95] Around the state, many other places contained similar levels of deadly fighting. During the gold rush years, the murder rate per 100,000 hit 81 in Nevada County,[96] 117 in San Diego County,[97] 333 in Monterey County,[98] and 216 in Tuolumne Coun-

90. COURTWRIGHT, *supra* note 73, at 81.

91. This figure was nearly three times the rate of New York City, then considered an extremely dangerous place to live. *See* Isabel Wilkerson, *Urban Homicide Rates in U.S. Up Sharply in 1986*, N.Y. TIMES, Jan. 15, 1987, at A14. In 2011, New Orleans was the "murder capitol" of the United States. It had a murder rate of 57.6 per 100,000 people. Allen Powell II, *Homicides Down Nationally, But Not in N.O.*, NEW ORLEANS ADVOC., Oct. 30, 2012, at A1. Baltimore, Newark, St. Louis, Oakland, and Detroit also recorded over twenty-five murders per 100,000 in 2009. U.S. CENSUS BUREAU, *Table 309—Crime Rates by Type—Selected Large Cities: 2009*, *in* STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 198, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0309.pdf. On the other end of the spectrum a place like Des Moines, Iowa has roughly three murders occur for every 100,000 people living the city. *Crime in the United States by Metropolitan Statistical Area, 2010*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/
tables/table-6. The large urban centers of the industrial Midwest generally record around fifteen murders per 100,000 residents. U.S. Census Bureau, *supra*, at 198.

92. At base, the rate is simply the proportion of a locality's population murdered in a given year. However, since the proportions are typically very small, researchers multiply the number by 100,000 to make it easier to comprehend. The example of Des Moines, Iowa illuminates the issue. Scholars obtain the murder rate in Des Moines by dividing the number of homicides in the municipality (6 in 2010), by the city's population (202,564 in 2010). *See Crime in the United States By Metropolitan Statistical Area, 2010*, supra note 91. This calculation shows that .00002962 percent (6/202,564) of the population was murdered. Multiplying this number by 100,000 generates the standard measurement used in the literature. *See, e.g.*, *Computational Formulas*, CRIMINAL JUSTICE PROFILES – 2012, OFFICE OF THE ATT'Y GEN., STATE OF CAL. DEP'T OF JUSTICE, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/prof10/formulas.pdf?.

93. BOESSENECKER, *supra* note 69, at 323.

94. *Id.* The city and the suburbs had a population of nearly 2500 and witnessed 31 homicides. *Id.*

95. *Id.*

96. Between 1851 and 1856 there were ninety-eight killings—sixteen per year out of a population of around 20,000. *Id.* at 323–24.

97. McGrath, *supra* note 50, at 135 (citing unpublished work of Clare McKanna on San Diego county from 1871 to 1875).; *see also* Clare V. McKanna, Jr., *Enclaves of Violence in Nineteenth-Century California*, 73 PAC. HIST. REV. 391, 400 (2004).

98. From February 1855 to February 1858 there were 40 homicides. The county had a population of roughly 4000. BOESSENECKER, *supra* note 69, at 324.

ty.[99] The message carved into the data is clear: modern residents of even the most bloodsoaked inner-city neighborhood are far less likely to die of violence than the young fortune hunters who settled the gold fields of California.[100] Of course, violent men did not haunt every small settlement within the state. Blood did not spill everywhere.[101] Many gold camps surely experienced little violence and fewer intentional deaths.[102] But the central, undeniable conclusion is that the western mining frontier was an exceptionally vicious and volatile place. The gold fields, contrary to the claims of legal scholars, do not represent the unvarnished triumph of property schemes based on private ordering. Scholars who champion self-organization over governmental regulation must take into account the severe costs of interpersonal violence when evaluating systems that lack central government enforcers. The alarming number of murders, assaults, and other violent crimes must be weighed.

3. Fighting Over Property Rights

Those who support private ordering may have one last garrison to defend the Gold Rush. Conceivably, the crime statistics capture not a generalized failure of informal property regimes, but rather the propensity of miners to engage in drunken barroom brawls.[103] Indeed, some observers insist that, outside of the taprooms and gambling houses, order largely prevailed and property rights remained secure.[104] Although this view of the mining camps may accord with the standard Hollywood por-

99. *Id.* ("[A]t least 28 homicides took place in Toulume County in the fifteen-month period between May 1850 through July 1851. This is an annual rate of 21.6 murders; the county's population was about 10,000, resulting in an annual rate of 216."). Clare McKanna found a lower, but still alarming rate of 129 for the entire decade of the 1850s. McKanna, *supra* note 97, at 400.

100. Skeptics may protest that qualitative historians have generated their findings by cherry-picking data from only the most violent enclaves within California. But this argument falters under the weight of evidence. Professors McKanna, Monkkonen, and Mullen compiled data from nine populous counties over a fifteen-year period (1850-1865), revealing a combined adult homicide rate of 65.45 per 100,000 people. *See* Roth et al., *supra* note 89, at 183. This number is over ten times greater than San Francisco's homicide rate in 2011. *See* Demian Bulwa, *Through Hard Times, S.F. Killings at Historic Lows*, S.F. GATE, Jan. 5, 2012, http://www.sfgate.com/crime/article/Through-hard-times-S-F-killings-at-historic-lows-2441692.php. The murder rate in 2011 was approximately 6.2. In the last ten years, the murder rate in San Francisco has never topped thirteen per 100,000. *Id.* Moreover, critics cannot argue that the mid-nineteenth century was simply a more muscular and violent age. Vermont, which had a population of 330,000 reported only two murders between 1865 and 1869. McKanna, *supra* note 97, at 418. Similarly, Boston and Philadelphia had homicide rates of 5.8 and 3.2 per 100,000 in the two decades after 1860. David T. Courtwright, *Violence in America*, AM. HERITAGE, Sept. 1996, http://www.americanheritage.com/content/violence-America.

101. *See* BOESSENECKER, *supra* note 69, at 326; McKanna, *supra* note 96, at 393 (noting the diversity of experience in the towns of the American West).

102. *See generally* McKanna, *supra* note 97.

103.

> [E]ven if crime rates were high, it should be remembered that the preference for order can differ across time and people. To show that the West was more "lawless" than our present day society tells one very little unless some measure of the "demand for law and order" is available.

Anderson & Hill, *supra* note 50, at 14.

104. Ridge, *supra* note 50, at 14 (arguing that miners disregarded all social conventions except those governing personal or private property).

trayal of a whiskey-soaked West, it begins to collapse upon careful scrutiny. The evidence demonstrates that while heavy drinking and gunplay certainly contributed to the savagery of the gold fields,[105] it was the lack of state-enforced entitlements that truly propelled the turmoil along the frontier. Much of the violence in the mines sprung directly from struggles over property rights.

Across California and throughout the Gold Rush era, violent disputes between men over property were a bleakly predictable attribute of the diggings. Most commonly, miners fought over money. Examples are legion. In Sacramento, a man shot David Taylor in the face over a $10 debt.[106] A group of three men in Napa County knocked a prospector senseless over $1600.[107] In Sacramento, after David Gregory tried to enforce the payment of a loan, the debtor proclaimed to his friends, "now boys, we shall see some fun" and promptly fired a pistol into Gregory's neck.[108] These stories all illustrate that without the coercive power of the state to secure their rights, individual gold seekers assumed the task of safeguarding their own valuables and avenging their own wrongs. Peacemaking and vengeance-taking, however, were no easy tasks. Faced with such grave responsibilities, many miners failed, while other took advantage of the power vacuum and employed ferocious physical sanctions to enforce their claims.[109]

Another flashpoint of bloodshed was the continued uncertainty of land titles throughout California.[110] The U.S. Congress did not begin to recognize deeds conferred by the Mexican government until late 1850—almost five years after the U.S. military first captured the state.[111] Additionally, in the absence of state regulation, newly issued deeds to land, if not completely fabricated,[112] were often shoddily drafted and contained

105. BOESSENECKER, *supra* note 69, at 313 ("A significant amount of violence arose over women . . . ."); COURTWRIGHT, *supra* note 73, at 74 (the "combination of young men, liquor, and deadly weapons produced a steady stream of unpremeditated homicides . . . ."); McGrath, *supra* note 50, at 123; McKanna, *supra* note 97, at 403 (citing statistics that reveal the important role of alcohol in many homicides).

106. *See Sacramento Intelligence*, DAILY ALTA CAL., Feb. 16, 1851, at 2.

107. *See From Salt Lake*, DAILY ALTA CAL., July 17, 1852, at 2 (reporting on robbery near Spanish Flat, California).

108. *See Great Excitement in Sacramento*, DAILY ALTA CAL., Apr. 20 1851, at 2.

109. *See* MILLER, BLOODTAKING, *supra* note 26, at 299 (explaining that "the main theme" of many traditional sagas from Iceland and England is the difficulty of taking proper vengeance). *See generally* William Ian Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England*, 1 L. & HIST. REV. 159 (1983) [hereinafter Miller, *Avenger*].

110. *See, e.g.*, *Land Titles and Squatterism*, DAILY ALTA CAL., Feb. 11, 1851 at 2 (discussing the plague of squatters across the state).

111. "Before 1846, Spanish and Mexican authorities made over eight hundred grants covering between thirteen and fourteen million acres of the state's best arable land. . . . The claims averaged between 17,000 and 19,000 acres, but several Mexican families held estates in excess of 300,000 acres." Pisani, *supra* note 55, at 287.

112. MARK A. EIFLER, GOLD RUSH CAPITALISTS: GREED AND GROWTH IN SACRAMENTO 120 (2002) ("[A] number of Mexican grants were fraudulent, filed in the closing days of the Mexican War or immediately after its conclusion."); Paul Gates, *The California Land Act of 1851*, 50 CAL. HIST. Q. 395, 396 (1971) (discussing fabrication of titles in California).

serious inconsistencies and discrepancies.[113] It will surprise no one that the lack of settled boundaries, coupled with the inrush of newcomers, generated struggles between established California land barons and pioneers in need of space to build homes, raise businesses, and search for gold. These conflicts collapsed into violence with regularity.

One of the earliest clashes, and certainly the most notorious, occurred in Sacramento. As land became scarce during the peak of the Gold Rush, a band of miners contested the ownership of a 49,000-acre parcel of land given to John Sutter by the Mexican government.[114] The newcomers argued that because the title failed to accurately describe the property, much of the land remained in the public domain.[115] The prospectors hired their own surveyor, issued their own certificates of ownership, and began to fashion small lodgings on the property.[116] Inevitably, violence erupted between the squatters and a group of owners who had purchased Sutter's land. Over a two-day period in August of 1850, the two groups battled each other across the streets of Sacramento.[117] The gunfire left at least eight dead, including some of the city's most prominent citizens, and numerous others seriously wounded.[118] Similar incidents occurred in Santa Clara, San Francisco, Sonoma County, Santa Barbara, San Mateo County, Napa County, and Alameda County.[119]

Smaller-scale disputes over individual mining claims also sparked a steady stream of violence across the state. As mentioned earlier, prospectors did not own the property they excavated in fee simple absolute. Instead, the regulations of the mining districts specified that a gold seeker

113. *See* Gates, *supra* note 112, at 396–97 (highlighting the lack of proper surveying). Another factor affecting many land claims was the "careless manner in which owners had handled their titles. Frequently the papers had been lost or destroyed . . . ." *Id.* at 398; *see also* EIFLER, *supra* note 112, at 120 (stating that "the boundaries of most grants proved difficult to define"); Pisani, *supra* note 55, at 286 (explaining the historical reasons for many of the ambiguities in the land titles of Mexican California).

114. *See* Pisani, *supra* note 55, at 278 (discussing Sutter's grants).

115. *See* BOESSENECKER, *supra* note 69, at 179–180 ("Those who claims that Sutter's land was public began to squat on lots and build houses on them."); Pisani, *supra* note 55, at 281 (discussing the uncertain boundaries of the Sutter grant).

116. Jason Robert Beck, California Gold Rush Violence, 1849-1854: A Psychological Interpretation 154 (June 1978) (unpublished Ph.D. dissertation, University of Southern California) (discussing the settlers' belief that the ground in Sacramento was generally public land). "The association had its own surveyor and empowered itself to issue certificates of land ownership." *Id.*; *see also* Pisani, *supra* note 55, at 281 (noting that an "extra-legal claims club" had been making private surveys).

117. EIFLER, *supra* note 112, at 156–60.

118. *See* Pisani, *supra* note 55, at 277 (noting eight dead). *But see* BOESSENECKER, *supra* note 69, at 181–82 (claiming a slightly higher death toll).

119. *See, e.g.*, BOESSENECKER, *supra* note 69, at 201 (examining a particular squatter dispute in Santa Clara); PAUL W. GATES, LAND AND LAW IN CALIFORNIA: ESSAYS ON LAND POLICIES 165 (1991) (summarizing the struggles between squatters and title holders); *A Young Squatter Row*, DAILY ALTA CAL., Sept. 18, 1851, at 2 (reporting a squatter riot in San Francisco); *Another Squatter Riot*, DAILY ALTA CAL., June 9, 1854, at 2 (same); *San Joaquin News*, DAILY ALTA CAL., June 25, 1853, at 2; *Squatter Disturbance in Suisun Valley*, DAILY ALTA CAL., June 10, 1854, at 2 (discussing squatter problem near San Francisco); *Squatter Riot*, DAILY ALTA CAL., May 22, 1853, at 2 (mentioning squatter violence near San Francisco); *Squatter Row*, DAILY ALTA CAL., May 23, 1851, at 2 (describing a fight between squatters); *The Squatter Excitement*, DAILY ALTA CAL., July 22, 1853, at 2 (discussing squatter violence in San Francisco).

could establish possessory entitlements over a claim so long as he or she continuously worked the land. Idle claims could be legally "jumped" by another miner. Diaries, newspapers, and court dockets all indicate that these rules became a central locus of disputes.[120] Miners did not always agree on what actions constituted "work." They also struggled to delineate the legitimate exceptions to the labor requirements—sickness, the need to acquire supplies, and lack of water were the most commonly accepted.[121] Despite the mining districts' best efforts to resolve disputes, the definition of work remained fuzzy[122] and the excuses for nonwork were notoriously difficult or time-consuming to verify.[123] In consequence, rival miners frequently claimed rights over the same area of mining terrain. Often gold seekers settled these contests with blustering, shoving, and swearing;[124] if both prospectors felt they had a strong claim of ownership, however, contests escalated—often to violence. As John Boessenecker has noted, "[c]laim jumping was one of the most common causes of violence in the diggings."[125]

A murder near Modesto during the early years of the Gold Rush illustrates just how quickly miners turned to physical force to settle questions about ownership. In the autumn of 1851, a prospector identified as Redman staked a promising claim in the Stanislaus Diggings. Immediately, another local miner disputed Redman's title, saying "if he went to work on it he should have to die."[126] As Redman began digging, his antagonist, James Johnson, did not hesitate to initiate a mortal struggle. Both men drew their pistols, exchanging shots until Johnson crumpled with a bullet through the head.[127] Such violent clashes were not uncommon.

Foreign miners, in particular, encountered severe difficulty enforcing their rights under the private ordering system.[128] As thousands of Americans from the East Coast stumbled into California during the early

120. *See* Clay & Wright, *supra* note 49, at 157.

121. *See id.* at 173.

122. *See id.* at 178 (arguing that the rules were intentionally slippery in order to institutionalize claim-jumping and prevent large-scale disputes between first-possessors and late-arrivers).

123. *Id.* ("[E]xcuses were difficult or costly to verify.").

124. *See, e.g.*, *Threats*, DAILY ALTA CAL., May 23, 1851, at 2 (describing two miners arguing over "a lot of land" they both claimed). These contests generally followed a discernable pattern. When a miner first discovered that a rival had jumped his claim, he rushed into the field and confronted the jumper. *See* McDowell, *Spontaneous Order*, *supra* note 49, at 781. The aggrieved miner would then "bluster[] & swear[] at a great rate" and declare that "he will not give up the hole[.]" *See* William F. Reed, Journal (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C-F 214) (entry for Feb., 22 1851). At this juncture, if the interloper had defied local rules, the stout show of intent by the true owner was usually enough to scare the violator away. *See* McDowell, *Spontaneous Order*, *supra* note 49, at 781.

125. BOESSENECKER, *supra* note 69, at 262.

126. *Fatal Affray at the Stanislaus Diggings*, DAILY ALTA CAL., Sept. 19, 1851, at 2.

127. *Id.*

128. It is vital to note here that Anglo miners did not have a monopoly on violence. Using violence to solve problems was a tactic employed by all ethnic groups in California. See, for example, Professor McKanna's description of the violence deployed by Chinese gangs—called "tongs"—in San Francisco. McKanna, *supra* note 97, at 406–08.

years of the Gold Rush, they discovered that Latin Americans and Europeans already occupied much of the best land.[129] These newcomers did not believe that foreigners had any right to remove American gold from American soil, and thus began to abuse and dispossess the immigrants with enthusiasm.[130] Mexican miners were frequent targets. In the summer of 1852, for instance, armed Americans assaulted and then physically excluded Mexicans who had unearthed a rich vein of gold on the Mariposa River.[131] In the southern mines, Anglos made a "systematic" attempt to remove Mexicans from the diggings.[132] Chileans and Frenchmen also faced regular, sometimes murderous, attacks from nativists as part of the struggle to control California's mineral wealth.[133] But of all the miners, none suffered more than the Chinese.[134] "'They are not looked upon as human beings,' one [American] wrote, 'and have no rights that a white

129. BOESSENECKER, *supra* note 69, at 46 (discussing problems of foreign miners).

130. *See* Pisani, *supra* note 55, at 289 ("Many settlers assumed that the United States, having won California on the field of battle, should treat *all* land within the new state's borders as the spoils of war." (emphasis in original)); Ridge, *supra* note 50, at 22 ("Claim jumpers boasted that since California was part of the United States, they had a superior right to the mines.").

131. *See Expulsion of Foreign Miners—Excitement at Shaw's Flat*, DAILY ALTA CAL., July 16, 1852, at 1.

