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## Some Caution about Property Rights as a Recipe for Economic Development

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# Some Caution about Property Rights as a Recipe for Economic Development

David Kennedy

## **Abstract**

Choices about the meaning and allocation of property rights pose the sorts of policy questions familiar to economists thinking about development policy. If we are seeking economic growth of this or that sort, who should have access to what resources and on what conditions? “Clear and strong property rights” are neither an escape from these questions nor a ready-made answer. Property law is simply one place in which struggles over these questions have been carried out. In this short essay, I review these common, if mistaken, ideas about property rights in the West in light of the Western experience. My objective is to place the strategic choices embedded in any property regime in the foreground and lead one to hesitate before accepting conventional neo-liberal wisdom about the importance of “clear” or “strong property rights” for economic development.

**KEYWORDS:** property law, economic development

**JEL Classification Codes:** K11, P14

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In recent years, enhancing the security and formality of property rights has become something of an *idée fixe* among economic development policy experts. The legal orthodoxy which has accompanied neo-liberal economic prescriptions routinely affirms that “strong and clear” property rights are a prerequisite to a functioning market economy and that their provision will promote efficiency and growth.<sup>1</sup> As a result, strengthening and clarifying property rights has become a

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<sup>1</sup> Hernando de Soto offered one of the most cited arguments for “strong and clear” property rights and proposals for formalizing property regimes to promote growth and development. De Soto, Hernando. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books, (2000) (arguing that without formal private property regimes, capital cannot be adequately mobilized and produced, making domestic capitalism an inevitable failure in the developing world). See also, *Hernando de Soto and Property in a Market Economy* (Barros, D. Benjamin ed.) Burlington: Ashgate (2010). But see Santos, Alvaro. “The World Bank’s Use of the ‘Rule of Law’ Promise” in *The New Law and Economic Development* (Trubek, David M. and Santos, Alvaro eds.) New York: Cambridge University Press (2006) at pp. 286-89. Scholars loosely grouped under the rubric of New Institutional Economics, an interdisciplinary program of lawyers, economists, and other social scientists, have offered a variety of arguments on behalf of the need for formal property rights to promote growth. See, e.g., North, Douglas C. & Weingast, Barry R. *The Rise of the Western World: A New Economic History*, New York: Cambridge University Press (1973); North, Douglas C. *Structure and Change in Economic History*, New York: Norton (1981); North, Douglas C. *Institutional Change and Economic Performance*, New York: Cambridge University Press (1990). But see Davis, Lewis S. “Institutional Flexibility and Economic Growth,” *Journal of Comparative Economics* 38(3) (Sept. 2010) at pp. 306-20 (arguing for institutional flexibility rather than rigid formality in property rights protections). For an evolutionary account of economic development in which property rights play a pivotal role, see O’Driscoll Jr., Gerald P. and Hoskins, W. Lee. *Property Rights: The Key to Economic Development*, Cato Institute Policy Analysis no. 482, (Aug. 7, 2003). The World Bank has played a central role in promoting (through both research publications and loan conditionality) the argument that property rights are crucial to sustainable growth. See, e.g., World Bank. *Initiatives in Legal and Judicial Reform: A Working Paper*, p. 2 (2004) (arguing that sustainable development requires legal and institutional reforms instituting private property rights and the rule of law)

[http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000012009\\_20040301142827](http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000012009_20040301142827). See also World Bank, *Doing Business in 2005: Removing Obstacles to Growth*, (2005) at p. 3 (suggesting that unclear or weak property rights preclude those less well-off from doing business), <http://www.doingbusiness.org/documents/doingbusiness2005.pdf>. See also, Deininger, Klaus. *Land Policies for Growth and Poverty Reduction*, World Bank (2003) (p. xix: “Even though the ability to make productive use of land will depend on policies in areas beyond land policy that may warrant separate attention, secure and well-defined land rights are key for households’ asset ownership, productive development, and factor market functioning.”). For country-specific examples in the literature, see, e.g., Ali, Daniel Ayalew, Dercon, Stefan & Gautam, Madhur. “Property Rights in a Very Poor Country: Tenure Insecurity and Investment in Ethiopia,” Policy Research Working Paper 4363, Sustainable Development Department and Development Research Group (Sept. 2007); Besley, Timothy. “Property Rights and Investment Incentives: Theory and Evidence from Ghana,” *Journal of Political Economy* 103(5) (1995) at p. 903; Frye, Timothy. “Credible Commitment and Property Rights: Evidence from Russia”

standard part of the recipe offered by outside experts for developing countries from Mexico to Mali, Chile to China. There is no question that all property law regimes enshrine choices of deep significance for economic development. The image of “strong and clear” property rights, however, obscures more than it clarifies about the links between those choices and the direction of a society’s economic development. This recipe is rooted in historical claims about the legal regimes of developed societies and analytic claims about the nature of property entitlements which are not compelling.

The case for a straightforward link between “clear and strong” property rights and robust growth or development in today’s industrial societies is more ideological assertion than careful history. In fact, the developed economies of the modern West have experienced periods of aggressive industrialization and economic growth with a wide range of different property regimes in place.<sup>2</sup> Property regimes differ, sometimes dramatically, among industrialized societies, and all such societies are home to a variety of different formal and informal regimes.<sup>3</sup> Economic growth has often depended upon the erosion or elimination of traditional entitlements, just as it has generated new rights and new forms of property. The enclosure of land once cultivated for food to raise sheep in support of an expanding British textile industry is a familiar historical example.<sup>4</sup> Moreover, we know that property rights sometimes slow growth, contribute to market inefficiencies and help to fuel or magnify economic busts. David Ricardo’s observation that the accumulation of agricultural land rents could be an obstacle to growth provided an early theoretical exposition of this possibility.<sup>5</sup> In the recent economic crisis, the role played by the rapid expansion of home ownership, of formal and enforceable mortgage entitlements and mortgage-backed securities illustrates the potential for expanding entitlements to magnify

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*American Political Science Review* 98(3) (Aug. 2004).

<sup>2</sup>Max Weber famously identified the puzzle that industrialization occurred first in England, home to a notoriously arcane property law regime. Weber, Max *Economy and Society* (Roth G. & Wittich R. eds. Fischhoff, Ephraim et al. trans., 1968) (1956). For a summary of Weber’s analysis, see Trubek, David M. “Max Weber on Law and the Rise of Capitalism,” *Wisconsin Law Review* 1972 (1972) at pp. 746-48

<sup>3</sup> Dwyer, John P. *Property Law and Policy: A Comparative Institutional Perspective*. Foundation Press, (1998). Mattei, Ugo. *Basic Principles of Property Law: A Comparative Legal and Economic Introduction*. Greenwood Press, (2000).

<sup>4</sup> See Barrington Moore Jr. *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*. Boston: Beacon Press (1967) at pp. 20-29. See also E.P. Thompson. *The Making of the English Working Class*. Harmondsworth: Penguin (1963) at ch. 7; and the analysis by Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (1944) New York. Rinehart, (1957, c 1944)

<sup>5</sup> “[Rent] is a symptom, but it is never a cause of wealth; for wealth often increases most rapidly while rent is either stationary, or even falling.” Ricardo, David *On the Principles of Political Economy and Taxation*, Joseph Milligan (1819) Chapter 2, “On Rent,” at paragraph 2.18.

leverage and exacerbate cycles of boom and bust.<sup>6</sup> The idea that clear and strong property entitlements stand as a kind of historic baseline for growth and development obscures this varied history.

The focus on strong and clear rights also obscures the fact that no property law regime is composed solely of *rights*, however strong or clear. There are always also lots of reciprocal obligations, duties and legal privileges to injure.<sup>7</sup> Property law is a complex system of forces pulling in contradictory directions. As such, it offers myriad opportunities for fine-tuning the relationship among economic and social interests in pursuit of a development strategy. Using property as an instrument for development strategy requires choice – among various economic interests and among modes of entitlement. The strategic instrument may well be the *relative* strength or clarity of one, rather than another, legal interest. In any property regime some entitlements will be weak and vague, others strong or clear. The strategic arrangement of a property regime requires careful analysis of the economic impact of rendering some rights strong or some entitlements clear at the expense of others.

Nor do property entitlements stand alone.<sup>8</sup> In developed economies, property rights and obligations have always been embedded in a broader legal

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<sup>6</sup> See, e.g., Heller, Michael *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, Basic Books (2008) (arguing that the unbundling and demarcation of intellectual and real property into increasingly smaller and more rigidly defined bits ultimately erodes social welfare by curbing innovation and stymieing socially beneficial capital projects).

<sup>7</sup> See Hohfeld, Wesley. “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 *Yale Law Journal* 16 (1913) (clarifying the correlative relationships among rights, duties, powers, and immunities), reprinted with introduction in *The Canon of American Legal Thought* (Kennedy, David and Fisher III, William W. eds). See also Hohfeld, Wesley. “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 26 *Yale Law Journal* 710 (1917).

<sup>8</sup> The significance of social and legal context has been the focus of research for legal scholars for more than a century. For an overview of the postwar history of socio-legal studies see, for example, Trubek, David, “Back to the Future: The Short Happy Life of the Law and Society Movement,” 18 *Florida State University Law Review* 4 (1990); Friedman, Lawrence M. “The Law and Society Movement,” 38 *Stanford Law Review* 763 (1985). The best collection of material from the Law and Society movement in the United States remains Macaulay, Stewart, Friedman, Lawrence and Stookey, John ed., *Law and Society: Readings on the Social Study of Law* (New York: W.W. Norton, 1995). See also, Kennedy, David and Fisher, William, eds., *The Canon of American Legal Thought*, (Princeton, 2006) at 445-646. Economist Gary Libecap provides an extensive study of how political forces and vested interests have shaped the American property landscape in Libecap, Gary, *Contracting for Property Rights*, Cambridge University Press (1989). Within the modern law and economics tradition, economist Harold Demsetz provides the starting point for examining how property rights emerge and shift in response to underlying economic and geographic forces. See, e.g., Demsetz, Harold, “Toward a Theory of Property Rights,” 57:2 *American Economic Review* 347-359 (1967). Nobel Prize winner Elinor Ostrom highlights the importance of social and cultural factors in shaping and maintaining property regimes. See, e.g., Ostrom, Elinor, *Governing the Commons: The Evolution of Institutions for Collective Action*,

fabric which qualifies and complicates their meaning. Moreover, the exercise of property entitlements is set within a complex and dynamic social context that further modifies their meaning and qualifies their enforcement. Economic actors will view entitlements quite differently – what is clear for someone deep within a social network may be quite obscure to someone arriving from far away. The reverse may also be true – to render entitlements “clear” to foreign market participants may disempower local players for whom the earlier system made complete sense. From a development perspective, what matters is not the “strength” or “clarity” of property rights, but the relationship between legal entitlements and the distribution and use of resources in a particular time and place.

