

---

# *Trespassing, An Inquiry Into Private Ownership of Land*

Reviewed by Weld Carter, Jr., Belmont, MA

(Authored by John Hanson Mitchell, *Trespassing*—an inquiry into the private ownership of land, was published by Perseus Books, Reading, Mass. in 1998. Price is \$15.)

Mitchell here offers a complex and delightful choreography among several dances. On one extreme, he focuses upon the exceedingly local issues relating to a square patch of land, four miles on each side, about thirty-five miles west of Boston, while dancing between the early 1600s and the 1990s. At another he addresses the differences in land holding traditions among at least four heritages: French, Dutch, Spanish, and English. For instance, he describes the Dutch patroon and the roots of the early authority of each such aristocratic and avaricious landlord over all occupants of 'his' enormous land holdings. Then he proceeds to report how one such patroon, a van Rensselaer, negotiated from Alexander Hamilton the preservation of most of that authority after the Revolutionary War. In another, he shows similarities and differences between that and the hacienda method of Spanish conquistadors for holding huge tracts in the southwest and controlling all who till or otherwise occupy the land. In yet another, he points out the legal and societal impacts of post-Norman nobles holding land and serfs 'of the king' and of lesser persons holding portions 'of the noble.'

He relates that to the stricture of the various royal charters granted by English monarchs to companies of settlers in the new world. He describes the legal fiction (probably unintended as such) behind this: "The ethics of taking over lands of North America by the English and the French was based on the belief that North America (and, later, Australia) was in fact terra nullius, that is to say, land owned by no one. In New England, land was granted outright by the crown, which derived its claim from Cabot's 'discovery' (1498) as it was believed, of the region. The Puritans, who for all their faults really were the most ethical of the colonists of the new world, believed that since the Indians were not clearing land to farm, they did not use the land and thus were not in possession of it" (page 111).

Interspersed with all this, he presents a searching inquiry into the justice of the treatment by colonists of native Americans and of the land and wildlife. One of the other of the dances in the choreography teaches of the rights to land ownership confirmed (whether or not they understood the terms) to one tribal group, 'praying Indians,' by the Great and General Court of the Colony of Massachusetts, predecessor to today's legislature. He repeatedly touches upon the differing comprehensions by colonists and courts as con-

trasted with those of native Americans as regards both treaties and, in later phase, deeds. He tells of the abrogation by that court of rights previously affirmed, on the occasion of 'King Phillip's War,' and of the partial restoration of those rights for the few survivors. He draws a frightening parallel between the imprisonment and near starvation on Deer Island, out in Boston Harbor, of these people during that pre-Revolutionary conflict and our 'internment' of Nisei during World War II.

While not losing his central focus on one small patch of Massachusetts land called Nashobah located between Littleton Common and Westford, his dance embraces Mexico, Texas, California, the southeastern colonies and the states they became, and other regions. He goes back on several occasions to the ultimate roots of all 'title' to land, as the natural element, in fraud or in conquest or other violence. He also repeatedly consults a contemporary who is both qualified and expert in US law (though born a British subject), whom he designates "the Solicitor" and who offers valuable insights into ancient and recent legal precedents and probably current judgments on questions the author raises.

Some portions of his dance make reference to the land occupancy customs and practices of pre-invasion Britain, and to the changes wrought by the Norman conquest, some described in the records of the Domesday book. With a deep sense of the history and value to all living creatures of the diversity of land useages and of the advantages of the old practices surrounding a 'commons', he raises questions concerning the fundamental legality, including extensive discussion of roots in English common law of the seventeenth and eighteenth centuries and its roots before 1066, of the construct of title to land. He also debunks *Tragedy of the Commons*, a book popular a decade or so back.

From the back cover: "How did a nation built on a vision of 'the wide open spaces' come to believe in the private ownership of land? From the heartbreaking sage of a dispossessed Indian tribe, through land use battles, casinos, takings, and sometimes hilarious head-to-head collisions between developers and conservationists, Mitchell explores this question in his fascinating and beautifully told story."

The author edits *Sanctuary*, a periodical published by the Audubon Society, and has several other published books, centered around Walden Pond. Despite his preference for solutions more statist than most libertarians could stomach, his exposition of 'the land question' probably can leave most readers not only entertained and sometimes outraged, but also better informed than before. All told, I consider it a fascinating read.