132. ROHRBOUGH, *supra* note 56, at 224 ("By 1850, Americans in the southern mines had begun systematic attempts to remove the Mexican miners.").

133. Scholars agree that the Chileans were a favorite target of American miners. *See, e.g.*, JAY MONAGHAN, CHILE, PERU, AND THE CALIFORNIA GOLD RUSH OF 1849 242 (1973) (detailing the flogging and ear-cropping of Chilean miners by Americans); WILLIAM PERKINS, THREE YEARS IN CALIFORNIA: WILLIAM PERKINS' JOURNAL OF LIFE AT SONORA, 1849-1852 226–27 (1964) (reporting that Americans attacked and severely injured multiple Chileans); ROHRBOUGH, *supra* note 56, at 225 (detailing another clash between American and Chilean miners); Richard Henry Morefield, *Mexicans in the California Mines, 1848-53*, 35 CAL. HIST. SOC'Y Q. 37, 38 (1956) (discussing flogging of Chilean miners); Abraham P. Nasatir, *Chileans in California During the Gold Rush Period and the Establishment of the Chilean Consulate*, 53 CAL. HIST. Q. 52, 62–63 (1974) (detailing some of the violence against Chileans); *Expulsion*, DAILY ALTA CAL., Sept. 20, 1852 (reporting expulsion of "every" Chilean miner from a community called Greasertown). The French, too, faced routine harassment. *See, e.g.*, ETIENNE DERBEC, A FRENCH JOURNALIST IN THE CALIFORNIA GOLD RUSH: THE LETTERS OF ETIENNE DERBEC 24, 80 (A. P. Nasatir ed., 1964); MONAGHAN, *supra* note 77, at 81–82 (discussing show trial and punishment of French miners); McDowell, *Spontaneous Order*, *supra* note 49, at 811 (discussing battle between American and French miners at Mokelumne Hill); Ridge, *supra* note 50, at 22–23 (providing examples of Frenchmen being driven off of claims); *Excitement Among the French*, DAILY ALTA CAL., April 29, 1851, at 2.

134. The indignities suffered by Chinese miners ranged from the schoolboy humiliations to murderous racial violence. *Compare Cutting of a Tail*, DAILY ALTA CAL., May 23, 1851, at 2 (relating story of miner who attempted to cut the hair off of a Chinese miner), *with Summary of the News for the Fortnight Ending August 1st*, DAILY ALTA CAL., Aug. 1, 1854, at 1 (reporting that a Mr. Powell decided to murder the "first Chinaman he should meet" after experiencing some trouble with other Chinese miners). The examples are numerous. *See Chinese Driven Off*, SACRAMENTO DAILY UNION, April 26, 1852, at 2 ("A miners' meeting was held on New York Bar last week, and all the Chinamen at work there were driven off."); *From the Interior*, SACRAMENTO DAILY UNION, May 17, 1852, at 3 ("A large number of Chinamen and Sonorians passed through Pacerville on Friday on their way South, having been driven from a bar on the South Fork of the American."); *Marysville*, SACRAMENTO DAILY UNION, May 23, 1853, at 2 (reporting the Americans dispossessed Chinese miners from their claim because the Chinese "had lately struck good diggings, and the Americans wished to deprive them of them").

man is bound to respect.'"[135] Men from the United States "attacked, extorted, robbed, kidnapped and killed Chinese miners without any pretext of law, committing violent crimes that drove the immigrants from rich mining areas."[136] A Mexican immigrant summarized the struggle over power and property in the gold fields: "[d]aily," he said, "some of the weak were despoiled of their claims by the stronger."[137]

This quote, in large measure, explains not only the aggression directed at foreigners but also the general mayhem in the gold fields. The available evidence demonstrates that in absence of formal legal authority, miners with a natural bent for violence bullied, harassed, and attacked politically unpopular groups and vulnerable individuals. Immigrants, who were generally outnumbered by Anglo miners, were only the most obvious targets. Many others suffered, as well.[138] After 1850, the spilling of blood was a persistent feature of the diggings, and much of the trouble centered around disputes over property. Miners fought and killed over money, gold, and land. Peeling off the shroud of myth that surrounds the western frontier reveals that in absence of the state, men (and women) did not beat their pistols into plowshares. All of these facts challenge the dominant narrative in property scholarship that order and secure entitlements can emerge without the steadying hand of state power. Indeed, despite the jarring presence of death and pain, legal academics have either overlooked or largely excused the everyday news of violence.[139] Go-

135. Ridge, *supra* note 50, at 23; *see also* Chan, *supra* note 59, at 74 ("Sixty white miners drove away two hundred Chinese from Mormon Bar on the American River and later another four hundred from Horse Shoe Bar.").

136. COURTWRIGHT, *supra* note 73, at 154.

137. McDowell, *Spontaneous Order*, *supra* note 49, at 811; *see also* Chan, *supra* note 59, at 64 (noting that "American miners often resorted to violence" to drive foreigners off of their claims).

138. The plight of California's indigenous people should not be ignored. As Kevin Starr has written, "Native Americans were hunted down like so much vermin . . . ." Starr, *supra* note 85, at 6. *See also* BOESSENECKER, *supra* note 69, at 11 ("Between 1848 and 1880, more than 4,500 Indians died from the white man's guns."); McKanna, *supra* note 97, at 411 (discussing whites' lack of respect for Indian property claims). Black miners also suffered. *See* RUDOLPH M. LAPP, BLACKS IN GOLD RUSH CALIFORNIA 59–60 (1977).

139. Legal academics have either overlooked or largely excused the everyday news of violence. This is especially true in regard to foreign miners. A few prominent studies have simply focused their attention on the early years of the Gold Rush, when the mines were less crowded and less populated with immigrants. Others attribute the attacks to a lack of cultural understanding between Americans and their foreign competitors. Miners from the States, according to one theory, valued democracy, independence, and an ethic of individual producerism. A result of cultural differences and the language barriers, American miners did not understand, and ultimately resented, prospectors from Mexico, Chile, France, and China who either engaged in wage labor or worked in collective mining associations. The failure to bridge these cultural chasms, so the story goes, made compromise and cooperation between groups difficult. ROHRBOUGH, *supra* note 56, at 220–29.

This argument is a flimsy reed to justify the furious passions witnessed in the mines. First, a culture-based explanation cannot account for the worst of the violence in the diggings. One study, for example, found that miners almost always killed within their own racial and ethnic group. Eighty-four percent of white murderers hurt white victims, while Chinese killed within their ethnic group ninety-four percent of the time. *See* McKanna, *supra* note 97, at 416. Second, the "culture-as-transaction-cost" theme broadly overstates the ideological commitments of miners from the United States. For example, the Americans' devotion to a Jacksonian ideal of the free individual producer was, at best, halfhearted—the historical record reveals that many Anglo miners arrived in California intending to work as

ing forward, property scholars should account for bloodshed when they evaluate the merits of private ordering systems and property rules enforced by local norms. The costs as well as benefits must be tallied.

B. The Lobster Fishery of Maine

1. Background

The Gold Rush is not the only celebrated example of a property system based on private ordering principles. Amongst scholars, the lobstermen[140] of Maine are widely hailed for having established a regime that allocates fishing rights without any reliance on the coercive power of state authority.[141] Commentators have dubbed the fishermen's use of informal norms to regulate property entitlements as "successful,"[142] "highly successful,"[143] "remarkably successful,"[144] "noteworthy,"[145] "efficient,"[146] and

members of a larger companies, which only dissolved in the chaos of the gold fields. *See, e.g.*, EIFLER, *supra* note 112, at 172. Finally, this strain of argument underestimates the amount of intercultural understanding that occurred across the frontier. Newly arrived miners did not hesitate to learn mining techniques from the more experienced Mexican and Chilean miners. *See* Chan, *supra* note 59, at 59. And American miners also frequently managed to traverse ethnic boundaries when it came to their appetites for new food and available women. *See id.* at 48 (discussing the miners appetite for Chinese food); Susan Lee Johnson, *"My Own Private Life": Toward a History of Desire in Gold Rush California*, *in* ROOTED IN BARBAROUS SOIL: PEOPLE, CULTURE, AND COMMUNITY IN GOLD RUSH CALIFORNIA, *supra* note 59, at 325–32 (discussing interracial sex and desire in the Gold Rush).

140. Please note that out of deference to the custom of women in the industry, I use the terms "lobstermen" and "fishermen" (rather than "fisher") to refer to both the men and women who fish along the coast of Maine. *See* Chris Arnold, *She's No Man; She's a Lobsterman*, NAT'L PUB. RADIO (Aug. 19, 2012, 2:19 AM), http://www.npr.org/2012/08/19/159175781/fishing-for-lobsters-not-just-a-mans-game ("Kurilec calls herself a lobsterman, though she's a woman."). For a thoughtful take on the debate see Blair Shewchuk, *Men, Women, and Fishers*, CBC NEWS (Aug. 24, 2000), http://www.cbc.ca/news2/indepth/words/fishermen.html. Shewchuk, in discussing the official policy of the Canadian Broadcasting Corporation, acknowledges the feminist concerns over the word "fisherman." He concludes, however, that fisherman is the correct choice because it is the term that women in the industry strongly prefer. He concludes, "we should not foist words on women who consider the terms both unnecessary and disrespectful." *Id.*

141. Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 659 (2010) ("The Maine lobster fishery has been recognized as a successful example of a managed natural resource commons."); Avi Perry, Comment, *Rethinking the Adequacy of Informal Property Rules: Some Evidence from Maine's Lobster Fishery*, 15 OCEAN & COASTAL L.J. 85, 85 (2010) (stating that the lobster fishery of Maine "has assumed a place within the body of legal scholarship arguing that *de facto* property regimes can develop organically outside of the state's formal legal apparatus").

142. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 29 (2004).

143. Michael Lyons, 44 NAT. RESOURCES J. 916, 917 (2004) (reviewing JAMES M. ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY (2003) [hereinafter ACHESON, THE COMMONS]).

144. ACHESON, THE COMMONS, *supra* note 143, at 1. Acheson is, without question, the leading authority on the Maine lobster industry. Every important work in the legal scholarship about the fishery engages with his scholarship.

145. Jonathan H. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 ROGER WILLIAMS U. L. REV. 9, 24 (2002).

146. Eric M. Singer, *Towards a Sustainable Fishery: The Price-Cap Approach*, 24 TUL. ENVTL. L.J. 253, 282 (2011).

"effective."[147] Modern law school textbooks, too, continue to endorse the fishery's practices,[148] and environmentalists tout the system for its ability to get "fishermen to conserve"[149] while generating "very little trouble."[150] In short, there is a strong consensus that the lobstermen of Maine have capably arranged their own affairs outside of any formal government apparatus. Despite this sustained attention on the fishermen's use of extralegal rules, the same problem that plagued academic analysis of the western frontier reappears in the literature about the Maine lobster industry; scholars have carefully catalogued all of the advantages of private ordering, but have largely failed to highlight the obvious pitfalls of property systems that lack a central enforcement mechanism. The purpose of this Section is to demonstrate, conclusively, that violence plays a cardinal role in the work-a-day lives of lobstermen, and that commentators have overlooked the costs of this mayhem.

Some background material on the lobster industry is needed to provide context for the discussions that animate the scholarly literature. The lobster fishing grounds of Maine are an inshore trap fishery; boats launch in the early morning, return before sundown, and rarely venture more then a few miles from their home pier.[151] The typical full-time lobsterman owns a gas-powered boat between thirty-five and forty feet long, which he operates alone or with a single "sternman."[152] Lobstermen catch lobsters in four-foot long wire traps (called "pots"),[153] which they place on the ocean bottom and bait with fish cuttings.[154] The traps are attached by a long polypropylene rope ("pot warp") to distinctively-colored Styrofoam buoys that float on the surface.[155] Although the exact number

147. Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 528 n.63 (2007); Ronald J. Rychlak, *Ocean Aquaculture*, 8 FORDHAM ENVTL. L. REV. 497, 514–15 (1997).

148. *See* BARTON H. THOMPSON, JR. & PAUL GOLDSTEIN, PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 216–17 (2d ed. 2006).

149. Saunders, *supra* note 14, at 1334 (quoting ACHESON, THE COMMONS, *supra* note 143, at 6).

150. ACHESON, THE COMMONS, *supra* note 143, at 29; *see also id.* at 223 (arguing that territories limit the amount of competition for space and, thus, limit the amount of violence); James M. Acheson & Roy J. Gardner, *Strategies, Conflict, and the Emergence of Territoriality: The Case of the Maine Lobster Industry*, 106 AM. ANTHROPOLOGIST 296, 299 (2004) ("Most of the time, there is remarkably little conflict concerning territorial claims . . . .").

151. *See* James M. Acheson & Jack Knight, *Distribution Fights, Coordination Games, and Lobster Management*, 42 COMP. STUD. SOC'Y & HIST. 209, 214 (2000). Lobstering is highly seasonal work. During the dead of winter and early summer, many fishermen seek other employment. Even full-time fishermen do not pull their traps everyday in December. Late summer and early fall is prime lobstering season and the time when competition among fishermen is most severe. *See* Acheson & Gardner, *supra* note 150, at 298; Perry, *supra* note 141, at 87.

152. James M. Acheson & Ann W. Acheson, *Factions, Models and Resource Regulation: Prospects for Lowering the Maine Lobster Trap Limit*, 38 HUM. ECOLOGY 587, 588 (2010).

153. Although they are less popular, some lobstermen use three-foot traps. *See* LINDA GREENLAW, THE LOBSTER CHRONICLES: LIFE ON A VERY SMALL ISLAND 22 (2002) (noting that four-foot traps are heavier and not always manageable for smaller fishermen).

154. *See* Perry, *supra* note 141, at 87.

155. *See* Acheson & Gardner, *supra* note 150, at 298 (discussing basics of the lobster industry). Most lobstermen position their traps in clusters or rows so that they can easily navigate from one buoy to the next on days of thick fog. *See* James M. Acheson, *The Lobster Fiefs Revisited: Economic and Ecological Effects of Territoriality in Maine Lobster Fishing*, *in* THE QUESTION OF THE COMMONS: THE

of working fishermen is unknown, researchers estimate that there are approximately 6000 lobster crews trolling the coast of Maine and they fish an average of 575 traps.[156]

For legal scholars and anthropologists, the most distinctive feature of the fishery is the territorial system that has emerged among the lobstermen.[157] According to the formal law of Maine, anyone who qualifies for a state license may go lobstering along the coast.[158] In practice, however, "far more is required."[159] Custom dictates that before a novice fisherman puts traps in the water, he must first gain acceptance into a local "harbor gang." These clannish groups, which admit new members only grudgingly, are the "root institution" of the lobster industry.[160] They remain vitally important—even though no government unit recognizes their existence[161]— because each has established informal control over a particular swath of the state's productive fishing ground.[162] Most harbor gangs command territories that cover less than one hundred square miles of ocean and sustain fewer than forty lobster boats; some are even smaller.[163] Importantly, interlopers who violate traditional territorial boundaries face punitive sanctions from other local fishermen.[164] The men of each gang energetically defend their space from predation by outsiders.[165] As Professors Acheson and Gardner summarized, "[i]n this system, lobster-fishing rights are held jointly by a group" and the rules "are enforced by the fishermen themselves, sometimes by illegal means."[166]

CULTURE AND ECOLOGY OF COMMUNAL RESOURCES 37, 38 (Bonnie J. McCay & James M. Acheson eds., 1987) [hereinafter Acheson, *Fiefs Revisited*].

156. *See* Acheson & Acheson, *supra* note 152, at 588. The number of traps in the water is a matter of much consternation among fishermen. In 1950, there were roughly 430,000 traps in the water. Today there are far more than three million. *Id.*

157. *See* ACHESON, THE COMMONS, *supra* note 143, at 41–43 (describing newspaper article from 1907 about lobster territories); Perry, *supra* note 141, at 88 (noting that the "territorial nature of Maine's lobster fishery dates from at least the 1890s").

158. *See* VIRGINIA L. THORNDIKE, ISLANDERS: REAL LIFE ON THE MAINE ISLANDS 66 (2005); Saunders, *supra* note 14, at 1331 ("In theory, all one needs to do in order to go lobster fishing off the coast of Maine is satisfy the requirements for a state license . . . ."). It is not true that a person with a license is legally entitled to fish anywhere on the coast. In 1995, the state of Maine passed what has become known as the "Zone Management Law," which divides the coast into seven different territories. Although there is some wiggle room, fishermen with a Zone A license can only fish in Zone A. *See* Acheson & Knight, *supra* note 151, at 226–27.

159. *See* Acheson, *Fiefs Revisited*, *supra* note 155, at 40; Saunders, *supra* note 14, at 1332 (stating that a lobsterman must "jump through substantially more hoops" than just getting a license).

160. ACHESON, THE COMMONS, *supra* note 143, at 221.

161. The state marine patrol may even overlook criminal actions in defense of the territorial system. *See* Acheson & Gardner, *supra* note 150, at 299, 303.

162. *See* ACHESON, THE COMMONS, *supra* note 143, at 221–22; Saunders, *supra* note 14, at 1332.

163. *See* Acheson & Gardner, *supra* note 150, at 299. Even the largest harbor gangs generally have fewer than fifty boats, and some more modest territories support as few as seven or eight crews. *Id.*

164. *See* Acheson, *Fiefs Revisited*, *supra* note 155, at 42 (stating that a stranger attempting to fish in the territory of a harbor gang would "almost certainly" meet with swift opposition).

165. Perry, *supra* note 141, at 87 (stating that "lobstermen always protect their territory and its quarry vigilantly").

166. *See* Acheson & Gardner, *supra* note 150, at 298.