As one sorts through the technical details of any Western legal regime, moreover, it is notoriously difficult to say just which entitlements are in fact “clear” or “strong.” Were American sub-prime mortgages clear and strong?<sup>9</sup> They were strong enough to endanger the global banking system, clear enough to support dramatic growth in the housing market and tremendous leverage in financial markets – and yet few understood their terms. As housing prices plummeted, it was not at all clear they would or could ultimately be enforced and yet they continued to provide the measure for “testing” the soundness of banks and assessing the scale of necessary fiscal support. It might be better to ask *for whom* entitlements *seemed* strong or clear and at what point, although that can also be terribly difficult to assess. Homeowners and banks may all have thought they understood the mortgages they were concluding, yet it is now clear many did not. Banks – and borrowers – may have felt their entitlements strong and enforceable, only to find they were anything but. Moreover, “strength” and “clarity” do not always run together. It may well have been precisely the obscurity of mortgage obligations that ensured they would not be questioned as the crisis began, precisely because no one could be sure what they meant or how their value could be measured.

To undertake a broad empirical study correlating property rights with economic growth, one must find a way to assess the overall “strength and clarity”

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Cambridge University Press (1990).

<sup>9</sup> It could be said that to lenders and borrowers, the sub-prime mortgages were “clear and strong” because the substance of the rights under security arrangements as well as the consequences of default were clearly defined in contract and in statutory law. At the same time, it is certainly true that the complexity of the arrangements was unclear to borrowers and lenders alike, as well as to those who purchased securities backed by these arrangements. Nor, as we have seen, was the enforceability of these putatively clear arrangements certain or predictable. See generally Davidson, Nestor M. and Dyal-Chand, Rashmi. “Property in Crisis,” 78:4 *Fordham Law Review* 1607 (2009) (discussing the role of property law in the context of the recent crisis). See also Bargil, Oren and Warren, Elizabeth. “Making Credit Safer,” 157 *University of Pennsylvania Law Review* 1 (2008) (suggesting methods for improving security regulation).

of property rights in a society.<sup>10</sup> Doing so forces one to overlook the conflicting and relative nature of property entitlements. The indicia relied upon to make such assessments routinely underestimate the extent to which the clarity or strength of entitlements is a relative affair which depends upon one's perspective and interest, as well as on the relationship between property entitlements and other elements in the legal fabric and the informal world of custom and business practice which transform the meaning of entitlements for different actors. As a result, empirical work typically relies upon *perception*, correlating the perception, particularly among outsiders or foreign investors, that property rights in a society are strong and clear with the society's level of development.<sup>11</sup> We should not be surprised that the common, if erroneous, conception that growth presupposes or requires strong property rights explains many of these perceptions.

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<sup>10</sup> In recent years, there has been an explosion of comparative empirical study of property entitlements and economic performance. See, e.g., Torstensson, Johan. "Property Rights and Economic Growth: An Empirical Study," *Kyklos* 47(2) (1994) at pp. 231-47; Stem, N. "The Determinants of Growth," *Economic Journal* 101 (1991) at pp. 122-33. The most widely-used source for assessing or scoring the strength and clarity of property rights in a particular regime remains the International Property Rights Index, providing annual reports correlating the quality of property rights protection with local development. Past reports can be found at <http://www.internationalpropertyrightsindex.org/>. For a sampling of empirical studies on the relationship between property rights and development within individual countries, see, e.g., Lanjouw, Jean O., and Levy, Philip I. "Untitled: A Study of Formal and Informal Property Rights in Urban Ecuador," *The Economic Journal* 112(482) (Oct. 2002) at pp. 986-1019 (using the presence of title as proxy for property rights variable); Alston, Lee J., Libecap, Gary and Schneider, Robert. "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier," *Journal of Law, Economics and Organizations* 12(1) (1996) (utilizing percentage of farmers with title as proxy for strength of property rights); Besley, Timothy. "Property Rights and Incentives: Theory and Evidence from Ghana," *Journal of Political Economy* 103(5) (1995) (utilizing transfer rights – ability to sell, rent, bequeath, pledge, mortgage, gift – as independent variable for property regime); Feder, Gershon and Feeny, David. "Land Tenure and Property Rights: Theory and Implications for Development Policy," *World Bank Economic Review* 5(1) (1991) (finding that titled farmers in Thailand had a "larger volume of investment, higher likelihood of land improvements, more intensive use of variable inputs, and higher output per unit of land," as compared to squatters). But see Knack, Stephen and Keefer, Philip. "Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures," *Economics and Politics* 7(3) (Nov. 1995) (discussing the inherent difficulties in using any methodology to correlate property rights with development).

<sup>11</sup> For a discussion of the interdependence of formal law, legal perception, and "legal information systems" see Katharina Pistor, "The Standardization of Law and Its Effect on Developing Economies," *American Journal of Comparative Law* 50 (2002) at pp 111-112. For analysis of the role of institutions in shaping perceptions of the law, see, e.g., Robert C. Means. *Underdevelopment and the Development of Law: Corporations and Corporation Law in Nineteenth-Century Colombia*. University of North Carolina Press (1980) at pp 4-5, 44-47. See also, Fisher, William W. "Significance of Public Perceptions of the Takings Doctrine," *Columbia Law Review* 88 (1988) at p. 1774; Nash, Jonathan Remy. "Packaging Property: The Effect of Paradigmatic Framing of Property Rights," *Tulsa Law Review* 88 (2008) at p. 691.

The roots for the conviction that “clear and strong” property rights lead inexorably to market efficiency or economic growth lie less in history than in widely shared myths about the nature of markets and the meaning of economic and political liberalism. In some deep background way, we all sometimes feel that ownership and exchange (and with them property, contract and money) somehow preceded the emergence of states and governments, that they arose spontaneously from a natural tendency of humans to barter with one another and that we might therefore trace the lineage of contemporary property and contract law arrangements as an evolution from quite primitive human behavior and instinct. Classic theorists of liberalism in politics and political economy from Adam Smith to John Locke are sometimes invoked in support of these background convictions.<sup>12</sup> Seen this way, the domain of ownership and exchange has been a spontaneously recurring and natural alternative to the activities of the state as primitive societies evolve. Economic activity, in this view, happens outside of state power and prospers most when left alone. Today, it can seem that modernization and growth in the world’s less developed regions requires that this economic domain be liberated from the control of the developmental state as it was once liberated from feudalism and mercantilism. Although we know that property law must be defined and enforced by the state, it can still seem that strong and clear property rights are legal mechanisms through which the state’s tendency to predation can be controlled and the productive domain of ownership and exchange can be at once liberated and defended. It is not unusual to associate strong and clear property rights with a sharply constrained state and a concomitantly robust private market, capable of functioning as an engine of growth and a guarantor of efficiency.

More recent liberal theories replace the idea of property, contract and exchange as precursors to law and government, with the idea that the *private law* of property is the precursor and foundation for public law and sovereignty. As Jeremy Bentham famously stated, “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”<sup>13</sup> Economic order does not precede law – it is the central

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<sup>12</sup> Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*, University of Chicago Press (1977) [1776]; Locke, John. *Two Treatises of Government and a Letter Concerning Toleration*, Yale University Press (2003) (Ian Shapiro ed.). Locke famously argued that every man has property in his own labor and by mixing labor with the plentiful natural resources he makes them his property as well. The government’s subsequent sole “end or measure” then is “to preserve the members of that society in their lives, liberties, and possessions.” See also, McKenna, Stephen J. *Adam Smith: The Rhetoric of Property*. Albany: State University of New York Press (2006); Hamilton, Walton H. “Property According to Locke,” *Yale Law Journal* 41(6) (April 1932) at pp. 864-80.

<sup>13</sup> Bentham, Jeremy *The Theory of Legislation*, p. 69, Oceana Publications (1975) [1690]. The idea that property (and contract) is somehow prior to public law and sovereignty animates much of the

preoccupation and objective for law. The legal establishment of property and contract provides the basis for market relations and civil society. Sovereign power is legitimate when it supports rather than distorts the market and when it defends the private rights which establish a limit to sovereign authority. Clear and strong property rights are, in this vision, precisely the legal restraints most necessary to support – and least able to distort – a market. At various times, national legal orders have given this idea constitutional form and tried to work out the entailments of this very general sensibility for specific legal doctrine through constitutional adjudication.

These are all interesting ideas about the appropriate relationship between private law and public power, but their relationship to the role of property rights in economic development and growth is anything but straightforward. It is a long stride from these background notions about the nature of contemporary liberal political economy in the North Atlantic democracies and post-industrial societies of the West to the proposition that “strong and clear” property rights are a prerequisite to and will generate economic growth, development and modernization in the rest of the world. Nor can these ideas easily be squared with the analytics of legal entitlement in the developed West.

As a recipe for development, support for “clear and strong” property rights ultimately rests on a series of lay conceptions about the legal order which are simply not warranted. These include ideas like the following:

- That “property rights” have an ideal form – capable of being clarified and strengthened – which can be disentangled from the warp and woof of social and economic struggle in a society;
- That we have a workable analytic for distinguishing the private order of property rights from public regulation and for distinguishing market supporting from market distorting legal rules;
- That clarifying and strengthening property rights will facilitate economic activity without distributive implications of significance for economic

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contemporary American liberal tradition and found powerful expression in the work of post-World War II Austrian and Freiburg School of so-called “ordo-liberal” economists, political theorists and legal scholars, whose views informed the establishment of the European Union as well as postwar German economic policy. See, e.g., Hayek, Friedrich von. *The Road to Serfdom*. Routledge (1944, 2008); Roepke, Wilhelm. *Economics of the Free Society*, Henry Regnery Company (1963); Eucken, Walter. *The Foundations of Economics; History and Theory in the Analysis of Economic Reality*, University of Chicago Press (1951). For a history of the ordo-liberal tradition, see Peacock, Alan T. and Willgerodt, Hans. *Germany's Social Market Economy: Origins and Evolution*. St. Martin's Press (1989). See also Gerber, David J. “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe,” *American Journal of Comparative Law* 42 (1994) at p. 25 (surveying ordo-liberal ideas and assessing their significance for contemporary law and policy).

development, either because property law concerns “only” the rights of individuals over things rather than complex relations of reciprocal rights and duties among people with respect to things, or because in a well functioning market economy with clear entitlements, private rights can and will be freely rearranged by market forces, rendering decisions about their initial allocation unimportant;

- That concerns about social uses and obligations in developed societies ought to be pursued and in developed societies typically are pursued only outside the property regime through social regulation of one or another sort;
- That the establishment and formalization of property rights leads cleanly to both efficiency and growth, while growth returns the favor by strengthening property entitlements, eliminating the need for policy judgment about the desirability of alternative uses and distributional arrangements.

Each of these ideas supports the notion that the development of a proper law of property can be accomplished without facing complex questions of social, political and economic strategy. But each is incorrect. Property law is certainly a crucial domain for engaging, debating and institutionalizing development policy. But that does not mean there is a formula – such as strengthening and clarifying rights – which can substitute for strategic analysis and political choice about the modes of entitlement appropriate to a given development path.

In this short essay, I review these common, if mistaken, ideas about property rights in the West in light of the Western experience. My objective is to place the strategic choices embedded in any property regime in the foreground and lead one to hesitate before accepting conventional neo-liberal wisdom about the importance of “clear” or “strong property rights” for economic development.

It turns out that there is no ideal form for property entitlements. They everywhere reflect a history of social and political struggle. The arrangement of property entitlements will influence a society’s development path and may inhibit or strengthen its capacity for growth. It is often necessary to modify or destroy entitlements to get things moving in a different direction. Doing so requires choices about the direction for economic development. In this sense, a specific property rights regime can channel growth. An arrangement of entitlements is a set of choices about the relationships among correlative legal rights, duties and privileges – decisions about who can injure whom by denying him access to resources or affecting the value of his entitlements.

The ideas about property law which undergird assertions that strong and clear rights will lead to economic efficiency and growth become incoherent when we begin to translate them into technical legal regimes. All property regimes

combine strong entitlements to act with obligations restricting one's freedom of maneuver, just as they rely upon both clear rules and more discretionary standards. All are embedded in a larger complex of legal rules, institutions and procedures which alter the meaning of entitlements, and in a dense fabric of social expectations and informal arrangements which affect the meaning and usefulness of entitlements. The result is a dense fabric of rules and procedures for *adjusting* competing claims on and uses for a society's productive resources. Configuring a regime of property entitlements poses the sort of policy questions familiar to economists thinking about development policy. Who should have access to what resources and on what conditions – and who ought to be denied access or forced to pay for it? “Clear and strong property rights” are neither an escape from these questions nor a ready-made answer. Property law is simply one place in which struggles over these questions have been carried out.

## **1. Property and the history of struggle over modes of economic life.**

Development specialists must understand that in a market economy, “property” has no ideal form separate from social and economic struggle in that society. Property law is everywhere the sedimented remnant of a complex history, full of political and social conflict and compromise over the form of society and the modes of economic production. Before “property rights” can be strong or weak, they must be allocated. In every Western society, the process of allocation has been inseparable from political and social struggle and debate. Who in a chain of investment and production ought to have what claims on the use of which resources or on the revenue from what activities, against which other actors? Who is entitled to use their access to resources in such a way as to harm others or reduce the value of their entitlements, and under what circumstances? Who can call upon the state to compel others to refrain from using – or to share – which resources, and under what conditions?

A pattern of allocation and entitlement may arise slowly out of the long political and social history of a society or may be imposed in a moment of reallocation. In this sense, given the political will and opportunity, one can always start over. The call to “clarify and strengthen” property entitlements is itself a call to start over – to allocate authority with respect to productive assets differently among people and economic actors in the society. Where people have had mixed, informal or unsettled and competing access, for example, a “property owner” will henceforth have the authority to ask the state to enforce a more exclusive claim. There may be reasons to think entitling these people rather than those, in this way, rather than in that, will generate development. It would be unlikely, however, if

doing so would have the same effect – or even mean the same thing – across a range of societies, or even within one society. Access to the return on resources is everywhere a far more complex affair and the dynamic impact of various distributional arrangements far harder to assess than the call for strong and clear rights seems to imagine. In any event, the argument for strong and clear rights only makes sense if it is accompanied by a powerful justification for the growth potential to be unleashed by what will be a redistribution of wealth.

In the history of the West, one has repeatedly started over, inventing new kinds of property, eliminating or qualifying old property rights and reallocating obligations and entitlements with respect to resources. The invention of the limited liability corporation, the abolition of slavery, the establishment – or later privatization – of state enterprises or quasi-public institutions to manage new modes of infrastructure, the establishment of zoning regulations, changing rules about securitization, the invention of commodity futures, or the changes in intellectual property rules which have accompanied technological changes over the last century are among the most common examples. Changes in modes of economic activity have as often destroyed entitlements and settled expectations about access to resources and the value of assets as they have given rise to new rights, new duties, new privileges and new obligations. New modes of property have continually been devised to empower new types of actors in new kinds of economic relationships, exploiting new forms of knowledge or new resources. Existing entitlements can and often have been reallocated, either slowly or quite precipitously as part of a conscious project of social and historical renewal or struggle.

In the developing world, the shift from a developmental state to a market based “neo-liberal” economic policy has everywhere been accompanied by the elimination and devaluation of legal entitlements and expectations, both formal and informal, as new economic players have been legitimated and new rights have been legislated. The process by which rights, once allocated, become “constitutional” or “vested” or “fundamental” in ways which inhibit their rearrangement has always been a controversial one as the rights characteristic of one era’s economic arrangements give way to others. Land has repeatedly been reallocated, from informal or traditional modes of entitlement to settlers, from public or private owners to communities of “informal housing,” from informal and often familial or cooperative arrangements to formal titles consolidating ownership, from private to public ownership through nationalization, and more. Each allocation has in turn been hedged and overlain with regimes for securing debt, respecting familial obligations, stabilizing prices and consolidating risk through cooperation, taxation or share-cropping.

Of course, it is not always easy to remake entitlement regimes. The existence of settled expectations about the meaning and significance of legal

entitlements can also slow both economic and political change. Whether this will ultimately benefit or block economic growth and development in a particular situation is not clear. We do know that those with entitlements from round one will often be able to exercise political, economic or legal influence in round two, making it more difficult to begin again. This may be helpful, where the next round portends an allocation harmful to development, or where slowing change will make it more sustainable, but it may also be harmful, consolidating monopoly power or preventing reallocations which recognize new productive forces or modes of economic life.

This is as true for the allocation of rights to property or capital as it is for licenses giving access to markets, credit or foreign exchange. Large economic actors in every economy seek to use their entitlements to consolidate their political and economic position. When those with publicly allocated licenses from a development state rebelled against privatization, it was conventional to see this as “rent-seeking” inimical to growth. When those with property rights defined and enforced by the state rebel against regulatory or other changes which alter the expected value of those calls on state authority, we might also call their effort to enforce property entitlements “rent-seeking.” It is not clear whether these legally enabled resistances to reallocation slow or speed growth in a given case – and it would be surprising if it turned out always and everywhere that the reallocations involved in resisting rent-seeking by one kind of actor will always be more salutary, those of other actors always harmful.

What is clear is that the arrangement of entitlements is not only the result of political and social struggle, it also provides the stakes and instruments for that struggle. The allocation of entitlements in each round establishes actors with interests and procedures for their pursuit which have an impact on the evolution of the society in successive rounds of political and economic development. As a result, a regime of entitlements helps structure the next round of social struggle. In simplest terms, if the state will enforce your entitlement, you can seek rent from other economic actors. This is true whether the entitlement is a property right or a license and whether you are a state agency or a private entrepreneur. If, through rent seeking, you are able to become politically powerful, you may be able to reinforce your entitlements and prevent the emergence of entitlement schemes favoring others. We might say that this places a premium on getting it as close to right as possible whenever the opportunity for reallocation arises, or at least to take into account the dynamic process of social and political struggle set in motion by any given allocation of entitlements. At the same time, it may turn out that legal resistance to new modes of entitlement may help make the social and economic change necessary for growth and development both politically and socially tolerable.

As a result of the dynamic push and pull among interests which accompanies the implementation and evolution of entitlements over time, the details of a property regime are usually quite specific to a country's social, economic and political experience, even where legal cultures influence one another and borrow repeatedly. As one might expect, western societies differ in the definition and allocation of entitlements and in the relative powers of various players in the property system. As fortunes have shifted in ongoing economic and political struggles, different people have come to possess different rights against different others. To take but one example, the moment at which women – or corporations – became able to inherit and transfer property on their own marked a break in the economic possibilities for each society in which it occurred.<sup>14</sup> As ideas change – and as the social, economic, legal and political balance of forces changes – allocations shift and the technical definitions of entitlements are rearranged.