The benefits generated by the private harbor gangs and their *de facto* control of local fishing zones have been well documented throughout the academic literature. Around the world, many marine ecosystems have suffered from over-fishing, pollution, and other environmental degradation.[167] The Maine fishery, in contrast, has avoided the worst calamities. Since 1947, for example, lobster populations have steadily increased, and annual catches have risen in value.[168] Most scholars believe that the health of the fishery stems, in large part, from the lobstermen's resolve to exclude outsiders from their fishing grounds. Under the territorial system, fishermen cannot deplete the resources of their local harbor and then plunder lobsters from another location—the privately enforced boundaries force them to "stay at home" and internalize the consequences of their decisionmaking.[169] Empirical studies have also confirmed that in areas under the firm control of the harbor gangs—the places where property rights are most vigorously enforced—fishermen expend less effort to catch more and bigger lobsters than their similarly situated peers.[170] Viewed from this particular angle, private-ordering enthusiasts are not wrong to tout the lobster fishery of Maine as an important example of what ordinary citizens can accomplish when left alone by the central government. It seems that the territorial system devised and administered by lobstermen has "promoted a sense of stewardship and conservation among its protagonists" and generated some monetary gain for the state.[171]

2. The Problem of Violence

But what about enforcement? In the legal literature, the harbor gangs' extralegal defense of their entitlements has elicited barely a shrug. Very few scholars who endorse the informal territorial regime have scrutinized with any rigor how fishermen settle disputes and compel obedience to local norms. And those that do confront the problem of en-

167. Some experts predict that by 2050 nearly all the world's commercial fisheries will have collapsed. *See* Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCIENCE 787, 788–90 (2006).

168. There are concerns that the fishery is *too* healthy. Some think that global warming has increased the population of lobsters and, as a result, the price per pound has dropped in recent years. *See* North Cairn, *Maine Coalition: Less Carbon Pollution Would Benefit Lobsters*, PORTLAND PRESS HERALD, July 2, 2013, http://www.pressherald.com/2013/07/02/campaign-carbon-pollution-threatens-maine-lobsters/ ("So far, one of the biggest problems for the Maine lobster industry, ironically, has been its own success."); Timothy Taylor, *A Lobster Supply and Demand Story*, CONVERSABLE ECONOMIST (Aug. 9, 2013, 6:00 AM), http://conversableeconomist.blogspot.com/2013/08/a-lobster-supply-and-demand-story.html.

169. *See* James Wilson et al., *The Precursors of Governance in the Maine Lobster Fishery*, 104 PROC. NAT'L ACAD. SCIS. U.S. 15212, 15212 (2007).

170. JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE 80 (1988) [hereinafter ACHESON, LOBSTER GANGS] ("[L]obsters taken from perimeter-defended areas are consistently larger, and catches per unit of effort are greater.").

171. James M. Acheson & Roy J. Gardner, *Spatial Strategies and Territoriality in the Maine Lobster Industry*, 17 RATIONALITY & SOC'Y 309, 334–35 (2005) [hereinafter Acheson & Gardner, *Territoriality*].

forcement tend to insist that the harbor gangs cause "little trouble"[172] and generate "remarkably little conflict."[173] The evidence does not support such upbeat assessments. While the system of privately administered fishing entitlements has surely induced some economic benefits, the surplus comes at a steep cost. Lobstermen in Maine control the behavior of their rivals through intimidation, property destruction, and raw physical aggression. This violence is not confined to the sepia-toned past; fights between harbor gangs over customary fishing areas remain endemic along the coast of Maine. Indeed, the entire system of unofficial territorial boundaries rests on the fishermen's willingness to impose pain—both economic and corporeal—upon outsiders.[174]

Even a brief glance at Maine's local newspapers reveals that clashes between fishermen are an everyday occurrence.[175] Most commonly, disputes arise over the contours of the lobster fishing territories.[176] When outsiders place traps in water claimed by a rival gang,[177] the encroached-upon lobstermen typically view the gear as a provocation and respond with swift retribution.[178] Direct verbal threats occur with some regularity.[179] However, in the early stages of a conflict, the surreptitious disturbance of fishing gear is the primary disciplinary tool used by lobstermen in the struggle over property rights.[180] Fishermen, for example, have been known to open the hatches of offending traps (allowing all the lobsters to

172. ACHESON, THE COMMONS, *supra* note 143, at 29.

173. Acheson & Gardner, *supra* note 150, at 299.

174. The work of Professor Acheson contains conflicting messages about the importance of violence. In some instances, Acheson states the level of violence is low and that incidents of mayhem are becoming increasingly rare. *See, e.g.*, Acheson & Gardner, *Territoriality*, *supra* note 171, at 315. At other times, he acknowledges the violent core of the fishery. *See* ACHESON, LOBSTER GANGS, *supra* note 170, at 60–62 (noting that one harbor gang is known to be "effective, if brutal" in defense of their territory); *id.* at 79 (relating incident of harbor gang throwing a hammer through the windshield of a rival); Acheson, *Fiefs Revisited*, *supra* note 155, at 42 (noting that outsiders "would almost certainly meet with violent opposition" if they fished in traditionally well-defended areas); Acheson & Gardner, *Territoriality*, *supra* note 171, at 338 ("Fishermen have no compunctions about challenging these territorial claims if they are able to muster the necessary force.").

175. ACHESON, THE COMMONS, *supra* note 143, at 38 (stating that "individuals get into small fracases all the time"). It should also be noted that Maine is not the only place where fisheries have erupted into violence. *See* E.N. Anderson, Jr., *A Malaysian Tragedy of the Commons*, *in* THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES, *supra* note 155, at 330 (describing extreme violence among Malaysian fishermen); Edella Schlager & Elinor Ostrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 LAND ECON. 249, 255 (1992) (discussing violence among fishermen in Valenca, Brazil); Lawrence Taylor, *"The River Would Run Red with Blood": Community and Common Property in an Irish Fishing Settlement*, *in* THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES, *supra* note 155, at 299 (discussing net-slashing among Irish fishermen of Teelin).

176. ACHESON, LOBSTER GANGS, *supra* note 170, at 74 ("It is a rare day in the harbor when someone does not suspect that his traps have been tampered with.").

177. This is a very common practice and is referred to as "pushing the lines." Acheson & Gardner, *Territoriality*, *supra* note 171, at 314.

178. The first sanction is usually a sharp warning. *See* Acheson, *Fiefs Revisited*, *supra* note 155, at 41.

179. *See* ACHESON, LOBSTER GANGS, *supra* note 170, at 74.

180. *See* Schlager & Ostrom, *supra* note 175, at 257–58 (discussing trap cutting). My definition of violence does not include small-scale property destruction, but I discuss trap molestations because it is important to understanding the larger, violent conflicts that erupt.

escape),[181] tie hitches in an intruder's pot warp,[182] leave offensive messages attached to others' gear,[183] and "one colorful islander carves a representation of female genitalia in the styrofoam buoys."[184] If these threats do not persuade the outsiders to retreat, fishermen resort to the "law of the knife."[185] Competitors' traps are either smashed or cut off from the buoys and pushed into deep water where they cannot be recovered.[186] The most intense trap-cutting battles can ensnare large groups of fishermen and result in the loss of thousands of dollars worth of equipment.[187]

Disorder along the coast does not stop with property destruction. Lobsterman Linda Greenlaw explains, "any fisherman worth his salt who suspects he has lost traps [to a rival's knife], will certainly retaliate by cutting someone else 'out of the water.' Cutting . . . escalate[s] to other types of destruction . . . ."[188] In the summer, when competition among lobstermen intensifies, trouble seems to metastasize most quickly. Minor skirmishes about trap placement routinely spiral into dangerous physical confrontations. Recently on Matinicus Island, two drunk lobster boat sternmen—enraged by a dispute over fishing rights—barged into the home of a rival and began throwing punches.[189] For almost an hour, the assailants, Joshua Anthony and Jason Luce, took turns beating the victim, leaving him with a fractured nose, severe bruising, and damaged ribs.[190] According to police, the two attackers also moored the victim's hand to a table and repeatedly threatened to break his fingers with a chunk of firewood.[191] Finally, before fleeing, Luce grabbed a gun and suggested that he would hurt the victim's girlfriend and parents if he reported the incident to the police.[192]

Critics may charge that such episodes are unrepresentative. However, strong evidence exists that violence, in its most garish colors, remains part of the fabric of lobstering communities. Police Detective Dwight

181. *See* Acheson, *Fiefs Revisited*, *supra* note 155, at 41.

182. *See* THORNDIKE, *supra* note 158, at 66–67.

183. *See* ACHESON, THE COMMONS, *supra* note 143, at 27.

184. ACHESON, LOBSTER GANGS, *supra* note 170, at 74.

185. *See* Ship Bright, *Tuesday Throwback: Lobster Fishing in Maine*, PRAGUE REVUE (Apr. 22, 2013), http://www.praguerevue.com/ViewArticle?articleId=3822. Fishermen show little remorse at their "skill with the knife." One said, "[w]hen you go over the line, they [warn you]. If you do not want to lose your traps, move them. If you do not move your traps, it is your own fault." ACHESON, THE COMMONS, *supra* note 143, at 33.

186. *See* ACHESON, LOBSTER GANGS, *supra* note 170, at 74; Acheson & Gardner, *supra* note 150, at 298.

187. Richard Selig Grossinger, The Strategy and Ideology of Lobsterfishing on the Back Side of Mount Desert Island, Hancock County, Maine 217 (1975) (unpublished Ph.D. dissertation, University of Michigan) ("[T]he image of 'all-out nuclear war' is an accurate one in terms of the mayhem, malice, and general destruction caused by an open lobster-trap war; it is certainly the ultimate form of strife among lobster-fishermen.").

188. GREENLAW, *supra* note 153, at 28.

189. Heather Steeves, *2 Matinicus Men Plead Guilty in Beating Case*, BANGOR DAILY NEWS, Dec. 21, 2010, http://bangordailynews.com/2010/12/21/news/2-matinicus-men-plead-guilty-in-beating-case/.

190. *Id.*

191. *Id.*

192. *Id.*

Burtis, for instance, reports that similar incidents "happen all the time. . . . This is standard stuff out there."[193] Newspaper records, too, confirm that vicious fights regularly erupt over fishing entitlements: on a remote island in Penobscot Bay, a fishermen shot a rival through the neck, paralyzing the victim;[194] three boats in Owl's Head harbor were intentionally sunk;[195] an aggressive boat captain rammed a competitor's ship and then boarded the vessel;[196] other assailants set fire to a lobstermen's yard, destroying all of his traps.[197] In Machiasport, a confrontation on the dock escalated until one man attacked another with a four-foot piece of wood;[198] further up the coast a lobstermen shot his neighbor's cat fifteen times;[199] and, near Friendship, someone fired a high-powered rifle into a working lobster boat.[200]

In 2009, the mayhem became so routine and so intense that the readers of the state's leading newspaper named the "lobster wars" one of the top local news stories of the year.[201] It is also worth noting that there are strong indications the violence among fishermen is significantly underreported.[202] Along the coast, a resilient code of silence exists surrounding disputes over fishing territory—a code supported by ingrained norms of personal honor and ideals of rugged individualism.[203] Anyone

193. Heather Steeves, *2 Matinicus Men in Court After Alleged Assault*, BANGOR DAILY NEWS, May 5, 2012, http://bangordailynews.com/2010/05/05/news/2-matinicus-men-in-court-after-alleged-assault/.

194. *See* Kirk Moore, *Summer of Their Discontent: Maine's Lobster Fishery Flares Up Along the Midcoast*, NAT'L FISHERMAN, Nov. 2009, at 22; Beth Quimby, *Better Lobster Season Helps Tone Down Feuding*, PORTLAND PRESS HERALD, Aug. 15, 2010, http://www.pressherald.com/2010/08/15/better-lobster-season-helps-tone-down-feuding_2010-08-15/; *see also* Grossinger, *supra* note 187, at 219 (discussing shootings near Mount Desert).

195. Kevin Miller, *Lobster Feed Benefits Boat Vandalism Victims*, BANGOR DAILY NEWS, Aug. 23, 2009, http://bangordailynews.com/2009/08/23/news/lobster-feed-benefits-boat-vandalism-victims; *see also* Clarke Canfield, *Lobster Hostilities Lead to Boat Sinking in Maine*, BANGOR DAILY NEWS, May 11, 2012, http://bangordailynews.com/2012/05/11/news/midcoast/lobster-hostilities-lead-to-boat-sinkings-in-maine/ (reporting on earlier boat sinking in Friendship); John Richardson, *Keeping Peace on the Water Depends on Uneasy Mix of State Law, Local Rules*, ME. SUNDAY TELEGRAM, July 26, 2009, at A1 (detailing earlier boat sinking in Rockport Harbor).

196. *See* Sharon Kiley Mack, *2 Charged in Machiasport Lobster Dispute*, BANGOR DAILY NEWS, Aug. 3, 2010, at B1; Clarke Canfield, *Lobster Wars Turn Violent in Maine*, HUFFINGTON POST (Oct. 20, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/09/04/lobster-wars-turn-violent_n_277748.html.

197. *See* Quimby, *supra* note 194.

198. *See* Mack, *supra* note 196, at B1; *see also* Richardson, *supra* note 195, at A1 (describing lobsterman on Criehaven Island who attacked rival with a fishing gaff).

199. Leanne M. Robicheau, *Turf War Suspected in Vinalhaven Feud; Alleged Lobster Dispute Results in 4 Arrests*, BANGOR DAILY NEWS, Oct. 8, 2003, http://archive.bangordailynews.com/2003/10/08/turf-war-suspected-in-vinalhaven-feud-alleged-lobster-dispute-results-in-4-arrests/.

200. Canfield, *supra* note 195; *see also* Moore, *supra* note 194 (discussing another shooting on Matinicus).

201. *Readers Select Year's Top Topics*, ME. SUNDAY TELEGRAM, Dec. 27, 2009, at C1.

202. *See* Steeves, *supra* note 193 (quoting police detective who says that fishermen "just don't report" many violent episodes).

203. *See* Grossinger, *supra* note 187, at 219 ("The people in the community usually know who does the shooting . . . but no one will implicate the guilty fisherman . . . .").

who complains to the police is considered "ridiculous," "ineffectual," and "somewhat of a threat" to the entire system.[204]

Despite the widespread violence and extralegal property destruction, scholars continue to portray the informal territorial system of Maine in flattering, harmless tones. The indifference seems rooted in a faith that the fishermen solve their disputes efficiently and that fear of retaliation ultimately forces them to act in a neighborly fashion.[205] But, these speculative musings overlook the actual human cost of a property system enforced through private means—the black eyes, the sunken boats, and the gunshot wounds. To fully see the glitch in the conventional wisdom, imagine a world in which coffee shop owners routinely brawl in parking lots, crush their rivals' espresso machines, and set aflame mountains of coffee beans under the cover of darkness. In this scenario, would any law enforcement officer or academic respond by cataloguing only the benefits of such a system? Of course not. Almost certainly, commentators would focus on the destruction and condemn the lawlessness. The same standard should apply to property systems that operate outside the state's formal authority.

C. Cattle Ranchers

1. Background

As the measure of violence in the lobster fisheries of Maine and the gold fields of California begins to cast doubt on some of the benefits generated by informal property regimes, proponents of private ordering may turn toward American ranchers as the last and best illustration of the efficacy of their theories. Defenders of self-enforcing rights have reason to put stock in the example of American livestock owners. As with the lobstermen and gold prospectors, commentators cite ranching communities as a "paradigmatic" example of how close-knit groups successfully allocate property rights with no assistance from the state.[206] A handful of observers even consider the behavior of ranchers as *the* seminal example of effective private ordering.[207] This is not mere puffery; a richly

204. ACHESON, LOBSTER GANGS, *supra* note 170, at 75; *see also* Acheson, *Fiefs Revisited*, *supra* note 155, at 41 (noting that "there is a strong feeling among fishermen that the law should be kept at a distance"). The antipathy toward outsiders involvement in the fishing industry remains intense. Even when the Maine Marine Patrol directly witnesses lobstermen cutting traps in violation of the law, prosecutors struggle to convince local juries to convict. *See* Editorial, *Calming Wild Waters*, BANGOR DAILY NEWS, Mar. 20, 2010, http://bangordailynews.com/2010/03/19/opinion/calming-wild-waters.

205. Acheson, Lobster Games, *supra* note 170, at 75.

206. Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 750 (2012) ("[C]attle ranchers might be a paradigmatic illustration of spontaneous private enforcement."); s*ee also* Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 866 (2006) (describing cattle ranchers as paradigmatic example of a group that can establish efficient norms).

207. For scholars referring to work on the cattle ranchers as "seminal" see Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1500 (2005); Michael J. Madison, *Of Coase and Comics, Or, The Comedy of Copyright*, 95 VA. L. REV. IN BRIEF 27, 27 (2009); Keith Sharfman, *Valuation Av-*

nuanced vein of scholarship buttresses such pronouncements. Yet, despite the accolades, a familiar note hangs in the air. In the ample literature that has sprouted up around the livestock owners, academics have—once again—overlooked the prominent role of violence in shaping the social world and failed to account for the costs imposed by bloodshed.

Before turning a lens toward the violence, some context is once again necessary. Cattlemen of the American West have caught the attention of legal scholars because they resolve many of their property disputes through a privately established system of social norms.[208] Take, for example, the persistent problem of wayward cattle. Who should pay when an animal barges onto a neighbor's land and causes damage? State law provides surprisingly clear answers.[209] Yet, in practice, the formal rules play almost no role in settling intra-group conflict. Regardless of the substance of local ordinances, it is the ranchers' private code of behavior—not the findings of judges or lawyers—that dictates the outcome of trespass disputes.[210] The ranchers believe that individuals must control their animals,[211] and, as a result, they impose liability on cattlemen for the destruction caused by their stray livestock.[212] Cattlemen must also shoulder the burden of enforcing their self-generated norms about animal trespass.[213] The system retains its stability because livestock owners who defect from the established tradition face a series of escalating sanctions from the wider community.[214] Police rarely intervene and government power remains a distant presence.[215]

In the legal literature, scholars have detailed the many benefits of the ranchers' extralegal methods of dispute resolution. The work of Robert Ellickson, in particular, remains extremely influential.[216] In fact,

eraging: A New Procedure for Resolving Valuation Disputes, 88 MINN. L. REV. 357, 368 n.40 (2003); Mark F. Shultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 694 n.222 (2006).

208. *See* ELLICKSON, *supra* note 13, at 167–83; *see* Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLINICAL L. REV. 183, 237 n.240 (2011) ("[R]anchers settle disputes without relying on law, relying instead on informal rules and social norms.").