In every developed society struggles over modes of entitlement are given shape through a dynamic process of technical definition and dispute settlement. As the state enforces claims, it also defines them and establishes a process to facilitate – or limit – their enforcement. Who has the authority to determine boundaries, define claims, settle disputes, compel sanctions or permit infringement? Different modes of technical definition and different legal procedural arrangements influence the codification and implementation of the entitlements that emerge from social and political struggle. This technical process is informed both by background conceptions about economics, public and private authority, the nature of property and by ideas about what *law* itself is and how it works, all of which differ from time to time and place to place. Taken together, the property law regimes of the developed world are dynamic professional and social institutions embodying an ongoing process of technical definition and redefinition.

The meaning and significance of entitlements is therefore intertwined with other elements of the legal order, perhaps most notably, rules structuring the entities which may be the holders of legal entitlements. Family law is probably the most striking example – may property be held by the “family,” the “head of household,” by each individual, by women or children, and if so, subject to what limitations in favor of the others? The history of corporate entities in the

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<sup>14</sup> See *Family Welfare: Gender, Property, and Inheritance Since the Seventeenth Century*, (Green, David R. and Owens, Alastair eds.) Praeger Publishers (2004). The legal capacities of corporate entities have everywhere been the subject of much debate. On the history of controversies over the emergence of “corporate personality” in the United States, see Horwitz, Morton. “Santa Clara Revisited: The Development of Corporate Theory,” originally published in *West Virginia Law Review* 88 (1985) and extended as Chapter 3 of *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*, Oxford University Press (1992) at pp. 65-107.

developed world offers another striking example of the ways in which changes in the legal structure and capacity of entitlement holders may change the nature and economic significance of property itself. How and under what conditions may the resources of those who “own” capital be aggregated for investment? Who controls decisions about aggregation or investment, who shares in the returns from investment and in what ways? There are lots of options. At a most general level, the aggregation and investment of capital may be accomplished through taxation and public expenditure or investment, through a variety of state-sponsored entities from chartered corporations to development banks, through a private banking system, through partnership and other schemes of joint or cooperative ownership, through the ownership of shares in privately held or publicly traded corporations. Each mode of capital aggregation and investment requires a slightly different set of legal arrangements and a somewhat different conception of what it means to “own” capital. The relationships among legally permitted or encouraged corporate forms and the concomitant regimes of property law have been matters of intense debate across the developed world. These debates have often seemed to implicate not only the details of a technical legal regime, but the political and social structure of a nation’s economic life.<sup>15</sup>

Adolf Berle and Gerdiner Means’ classic 1932 study of the relationship between corporate form and modes of property ownership in the United States gives a sense for the tone and drama of debate once property is understood to vary with modes of economic organization. Berle and Means saw a political and economic “revolution” in the transformation in property relations wrought by the emergence of large scale publicly traded corporations with their characteristic separation of ownership and control.

The separation of ownership and control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear. Size alone tends to give these giant corporations a social significance not attached to the smaller units of private enterprise. By the use of the open market for securities, each of these corporations assumes obligations towards the investing public which transform it into an institution at least nominally serving investors who have embarked their funds in its enterprise. New responsibilities towards the owners, the workers, the consumers, and the State thus rest upon the shoulders of those in control. In creating these new relationships, the quasi-public

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<sup>15</sup> See e.g. Grey, Thomas, “The Disintegration of Property,” *NOMOS XXII: Property*, NYU Press (1980) (examining the relationship between evolving legal rules and economic modes of production).

corporation may fairly be said to work a revolution. It has destroyed the unity that we commonly call property – has divided ownership into nominal ownership and the power formerly joined to it. Thereby the corporation has changed the nature of profit-seeking enterprise...Physical control over the instruments of production has been surrendered in ever growing degree to centralized groups who manage property in bulk, supposedly, but by no means necessarily, for the benefit of the security holders. Power over industrial property has been cut off from the beneficial ownership of property – or, in less technical language, from the legal right to enjoy its fruits. .... We see, in fact, the surrender and regrouping of the incidence of ownership, which formerly bracketed full power of manual disposition with complete right to enjoy the use, the fruits and the proceeds of physical assets. There has resulted the dissolution of the old atom of ownership into its component parts, control and beneficial ownership.... The explosion of the atom of property destroys the basis of the old assumption that the quest for profits will spur the owner of industrial property to its effective use. It consequently challenges the fundamental economic principle of individual initiative in industrial enterprise. It raises for reexamination the question of the motive force back of industry, and the ends for which the modern corporation can be or will be run.<sup>16</sup>

In China today, the relationship of the state to various types of economic enterprise is as closely watched and debated.<sup>17</sup> How significant were small-scale entrepreneurs in the early stages of market liberalization? How significant is the local government hand in the activities of medium sized enterprises? Through what mechanisms does the state, whether locally or nationally, support the economic activities of state-owned enterprise? Different modes of economic

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<sup>16</sup> Berle, Adolf A. and Means, Gardiner C. *The Modern Corporation and Private Property*, Transaction Publishers (1991) at pp. 7-9. Originally published in 1932 by Harcourt, Brace and World, Inc. Joseph Stiglitz summarizes the significance of this development for a reform program oriented to clear and strong property rights this way:

“[T]he separation of ownership and control in large western companies means that the control function is not allocated on the basis of ‘clearly defined private property rights.’ The ownership of shares, like the ownership of bonds, is indeed clearly defined; the shareholder can buy, sell, or hold those rights. But those rights do not, ‘add up’, to a real ownership-based control of the company when the shareholders are atomized and dispersed.”

Joseph Stiglitz, “Whither Reform? Ten Years of Transition” Paper prepared for the Annual World Bank Conference on Development Economics, April 28-30, 1999, at page 6.

<sup>17</sup> For an anthology discussing the various issues facing private enterprise in China, see *Private Enterprises and China’s Economic Development* (Lin, Shuanglin and Zhu, Xiaodong eds.) Routledge (2007).

organization affect the meaning and allocation of entitlements. We know that the answers to these questions of economic organization will affect, and be affected by, the property regime. Although it is common to frame the debate as a *choice* between private property rights and state control, we know that the relationship between modes of economic organization and modes of property entitlement is far more complex than a choice between public and private ownership. Entitlements are allocated and enforced by the state and their value will vary enormously with the modes of possible legal organization. There are all manner of intermediary forms, each affected by a variety of policies implemented through administrative decisions about access to factors of production. Allocation of “property rights” is one piece of this puzzle.

The economic significance of “property rights” in land or other capital is impossible to decipher except in relation to this broader structure of economic organization and in the context of this larger legal and political architecture. Nevertheless, it is common to speak as if the developmental effect of “private ownership” and “property rights” were axiomatic rather than relative, and as if there were an ideal model of economic life in which private ownership of private property drove market activity without the state. This is the voice of ideology – everywhere the meaning of property is tied up with forms of economic and social organization which are themselves the legally sanctioned outcomes of political and social decisions.

The result of a society’s history of struggle over property, moreover, is never a uniform system. Western legal regimes have had a variety of quite different property regimes in place at the same time. And the same is true for China or Russia or Costa Rica today. Different kinds of entities or assets have been subject to divergent legal arrangements, while similar assets and entities are routinely subject to divergent regimes in different locations or across the divide which separates the formal and informal market. Regimes for land, or specifically for agricultural land, common land, residential land, often differ from those for other commodities, for intellectual property or for various forms of finance capital. Property held by trusts, corporations, individuals, cooperatives, partnerships or public agencies may each be subject to quite different entitlements. Property within the “family” is often strikingly exceptional within developed legal orders. The result is therefore not a simple or coherent Western system of property, but a dense network of entitlements reflecting specific social histories of allocative struggle.

Where new interests demand strong and clear entitlements of their own, it is rarely obvious as a matter of definitive legal science which of the many extant arrangements is most appropriate. Analogies are made to this or that existing arrangement, alongside claims to novelty and the need for innovation. The new regimes that emerge will themselves be either hybrid arrangements reflecting an

accommodation of social, economic and political interests within an existing technical vernacular of possible entitlements, or departures which mark change and innovation in that vernacular, available for appropriation by future claimants.

There are numerous familiar historical examples of intense economic, social and political struggle carried out around the definition and allocation of property entitlements. Across Europe, struggles to “enclose the commons” accompanied and facilitated a transformation in the agricultural system of production. The North American struggle to settle the western regions of the continent was promoted and resisted by a changing set of property arrangements promoting homesteading, restricting native title, removing native inhabitants and titling vast tracts to those who would cultivate and settle the land.<sup>18</sup> Is uncultivated land legally open for occupation? Does ownership require cultivation? Is unoccupied or untilled land “owned” by the state? May landlords – or the public weal – allow land to lie fallow or do squatters have the right to render it productive? Answering such legal questions one way or the other in turn transformed the political and institutional context for further economic development. Once homesteaders are *there*, the politics of economic policy is altogether different.

Struggles over economic and social changes are often carried out quite directly in legal terms. By the end of the nineteenth century, there was little common land left in Germany – a fact which provided the context for Proudhon’s famous observation that “property is theft.”<sup>19</sup> Nineteenth century Germany jurists then worried whether land had been held in common “before” the emergence of villages or whether it had been taken and could now be reallocated. In the United States, economic struggles between the worlds of finance and farming, between the urban East and the rural Midwest and West, were also often framed as struggles over the property regime, and in particular, its interaction with banking and bankruptcy law. If a farmer is unable to pay commercial debts, does he lose the farm to the big city bankers, or is the “family farm” exempt from seizure in bankruptcy?

Similar legal questions have arisen recently in local struggles between those favoring an extractive economy and those favoring an economy rooted in recreation and uses of land more protective of the environment. When should private actors be permitted to use public lands for profit – for logging or mining,

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<sup>18</sup> See, e.g., Anderson, Terry L. & Hill, P.J. “The Evolution of Property Rights: A Study of the American West,” *Journal of Law and Economics* 18(1) (1975); White, Richard. *It’s Your Misfortune and None of My Own*, University of Oklahoma Press (1991); Limerick, Patricia. *The Legacy of Conquest: The Unbroken Past of the American West*, Norton (2006).

<sup>19</sup> Proudhon, Pierre-Joseph. *What is Property? An inquiry into the principle of right and of government*. Cambridge University Press (1994) [1840] (Kelley, Donald R. and Smith, Bonnie G. eds.).

for grazing, for travel or tourism? When should public power be brought to bear on private land in the name of one or another of these economic futures? As a matter of property law, are all beaches open to the public? Must access be provided by adjacent land owners? If you own a pond, do you own the fish? Is your right to fish exclusive? How much water can you remove from a stream which crosses your property? Contemporary struggles over the allocation of property rights in water among a range of public and private uses are suffused with questions of economic policy and choices about the mode of production – suburbs or farms, industry or agriculture or recreation and so on.<sup>20</sup>

Divisions within industries among players with different strategies and different conceptions of the future for their industry and their national economy are often also fought out in the domain of property law. A particularly obvious case in recent years has been the struggle between dominant and upstart players in technology sectors for which intellectual property is an important resource. Should software be protected by a property right, and if so, of what type – copyright, patent?<sup>21</sup> When protected, on what terms – what constitutes “fair use?” We are all familiar with the struggles of the nineteen eighties and nineties between American, European and Asian producers of electronic equipment, computers and then software.<sup>22</sup> How quickly should emulation be permitted and new discoveries put in competition? In the early nineteen nineties, the struggle over the European Union Software Directive placed Europe between a Japanese and an American model of innovation and production, presenting difficult choices of economic policy.<sup>23</sup> It was possible to design a regime of “clear and strong property rights” compatible with either mode of production. The same kind of struggle has more recently played itself out between the large Western pharmaceutical companies and generic manufacturers – when are pharmaceuticals subject to compulsory licensing, when do patent owners have a right of action

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<sup>20</sup> See, e.g., Gaudet, Joseph B. “Water Recreation- Public Use of Private Waters,” *California Law Review* 52(1) (March 1964) at pp. 171-84; Corker, Charles E. “Let There Be No Nagging Doubts: Nor Shall Private Property, Including Water Rights, Be Taken For Public Use Without Just Compensation,” *Land and Water Law Review* 6(1) (1970) at pp. 109-16.

<sup>21</sup> For a debate about the advantages and disadvantages of each of these modes of protection and for a predicted future development see Thomson, Andy, “Intellectual Property Protection of Computer Software: More Effective than Skywriting on a Windy Day,” *37 Cumberland Law Review* 289 (2006). For an argument in favor of the patent option, see Smith, Bradford L and Mann, Susan O. “Innovation and Intellectual Property Protection in the Software Industry: An Emerging Role for Patents,” *71 University of Chicago Law Review* 241-264 (2004).

<sup>22</sup> Duggan, James E. “Legal Protection for Computer Programs, 1980-1992: A Bibliography of Law-Related Materials,” *15 Hastings Comm. & Ent. L.J.* 211-295 (1992).

<sup>23</sup> Council Directive 91/250/ECC of 14 May, now replaced by Council Directive 2009/24/EC of April 23. See: Deveza, Robert R. “Legal Protection of Computer Software in Major Industrial Countries: A Survey of Copyright and Patent Protection for Computer Software,” *UCLA Pac. Basin L.J.* 9 (1991).

against generics?<sup>24</sup> A similar struggle is underway in the fields of art and entertainment.<sup>25</sup> In each field, the outcome will be influenced both by general ideas about the meaning and legal structure of “intellectual property” and by the political and economic strength of the interests involved. The result at each stage in each field will reflect a quite specific regime of property entitlements accommodating these ideas and interests – and influencing the next round of innovation and political struggle.

Legal arrangements can speed or slow changes in modes of economic order. This was a key lesson of the enclosure moment and of the subsequent transition from an agricultural to an extractive and industrial economy. The allocation of entitlements was not only about who gets the asset. With more duties toward tenants, the dismantling of feudal agriculture, migration towards the towns and freeing of agricultural land for new uses, such as grazing, would be slower. With fewer duties, faster. Similar choices accompanied the struggle between industry and agriculture from the eighteenth through the twentieth century. Complex feudal land arrangements (fee-tails, copyhold estates, etc.) and restraints on alienation and testamentary power seemed to slow transformation of the regime of landed aristocracy. This is difficult to interpret. It may have slowed industrialization, delaying the onset of productivity gains and rapid economic growth. But it may also have made industrialization more sustainable in political and social terms, thereby helping to solidify the industrial revolution.<sup>26</sup>

For those designing the property regime, the question was both a narrow one of distribution and interest among those favoring more or less restrictive modes of ownership, and a broader one of dynamic economic policy making. Should the state be “on the side” of agriculture or industry? Should the state favor economic transformation from agriculture to industry, and, if so, how? By encouraging alienability and lessening duties to traditional tenants? By slowing the process until displaced workers were absorbed in industry, even if that raised wages and made new industrial ventures less profitable? Should the nuisance to neighbors presented by new extractive or industrial uses of property be

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<sup>24</sup> For a discussion of the utility of compulsory licensing, see Fisher III, William W. “Intellectual Property and Innovation: Theoretical, Empirical, and Historical Perspectives in Industrial Property, Innovation, and the Knowledge-based Economy,” *Beleidsstudies Technologie Economie* 37 (2001), available at <http://cyber.law.harvard.edu/people/tfisher/Innovation.pdf>.

<sup>25</sup> For a historical genealogy of this issue in the music and film industry, see Fisher III, William W. *Promises to Keep: Technology, Law and the Future of Entertainment*, Stanford: Stanford Law and Politics (2004). See also: Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*, New Haven: Yale University Press (2008), available at <http://www.thepublicdomain.org/download/>.

<sup>26</sup> The classic study of this question remains Polanyi, Karl, *The Great Transformation: The Political and Economic Origins of our Time* (1944), reprinted by Beacon Press, Boston, (2001).

encouraged, prevented, permitted with compensation? Such questions of legal design present difficult issues of economic policy and political choice.

Economic struggles have also often resulted in new forms of property.<sup>27</sup> The emergence of commodity markets blended contract entitlements with property. “Futures” began as warehouse receipts for agricultural produce which became a tradable commodity themselves.<sup>28</sup> Sometimes, this leads to standardization and more formal terms for property and contract. The grading of grain and other agricultural commodities to permit trade without inspection or the private or public inspection and guarantee of weights and measures to facilitate transactions have often been part of the story when a market in a new commodity emerged, from grain to biotechnology. Sometimes it leads to a softening of what had been clear rights – through an expansive interpretation of standards like “fair” or “reasonable” use to accommodate new uses. Property law can take these standards on board – or it can resist them, requiring more localized and specific assessments. Again, an opportunity to speed or retard economic transformation.

Struggles over a nation’s economic direction and priorities are not all about law, of course. Nevertheless, none of these struggles took place *on top of* an existing and well settled regime of “clear” or “strong” property rights. These struggles often led to regulations of various sorts – but they were all *also* fought within the framework of defining and allocating property entitlements themselves. They were all struggles about which property rights should be clear and which should remain murky, which duties ought to accompany property rights, when rights should be defined to give way to public – or to other private – interests. Each struggle was a matter of pull and tug, and few were cleanly resolved. The result is a private property regime bearing the residue of these struggles and the compromises in which they terminated. Consequently, property rights are less a legal “system” than a historical record of winners, losers and social accommodation in economic and political struggles over a nation’s direction. In this sense, neo-liberal legal orthodoxy is wrong to suggest that the establishment of property rights of a particular kind is a *pre-condition* to a market economy. The ongoing allocation and definition of property entitlements is part of the social and political history of any market economy.

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<sup>27</sup> The classic American analysis of the potential for government benefits and expectations rooted in regulation to be treated as “property” remains Reich, Charles. “The New Property,” 73 *Yale Law Journal* 733 (1964).

<sup>28</sup> Stassen, John H. “Commodity Exchange Act in Perspective: A Short and Not-So-Reverent History of Futures Trading Legislation in the United States.” 39 *Washington & Lee Law Review* 825-843 (1982); Cronon, William. *Nature’s Metropolis: Chicago and the Great West*, W. W. Norton (1992) (providing history of the Chicago futures market).

## 2. Property and sovereignty: the fusion of private and public order.

The call for clear and strong property rights is linked to the idea that economic activity in the private market ought to be separated – and defended – from public authority. This has not been the historical experience of the developed world. As we have seen, if anything the opposite is more the case: the economic life of property has been a constant play of forces structured, validated and defended by the state. Moreover, a sharp distinction between a horizontal private legal order among individuals and a vertical public legal order through which the state regulates the activities of private individuals is neither conceptually nor practically plausible.