209. *See* CAL. FOOD & AGRIC. CODE §§ 17122–28 (West 2014). For more on open-range grazing see, Coby Dolan, Comment, *Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147 (1999).

210. *See* ELLICKSON, *supra* note 13, at 52–64.

211. *Id.* at 53.

212. *Id.* at 185. Note however, that there is countervailing norm that a "rural resident should put up with . . . minor damage stemming from isolated trespass incidents." *Id.* at 53.

213. *Id.* at 56–59, 207–29.

214. In similar fashion, ranchers use a self-generated norm to allocate the expense of shared boundary fencing—costs are split in "rough proportion to the average density of livestock present on the respective sides of the boundary line." *Id.* at 71. Pertinent state laws on fencing are widely disregarded, and many ranchers do not even know the contours of their legal rights. *Id.* at 65–81.

215. Third parties sometimes do get involved in disputes that flare up in cattle country. Residents without strong, established ties to the community will sometimes contact public officials. Moreover, when ranchers end up in a dispute with outsiders, it is common to contact state actors. *Id.* at 59, 82–103.

216. Most commentators consider Ellickson's book *Order Without Law: How Neighbors Settle Disputes* to be a defining text in the legal literature. *See, e.g.*, Richard H. McAdams, Book Review, *Signaling Discount Rates: Laws, Norms, and Economic Methodology*, 110 YALE L.J. 625, 626 (2001)

American ranchers play a singular role in the discussion of informal property regimes largely as a result of Ellickson's memorable case study of ranchers in Shasta County, California.[217] In his book-length treatment of livestock owners, *Order without Law: How Neighbors Settle Disputes*, Ellickson argues that the informal norms of close-knit groups outperform state-backed law. To support this position, Ellickson shows that norm-producers are generally better informed about local conditions than distant lawmakers and, as a result, they tend to draft welfare-maximizing rules.[218] The informal rule making system also remains less susceptible to capture by selfish special interest groups and imposes fewer transaction costs on community members.[219] Furthermore, the ruralites of Shasta have determined that self-enforcing schemes generate more just outcomes at a lower cost than the state-backed law.[220] It is cheaper, they believe, to resolve incidents of animal trespass with neighborly conversation rather than pursue claims through the time-chewing machinery of the court system.[221] These findings have allowed Ellickson and other like-minded scholars to build a strong case that, contra the warnings of Hobbes, the world does not devolve into chaos in the absence of formal law. Rather, it appears, individuals can come together, forge communities, and create rules that allocate entitlements in an efficient and cooperative fashion.

2. The Role of Violence

Is this view of the ranchers skeptical enough? Should academics be so quick to bury Hobbes? The short answer is no. Current scholarly assessments of the cattlemen's ability to resolve conflicts without a central enforcer remain overly sanguine and cannot survive careful scrutiny. The weight of evidence reveals that it is raw physical force, not levelheaded deal making, that has animated the history of American ranching since its beginnings in the 1840s. The remainder of this Section catalogues the violence inherent in pastoralist communities and, by necessity, inter-

(opining that "[t]he seminal work in the law-and-economics camp is unquestionably Robert Ellickson's" *Order Without Law*). Numerous symposia have been convened on the subject. *See, e.g.*, Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996) (examining the enforceability of norms); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000) (discussing law's effect on social norms).

217. ELLICKSON, *supra* note 13, at 167–83.

218. *Id.* at 250 ("A close-knit group's members will often regard their norms as superior to governing laws, . . . because distant lawmakers may be less informed than norm-makers . . . ."). Ellickson defines welfare-maximizing by examining the sum costs of transaction costs and deadweight losses of a particular policy. *Id.* at 184.

219. *Id.* at 250 (["S]elfish interest groups can generally manipulate laws more easily than norms.").

220. *Id.* at 283 ("[P]eople often choose informal custom over law not only because custom tends to be administratively cheaper but also because the substantive content of customary rules is more likely to be welfare maximizing.").

221. *Id.* at 282–83 ("[O]ne reason people are frequently willing to ignore law is that they often possess more expeditious means for achieving order.").

twines an examination of *Order Without Law*. Ellickson's work exerts such a gravitational influence over the private ordering scholarship that it is worth unpacking how *Order Without Law* has shaped the course of thinking about violence in informal property schemes.[222] The record is clear: violence matters. Even Ellickson acknowledged that interpersonal aggression exerts some pull on *de facto* property systems. Contemporary scholars, however, have forgotten this bit of wisdom and almost uniformly ignored: (1) the presence of violence in ranching communities, (2) the costs of that violence, and (3) the history of bloodshed on the range.

a. The Presence of Violence

When scholars write about the informal property system of American ranchers, they devote little energy to explaining how the cattlemen ensure the security of their entitlements. Most commentators mention only that livestock owners capably enforce their rules with "social norms" or "extra legal" methods.[223] Those who dig deeper tend to focus on the role of shame and peer pressure in maintaining control over potential deviants. Professor Richman's summary of the ranchers is characteristic of the modern view. "[R]anchers might be a paradigmatic illustration of spontaneous private enforcement," Richman writes.[224] "To enforce [their] alternative rules, ranchers established an informal network of gossip and social sanctions, so violators of the community's norms and customs suffered from scorn and exclusion."[225] In Richman's discussion—and in the view of many, many other commentators—the threat of malicious gossip and ostracism is enough to regulate the behavior of deviants; violence plays no role in the ranchers' world.[226]

222. *See, e.g.*, Juliet P. Kostritsky, *The Law and Economics of Norms*, 48 TEX. INT'L L.J. 465, 467 n.1 (2013) ("Robert Ellickson's work on cattle farmers changed everything."); Litowitz, *supra* note 4, at 296 ("It is no exaggeration to say that Ellickson's book is the founding document of the New Chicago School and the starting point for all recent work on social norms."); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603 n.1 (2000) ("Ellickson is generally credited with anticipating, if not creating, the field of law and social norms.").

223. *See, e.g.*, McNeal, *supra* note 208, at 237 n.40 ("Ranchers settle disputes without relying on law, relying instead on informal rules and social norms.").

224. Richman, *supra* note 206, at 750.

225. *Id.* at 746.

226. Even very sophisticated discussions of Ellickson's work rarely mention violence. *See, e.g.*, McDowell, *Spontaneous Order*, *supra* note 49, at 772 (stating that when "ranchers violated local norms, the community punished him through social sanctions—for example, gossip, noncooperation, and in extreme cases, ostracism"); Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1440–44 (2009) (book review). Of the 1146 cites to *Order Without Law* uncovered through a Westlaw search, I found seven sources that acknowledge that violence plays a role in maintaining the cattlemen's system. *See* Joseph Blocher, *Order Without Judges: Customary Adjudication*, 62 DUKE L.J. 579, 592 (2012) (acknowledging that ranchers sometimes resort to interpersonal violence); Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1030 (2006); Fagundes, *supra* note 6, at 1129 n.83; Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1027 n.87 (1995); Tehila Sagy, *What's So Private About Private Ordering?*, 45 LAW & SOC'Y REV. 923, 944 (2011); Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. CHI. L. SCH. ROUNDTABLE 75, 87 n.49 (2002); W.

This silence is both odd and wrongheaded. Twenty years ago, in *Order Without Law*—the most influential work on the ranchers' norms—Ellickson openly acknowledged the necessity of violent deeds in regulating property systems that fall outside of the state's sphere of influence. In the book's opening pages, he suggests that "fear of physical retaliation is undoubtedly one of the major incentives for order in rural Shasta County,"[227] and later confirms that "Shasta County residents regularly punished, with gossip and ultimately with violent self-help, ranchers who failed to control their cattle."[228] Furthermore, *Order Without Law* provides many concrete examples to substantiate these claims. The book is replete with vivid stories of quarrelsome neighbors,[229] poison,[230] stolen farm equipment,[231] and murdered cattle.[232]

Although Ellickson takes pains to stress that violence is an integral form of social control in Shasta County, this particular thread of his argument has disappeared from subsequent discussion of his work. In fact, Ellickson's name is regularly affixed to propositions that he has explicitly refuted. Some scholars, for example, have portrayed Shasta County as an example of libertarian ideals made flesh.[233] Others have cited *Order Without Law* for the idea that informal property schemes operate "peacefully."[234] These commentators seem to have missed entirely the grislier episodes of mayhem in Shasta (such as the extralegal killing of mischievous bulls)[235] and have focused little attention on the energy that ranchers devote to policing the actions of committed rule breakers.[236] Far too often in current scholarship, a cardboard version of the cattle ranchers recognizes that social norms can purchase order but then fails to consider that violence is the currency of exchange.

Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1983 (2001). None of these seven sources spend more than a sentence discussing the cattlemen's use of violence.

227. ELLICKSON, *supra* note 13, at 58.

228. *Id.* at 130.

229. *Id.* at 33–35.

230. *Id.* at 47 n.32, 59.

231. *Id.* at 80.

232. *Id.* at 47, 58.

233. For commentators trying to succinctly encapsulate *Order Without Law* it is an easy mistake to state that Ellickson shows that "norms trump law." *See, e.g.*, Robert A. Pollack, *Bargaining Around the Hearth*, 116 YALE L.J. POCKET PART 414, 416 (2007). While Ellickson does attempt to chip away at legal centralism and demonstrate the ordinary people can produce orderly communities without the help of the state, his actual claims are more modest. Ellickson forthrightly admits that "law has its place," especially as the social distance between antagonists increases. ELLICKSON, *supra* note 13, at 283.

234. Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 561 n.182 (2009); Robert C. Deal, *Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the British Property Law of Whaling*, 37 ECOLOGY L.Q. 199, 202 (2010); Tamara R. Piety, *Something Fishy: Or Why I Make My Students Read* Fast-Fish and Loose-Fish, 29 VT. L. REV. 33, 42 (2004).

235. ELLICKSON, *supra* note 13, at 47, 58.

236. *Id.* at 213–19.

b. The Cost of Violence

Other difficulties further mar the discussion of the ranchers' informal property rights. Even amongst the few commentators who have acknowledged that physical force shapes the cattlemen's behavior, there is no discussion of the consequences of this fighting. Violence appears quickly, enforces the claims of the deserving, and then calmly recedes into the background—leaving behind no echoes or anguish. *Order Without Law*, for example, never explores the cost of violent self-help on the victims of mayhem. The book, in fact, presents a heavily sanitized and romanticized vision of violence and its aftermath: violence in Ellickson's telling is simple, quick, and clean,[237] never messy or excessive or intensely painful.

Take, for instance, Ellickson's description of how social norms work to prevent flag burning. He writes, "on July 4, 1989, when a handful of extremists scattered around the country tried to exercise the First Amendment flag-burning right that the Supreme Court had conspicuously recognized two weeks before, onlookers (mostly veterans) forcefully reminded them that informal rules against flag burning remained firmly in place."[238] This statement obscures key details that should influence how readers perceive the violence used to protect the flag.[239] First, the notion that "veterans" imposed the sanctions slants the historical record.[240] Newspaper accounts show that the norm enforcers were motivated more by bigotry than love of country. Chants of "burn the flag and we'll burn a fag" echoed around Tompkins Square Park in New York,[241] while "dozens of people" hurled racial epithets at the flag burners in Arkansas.[242] More importantly, Ellickson fails to directly confront the form of the violence that occurred at the demonstrations or discuss its ramifications. He states only that onlookers "forcefully reminded" the flag-wielding demonstrators of the informal rules.[243] There is no mention

237. *Id.* at 282 (describing physical reprisals as "simple").

238. *Id.* at 6.

239. Off the bat, some may contest the labeling the protestors as "extremists." In Little Rock, long-time community activist Robert McIntosh attempted to burn a flag to draw attention to social inequality. *Crowds Halt Flag-Burning Demonstrations*, N.Y. TIMES, July 5, 1989, at A17. In Minneapolis the flag-burners opposed restrictions on abortion. *Abortion Flames Fanned Flags Burned, Protesters Clash Across Country in Reaction to Court Ruling*, SEATTLE TIMES, July 5, 1989, at A1. And in New York City the protestors hoped to spotlight the cause of the homeless. Julio Laboy, *Skinheads, Protesters Clash in Park Spurred by Flag-Burning Try*, NEWSDAY, July 5, 1989, at 5.

240. In fairness, veterans did resist the flag burners in Albany, New York. Greg B. Smith, *Seeing Red, White and Blue Flag Burning Angers Veterans*, TIMES UNION, July 5, 1989, at A1. In Minneapolis waiters from a "topless bar" attacked the protesters. Stacey Singer, *Man Arrested in Assault on Flag-Burning Protesters*, ST. PAUL PIONEER PRESS, July 5, 1989, at 1B ("Witnesses say Chong held one protester against the wall, punching him, and another waiter put his hands around the neck of a female protester.").

241. Laboy, *supra* note 239, at 5.

242. Jerry Huston, *Arkansans Thwart Flag-Burning Try: Fight Breaks Out as Man Attempts Protest on Grounds of State Capitol*, ROCKY MTN. NEWS, July 5, 1989, at 23 (reporting that "dozens of people, both young and old, began shouting racial slurs and threats").

243. ELLICKSON, *supra* note 13, at 6.

of the punches thrown,[244] bloody gashes,[245] and hospital visits that resulted from the use of violent self-help.[246]

Similar distortions infect the discussion of the ranchers. Violence, again, appears costless, even noble. The heroes of *Order Without Law* are those men who are willing to enforce local norms by making credible threats and engaging in acts of destruction. Ellickson, for example, describes Tony Morton's surreptitious castration of a troublesome bull as a "creative" sanction against an antisocial neighbor.[247] Ellickson, however, submerges the inherent violence of this act in the jargon of law and economics. Regarding the amputation of the testicles, which both destroyed the bull's value and altered its temperament, readers are told only that it "served as a permanent injunction against future trespass."[248] There is no mention of whether the castration is carried out humanely—and the tone of the commentary implies the rancher's intent to hurt the animal.[249]

In contrast to the men who seek their own remedies for perceived wrongs, those who are either unwilling or unable to physically intimidate others come across as weak and ineffectual, never cautious or wise. Take, for instance, ranchette owner Jim Heinz. Ellickson writes that Heinz demonstrated a lack of "backbone" when he returned three unruly cattle to their owner without first exacting some measure of vengeance.[250] This discussion lacks context. *Order Without Law* never fully tabulates the potential costs associated with pursuing violent self-help against a committed deviant. Heinz's antagonist—a local bully named Frank Ellis—controlled far more land, owned more cattle, and employed many hired men to perform his grunt work.[251] Without the law as his avenger, any extralegal action by Heinz risked exposing his land, his cattle, and his family to the anger of a more powerful (and more vindictive) opponent. While it is possible that Heinz, as Ellickson states, lacked "backbone," it seems more likely that he simply possessed an acute understanding of the costs of violence and the shortcomings of property systems enforced by private mechanisms.

244. *Protesters Clash Over Flag Burning*, HOUS. CHRON., July 5, 1989, at A3 (reporting that "60 right-wing flag-protecting Skinheads" confronted protesters in New York City); *see also* Wendy S. Tai, *Prochoice Demonstration in Minneapolis Ends in Scuffle*, STAR TRIB., July 5, 1989, at A1 (mentioning that punches were thrown at Minneapolis flag burning and that one protestor was tossed down a flight of stairs).

245. *Protesters Clash Over Flag Burning*, *supra* note 244, at A3.

246. Laboy, *supra* note 239 (stating that two protesters were reportedly taken to the hospital after clash with skinheads).

247. ELLICKSON, *supra* note 13, at 217.

248. *Id.*

249. *Id.*

250. *Id.* at 217–18.

251. Ellis had the "largest ranching empire in the Northeastern Sector." *Id.* at 33. Heinz had a twenty-acre ranchette, Ellis owned 2500 acres. *Id.* at 33–35.

c. The History of Violence

Finally, a full accounting of the role of violence in *de facto* property systems must also consider the fraught history of American ranching. From the very beginnings of the cattle industry, livestock owners have committed shocking acts of violence to establish and preserve their informal property rights. This history matters. The bloody struggle over the ranchers' entitlements vividly demonstrates the instability of informal property regimes across time and place. It also suggests that some of the cooperation that Ellickson witnessed in modern ranching communities may result from the violent marginalization of unpopular groups.[252] Solving problems with diplomacy becomes far easier once competitors have been put to the sword.

Shasta County—the location of Ellickson's fieldwork—illustrates the principle in full. In the 1800s, white settlers intent on expanding their ranching and mining activities, violently removed the indigenous Native American population from their land.[253] One source succinctly describes the calamities: "In 1850, Shasta County was created. Soon thereafter, . . . [t]he Whites gave a 'friendship feast,' poisoned the food, and killed 100 Trinity Wintu. When the Trinity people tried to warn the *wenemem* Wintu, they were too late; at least 45 of the *wenemem* were killed."[254] The settlers also burned down the Wintu council meetinghouse, massacred an additional 300 Native Americans, polluted their water supplies, and then flooded Wintu land with a dam.[255]

The rancher's use of violence was not confined to cross-cultural struggles with Native Americans. In the late nineteenth century, for example, a bloody series of conflicts, known as "range wars" erupted over control of valuable pasturage in the Great Plains and Far West.[256] Organized groups of cattle barons fought and killed sheep owners, small-time ranchers, and homesteaders who threatened to exploit valuable resources for themselves.[257] Large scale cattle ranching erupted in the United States when entrepreneurs begun to fatten large herds on the

252. Douglas Litowitz has traced some of the darker episodes of Shasta County. *See* Litowitz, *supra* note 4, at 315–19.

253. *See* ANDREW C. ISENBERG, MINING CALIFORNIA: AN ECOLOGICAL HISTORY 101–02 (2005) (summarizing how the rise of industry and commercial agriculture put pressure on indigenous communities).

254. Frank R. Lapena, *Wintu*, *in* 8 HANDBOOK OF NORTH AMERICAN INDIANS: CALIFORNIA 324, 324 (Robert Heizer ed., 1978); *see also* Stephen Magagnini, *Indians' Misfortune Was Stamped in Gold*, SACRAMENTO BEE, Jan. 18, 1998, at 3 ("Shasta and Wintu oral historians tell of hundreds of Indians being poisoned at a banquet in November 1851 after signing a peace treaty with white settlers.").

255. *See* Bradley L. Garrett, *Drowned Memories: The Submerged Places of the Winnemem Wintu*, 6 ARCHAEOLOGIES 346 (2010) (discussing deleterious effect of the construction of Shasta Dam on the culture of local Indian tribes).

256. *See generally* HARRY SINCLAIR DRAGO, THE GREAT RANGE WARS: VIOLENCE ON THE GRASSLANDS (1985).

257. *See* DEBRA L. DONAHUE, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY 20–21 (1999); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 85–86 (1992).

grasslands of Montana, Wyoming, Colorado, Texas, and New Mexico that had stood almost uninhabited for decades.[258] Importantly, legal title to this stretch of prairie belonged to the federal government.[259] The cattlemen did not have any official property entitlements; they simply claimed *informal* rights over specific ribbons of land.[260] Local norms dictated that the first individual to place a herd upon a defined section of the range established exclusive rights to use the land for grazing livestock.[261] For the most part, these customary "range rights" were so widely accepted among the ranchers that they obtained market value and became fully transferable.[262]

The trouble for livestock owners ignited only once competing enterprises began to appear on the prairie and make property claims over the public domain.[263] At first, the cattle barons endeavored to defend their extralegal claims with nonviolent means. They blocked deviants' access to essential community services,[264] refused to assist defectors in times of accident and sickness,[265] and excluded outsiders with illegally built fences.[266] In Montana alone, cattlemen placed almost 250,000 acres of the government land behind private barbed-wire fences.[267] But as the

258. The 1870 census counted only 9118 people in Wyoming. T. A. LARSON, HISTORY OF WYOMING 619 (2d ed. 1978). The 1890 census in Montana counts 142,924 people. ANDREA MERRILL-MAKER, MONTANA ALMANAC 126 (2005).

259. *See* JOHN W. DAVIS, WYOMING RANGE WAR: THE INFAMOUS INVASION OF JOHNSON COUNTY 14 (2010) (noting that cattle owners grazed their animals "not on privately owned land but on the public domain, land owned by the United States, theoretically by each and every citizen").

260. *See* WARREN M. ELOFSON, FRONTIER CATTLE RANCHING IN THE LAND AND TIMES OF CHARLIE RUSSELL 133 (2004) ("In Montana, the first cattlemen operated mostly on publicly owned land, of which they had merely taken possession . . . ."); Morriss, *Vigilantes*, *supra* note 49, at 652 (stating that "no rancher legally owned the rangeland"). Grazing cattle tend not to traverse natural boundaries like creeks and divides. Thus, the "open range" was actually composed of many smaller distinct ranges. Daniel Belgrad, *"Power's Larger Meaning": The Johnson County War as Political Violence in an Environmental Context*, 33 W. HIST. Q. 159, 169 (2002).

261. *See* Belgrad, *supra* note 260, at 169; Clay & Wright, *supra* note 49, at 175 n.38; Randy McFerrin & Douglas Wills, *High Noon on the Western Range: A Property Rights Analysis of the Johnson County War*, 67 J. ECON. HIST. 69, 72 (2007); Morriss, *Vigilantes*, *supra* note 49, at 652.

262. *See* Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489, 503 (2002); McFerrin & Wills, *supra* note 261, at 72 (discussing transferability).

263. *See* Belgrad, *supra* note 260, at 165–67; McFerrin & Wills, *supra* note 261, at 75 (explaining that "during the later part of the [1890s], the principle competition for range use was small stock ranchers, sheepherders, and farmers known as 'grangers'").

264. Access to the group roundup was vital for success as a cattle rancher. In theory, roundups could have been conducted by individual owners, but group action captured economies of scale and dramatically reduced chances of losing stray cattle. "To be blacklisted or expelled from the general roundup was effectively to be drummed out of the range cattle industry." Belgrad, *supra* note 260, at 173. For more on roundup see, Anderson & Hill, *supra* note 262, at 502–04; McFerrin & Wills, *supra* note 261, at 76; Morriss, *Vigilantes*, *supra* note 49, at 655.

265. Morriss, *Vigilantes*, *supra* note 49, at 655.

266. *See* MARILYNN S. JOHNSON, VIOLENCE IN THE WEST: THE JOHNSON COUNTY RANGE WAR AND THE LUDLOW MASSACRE 12 (2009) (stating that in response to increased competition from newcomers on the range, some ranchers constructed barbed-wire fences around the customary ranges); Belgrad, *supra* note 260, at 171 ("Frank Wolcott, who managed the Tolland Cattle Company . . . at one time had fifteen square miles (9600 acres) of government land behind fence.").

267. Morriss, *Vigilantes*, *supra* note 49, at 657.

competition for flush grazing intensified in the 1880s,[268] livestock owners quickly turned toward violence to preserve their informal property rights and ensure their monopoly over contested resources.

The ranchers directed most of their ire at sheepherders.[269] Even though no law restricted use of public domain lands, cattlemen resented the encroachment on their customary range rights and worried that the sheep would further deplete already stressed grasslands.[270] In response to the perceived threat, the stockmen initiated a bloody campaign to drive the shepherds out of cattle country. The worst fighting occurred along the Wyoming-Colorado border.[271] Examples are legion. In 1894, cowboys in northwest Colorado shot a shepherd and drove his 3800 sheep over a cliff into Parachute Creek.[272] Along the Little Snake River, fifty masked men attacked a sheep camp, captured the herders, and killed over 3000 animals.[273] Later, near Ten Sleep, Wyoming, a raiding party shot three sheepherders, torched their wagon, and killed twenty-five sheep and two dogs.[274] And, in North Rock Springs, Wyoming, cattlemen managed to slaughter 12,000 sheep during a nighttime raid.[275] The fighting soon poured out of the Northern Plains and infected most of the West; "[f]rom the Tonto Basin in Arizona to the Columbia Plateau in Oregon, cattlemen battled sheep owners by running their herd off cliffs or into rivers, shooting at herders, and burning their camps."[276] In all, skirmishes occurred in at least twelve different states or territories between 1870 and 1920.[277] The violence claimed the lives of at least dozens of men, and over

268. By and large, the settlers on the prairie did not graze their animals in a sustainable manner. Constant grazing harmed the grasses ability to reproduce so more and more land was needed to support the same amount of cattle. McFerrin & Wills, *supra* note 261, at 72 ("By the mid-1880s, conditions changed such that informal arrangements became less effective in protecting rights.").

269. DAVID EDWIN HARRELL, JR. ET AL., UNTO A GOOD LAND: A HISTORY OF THE AMERICAN PEOPLE VOLUME 2: FROM 1865 577 (2005) ("Cattlemen despised sheep."). The struggle between cattle owners and sheepherders has been immortalized in American Western movies. Movies like *Big Jake* (1971) and *The Sheepman* (1958) revolve around the struggle for the control of the public domain. *See* JEREMY AGNEW, THE OLD WEST IN FACT AND FILM: HISTORY VERSUS HOLLYWOOD 41 (2012).

270. *See* BERNARD DEVOTO, THE WESTERN PARADOX: A CONSERVATION READER 426 (Douglas Brinkley & Patricia Nelson Limerick eds., 2001) (explaining the tense relationship between cattlemen and sheep owners).

271. Diane Abraham, *Bloody Grass: Western Colorado Range Wars, 1881–1934: A Study of the Sheepwars*, J. W. SLOPE, Spring 1991, at 3. ("During the ten years prior to 1903, about fifty sheepmen were murdered in Wyoming and Colorado and 25,000 sheep were run over cliffs or destroyed by other means.").

272. Forrest R. Pitts, *A Colorado Sheep Wars Incident, 1894*, 74 Y.B. ASSOC. PAC. COAST GEOGRAPHERS 96 (2012); *Driven to Death*, ROCKY MTN. NEWS, Sept. 12, 1894, at 1.

273. *Colorado Masked Men Kill 3000 Sheep*, N.Y. TIMES, Nov. 22, 1899, at 4. Three years earlier, in a nearby location, cowboys killed 300 sheep, murdered two herders, and tortured the sheep's owner. *See* Annie Proulx, *The Little Snake River Valley*, *in* RED DESERT: HISTORY OF A PLACE 311, 312 (Annie Proulx ed., 2008).

274. *See* JOHN W. DAVIS, A VAST AMOUNT OF TROUBLE: A HISTORY OF THE SPRING CREEK RAID 1 (1993).

275. *The War of the Range*, L.A. HERALD, Nov. 2, 1902, at 4.

276. JOHNSON, *supra* note 266, at 17.

277. *See* John Perkins, *Up the Trail from Dixie: Animosity Toward Sheep in the Culture of the U.S. West*, 11 AUSTRALASIAN J. AM. STUD. 1, 1 (1992).

a hundred thousand sheep were poisoned, dynamited, clubbed to death, forced into quicksand, maimed, or gunned down.[278]

The cattle kings also fought with small stock ranchers and farmers over their differing conceptions of property.[279] The economic system established by the wealthy cattle owners required use rights over huge swaths of open grassland.[280] The migration of many small homesteaders, however, threatened to break up the range into an unusable patchwork, divert scarce water resources to crop production, and upend the established political order.[281] Without formal state actors to referee the disputes, violence flared again. In Texas, the "Fence Cutting War," a battle between landowners and open-range cattlemen over the placement of barbed-wire fences, claimed three lives and caused over twenty million dollars in property damage.[282] In New Mexico, a dispute over beef contracts and grazing rights led to back-and-forth revenge killings that left over twenty dead.[283]

By far the most notorious incident, however, occurred in northern Wyoming.[284] In the spring of 1892, prominent cattle businessmen, all members of the Wyoming Stock Growers Association ("WSGA"), organized an armed militia in hopes of intimidating local farmers and small-scale stockmen.[285] Their plan was to quickly kill their most troublesome adversaries (at least seventy individuals were included on the "death list")[286] and then warn others to vacate the area within twenty-four hours, shooting those who defied them.[287] When the scheme was finally put into action after months of planning, the cattle barons bungled its execution.

278. *Id.*

279. *See* Belgrad, *supra* note 260, at 169 (discussing struggle with small ranchers over ownership of unbranded cattle); McFerrin & Wills, *supra* note 261, at 71.

280. McFerrin & Wills, *supra* note 261, at 71–76.

281. *See* Belgrad, *supra* note 260, at 165 (discussing the struggle over land and water); McFerrin & Wills, *supra* note 261, at 69–76 (discussing the threat homesteaders posed to cattlemen).

282. *See* Wayne Gard, *The Fence-Cutters*, 51 SW. HIST. Q. 1, 9–10 (1947).

283. *See* DOUGLAS PRESTON, CITIES OF GOLD: A JOURNEY ACROSS THE AMERICAN SOUTHWEST IN PURSUIT OF CORONADO 225–26 (1992) (discussing genesis of the conflict). For more on the Pleasant Valley War, see DON DEDERA, A LITTLE WAR OF OUR OWN: THE PLEASANT VALLEY FEUD REVISITED (1988); LELAND J. HANCHETT, JR., ARIZONA'S GRAHAM-TEWKSBURY FEUD (1994).

284. *See generally* DAVIS, *supra* note 259 (describing the incidents in Johnson County as infamous and notorious). The events of the Johnson County War form the basis of many Westerns, including the original *Virginian* (1914), *Shane* (1953), and *Heaven's Gate* (1980). McFerrin & Wills, *supra* note 261, at 2.

285. McFerrin & Wills, *supra* note 261, at 70–71 (stating that the organizers hoped to stop the rise of homesteader settlement); *id.* at 71–76 (discussing tensions between large-scale and small-scale ranchers over unbranded cattle); *see also* JOHNSON, *supra* note 266, at 14 (stating that homesteaders were putting pressure on cattlemen); Belgrad, *supra* note 260, at 169 (explaining tension over unbranded cattle, referred to as mavericks). In all, fifty-two men were part of the militia. Some of the men were members of the Wyoming Stock Growers Association and some were hired guns from Texas. *See* DAVIS, *supra* note 259, at 142.

286. There exists contradictory evidence about the exact number of individuals on the death list. Most sources put the number at seventy, although it may have been as low as nineteen. *See* DAVIS, *supra* note 259, at 134.

287. Morriss, *Vigilantes*, *supra* note 49, at 674.

They killed two suspected cattle rustlers before local homesteaders managed to organize a superior force and repel the attack.[288]

Despite the high toll of lives lost and property destroyed, these incidents almost never find their way into modern discussions of informal property systems. *Order Without Law*, for example, confines the range wars to a fleeting mention within a single footnote.[289] It also makes no reference to the significant violence directed at Indian tribes. The book is not alone in this omission. Again and again, when commentators discuss property systems based on private ordering principles they carefully list the schemes' benefits, but fail to properly weigh the costs. And the costs are significant. In the discussion of American ranchers, scholars have systematically disregarded that ranchers forged their property rights through violent struggle, that this violence imposed tremendous costs on their countrymen, and that the threat of physical force continues to influence the lives of ordinary people in cattle country. Looking at the full sweep of the evidence, the story of the cattle ranchers confirms what the lobster fishermen and Gold Rush prospectors first suggested. The record of private ordering systems—systems that lack a state-backed central enforcer—is far muddier than legal scholars have indicated. Such regimes may generate some advantages for group members, but viewed in their full and violent context, these benefits seem more akin to patches of lace sewn on a sackcloth than the basis of a workable political or economic system.

IV. THE COST OF INFORMAL ENFORCEMENT

The foregoing Sections of this Article demonstrate the dark side of informal property regimes. Without a central government to enforce the right to exclude, ordinary people must defend their own land and wage their own battles against committed deviants. These struggles routinely descend into violence, resulting in significant human suffering and the destruction of valuable material resources. Acknowledging this mayhem is an important step toward a more accurate assessment of the private ordering systems championed by legal commentators.

Admittedly, however, the presence of violence in informal property schemes—without more—does not automatically tip the balance in favor of regimes that rely on the coercive power of the state to resolve disputes. Recall that formal law, too, is grounded in force[290] and that even

288. *See* DRAGO, *supra* note 256, at 281–86 (describing firefight that led to the death of Nate Champion and Nick Ray); McFerrin & Wills, *supra* note 261, at 70 (discussing ultimate failure of the militia).

289. ELLICKSON, *supra* note 13, at 58 n.58.

290. *See* FOUCAULT, *supra* note 25, at 302 (noting that imprisonment is a form of nearly invisible state violence); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986); Sarat, *supra* note 25, at 5 (noting the central role of violence in the law's discourse); *see also* ANDREAS HEUSLER, DAS STRAFRECHT DER ISLANDERSAGAS 103 (1911) ("Legal process is stylized feud."), *quoted in* MILLER, BLOODTAKING *supra* note 26, at 232.

the most enlightened central enforcers produce carnage.[291] The use of lethal weapons by police, the torture of terror suspects, and the execution of felons are only the most graphic reminders of the modern state's ability to deal pain and death. The ubiquity of bloodshed suggests that any considered assessment of the use of violence must take up a comparativist lens. In which type of system is the lived reality of threat, domination, and pain *more* oppressive? Is it possible to get a fix on whether the total cost of the bloodshed in communities governed by informal rules outweighs the violence in similar, but more hierarchical, states?[292] Although comparisons across time and culture are fraught with difficulties, the available evidence suggests the violence in private ordering systems produces quantitatively and qualitatively worse outcomes. The use of force in these regimes not only imposes direct costs on victims, but also inflicts significant harms across multiple layers of the social order. More precisely, the violence in informal property schemes generates widespread human rights abuses, imposes psychic costs on innocents, disrupts the efficiency of labor markets, and impedes technological innovation.

A. More and Worse Violence

The first half of this Article made the limited claim that informal property regimes contain more violence than previously imagined. This Section now extends the argument a step further, building a case that the bloodletting in private ordering regimes is palpably worse than the violence of formal state arrangements. The problem for informal property is that the use of physical force occurs with greater frequency and, once initiated, endures longer and proceeds with cruder excesses. The murder statistics from the gold camps of California, discussed earlier, speak loudly on this point. This Section, however, focuses on three structural differences between informal systems and more centralized states that explain why the violence gap likely extends to all *de facto* property regimes. First, informal systems lack the procedural protections necessary to ensure that innocent citizens are not wrongly treated. Second, private ordering regimes do little to safeguard the guilty from intemperate retribution. Third, small conflicts routinely escalate into dangerous and destructive feuds.

1. Lack of Protection for The Innocent

The chief weakness of private ordering regimes is that they lack the bureaucratic and procedural safeguards that typically constrain the use of violence in formal government settings. Few institutions uphold the

291. Austin Sarat, *Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 3, 3 (Austin Sarat ed., 2001) ("Law without violence is unthinkable . . . .").

292. *See* MILLER, HUMILIATION, *supra* note 27, at 79.

rights of the accused, neutral fact-finders are rarely recruited to render judgments, and articulable standards that help state actors produce similar outcomes in similar cases remain scarce. Stripped of these protections, innocent individuals in informal systems are exposed to ugly physical abuses that central governments easily prevent.

The experiences of Gold Rush miners in California vividly highlight this concern. The trials conducted by the miners prohibited cross-examination of witnesses,[293] discouraged the participation of lawyers,[294] and allowed for no appeals.[295] As one scholar summarized, "[a]rrest, trial, and punishment rarely occupy more than a few hours. . . . No warrants, indictments, or appeals delay the proceedings. . . . The miners are anxious to get back to their work."[296] The emphasis on speed over careful procedure produced predictable results; many individuals were subjected to violence based on very thin evidence heard by hastily assembled tribunals.[297] Others received even less protection. Between 1849 and 1853, more than two hundred lynchings occurred in California, with the vast majority of carnage in the gold fields.[298] Fueled by emotion (and often racial prejudice), mobs of miners used physical force to overwhelm suspected wrongdoers and summarily impose their own rough form of justice.[299]

The same disregard for bureaucracy and careful procedure appears in other systems governed by informal property rights. Cattle ranchers, for example, routinely lashed out against their rivals with little regard for their ultimate guilt or innocence.[300] And lobster fishermen, too, have regularly punished competitors based more on hunches than reliable evi-

293. *See* Morriss, *Vigilantes*, *supra* note 49, at 608.