Nor is it analytically possible to distinguish private legal rules which “support” market transactions from public law rules which “distort” market prices. All prices are bargained in the shadow of the law and reflect the respective legal ability of different parties to mobilize the state for or against their economic interests. In the simplest example, a worker’s ability to withhold his or her labor, like the capitalist’s ability to withhold capital, is a legal entitlement which can be and has been allocated and defined in various ways. The wage (or interest rate) toward which they negotiate reflects the relative allocation of legal powers between them.<sup>29</sup>

The relationship between “property” and “sovereignty” is an ancient issue, which is often said to have arisen in Roman law as the relationship between *dominium* (rule over things by an individual) and *imperium* (the rule over individuals by the prince).<sup>30</sup> In many conventional accounts, the relationship between *dominium* and the regime of general jurisdiction or *jus* which emerged from *imperium* altered over the course of the empire: early on, *dominium* was rather separate, by the late empire, it had been subsumed within the *jus*. One impression which results from this story is that in civil law systems influenced by the Roman law tradition, more weight is given to public law elements in the legal

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<sup>29</sup> Robert Hale is perhaps most well known in the American tradition for having developed this point. See “Coercion and Distribution in a Supposedly Noncoercive State,” *Political Science Quarterly* 38 (1923), reprinted with introduction and bibliography in *The Canon of American Legal Thought*, Princeton (2006) (Kennedy, David and Fisher III, William W. eds.) at p. 83. See also Hale, “Force and the State: A Comparison of ‘Political’ and ‘Economic’ Compulsion” *Columbia Law Review* 35(2) (1935); *Freedom Through Law: Public Control of Private Governing Power*, Columbia University Press (1952). For commentary, see Duncan Kennedy, “The Stakes of Law, or Hale and Foucault!” 15 *Legal Studies Forum* 327 (1991). See also, Mnookin, Robert H. and Kornhauser, Lewis, “Bargaining in the Shadow of the Law: The Case of Divorce,” 88:5 *The Yale Law Journal* 950-997 (1979)

<sup>30</sup> Nicholas, Barry. *An Introduction to Roman Law*, Clarendon Press (1962) at ch. 1.

regime while “common law” traditions place more weight on the autonomy of private legal arrangements. It turns out, however, that the situation is more complex. In every Western tradition, whether civil and common, there has been a continuing struggle over the relationship between public and private arrangements, both of which are rooted in the enforcement power of the state. The significance of state action for private ordering becomes immediately apparent as one comes to see property law as a legally enforceable relationship between people concerning an asset rather than as a relationship between a person and a thing.<sup>31</sup>

Speaking very generally, since the industrial revolution, legal theorists have proposed a range of accounts for the relationship between public and private ordering and enforcement. Some have sought to strengthen public law making and enforcement at the expense of the private by repressing customary law and informal commercial relationships, insisting that economic activity be undertaken in the “formal economy,” often by criminalizing other forms of economic life, by emphasizing the priority of legislation or regulation and by identifying and expanding the points within private law at which officials charged with enforcing private arrangements could exercise discretion and recognize or impose social duties on those in private relationships. For others, the goal has been to strengthen the private against the public by strengthening the significance of business practice and customary law, encouraging its recognition and enforcement by the official legal regime, treating private rights as constitutional limits upon sovereign powers and narrowing the opportunities for officials implementing private arrangements to exercise discretion or impose social obligations.

But these two poles are not the only, or even the most important, alternatives. There have also been numerous efforts to see the domains as “equal” if distinct, or to imagine a functional “partnership” between them or “balance” among their respective virtues guided by a larger policy objective such as market efficiency or economic development or social welfare or the provision of public goods. Indeed, we might see property rights as something of a middle position between the informal “legal” arrangements characteristic of customary law or social custom and the discretionary allocation of administrative or statutory entitlements in the form of licenses, budgetary allocations or taxes. At the same time, customary arrangements may be clearer and more effectively enforced than formal property entitlements, just as public law arrangements may defend the ability of private parties to garner and retain rent more effectively than private property rights. We might say that there is something incomplete about all entitlements, whether formal or informal, private or public – they await the

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<sup>31</sup> Legal philosopher John Austin’s definition of property rights *in rem* made clear that “the right in question avails against persons generally; and not that the right in question is a right over a thing.” *The Province of Jurisprudence Determined* (1832) at 253.

interpretation and enforcement or forbearance of the state to become effective. It is analytically very difficult to distinguish state forbearance in the face of informal or customary law enforcement, state defense of formally articulated private law entitlements and state enforcement of public law licenses, permits, credit allocations and the like. In each case, the power of the state is sanctioning one actor's use of resources at the expense of others.

Looking back at the institutional arrangements in place at particular times, it is difficult to disentangle the public and private elements with confidence, precisely because the private order relies upon public authority for effect and may itself be put together in many ways, reflecting different social, economic and political arrangements. Moreover, the way legal professionals use the terms "public" and "private" has changed. At different moments legal professionals have understood what they termed public and private law to be more or less distinct from one another, and matters we now think of as clearly "public" or "private" have been combined in a variety of ways. In the feudal period, land tenure (which we might think of as private) and hierarchical relations of personal homage (which we might think of as public) were combined in a range of legal doctrines. The feudal baron sometimes had the right to determine the marriage of his ward or to nominate the local priest, activities we might well now see as administrative or public. In international law, sovereignty and right remained overlapping categories until the nineteenth century. Chartered corporations and privateers exercised "sovereign rights." The idea of a single unified public "sovereignty," universal in its absolute authority over territory and distinct from the private rights of commercial actors, emerged only late in the nineteenth century.

Although it has often been said that the late nineteenth century period of classical laissez-faire economics was characterized by a particularly strong theorization of the formal distinction between public and private arrangements, this conception began to break down almost as soon as it was developed as ever more exceptions and divergent practices became integrated into it.<sup>32</sup> The history of twentieth century legal thought in both civil and common law jurisdictions was preoccupied with rebuilding a theoretical appreciation for the connections between public and private authority and rebutting the idea that public and private could, in fact, be analytically distinguished. Repeatedly, economic, social and other policy considerations we might associate with public regulation and administrative action have become routine components of private law doctrines.

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<sup>32</sup> Kennedy, Duncan "Three Globalizations of Law and Legal Thought: 1850-2000", in *The New Law and Economic Development: A Critical Appraisal*, eds. Trubek, David and Santos, Alvaro (Cambridge: Cambridge University Press, 2006) at 19-73; and Kennedy, Duncan *The Rise and Fall of Classical Legal Thought* (unpublished manuscript 1975; published with a new preface by the author, Washington D.C.; Beard Books, 2006).

Moreover, over the last century, legal professionals in the United States have become ever more adept at multiplying the number of possible combinations of public and private authority. Indeed, creative lawyering is often about expanding the toolkit of possible institutional arrangements which combine public and private authorities in novel ways. This proliferation of mixed arrangements was made more possible as jurists lost confidence in the plausibility of a sharp analytic distinction between private arrangements – like property law – which reflected the free “consent” of private individuals and public law which entailed coercion through the plenary power of the state.

It is always difficult to date the emergence of such a general understanding, but two jurists writing in the early twentieth century have often been credited. In the United States, Robert Hale stressed the role of the state coercion in private law arrangements by focusing on the ways in which those without property could be forced to refrain from using resources owned by others.<sup>33</sup> Hale emphasized that the property rights of owners placed others under a legal duty to make due without access to assets, an obligation which would be enforced by the state should they trespass or seek to convert another’s property for their use. There was, he argued, an unavoidable element of coercion and public power in the routine operation of the private legal order.

At about the same time, Morris Cohen argued that because property is a state sanctioned right to exclude, it is also the power to compel service for use or the payment of rent. He wrote: “We must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.”<sup>34</sup> For Cohen, property is more than the legal protection of possession. It also determines the “future distribution of the goods that will come into being,”<sup>35</sup> which we might well have considered exclusively the province of public law and sovereignty.

The owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers who are not economically independent, we have the essence of what historically has constituted political sovereignty.<sup>36</sup>

This insight made it easy to see the parallel between the sorts of policy questions faced in making “sovereign” regulatory decisions and those faced in the allocation and definition of “private” property rights. For Cohen, economic policy ought to

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<sup>33</sup> Hale, Robert “*Coercion and Distribution in a Supposedly Noncoercive State*,” *Political Science Quarterly* 38 (1923): 470-494.

<sup>34</sup> Cohen, Morris R. “*Property and Sovereignty*,” 13 *Cornell Law Quarterly* 8 (1927-28) at 13.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

drive decisions about the allocation and meaning of property: “the essential truth is that labor has to be encouraged and that property must be distributed in such a way as to encourage ever greater efforts at productivity.”<sup>37</sup>

Here begins a century long relationship between legal and economic analysis. For lawyers, the discovery of this relationship brought liberation from a professional experience of necessity – the experience that private rights *had* to be arranged this way rather than that because of the “nature” of property. There were many ways in which they might be arranged, all had economic effects, and each would harness public authority and private power. Cohen was particularly concerned to disentangle the argument for a strong property system from any preconception about who ought in such a system to have which specific rights.

It may well be argued ... that just as restraining traffic rules in the end gives us greater freedom of motion, so, by giving control over things to individual property owners, greater economic freedom is in the end assured to all. This is a strong argument,....It is, however, an argument for legal order rather than for any particular form of government or private property. It argues for a regime where everyone has a definite sphere of rights and duties, but it does not tell us where these lines should be drawn.<sup>38</sup>

Cohen was attentive to a number of specific issues: how firmly to set intellectual property rights to stimulate innovation without preventing the productive use of the knowledge (“patents for processes which would cheapen the product are often bought up by manufacturers and never used”) and how to combine property rights with anti-monopoly power to prevent “abuse of a dominant position” through compulsory licensing or in other ways. The details of his particular policy preoccupations are less important, however, than the broad terrain opened up for legal analysis by the general acceptance within the profession of the background idea that property and sovereignty perform parallel functions and ought to be thought of as available for rearrangement in numerous ways depending upon one’s policy preferences.

Nevertheless, it is still common to imagine that property rights in some sense comes *before* or lies *beneath* whatever public regulation has been added on top. Of course in a sense this is certainly true – property rights are everywhere restrained and modified by a regulatory framework. Property entitlements and the administrative or regulatory arrangements which affect them may also be qualified or reinforced by one or another constitutional provision. The law

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<sup>37</sup> Ibid. at 17.

<sup>38</sup> Ibid. at 19.

relating to property in every society rests within a broader legal context which affects the meanings property entitlements will have. Numerous adjacent legal regimes affect the meaning of property rights in every system – laws about taxation, bankruptcy, consumer protection, zoning, family law, corporate governance, environmental regulation, and many more. In this sense, the use of economic resources is never the exclusive concern of “property law.”

Even if we could imagine the absence of explicit regulation modifying rights, however, the idea that property rights exist before or outside public policy would still not be sound. Hale and his contemporaries were correct that property rights are, in the end, only as strong as one’s ability to bring the state into play as their enforcer. The enforcement and definition of property rights depends upon the larger regime of private law and procedure which may be organized to strengthen or weaken various interests in society. Procedural and institutional arrangements make it easy for some and difficult for others to mobilize the state to protect their interests.<sup>39</sup> Moreover, property rights also vary when combined with different “private law” regimes of contract and tort or obligation, as they do with various modes of legal organization and “personality.” A strong tort regime of duties to avoid negligent injury to others may limit one’s legal privilege to use one’s property to another’s detriment. In the end, we must recognize that the private legal order is shot through with public policy commitments, relies upon the state for interpretation and enforcement, and never controls access to resources in the absence of public law restrictions or permissions.