294. *See* HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 492 n.316; Morriss, *Vigilantes*, *supra* note 49, at 608. A good example of the sentiment against lawyers came from Bidwell's Bar in the fall of 1849: "No great Criminal Lawyer is allowed to humbug in this country, thereby creating the hope of escape. . . . Miners' Laws are swift and certain in their execution." HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 492.

295. *See* Morriss, *Vigilantes*, *supra* note 49, at 607.

296. *See* Morriss, *Vigilantes*, *supra* note 49, at 607; *see also* MONAGHAN, *supra* note 133, at 82 (describing trial of foreigners). As one miner put things, "[f]or the fear of the law, in the best regulated community, is not so strong as the fear of sudden death." Ridge, *supra* note 50, at 23.

297. WILLIAM HENRY ELLISON, A SELF-GOVERNING DOMINION: CALIFORNIA, 1849-1860 193 (1950) (stating that gold rush miners condemned men to death "without adequate proof"); CLARENCE KING, MOUNTAINEERING IN THE SIERRA NEVADA 300–02 (1874) (relating story of Mexican miner who was wrongly hanged for stealing a horse); BOESSENECKER, *supra* note 69, at 54 (describing incident of Mexicans killed on very thin evidence); Morriss, *Returning Justice*, *supra* note 50, at 560 (reviewing BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE (1998)) ("Critics . . . are correct that some (and perhaps many) of the individuals who called themselves 'vigilantes' were simply thugs violating the rights of their victims.").

298. BOESSENECKER, *supra* note 69, at 37. *See also* LEVY, *supra* note 88, at 82–83 (discussing lynching).

299. *See* David A. Johnson, *Vigilance and the Law: The Moral Authority of Popular Justice in the Far West*, 33 AM. Q. 558, 560 (1981) (finding that in California "[c]ontemporary diaries, journals, newspapers, and reminiscences record more than 380 cases of lynch law justice between 1849 and 1902.").

300. *See supra* Parts III.C.2.a, III.C.2.b.

dence of wrongdoing.[301] Thus, while the justice of informal property systems is certainly fast justice, stripped of neutral fact finders and thoughtful experts, it frequently exposes the innocent to cruel and brutal punishments.[302]

2. *Extreme Punishments Imposed on The Guilty*

A second obvious weakness that corrupts informal property is that private individuals—rather than trained professionals—impose sanctions on rule breakers. Much evidence exists that these private enforcers are prone to impose overzealous and extreme punishments for deviations from local norms.[303] The lobstermen of Maine, as discussed earlier, quickly turn to violence to resolve small-scale violations of their entitlements; they destroy property, burn boats, and engage in bloody fights.[304] The behavior of the Gold Rush miners is also instructive. Offenses—even relatively minor disturbances of the social order—were met with spectacularly brutal abuses.[305] Thieves regularly lost their lives.[306] Other small-time

301. James M. Acheson, *The Lobster Fiefs: Economic and Ecological Effects of Territoriality in the Maine Lobster Industry*, 3 HUM. ECOLOGY 183, 189 (1975) (noting that rumors rather than concrete evidence often accompany trap cutting incidents).

302. A related point also merits brief discussion. Rule-following citizens enmeshed in informal property systems have more to worry about than being mistakenly accused of a crime. They also needed to worry about being preyed on by actual wrongdoers. An underappreciated nuance of private ordering regimes is that innocent victims of wrongdoing do not have automatic access to a system of justice—there are no policemen or other state actors who serve the common good. To obtain redress, a wronged party must enforce their own rights or muster support from those individuals in a social structure with power and influence over others. *See* MILLER, BLOODTAKING, *supra* note 26, at 240, 243–47 ("Big people controlled lesser people's access to justice."); *see also* ACHESON, LOBSTER GANGS, *supra* note 170, at 58 (discussing the important role of the harbor "kingpin" in lobster gangs). This is not always an easy task. Within the fishing harbors of Maine, for example, an older fisherman with deep roots in the area and a large family might unfairly infringe on the rights of a new man or part-timer "almost indefinitely." *See id.* at 73; s*ee also* Acheson & Gardner, *supra* note 150, at 300 ("A major cost of offence and defense is the cost of organizing teams to invade or defend existing territorial boundaries."). In the Gold Rush a miner might be attacked in a brawl, but unless he had friends the offense would "simply [be] ignored as part of the general disorder." Ridge, *supra* note 50, at 19; *see also* PERKINS, *supra* note 133, at 148 (discussing how no action was taken after two gamblers shot a Mexican miner in the street); Clay & Wright, *supra* note 49, at 169 (providing an example of miner who refused to arbitrate a claim because the opposing prospector assembled a larger network of friends). These are serious problems for anyone concerned about the enforcement of rights. Without a state apparatus to level the power of parties in a dispute, the poor, the weak, and the unpopular all found themselves exposed to a systematic exploitation by actors with more assets, physical strength, and status.

303. MILLER, BLOODTAKING, *supra* note 26, at 184–87, 304–07 (discussing the savagery of blood feuds that occurred before the rise of the Icelandic state).

304. *See supra* Part III.B.2.

305. See Zerbe & Anderson, *supra* note 49, at 128 ("The certain and speedy punishments of defectors was one of the most widely reported aspects of the gold fields.").

306. California's fifth military governor, Richard Mason, set the tone early. In 1847, he remarked, "[y]ou may tell the people that if they catch Indians in the act of stealing their horses, they should shoot them." J. S. HOLLIDAY, RUSH FOR RICHES: GOLD FEVER AND THE MAKING OF CALIFORNIA 47–48 (1999) [hereinafter HOLLIDAY, RUSH FOR RICHES]; *see also* HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 316–317 (discussing the killing of thieves); SARAH ROYCE, A FRONTIER LADY, RECOLLECTIONS OF THE GOLD RUSH AND EARLY CALIFORNIA 80 (Ralph Henry Gabriel ed., 1932) (detailing the summary hanging of three thieves).

criminals were flogged,[307] mutilated (cropping of the ears was common),[308] branded with hot irons,[309] or subject to crippling fines.[310] The history of cattle ranching, too, is littered with stories of private enforcers who impose overly energetic forms of aggression on their rivals for *de minimis* transgressions of property rules. As one scholar summarized, "[w]ithout training . . . , private parties are bound to make wrong enforcement decisions, either in good faith or with discriminatory intent . . . ."[311]

The many concrete examples of caustic retaliation in nonstate systems suggest more abstract questions. Why, exactly, are informal strongmen likely to impart more intemperate punishments than the agents of a central government? What theories explain why private enforcers often struggle to impart deftly calibrated punishments on deviants? To start, self-help schemes are easy to unleash, but often difficult to control. Private enforcers who intend to impose only mild physical sanctions may, in the emotionally charged chaos of an altercation, respond impulsively and inflict more harm than originally planned. The target of retaliation may also resist, further escalating the quantum of violence needed to settle disputes.

Historical sources are filled with stories of such overzealous enforcers. Before the rise of the Icelandic State, for example, Snorri Thorvaldsson set out to hurt the person who murdered his father.[312] Unfortunately, once Thorvaldsson initiated violence, the mayhem took its own course, and the scheme quickly devolved into a tragic farce. Thorvaldsson's first mistake was pursuing an innocent man, Sturla Sighvatsson, as his father's killer.[313] Under the cover of darkness, Thorvaldsson snuck onto Sighvatsson's farmstead, but then panicked and began to hack indiscriminately at the members of the household.[314] He attacked a priest, severed a women's breast, maimed laborers, and, in the process, brought dishonor upon himself.[315] Snorri Thorvaldsson's bloody (and unsuccessful) attempt to square accounts with his family's tormenter demonstrates that in a world of amateur enforcers, private disputes can

307. *See, e.g.*, HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 317 (discussing lashes given to thief); Morriss, *Vigilantes*, supra note 49, at 605.

308. BOESSENECKER, *supra* note 69, at 31 (describing an ear-cropping); HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 317 (same); Morriss, *Vigilantes*, *supra* note 49, at 607 (same); *Sacramento News*, DAILY ALTA CAL., June. 22, 1852, at 2 (noting the story of a horse thief, William Hibbard, who was shot and then had his head "whacked off" by a physician with a Bowie knife).

309. BOESSENECKER, *supra* note 69, at 31; HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 317; Morriss, *Vigilantes*, *supra* note 49, at 605.

310. Fines and taxes were a common tool used against foreign miners and racial minorities. *See* MONAGHAN, *supra* note 133, at 244. The Foreign Miners Tax of 1850 was particularly pernicious. *See* Chan, *supra* note 59, at 63; McKanna, *supra* note 97, at 403.

311. Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 812 (2008).

312. Ármann Jakobsson, *Snorri and His Death: Youth, Violence, and Autobiography in Medieval Iceland*, 75 SCANDINAVIAN STUD. 317, 319 (2003).

313. *Id.*

314. *Id.* at 319–25

315. *Id.*

quickly curdle into grisly deaths and large-scale slaughter.[316] Many similar stories exist.[317]

The tendency of victims to exaggerate the severity of damages they suffer further increases the risk of excessive punishments in informal systems.[318] Often these miscalculations are not purposeful. Numerous studies demonstrate that humans routinely and unconsciously inflate their own virtues, magnify their grievances, and do the reverse with their adversaries.[319] A classic illustration of this point was provided by psychologists Albert Hastorf and Hadley Cantril.[320] In 1954, Hastorf and Cantril played a film of a particularly brutal Princeton-Dartmouth football game for undergraduates at the two schools.[321] Although the students viewed the exact same images, they came to drastically different conclusions about which team initiated the incivilities and which perpetrated more violence.[322] This cognitive bias, when left uncorrected, contains a seed of

316. In the Gold Rush, small disputes between men were notorious for ending in bloodshed. *See* Ridge, *supra* note 50, at 19 ("What might start as a verbal altercation between intoxicated men could lead to a fistfight and ultimately homicide."). On the grassland prairie, private violence could also escalate quickly. COURTWRIGHT, *supra* note 73, at 90 ("Texas-born cowboys were particularly notorious for their willingness to resort to guns to settle personal disputes . . . ."). It will surprise no one that the quick escalation of violence often worsens in places where firearms ownership is common. *Id.* at 43. Biologists suggest that disputes over land and territory are more likely to turn physical. *See* JOHN ARCHER, THE BEHAVIOURAL BIOLOGY OF AGGRESSION 164 (1988) ("[A]n escalated fight would occur if both animals perceive themselves to be the 'owner' of the resource or the resident." (citations omitted)); IRENÄUS EIBL-EIBESFELDT, ETHOLOGY: THE BIOLOGY OF BEHAVIOR 347 (Erich Klinghammer trans., 2d ed. 1975) ("Ownership of territory is frequently a prerequisite for the occurrence of aggressive behavior."). Professor Brumble also notes the importance of murderous violence in cultures that strongly value honor and reputation. *See* H. David Brumble, *The Gangbanger Autobiography of Monster Kody (aka Sanyika Shakur) and Warrior Literature*, 12 AM. LITERARY HIST. 158, 171–72 (2000) ([I]n warrior narratives we frequently find that murderous endings often have absurdly small beginnings."). Brumble writes, "this is one of the points of warrior pride: to be willing to risk one's life to avenge an insult, even a slight, even a *look*." *Id.* at 172.

317. Of course, the danger of overzealous enforcers is not confined to informal property regimes. For recent examples from U.S. criminal law, see People v. Jones, 936 N.E.2d 1160, 1172–73 (Ill. App. Ct. 2010) (defendant intended to "beat up" man sleeping with his girlfriend but the fight resulted in the man's death); People v. Keller, No. A124739, 2010 WL 3159027, at *2 (Cal. Ct. App. Aug. 11, 2010) (in avenging an assault, defendant imposed more harm than intended); People v. Ervin, No. 268199, 2007 WL 2404521, at *1 (Mich. Ct. App. Aug. 23, 2007) (defendant attempted to scare a group of people who had threatened his brother but accidently shot a person).

318. *See generally* MILLER, BLOODTAKING, *supra* note 26, at 200; MILLER, HUMILIATION, *supra* note 27, at 57; Robert Wright, *Why Can't We All Just Get Along? The Uncertain Biological Basis of Morality*, ATLANTIC (Nov. 2013), http://www.theatlantic.com/magazine/print/2013/11/why-we-fight and-can-we-stop/309525/; *see also* Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 652 (2012) (discussing how people justify their crimes through their property).

319. *See* Roy F. Baumeister et al., *Victim and Perpetrator Accounts of Interpersonal Conflict: Autobiographical Narratives About Anger*, 59 J. PERSONALITY & SOC. PSYCHOL. 994, 1000 (1990); Sara Konrath & Irene Cheung, *The Fuzzy Reality of Perceived Harms*, 36 BEHAV. & BRAIN SCI. 26, 27 (2012) ("When it comes to revenge and forgiveness, there is no black and white world where harms are objective."); Jeanne S. Zechmeister & Catherine Romero, *Victim and Offender Accounts of Interpersonal Conflict: Autobiographical Narratives of Forgiveness and Unforgiveness*, 82 J. PERSONALITY & SOC. PSYCHOL. 675, 678 (2002).

320. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

321. *Id.* at 130.

322. *Id.* at 130–31.

danger. If victims of wrongdoing do not accurately assess the amount of harm they have suffered, they may miscalibrate their responses to deviants and impose asymmetric and extreme penalties on their opponents.[323]

The widespread inability of humans to impartially evaluate their own suffering certainly explains some of the ruthless punishments on view in the Gold Rush. "In a world without insurance, where men risked their lives and exhausted their bodies to accumulate wealth," the miners struggled to judge thieves with detached rationality.[324] Men who stole, they believed, deserved swift punishment and had no rights worth protecting.[325] The same emotionally-charged assessments of wrongdoers sprung up on the prairie, where cattlemen continually exaggerated their own virtue and overstated the deviancy of their sheepherding rivals. The views of President Theodore Roosevelt crystalize their prejudices. "Cattlemen hate sheep," Roosevelt wrote, "[t]he sheep-herders are a morose, melancholy set of men, generally afoot, and with no companionship except that of the bleating idiots they are hired to guard. No man can associate with sheep and retain his self respect."[326] When struggles over entitlements inevitably arose, cowboys—like the Gold Rush miners before them—lacked a neutral third party to measure and record the injustices they suffered.[327] They had only their own perceptions and judgment to guide necessary remedial actions. Unfortunately, personal bias often distorted their views, leading enforcers away from the kind of finely graduated responses available in centralized systems, and toward strikingly violent outcomes.

3. The Prevalence of Feuds Fuels Violence

A third factor further compounds the violence gap between *de facto* property and state-backed systems. Unlike centralized punishment regimes, which deter violent reprisals with the threat of overwhelming force, private ordering has a propensity to spark damaging feuds that prolong conflict and amplify destruction.[328] The upward pressure to in-

323. Karina Schumann & Michael Ross, *The Benefits, Costs, and Paradox of Revenge*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS 1193, 1196 (2010); Arlene Stillwell et al., *We're All Victims Here: Toward a Psychology of Revenge*, 30 BASIC & APPLIED SOC. PSYCHOL. 253, 253 (2008) ("[R]evenge is an aggressive act that is often justified by the pursuit of equity—but the enactment of revenge and the calculations of equity can be severely compromised by the biases inherent in the interpersonal roles of the avenger . . . and recipient of the revenge . . . .").

324. COURTWRIGHT, *supra* note 73, at 77.

325. *Id.* at 77–78; ROHRBOUGH, *supra* note 56, at 219 (discussing the extreme anger of miners toward thieves).

326. THEODORE ROOSEVELT, HUNTING TRIPS OF A RANCHMAN 131 (1885).

327. *But see* Zerbe & Anderson, *supra* note 49, at 127 (noting that outside referees were often used to settle disputes in the gold fields). The obvious difficulty is that judgments came with no enforcement mechanism. It was not unusual for the losing party to resist. For example, John Wheeler, one of three referees selected to resolve a dispute over a mining claim, was stabbed in the back by the party he decided against. *Stabbed*, SACRAMENTO DAILY UNION, Jan. 20, 1854, at 3.

328. Indeed, the necessity of state-backed enforcement to keep disagreements from getting out of hand is the central thrust of the social contract espoused theorists such as Hobbes, Locke, and the an-

creasingly serious levels of violence results chiefly from the perspective biases discussed above.[329] In private ordering systems, vendettas typically begin when an enforcer regards her conduct as proper and justified, but the freshly-chastised rule breaker views the imposed sanctions as an inappropriate overreaction. The rule breaker's perception of being roughly treated then grants him victim status and serves as a basis for "justified" counterattacks.[330] As one party's nonproportional acts provoke further nonproportional retaliation, an escalating cycle of mayhem becomes entrenched.[331] Additionally, those seeking reprisal may also make mistakes about the identity of those marked as deviants, thereby risking the spread of new conflicts with different peoples and providing a spark for the enlargement of disputes.[332]

A few commentators have argued that the threat of feud in private ordering systems is widely exaggerated.[333] These scholars put forth that tight-knit communities with strong social norms can encourage acceptable behavior and restrain impulses toward savage retribution.[334] This argument merits suspicion for two reasons. First, the theorizing ignores that in many groups with cohesive social structures, violence—even extreme violence—is not considered "pathological or counternormative."[335] In such communities, the stronger the social bonds, the

cient Roman philosopher Lucretius. *See* THOMAS HOBBES, LEVIATHAN 226–27 (C.B. Macpherson ed., Penguin Books 1986) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324–25 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); LUCRETIUS, ON THE NATURE OF THE UNIVERSE 206 (R. E. Latham trans., 1951) ("Mankind, worn out by a life of violence and enfeebled by feuds, was the more ready to submit of its own free will to the bondage of laws and institutions.").