### **3. Property as distribution: regulating relations among people with respect to things.**

One reason the “strong and clear property rights” idea continues to seem innocent of any allocative public policy commitment is the lay notion that property rights concern the relationship between an individual and “his property.” Strengthening and clarifying that relationship does not seem to implicate anyone else. It seems merely to empower *him* to participate more effectively in the economy. For a legal professional, however, property is not about the relationship between persons and things. Rather it concerns the relationship between people with respect to a thing. The difference is crucial.

When we say that I own my home, what we mean is that I can enforce a series of rights against other people – to “quiet enjoyment” of the home, to exclude others from the land, to remove a trespasser, to contract for the sale of the home, prevent others from selling or renting it without my permission, and so on.

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<sup>39</sup>See Galanter, Marc S. “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” 9(1) *Law & Society Review* 95 (1974).

Others have duties – not to trespass, not to convert my property to their use. Should they do so, the state may force them to pay me a penalty. At the same time, we may each have legal privileges – they to trespass in an emergency, me to use my property in ways which may prevent them from enjoying their own property or which decrease its market value. I may also have duties – not to allow a hazardous nuisance on my land, perhaps to cultivate or maintain the land. And so on. “Owning” land says nothing about my relationship to the home itself. It says a great deal about my relationship with other people. In this sense, property law distributes rights and duties among people with respect to things. Every time someone has a “strong” property right, someone else faces a “strong” duty. It is in this sense that property entitlements are always reciprocal – and their assignment allocative. When we “strengthen” an “owner’s” entitlements, we weaken the potential for others to use that asset. A development planner will need to assess the impact of the asset being used in one way rather than the other, by one party rather than the other, before knowing whether strengthening the entitlement is good for growth.

This might seem to suggest a dramatic new role for the state, the expert, the planner, in property management. Once we think of a property right as a relationship between two people, it is clear that the state also has a role as the enforcer – and definer – of the rights of one against the other. Where rights and duties are parceled out among numerous entities, both individual and collective or corporate, the position of the state as arbiter and enforcer is all the more pronounced. Thought of this way, the distributional dimension in routine enforcement of property rights is quite visible. For every right, someone is under a duty, and we will want a good explanation when we bring state force into play to force him to live up to that duty. In this sense, property law analytics can bring issues of social and economic choice to the surface. These are allocative questions, distributional questions, and no property law regime can be erected or maintained without resolving them. Doing so requires a political or economic or social choice – rooted in a conviction about why doing it that way rather than that will be a good thing.

To take a classic example, we all know that two property owners living side by side may often get in one another’s way even without trespassing. Playing music too loudly, opening a competing donut shop, running a brothel – if you do any of these things on your property, my enjoyment of my property will suffer, as may its value. But of course my preventing you from doing any of these things will compromise your enjoyment of your property and may reduce its value. We can imagine a variety of legal regimes to settle this issue. There may be general regulations applicable to both of us which solve it – no brothels in the neighborhood. But in the absence of regulation, it will also need to be settled *within* property law. Are owners under a duty to play their music at a reasonable

volume and do neighbors have a right to force them to turn it down? Or do owners have a privilege to play their music as loudly as they wish, giving their neighbors no right to interfere? In the abstract, “ownership” is compatible with both regimes and there is no satisfying way to get an outcome from the “logic” of property. An owner may be able to act until bought out at a negotiated price, may be forced to stop unless he negotiates and buys the right to continue, may be able to be forced to pay a given price to continue, may be forced to stop and left unable to buy the right to continue. The complaining party, reciprocally, may be able to offer to buy the loud neighbor out, may be able to get an injunction to prevent it, which he may then waive for a negotiated price, may be able to get specified damages, or may be able to get an injunction which he cannot waive for any price.

This set of choices was elaborated in an early classic of the American “law and economics” literature by Guido Calabresi and Douglas Melamed.<sup>40</sup> Their taxonomy was significant precisely because it shifted attention away from the question “should this be a matter of public regulation or private right” onto the questions “who should have the entitlement – whom should the law favor” and “what form of rule ought to be used to protect that entitlement.” In the years since, legal scholars have proposed a wide range of rules of thumb to resolve these two related issues so as to maximize economic performance. Scholars have proposed assigning the initial entitlement to the party who is the cheapest cost avoider to promote information discovery, or in such a way as to simulate the allocation which would be reached were the parties able to bargain over the allocation of the entitlement without transactions costs, or in ways which reflect distributional concerns exogenous to the problem of efficiency, such as favoring the weaker or poorer party in the initial allocation. Relatively little attention has been paid to the relationship between the initial assignment of entitlements and economic growth or development. As to the second issue, scholars have proposed using property rules (assignable at will through bargaining among economic actors) where transaction costs are low and liability rules (allowing the party without the entitlement to force surrender for a price determined by the state) where transaction costs are high (multiple parties, holdouts, freeloaders); and inalienability rules, where the party receiving the entitlement may not surrender or be deprived of it where one or another “moralism” is involved – preventing sale of body parts or waiving the right to be free from an intentional tort. Exploring these issues has generated an important scholarly tradition reframing the debate about the allocation and form of property entitlements away from questions about the appropriate balance of “public” and “private” and toward questions about the

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<sup>40</sup> Calabresi, Guido and Melamed, Douglas. “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” *Harvard Law Review* 85 (1972) at pp. 1089-1128, reprinted, with Introduction and bibliography in Kennedy, David and Fisher, William, The Canon of American Legal Thought (Princeton, 2006) at 401-444..

impact of various allocations and modes of entitlement on economic efficiency and questions of justice.

Economists and policy makers in the development field often write as if what has come to be called the “law and economics” tradition within legal scholarship supported the proposition that strong and clear entitlements are necessary for growth and economic development.<sup>41</sup> It is important to understand that nothing could be further from the truth. Rather, this literature begins with recognition that “clarity” and “strength” tell us very little – allocation and the form of entitlement are what matter. And they matter because of predictions about the impact of various entitlement arrangements on economic activity and on questions of morality or justice. The result has not been a decisive science specifying best practice entitlement schemes. Far from it – much remains disputed. It would be more accurate to say that the literature had spawned a number of rules of thumb and default assumptions which are useful in making policy arguments about how entitlements ought to be arranged.

For development purposes, moreover, the focus on “efficiency” which continues to characterize the law and economics field has tended to take the focus off the sorts of social, cultural, institutional and political transformations generally associated with “development” by focusing on allocation within constraints understood to be exogenous when development will often require sharp change in precisely these constraints. At the same time, the “distribution” or “other justice consideration” side of the equation has been associated with righting wrongs or corrective justice, based on an assessment of whether benefits or burdens are deserved, rather than on the link between distribution and growth. That said, there is no question that welfare economics has much to contribute to our understanding of the impact of entitlement change on economic activity and growth. What is required is an analysis of the distributional consequences between the parties and the dynamic consequences for the social and economic system of choosing one or another mode of property protection. The point is by now a familiar one – the turn to “property rights” as an economic strategy returns us to considerations of economic, social and political choice, this time for reasons embedded in the internal analytics of the legal field.<sup>42</sup>

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<sup>41</sup> For a wide-ranging introduction to the law and economics tradition, see Shavell, Steven, *Foundations of Economic Analysis of Law*, Belknap (2004).

<sup>42</sup> For an informed critique of the limitations of law and economics literature see Kennedy, Duncan; “Law and Economics from the Perspective of Critical Legal Studies” 2 *The New Palgrave Dictionary of Economics and the Law* 465 (P. Newman ed., Macmillan, New York, 1998); Kennedy, Duncan, “Cost-Benefit Analysis of Entitlement Problems: A Critique,” 33 *Stanford Law Review* 387 (1981); Kennedy, Duncan and Michelman, Frank, “Are Property and Contract Efficient?” 8 *Hofstra Law Review* 711 (1980); Kelman, Mark, “Consumption Theory, Production Theory and Ideology in the Coase Theorem,” 52 *Southern California Law Review* 669-698 (1979).

It is worth saying another word about the notion of “clear” entitlements here. If we return for a moment to our neighbors, each able to diminish the value of the other’s property, we could imagine resolving the issue “clearly” (no music after ten) or in such a way so to leave it more open to later interpretation (no “unreasonable” noise).<sup>43</sup> There is a loose association here between what Calabresi and Melamed term “property” rules (capable of being exchanged) and “liability rules” (requiring judicial assessment of the price of violation). It would seem that with “clear” resolution the parties could bargain more readily than where their entitlement rests on a vague (“unreasonable”) standard. It is important to notice, however, how weak this association is in practice. Parties may certainly bargain in the shadow of vague standards. They do so all the time in the informal sector. They may well agree completely on the meaning of “unreasonable” or may find agreement easier where the terms of their settlement remain vague. Where one party wants clarity and they remain in doubt about the likely judicial interpretation of “unreasonable” it would be more accurate to think of this as a change in their relative bargaining power than as an impediment to bargaining. Similarly for “clear” rules. Bargaining against the background of a specific rule (no music after ten) may well make it more difficult to reach agreement, may leave the parties uncertain about the situations in which for one or another reason the other will decide to violate the rule, and about the situations in which the judge may find a way around the rule altogether where its application does, in fact, seem unreasonable. As the rule comes to be applied, we might be surprised which turns out to be more predictable – judges (and neighbors) might find the “after ten” rule unreasonably restrictive and blunt its effects by exploiting adjacent rules, broader principles or discretion as to penalties found elsewhere in the legal materials. In short, the impact of “clarity” on bargaining is far more about the relative bargaining power of the parties than about the capacity for private settlement.