329. *See* MILLER, BLOODTAKING, *supra* note 26, at 74 ("At every moment there existed the possibility of miscommunication, miscomprehension, and misfire."); Craig A. Anderson et al., *Creating Your Own Hostile Environment: A Laboratory Examination of Trait Aggressiveness and the Violence Escalation Cycle*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 462, 464 (2008); Lynne M. Andersson & Christine M. Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, 24 ACAD. MGMT. REV. 452, 463 (1999).

330. *See* ELLICKSON, *supra* note 13, at 220; Anderson et al., *supra* note 329, at 464 ("One person's 'appropriate' and 'justified' retaliation is the other person's next provocation.").

331. *See* MILLER, BLOODTAKING, *supra* note 26, at 186 ("Favoring interminability was the fact that few return blows ever precisely balanced the wrong they were matched against."); Andersson & Pearson, *supra* note 329, at 458 ("The existence of interpersonal conflict spirals has been well documented.").

332. *See, e.g.*, ACHESON, THE COMMONS, *supra* note 143, at 28 (stating that lobstermen often retaliate "against the wrong person"); Acheson & Gardner, *Territoriality*, *supra* note 171, at 315 (noting that trap cutting incidents can escalate quickly, "with the guilty and innocent alike blindly retaliating against each other"); *see also* SUSAN LEE JOHNSON, ROARING CAMP: THE SOCIAL WORLD OF THE CALIFORNIA GOLD RUSH 209 (2000) (showing that in the Gold Rush, in a world where "might was right," retaliations were often made upon "unoffending individuals").

333. Max Gluckman famously proclaimed that there was peace in the feud. *See* Max Gluckman, *Peace in the Feud*, 8 PAST & PRESENT 1 (1955); *see also* WHITLEY R.P. KAUFMAN, HONOR AND REVENGE: A THEORY OF PUNISHMENT 98 (2013) (describing the danger of feud as a "caricature"); Bryan Caplan & Edward P. Stringham, *Privatizing the Adjudication of Disputes*, 9 THEORETICAL INQUIRIES L. 503, 505 (2008).

334. *See* ELLICKSON, *supra* note 13, at 207–08. Many of the Gold Rush miners felt their vigilantism was socially constructive and orderly. *See* BOESSENECKER, *supra* note 69, at 28.

335. *See* Dov Cohen, *Culture, Social Organization, and Patterns of Violence*, 75 J. PERSONALITY & SOC. PSYCHOL. 408, 408 (1998).

more culturally appropriate violence will appear.[336] Second, the lessons of history clearly demonstrate the danger of the feud. The cost and incidence of bloody reprisals are empirical rather than purely philosophical propositions, and there are many examples of informal systems that have become engulfed in the violence of spiraling revenge.[337] Places as disparate as medieval Iceland,[338] nineteenth-century Kentucky,[339] twenty-first century Albania,[340] and parts of contemporary Mexico have all suffered the mayhem of private vendettas.[341] In short, the potential for violence is inherently more perilous and more costly in private ordering regimes. Whereas a formal state, with its overwhelming power and specialized institutions of enforcement, can deter nasty cycles of retribution, private ordering systems provide a structural impetus for minor disagreements to blossom into ragged struggles for dominance.

B. Fear of Violence Costs

The previous Subsection argued that private ordering regimes expose individuals to more and worse physical harms than centralized dispute resolution systems. The total cost of the violence in informal property structures, however, cannot be measured solely by tallying bruises and broken bones. Bodily injuries sustained in the defense of entitlements are only the most obvious drawback of *de facto* property. Many other costs of violence sit like tectonic faults: seldom overtly visible but powerful in their impact. For example, in private ordering regimes, the *fear of violence* creates a separate catalogue of harms that inflicts damage across entire communities—not just upon the individuals directly engaged in mayhem. More specifically, fear of physical harm creates economic waste, decreases psychological wellbeing, and undermines the manufacture of social capital.

Surprisingly, fear and its attendant costs have received very little attention in the legal literature.[342] The neglect of the fear of violence is par-

336. *Id.*

337. *See* Joel T. Rosenthal, *Marriage and the Blood Feud in 'Heroic' Europe*, 17 BRIT. J. SOC. 133, 138 (1966) (warning that observers should "not be too sanguine about the elements of order and fusion" within the feud). Rosenthal writes, "[t]he mere existence of the blood feud was a challenge to efforts made towards organizing society into units larger than kin groups. The existence of the blood feud meant that the basic function of government . . . was being dealt with by the family . . . ." *Id.*

338. *See generally* MILLER, BLOODTAKING, *supra* note 26.

339. Perhaps the most well known feud in U.S. history is the battle between the Hatfield family of West Virginia and the McCoy clan of Kentucky. *See* OTIS K. RICE, THE HATFIELDS AND THE MCCOYS (1978). The Hatfield/McCoy feud was one of many vendettas that plagued Eastern Kentucky. *See* JOHN ED PEARCE, DAYS OF DARKNESS: THE FEUDS OF EASTERN KENTUCKY (1994).

340. Andrew J. Shryock, *Autonomy, Entanglement, and the Feud: Prestige Structures and Gender Values in Highland Albania*, 61 ANTHROPOLOGICAL Q. 113 (1988); Jenny Wormald, *Bloodfeud, Kindred and Government in Early Modern Scotland*, 87 PAST & PRESENT 54, 56 (1980) (summarizing the extreme amount of violence in Albanian feuds).

341. *See, e.g.*, David Bank, *Bad Blood: Two Families' Vendetta Has Killed at Least 34 in Mexico and Bay Area*, SAN JOSE MERCURY NEWS, July 28, 1991, at A1.

342. *See* Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 62 (stating that neglect of the fear of crime in the land use literature is "unfortunate and curious"); Nicole Garnett, *Or-*

ticularly remarkable when one considers that the conditions in private ordering regimes are ideally suited to generate dread and suspicion. Private ordering regimes, unlike state-backed systems, do not employ trained professionals to protect the innocent, police rights, and punish wrongdoers. Nor do they filter violence through predictable and bureaucratic channels. Instead, the first shot of violence often appears suddenly, as a baleful surprise imposed by outsiders looking to expand their entitlements at the expense of traditional owners.

Even a brief glance at the source material confirms that a tremendous amount of anxiety surges through the *de facto* property systems at the center of this Article. The Gold Rush miners, for example, regularly worried that hostile interlopers would drive rightful owners off of their claims and take their gold.[343] One miner noted that he and his companions "did [n]ot sleep much for there were a [n]umber of [m]urders [c]ommitted around [Sonora]. So we were afraid to [c]lose our [e]yes into [s]leep for fear of the [wrongdoers]."[344] The lobstermen, too, have expressed serious concern about the violence that haunts their work. The most vivid accounts of this fear appear in the memoir of lobster fisherman Linda Greenlaw. In *Life on a Very Small Island*, Greenlaw describes, in intimate detail, how members of her harbor gang became consumed by the prospect of a "gear war" with a neighboring group of fishermen.[345] Greenlaw's compatriots worried about the loss of their informal property rights, fretted over the possibility of violence, and discussed a number of strategies to resist the encroachments. Ultimately, when rival fisherman pushed into the area, the "fear of reaction or retaliation" compelled the harbor gang to surrender valuable fishing territory

dering the City, Redux, PRAWFSBLAWG (March 23, 2010, 12:09 PM), http://prawfsblawg.blogs.com/prawfsblawg/2010/03/ordering-the-city-redux.html (describing fear as "neglected by policymakers and undertheorized in the academy"). Fear of crime, a concept related to fear of violence, has received attention from psychologists and criminologists. *See* C. Hale, *Fear of Crime: A Review of the Literature*, 4 INT'L REV. VICTIMOLOGY 79 (1996).

343. As discussed elsewhere in this Article, foreigners and ethnic minorities experienced the worst abuse in the mines. As a result, they seem to have spent more time worrying about their safety. *See* McDowell, *Spontaneous Order*, *supra* note 49, at 811; *see also* JOHNSON, *supra* note 332, at 194 (detailing the case of a Hispanic Californio who left the diggings because of fear); LAPP, *supra* note 138, at 66, 122–23 (discussing abuse suffered by blacks and providing example of black miner who left the diggings on account of fear); MONAGHAN, *supra* note 133, at 195 (discussing fear). The instability of the mining camps also filled many Anglo-Americans with fear. They worried primarily about their vulnerability to thieves. *See* ROHRBOUGH, *supra* note 56, at 218–19; Clay & Wright, *supra* note 49, at 169 (stating that "even a miner whose claim was entirely legitimate" had to worry about risk of jumpers).

344. RONALD H. LIMBAUGH & WILLARD P. FULLER JR., CALAVERAS GOLD: THE IMPACT OF MINING ON A MOTHER LODE COUNTY 123 (2004).

345. GREENLAW, *supra* note 153, at 17, 82, 93, 102–06, 188, 198, 226. Greenlaw stresses that she was willing to fight to stop encroachment from outsiders. *Id.* at 105 ("I would gladly sacrifice all my gear, my fishing license, even [my boat] for the cause of saving what was left of our precious Island life.").

to the outsiders.[346] In Greenlaw's words, her fellow Islanders "just chickened out."[347]

The weight of all of this anxiety has consequences. To start, it inflicts significant economic damage on communities that lack a centralized enforcer to protect their rights. Taking precautions to prepare for mayhem and avoid physical harm is expensive—it places demands on the time, energy, and resources of the fearful.[348] For example, in *de facto* property systems, those individuals without a natural talent for violence must either hire effective enforcers,[349] forge cooperative relationships with more aggressive competitors,[350] or occasionally accept losses.[351] Greenlaw's cohorts, confronted with the prospect of a gear war, ceded some fishing rights to more hostile neighbors.[352] Other harbor gangs admit fiery young men into their ranks to serve as enforcers in times of trouble.[353] Although the presence of these thugs creates a powerful deterrent against predation by outsiders, the fishermen agree that the enforcers become "more of a liability than an asset" in times of peace.[354] There are no costless alternatives.

The fear of violence also inflicts separate psychic costs on individuals.[355] It should not be a major wonder that the lurking threat of confrontation and bodily injury can create a harmful state of anxiety, worry, and dread.[356] At its worst, the fear of violence can overwhelm and corrode otherwise healthy minds. The persistent danger of attacks and counterat-

346. *Id. at* 188; *see also id.* at 102–03.

347. *Id.* at 188.

348. Hale, *supra* note 342, at 80 (stating that dealing with fear can soak up "time, money, and effort which might be spent more positively on other activities to improve the quality of life"). Of course, dispute resolution mechanisms in communities that do not rely on violence also impose some costs. Negotiated resolutions of complicated issues, for example, can be incredibly time consuming.

349. The hiring of private security is a common strategy around the world. *See, e.g.*, ABBY STODDARD ET AL., HUMANITARIAN POL'Y GROUP, THE USE OF PRIVATE SECURITY PROVIDERS AND SERVICES IN HUMANITARIAN OPERATIONS 7 (2008), *available at* www.odi.org.uk/resources/download/2816.pdf (discussing use of private security by corporations and NGOs engaged humanitarian work).

350. This was a favored strategy of black miners in the California Gold Rush. *See* LAPP, *supra* note 138, at 60.

351. Those threatened with violence could also decide to abandon informal property regimes for areas governed by central states. For more on "exit" as a strategy, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

352. GREENLAW, *supra* note 153, at 102–03, 188.

353. ACHESON, LOBSTER GANGS, *supra* note 170, at 63–64.

354. ACHESON, THE COMMONS, *supra* note 143, at 38 (noting the strong tendency of boundary enforcer teams to be composed of "young fishermen who are as much interested in raising hell and excitements as they are in the more serious side of potential conflict at sea"); ACHESON, LOBSTER GANGS, *supra* note 170, at 63 (stating that these young "thugs" are "more of a liability than an asset" in times of peace).

355. *See* Marni White et al., *Perceived Crime in the Neighborhood and Mental Health of Women and Children*, 19 ENVTL. & BEHAV. 588, 609 (1987) (showing that fear can negatively impact the mental health of individuals).

356. WATERS ET AL., *supra* note 30, at 13 ("Throughout the literature on the costs of violence, psychological costs greatly outweighed the direct costs of violence."); *see also* Kenneth E. Boulding, *Towards a Pure Theory of Threat Systems*, 53 AM. ECON. REV. 424, 426–27 (1963) (stating that the mere threat of violence creates anxiety).

tacks has the power to trigger damaging psychological maladies such as paranoia, panic attacks, and suicidal thoughts.[357]

More subtle depredations plague others. Ta-Nehisi Coates, for instance, recently catalogued his experiences living under an informal property regime—the gang-controlled neighborhoods of crack-era Baltimore.[358] He recalled how the constant fear of violence kept him from focusing on higher-order pursuits: "On an average day . . . ," Coates writes, "fully a third of my brain was obsessed with personal safety. I feared the block 10 times more than any pop quiz."[359] Those trapped in private ordering systems have also chronicled that the presence of violence quickly erodes an individual's sense of security and confidence. Even the most mundane rituals—where one walks, the volume and timbre of one's voice, and whom one loves—can become sources of angst because they contain the potential to spark sudden conflict.[360] The evidence of these costs is not merely anecdotal. Throughout the violence literature, researchers agree that these psychological harms exist and that the costs they impose are substantial. In fact, most studies suggest that the mental anguish caused by the fear of violence greatly outweighs the direct costs of bodily injury.[361]

Pervasive fear also results in diminished social capital in communities governed by informal property systems. The notion of "social capital" is the subject of ample scholarly debate, but for the purposes of this discussion refers to features of social organization such as trust, reciprocity, and community networks that enable individuals to act cooperatively in pursuit of shared objectives.[362] Fear hampers a community's ability to collaborate and organize in at least two ways. First, when a frightened individual takes conspicuous measures to defend against violence, such as wearing a gun or installing bars on his windows, he may signal that he

357. *See* Bufacchi, *supra* note 29, at 173; *id.* at 175, 177 (asserting that exposure to violence and the threat of violence reminds victims of their "vulnerability and subordination in a power relationship"); *see also* FORUM ON GLOBAL VIOLENCE PREVENTION, SOCIAL AND ECONOMIC COSTS OF VIOLENCE 116 (2012) (affirming that those who fear violence suffer steep mental health consequences); HELGE HOEL ET AL., THE COST OF VIOLENCE/STRESS AT WORK AND THE BENEFITS OF A VIOLENCE/STRESS-FREE WORKING ENVIRONMENT 4 (2001) (recapping discussion of negative effects of violence on job-satisfaction and commitment).

358. *See generally* TA-NEHISI COATES, THE BEAUTIFUL STRUGGLE: A FATHER, TWO SONS, AND AN UNLIKELY ROAD TO MANHOOD (2009).

359. Ta-Nehisi Coates, *Hip-Hop Speaks to the Guns*, N.Y. TIMES, Feb. 6, 2013, http://www.nytimes.com/2013/02/07/opinion/coates-hip-hop-speaks-to-the-guns.html.

360. *Id.* ("In Baltimore, calling upon our Winnie Coopers meant gathering an entire crew."); *see also* MILLER, HUMILIATION, *supra* note 27, at 63 (describing how fear corrupts even the simplest of daily rituals).

361. WATERS ET AL., *supra* note 30, at 13; Alean Al-Krenawi et al., *Psychological Responses to Blood Vengeance Among Arab Adolescents*, 25 CHILD ABUSE & NEGLECT 457, 458 (2001) ("The deleterious psychological impact of exposure to violence has been well documented.").

362. Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006); *see also* Robert D. Putnam, *Bowling Alone, America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67 (1995).

does not trust other community members to act honestly and fairly.[363] Second, when individuals are afraid, they may attempt to ensure their personal security by limiting their social interactions to a cosseted group of kin or confining their movements to familiar places.[364] A simple "stay at home" strategy certainly reduces the odds of encountering the universe of threat and danger, but also dramatically shrinks the number of positive intraneighbor contacts that build trust and sustain local networks.[365] The lobster coast of Maine provides a germane example. As a result of the violent competition between harbor gangs, people from adjoining towns, sometimes separated by as little as a bend in the road, "feel a marked sense of distance mixed with a little hostility and even fear."[366] These close neighbors do not interact and never establish the enlivening connections that make cooperation possible.

Such anticommunitarian outcomes reveal in stark terms that the total cost of violence in private ordering systems includes more than the direct costs resulting from bloodshed. Fear—without anything more—can engender pain, discipline the body, and restrict freedom as effectively as any punch. As a result, any measured evaluation of informal property regimes must not only tabulate the number of fights, but also consider the psychic costs imposed on individuals who organize their lives around the terror violence provokes.

C. Occupational Sorting Costs

A third disadvantage of informal property systems merits consideration. As compared to centralized states, *de facto* property regimes distort the occupational decisions of individuals in local labor markets. The culprit, once again, is violence. During the last thirty years, social scientists have firmly established that safety risks exert a robust influence on employment decisions.[367] Some individuals demonstrate much less willing-

363. NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 134 (2010).

364. *See* Allen E. Liska et al., *Fear of Crime and Constrained Behaviour: Specifying and Estimating a Reciprocal Effects Model*, 66 SOC. FORCES 827 (1988); *see also* Terance D. Miethe, *Fear and Withdrawal from Urban Life*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 21 (1995) ("One of the most basic responses to crime and fear of it is to avoid particular places . . . and to avoid particular types of individuals.").

365. *See* Liesbeth De Donder et al., *Social Capital and Feelings of Unsafety in Later Life: A Study on the Influence of Social Network, Place Attachment, and Civic Participation on Perceived Safety in Belgium*, 34 RES. ON AGING 425, 443 (2012) (finding a "significant association between social capital and feelings of unsafety"); s*ee also* Steven Box et al., *Explaining Fear of Crime*, 28 BRIT. J. CRIMINOLOGY 340 (1988) (finding a negative relationship between perceptions of a neighborhood's cohesiveness and the fear of crime); Hale, *supra* note 342, at 80 (suggesting that fear of crime limits interactions with neighbors); Miethe, *supra* note 364, at 22–23 (arguing that fear leads to increased social divisions).

366. ACHESON, LOBSTER GANGS, *supra* note 170, at 27.

367. *See, e.g.*, Joni Hersch & Todd S. Pickton, *Risk-Taking Activities and Heterogeneity of Job-Risk Tradeoffs*, 11 J. RISK & UNCERTAINTY 205, 205–06 (1995) (finding that workers have heterogeneous tolerances for the prospect of bodily injury); W. Kip Viscusi, *The Value of Risks to Life and*

ness to expose themselves to health hazards and the prospect of bodily injury, even in return for significantly higher salaries.[368] The findings of these studies suggest, rather strongly, that risk averse (but competent) workers will forgo employment opportunities in areas governed by informal rules because of the persistent threat of violence. The use of physical force, in effect, creates a barrier to entry for the weak, the passive, and the cautious.

On-the-ground evidence from *de facto* property regimes supports this conclusion. A number of accounts from California describe how miners, dismayed at the level of belligerence in the gold fields, simply left the diggings for other work.[369] For instance, Jack Kimball, whom one commentator described as a "gentler sort," sold his claim and forsook the mines after witnessing a "group of drunken, prejudiced hotheads" attempt to enforce order.[370] In lobster villages, too, prospective fishermen have abandoned the industry after finding themselves unable to confront the prospect of enforcing their rights through violence.[371] A stout appetite for aggressive behavior is especially vital for any lobstermen who attempt to work on the small island communities of the central coast. In these locations, prevailing norms dictate that all lobstermen must participate in the defense of the community's fishing territory, while the intimate size of these areas makes shirking impossible.[372] The system, in short, gives individuals the choice of "fight" or "flight."

This type of occupational sorting, based solely on an individual's tolerance for mayhem, has the potential to introduce extreme inefficiencies and injustice into local labor markets. There are two glaring problems. First, as described above, individuals who lack a flair for aggressive behavior will self-select away from jobs that require them to wield violence, leaving the more bellicose and quarrelsome to fill the gaps. Unless the best fighters also happen to be the most effective workers, the vio-

Health, 31 J. ECON. LITERATURE 1912, 1913–15 (1993) (discussing risk-wage tradeoffs among workers).

368. *See* Hersch & Pickton, *supra* note 367, at 206; W. Kip Viscusi & Joni Hersch, *Cigarette Smokers as Job Risk Takers*, 83 REV. ECON. & STAT. 269, 269 (2001). Some of these insights go back until at least the time of Adam Smith. Smith writes, "[t]he wages of labor vary with the ease or hardship, the cleanliness or dirtiness, the honorableness or dishonourableness of the employment." *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 100 (Edwin Cannan ed., 1937) (1776).

369. *See, e.g.*, JOHNSON, *supra* note 332, at 194, 216; LAPP, *supra* note 138, at 60; McGrath, *supra* note 55, at 38 (discussing some Chileans who left the diggings when confronted with the prospect of violence); Mary Colette Standart, *The Sonoran Migration to California, 1848-1856: A Study in Prejudice*, *in* BETWEEN TWO WORLDS: MEXICAN IMMIGRANTS IN THE UNITED STATES 3, 11 (David G. Gutiérrez ed., 1996) (documenting that Mexicans and Chileans left the diggings in large numbers when confronted with the terror of private enforcement). Recent work in anthropology finds that exposure to violence leads to absenteeism and exit in the modern workplace. *See* HOEL ET AL., *supra* note 357, at 4; WATERS ET AL., *supra* note 30, at 23.

370. LAPP, *supra* note 138, at 59–60.

371. *See, e.g.*, ACHESON, LOBSTER GANGS, *supra* note 170, at 65, 69 (confirming that some new fishermen quickly abandon lobstering after an initial encounter with the system's informal enforcers), *see also* GREENLAW, *supra* note 153, at 24.

372. ACHESON, THE COMMONS, *supra* note 143, at 35.

lence of informal property systems will produce a less skilled labor force. For instance, it may take a fighter/fisherman who gains entry into the local harbor gang more time and effort to catch lobsters than his naturally gifted (but timid) neighbor who self-selects away from the industry. Consumers, as a result, will ultimately suffer declines in welfare. This "inefficient worker" problem seized California during the Gold Rush. Scholars of that era widely agree that Anglo-Americans were the least skilled miners in the diggings—they favored rapid profits over thoroughness and left much gold uncovered.[373] Nevertheless, their willingness to commit atrocities against Indians and foreigners allowed them to claim most of the area's wealth.[374]

Occupational entry requirements founded on an enthusiasm for violence also create pernicious gender effects. Research shows that women are less tolerant of physically aggressive behavior and remain less willing than their male counterparts to take jobs that expose them to the risk of serious bodily harm.[375] These forces have dramatic consequences within property regimes that demand individuals enforce their own entitlements at the point of a gun. In Maine, although many women participate on the business side of the lobster industry, there are only "a handful" who operate their own fishing boats.[376] The rolls of Gold Rush miners and Great Plains ranchers were equally devoid of female workers.[377] There are, of

373. McDowell, *Commons to Claims*, *supra* note 49, at 53 ("Each miner worked his claim blindly and hastily, sometimes overlooking rich deposits, and dumping his dirt and stones on what he supposed to be unproductive ground. The next wave of miners then washed the same dirt or shifted the first party's tailings to get at the remunerative ground beneath.").

374. BRANDS, *supra* note 52, at 260 ("[Chileans'] skill in the goldfields earned them the resentment of their neighbors, who by force and other means drove them off the best claims and in many cases out of the diggings entirely."); *see also id.* at 201 (discussing the Indians' mining techniques). Many of the Mexicans who came to the diggings were already experienced miners. As one group of scholars wrote, "there is good reason to suspect that much of hostility toward Mexicans had less to do with their race than with their skill and success as miners." ROBERT V. HINE & JOHN MACK FARAGHER, THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY 243 (2000).

375. *See* John Archer & Sylvana Cote, *Sex Differences in Aggressive Behavior: A Developmental and Evolutionary Perspective*, *in* DEVELOPMENTAL ORIGINS OF AGGRESSION 425, 427 (Richard E. Tremblay et al. eds., 2005) ("There are large sex differences in measures of physical aggression . . . ."); Joseph A. Vandello, Dov Cohen, & Sean Ransom, *U.S. Southern and Northern Differences in Perceptions of Norms About Aggression: Mechanisms for the Perpetuation of a Culture of Honor*, 39 J. CROSS-CULTURAL PSYCHOL. 162, 170 (2008) (finding males more encouraging of violence). Many studies have demonstrated that men and women cluster in different occupations. *See, e.g.*, Kim A. Weeden, *Revisiting Occupational Sex Segregation in the United States, 1910-1990: Results from a Log-Linear Approach*, 35 DEMOGRAPHY 475, 484–85 (1998); *see also* Kim A. Weeden, *Occupational Segregation*, *in* BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 3244–47 (George Ritzer ed., 2007). Some degree of occupational segregation can be tied to differences in willingness to accept risk. *See* Thomas DeLeire & Helen Levy, *Worker Sorting and the Risk of Death on the Job*, 22 J. LAB. ECON. 925, 946 (2004); S. Grazier & P.J. Sloane, *Accident Risk, Gender, Family Status, and Occupational Choice in the UK*, 15 LAB. ECON. 938, 955 (2008) (finding that risk of violence, specifically the risk of death, affects occupational gender segregation). For a broad look at studies on gender differences and risk-taking, see James P. Byrnes et al., *Gender Differences in Risk Taking: A Meta-Analysis*, 125 PSYCHOL. BULL. 367 (1999).

376. ACHESON, LOBSTER GANGS, *supra* note 170, at 3.

377. LEVY, *supra* note 88, at 109–14 (discussing the few women who did work as miners). There are few mentions of women who drove cattle in the 1800s. Women, however, did do considerable ranch work and filed many homestead claims in the West. *See* Sherry L. Smith, *Single Women Home-*

course, many explanations for such gender imbalances in the workplace. Discrimination certainly accounts for some of the uneven distribution.[378] Economists also note that women voluntarily cluster in occupations that flexibly accommodate maternity leave and impose fewer penalties for taking time out of the work force.[379] Demand-side factors create further differences in men's and women's employment patterns (e.g., some professions require physical strength and men remain, on average, stronger than women).[380] Nonetheless, the threat of bodily harm as a barrier to entry cannot be overlooked. One recent study found that the differential risks of serious physical injury across employment sectors explain at least "one-quarter of occupational gender segregation."[381] The fear of violence matters, and it matters more to women.

The takeaway of all this data is that threat of violence imposes costs. And, unlike occupational licensing requirements in state-backed systems, which also establish barriers to entry, the violence of *de facto* property regimes creates no offsetting benefits.[382] The use of physical aggression does not improve the overall the quality of the workforce. It does not solve information asymmetries between consumers and producers. It does not protect the unwitting from serious harm. Instead, the violence erects barriers against those who are either unwilling or unable to hurt others.

D. Technology Costs

Before wrapping up, one final argument is necessary to cement the notion that the violence of informal regimes imposes worse harms than the violence of centralized states. The mayhem embedded within *de facto* property systems also impedes optimal technological development. Importantly, these costs do not confine themselves to the individuals engaged in violent struggle, but rather spill out across all social strata. Two broad problems stall innovation. First, the violence of private ordering diverts resources away from socially useful enterprises. Second, the institutionalized use of physical force disincentivizes the creation of technologies that threaten to disrupt the status quo.

With respect to the former, it is "widely recognized" that fighting and making threats forces communities to channel investment toward martial assets that protect existing distributions of property, and away

steaders: The Perplexing Case of Elinore Pruitt Stewart, 22 W. HIST. Q. 163, 164 (1991) (discussing female homesteaders).

378. For a brief summary, see Paula England et al., *Explaining Occupational Sex Segregation and Wages: Findings from a Model with Fixed Effects*, 53 AM. SOC. REV. 544, 546–47 (1988).

379. *See* Solomon William Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 REV. ECON. & STAT. 60, 67–68 (1981).

380. *See* DeLeire & Levy, *supra* note 375, at 929.

381. *Id.* at 925.

382. Theresa Boyd, *The Artificial Barriers of Occupational Licensing*, AM. LEGISLATOR (Oct. 25, 2013), http://www.americanlegislator.org/artificial-barriers-occupational-licensing/.

from more productive resources.[383] Violence, in other words, distorts the market allocation of technological innovation by requiring societies to make guns instead of butter.[384] Bloodshed also distracts creators from their work.[385] Time expended fighting, worrying about fighting, acquiring weapons, and maintaining defensive infrastructure cannot be devoted to producing new inventions.[386] A person engaged in a bloody feud, for example, has fewer hours to test new mining technologies, construct new lobster traps, or design stronger cattle fences. Thus, at least at the margins, the violence of *de facto* property arrangements diminishes technological advancement, and shifts priorities away from the kinds of inventions that promise to improve the long-term social and economic life of communities.

With respect to incentives, informal property regimes tend to punish rather than reward innovators. The central insight is that technological discoveries—even seemingly mundane advances—often unsettle established customs and behaviors.[387] The invention of the bar code, for example, transformed how entrepreneurs manage inventory and reduced the demand for retail stock clerks.[388] Some particularly disruptive inventions—like the telegraph, steam engine, or Internet—can upend entire industries and reshuffle the traditional social order, resulting in dramatic swings of fortunes between competing groups.[389] In formal systems, the state often responds to these disruptions with rules and institutions designed to integrate the new technology into the official legal apparatus.[390]

383. David D. Haddock, *Force, Threat, Negotiation: The Private Enforcement of Rights*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 168, 169 (Terry L. Anderson & Fred S. McChesney eds., 2003); *see also* MILA FREIRE & MARIO POLÉSE, CONNECTING CITIES WITH MACROECONOMIC CONCERNS: THE MISSING LINK 37–38 (2003) (discussing costs imposed on firms in territories with weak central states).

384. Francisco Gutiérrez-Sanín, *Stupid and Expensive? A Critique of the Costs-of-Violence Literature* 3 (Crisis States Research Ctr., Working Paper No. 48, 2009), *available at* http://r4d.dfid.gov.uk/PDF/Outputs/CrisisStates/WP48.2.pdf. Forced expenditures on the machinery of war may eventually have positive spillovers in other sectors (radar, for example, was invented by the military), but the overinvestment threatens to pull the economy away from the frontier of optimality.

385. Gary D. Libecap, *Contracting for Property Rights*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW, *supra* note 383, at 142, 152 (explaining that violence can distract subsistence farmers in the Amazon from their work).

386. *See* Haddock, *supra* note 383, at 171 (noting that fighting and threatening violence consume "time and other resources that cannot be devoted to production").

387. This idea can be traced back to Joseph Schumpeter's concept of "creative destruction" articulated in his book, *Capitalism, Socialism, and Democracy*. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (3d ed. 1950).

388. Tony Seideman, *Barcodes Sweep the World*, BARCODING, INC., http://www.barcoding.com/information/barcode_history.shtml (last visited Nov. 9, 2014).

389. *See* Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV., 43, 46–47 (1995).

390. *See* Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 239–40 (giving examples of the state's response to railroads and computers).

Additionally, government officials protect the rights of innovators, often granting them some form of exclusive control over their creations.[391]

De facto property regimes, in contrast, show much less enthusiasm for products and processes that destabilize economic work and traditional social structures. Rather than the promise of new profits, innovators are often met with violence, as vested interests attempt to defend their entitlements from rapid change and challenge. Vivid examples proliferate. In the waters of the Malacca Strait, between Malaysia and Indonesia, fishermen using customary methods have viciously attacked the motorized trawlers that threaten their livelihood.[392] Professor Anderson elaborates, "[the traditional fishermen] reacted with admirable directness, if not restraint: they turned out in force, seized the first trawler and burned it, threatening the life of the enterprising fisherman who had introduced the threat of disequilibrium."[393] The three informal property regimes examined in this Article also provided innovators with very poor incentives to produce new and imaginative ideas. In the lobster fisheries of Maine, the prairie lands of the West, and the gold fields of California, the grisliest episodes of violence all occurred as the introduction of new technologies threated to collapse the customary entitlements of entrenched powers.

In Maine, the adoption of larger and faster boats in the 1950s and 1960s made it possible for fishermen to seek lobsters farther from their home ports.[394] The new technology quickly reshaped conceptions about which territories fishermen could profitably exploit.[395] This led to costly battles between lobstermen from communities at mouths of bays, who attempted to defend their traditional territories, and lobstermen stationed at the heads of bays, who demanded access to deeper waters.[396] In the grasslands of the West, the most sustained fighting broke out when entrepreneurial ranchers introduced a new grazing technology (sheep) that threatened the established cattlemen's traditional dominance over the resources of the prairie.[397] And in California, violence increased as new mining technology undermined the original enforcement mechanisms employed by the miners.[398] All of these examples demonstrate that

391. *See* DAN HUNTER, INTELLECTUAL PROPERTY 1 (2012). For a more in-depth look at the foundations of intellectual property rules, see ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 9–21 (2011).

392. *See* Anderson *supra* note 175, at 329–30.

393. *Id.*

394. Acheson & Gardner, *supra* note 150, at 300.

395. Bright, *supra* note 185.

396. *See id. See also* Acheson & Gardner, *supra* note 150, at 300.

397. *See* Anderson & Hill, *supra* note 262, at 505 (describing sheep as a new technology); Belgrad, *supra* note 260, at 176–77.

398. *See* BRANDS, *supra* note 52, at 169; ROHRBOUGH, *supra* note 56, at 217–18 (describing how as mining changed "many of the 49ers responded not with introspection and philosophy but with fear and hostility directed against both others like them and those they saw as different"). Clay & Wright, *supra* note 49, at 159 (describing some of the technological changes that occurred in the gold fields). There is widespread agreement that violence increased after 1850. *See, e.g.*, HOLLIDAY, CALIFORNIA GOLD RUSH, *supra* note 50, at 401; McDowell, *Commons to Claims*, *supra* note 49, at 71.

informal systems struggle to provide innovators with the correct incentives to produce better and more creative ideas in the future. Rather than protect their safety and set up rules that allow them to internalize the benefit of their risk taking, private ordering regimes tend to unleash violence on the most talented creators.

V. CONCLUSION

At a distance, violence is seductive. Homer knew this. Our hearts beat in sympathy with Achilles and Odysseus as they exact grim vengeance on their tormenters. But up-close, deprived of the safe expanse provided by film and literature, bloodshed appears less alluring and more like an unredeemable villain: horrific, terrifying, and uncontrollable. Distinct from ill fortune, violence does not just descend by chance upon the unwitting. Rather, it is imposed by a perpetrator upon a victim. It instills pain. And, when a transgressor asserts physical power over the body of another, he not only puts his victim on notice of possible future affronts, but also broadcasts the message that the injured is not someone whose person or possessions others must respect.

At its core, this Article has attempted to force scholarly attention on the overlooked presence of violence in informal property systems. Proponents of private ordering have long argued that, in the absence of a strong central government, local communities can fashion rules to distribute property entitlements and monitor their enforcement. These self-regulating systems, so the argument goes, are often more orderly, efficient, wealth-maximizing, and respectful of local knowledge than laws enacted in a top-down fashion by centralizing bureaucrats. The evidence compiled in this Article reveals that such arguments are, at best, incomplete, and, at worst, fraught with danger. The stories of the Gold Rush miners, Maine lobstermen, and U.S ranchers all demonstrate that violence is a more pervasive menace than legal scholars have indicated. It appears more often, endures longer, and inflicts more fear than previously imagined. The costs exacted from individuals and communities—in both pounds of flesh and moments of terror—call into question the fundamental morality and efficiency of property systems that lack a central enforcer.

Finally, it bears underlining that the ongoing debate over the successes and failures of private ordering amounts to more than academic navel gazing; the issue has profound implications for the larger political clash over the proper role of government in property systems.[399] As scholars and legislators call for the continued reduction in the footprint of the state and the elimination of regulatory programs we must imagine not only the benefits of such cuts but also weigh the full slate of costs that

399. *See* Litowitz, *supra* note 4, at 308 (arguing that social norms scholarship is "marked by a deep skepticism about governmental intervention").

arise when individuals find themselves saddled with the fierce responsibility of policing their own property rights and seeking their own vengeance.