As we think about penalties and enforcement mechanisms, we have the opportunity to make the initial entitlement relatively easy, more difficult or simply impossible to transfer through private bargaining. I may be able to sell you my right to prevent you from playing music for any price we agree, or you may be able to force me to surrender it by paying a sum of damages calculated by a court. It may be a crime for you to wake me up which may or may not be enforced by the sheriff. Penalties may be stiff or lax – and he may or may not take my views into account in deciding to prosecute. We could also make the transaction costs of

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<sup>43</sup> The classic legal problem of the relationship between “rules” and “standards” and its link to broader questions of policy, ethics and procedure in contemporary legal thought is analyzed in Kennedy, Duncan, “Form and Substance in Private Law Adjudication” 89 *Harvard Law Review* 1685 (1976).

later adjustment high or low. Can you negotiate with me (or I with you) alone, or must one of us secure the agreement of everyone in the neighborhood? And so on.

Strengthening or clarifying property rights tells us almost nothing about how to resolve issues of this sort which recur throughout the legal system. You need another reason for developing a music friendly or music unfriendly regime. Once you have decided on the level of music you want, you can accomplish that through a variety of different legal arrangements, ranging from criminal law through regulation to an appropriate arrangement of reciprocal rights, duties and privileges among the property owners or bystanders, each one of which may have important economic consequences. In the development context, these distributive questions are central. The issue is not whether one wants a musical or relatively quiet neighborhood, but how the nation's resources can most readily be aggregated and reinvested for development.

In that calculation, it is simply meaningless to say that property rights *in general* are or ought to be "strong" or "clear" without specifying just who ought to have a strong entitlement against whom or for just whom the application of the state's enforcement power ought to be clear and predictable in what circumstances. One might say, for example, that the property rights of foreign investors ought to be "strengthened" by empowering them to mobilize the state to seize the assets of local companies for payment of debts. Or one might decide the local company's "property right" ought to be strengthened by rendering it immune from this type of attachment. Either could be a development strategy – but one would need to articulate a reason why one approach rather than the other will be conducive to development.

As should be clear, moreover, from a legal point of view, property is not one, but a "bundle of rights"<sup>44</sup> – rights to use, alienate, exclude, assign, rent, enjoy, etc. This bundle of property rights can often be assembled and disassembled in various ways and shared among different parties. A great deal of creative legal analysis goes into arranging and rearranging these rights. We all know when we stay at a Hilton Hotel that many corporate and private entities will share in the proceeds from our stay. The entity "Hilton Hotel" is itself a bundle of legal relationships. It will probably be quite difficult to say with precision just who "owns" the building, or the trademark, or has the right to sell alcohol in the restaurant, or who employs the workers, and so on. Just as many will have rights

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<sup>44</sup> See Honoré, Tony. "Ownership." In *Oxford Essays in Jurisprudence*. A.G. Guest (ed.), Oxford University Press (1961) for one classic account of the "bundle of rights" view of property and for an account of the "incidents of ownership." Also see Penner, James. "The 'Bundle of Rights' Picture of Property," 43(3) *UCLA Law Review* 711-820 (1996). Much recent literature on the law of enterprises focuses precisely on the interaction of numerous entitlements and obligations in the construction of modern corporate enterprises. See, for example, Kurt Strasser and Phillip Blumberg, "Legal Form and Economic Substance of Enterprise Groups: Implications for Law and Economics," [Accounting, Economics, and Law](#) 2010.

of one or another sort, set by rules of contract and property, many will also have obligations. The more complex a legal scheme becomes, the more difficult it is to say what it could mean for all the rights to be strong or clear – strengthening and weakening, clarifying and muddying obligations and entitlements will be precisely what is at stake in negotiations to assemble capital and labor into an entity called the “Hilton Hotel.”

Moreover, it is not at all clear that “business” or “investors” will always be on the side of clear and strong rights. It all depends upon *whose* entitlements are under discussion. Across the developing world, foreign investors seek to have their entitlements strengthened as against others, extractive industries seek to have their rights enforced as against others, and intellectual property holders seek enforcement of their rights against others. To accede to these requests in the name of “clarifying” or “strengthening” entitlements is simply to ignore the entitlements on the other side. Moreover, in the world of business, there will be commercial and financial interests on both sides of the discussion at every point. Indeed, we might say that in commercial negotiations, as in war, when one side has an interest in precision, the other will by definition have an interest in something more woolly. Obviously this is not axiomatically the case – there will be lots of win-win possibilities in both directions – but it is often enough true to make it difficult to make sense of any general statement about what business wants or needs in the way of a legal regime to be productive. If we add the potential for collateral damage to third parties, the potential for multiple conflicting perspectives on which rights to “clarify” or “strengthen” becomes yet more complex. The potential for dynamic rearrangement of entitlements by private parties as well as by public regulatory and enforcement agencies makes the quest for “certainty” all the more elusive and the possibility of unforeseen outcomes more likely, transforming the issue from one of strengthening entitlements to one of dynamic risk management.

It is tempting to say that while rights and duties may be arranged in lots of ways, everyone shares an interest in a regime which can enforce with clarity and firmness whatever they have agreed. But this is also dubious. You can only build a railroad or exploit a vein of coal by eliminating or changing the property entitlements of those along the right of way. Many argue that you can only invent music or conduct pharmaceutical research by eliminating privileges, licenses or alternative entitlements which diminish the monopoly power of the global pharmaceutical or entertainment industries. Whether or not this is correct, at stake is the allocation of entitlements, not the clarity or strength of entitlements across the board. Moreover, in everyday business arrangements, there will come a further moment, once the hotel is erected and a dispute arises about who owes what duties to whom, when parties, including the state, may decide to use the legal regime to carry on that dispute. As they do so, their strategic interests will

vary – some will benefit from instant and draconian enforcement, others from delay. Some from clarity, some from vagueness. Indeed, in putting the deal together, vagueness may have won out over clarity for a reason. A dynamic observation of the legal analytics involved in the implementation of legal rules also reveals a proliferation of alternative arrangements, deferrals, settlements and so forth. Allocating property for purposes of national development requires that we form a view about whose interests in such matters ought to be furthered.

Within the domain of “private law,” moreover, it is not only property. Property and contract are mixed together in all sorts of ways which affect the shape of property entitlements and the allocation of power among economic actors. In today’s legal order, lawyers are adept at disaggregating ownership rights and transforming them into contracts between various parties for sharing in the use or risk or return on an economic activity. The reverse is also possible – transforming a contract right into something to own or sell. Much of our current financial architecture has been constructed in this way, including the parceling out and resale of mortgage debt in numerous ways. The private law regime which is used to reorganize entitlements back and forth from property to contract may, as a matter of policy, make these rearrangements more or less difficult, faster or slower. Moreover, policies expressed through contract doctrine may transform the meaning of property entitlements – and vice versa. A contract regime that imposes duties of care and implied warranties on sellers will also affect the freedom a property owner has to allow property to decay without affecting its value in a later transaction.

These questions of policy are also not amenable to assessment as “strong” or “weak” entitlement protection. They require choices between social and economic interests. The common lay perception that “strong” property rights are best reinforced by a “strong” contracts regime simply obscures the range of choices that need to be made to design these regimes and chart their relationship with one another. A classic example will suffice. The potential conflict between a factory owner’s “strong” property right to exclude trespassers (their duty to refrain from entering) and his workers “strong” right to freedom of contract with other employers, unions, health-care providers and commercial entities who might seek to enter the premises for purposes of doing business with the workers (the factory owner’s duty to allow access) cannot be resolved without facing a question of social policy. How easy or hard do we want to make it for employers to prevent workers from bargaining with others? The intersection between the labor regime governing relations between owners and workers and the property regime governing the “owner’s” interest in the factory itself is one which might be designed in numerous ways –to call for “strong” rights of property and contract is simply to refuse to reflect on the trade-offs and possible effects on the wage rate and the mode and efficiency of production of one or another solution.

After a half-century of analysis in this spirit, the complexity of allocating entitlements and the range of plausible legal arguments for their reorganization has expanded dramatically. Boundaries among doctrinal fields have broken down. Property, contract, tort, criminal law, all offer opportunities to arrange and rearrange entitlements to encourage and discourage various kinds of transaction. There simply is no baseline “private legal order” on top of which to build a market.

#### **4. Ownership and use: property duties and the social productivity of assets**

The idea that rights and duties ought to be arranged with a view to the economic and social consequences for the society as a whole is not new. Throughout the West, there has always been struggle over the relationship between property entitlement and the obligations to use assets productively or for social benefit. The idea that ownership brings obligations for productive use played a role in many significant historical disputes, over church lands, indigenous title, obligations of colonial occupation and more. One result has been recognition that property law is about duties as well as rights. Not only the correlative duties of *others* not to trespass and so on, but also the many duties of owners in different periods: to cultivate, to allow tenancy, to prevent dangerous conditions, provide light and safety, support the poor, and so on. Indeed, the details of every property law regime reflect decisions about social uses and obligations as much as they liberate owners to use or waste property as they wish.

The idea of property as a source for communal and civic obligations has a wide range of legal expressions. Property may be subject to forfeiture if not maintained or cultivated. Members of the public may have access rights, including the right to squat, cultivate, even to take title by adverse possession in certain circumstances. Indeed, in England, the ability to dispose of land by testament upon death of the “owner” begins only with Henry VIII and remains everywhere restricted.<sup>45</sup> Where property is held in “trust,” trustees who may possess or use the property will do so subject to various fiduciary obligations towards the beneficiaries of the trust. Trustee relationships have often been created by implication or judicial construction, as in the case of marital property pending divorce. As a form of private social welfare to prevent slaves, servants, children

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<sup>45</sup> Statute of Wills 1540 32 Hen. VIII Cap 1. See also Page, William Herbert *A Concise Treatise on the Law of Wills* W. H. Anderson & co, (1901) at pp. 12-13. See also Pollock, Frederick, Sir & Maitland, Frederic William *History of English Law Before the Time of Edward I* Volume II. Cambridge University Press, (1895) at pp 237-361 for a history of the development of the law of wills in England.

or spouses from becoming wards of the state, family law has often been a site for the emergence of property duties to protect widows and children. This communal element in the property system is often expressed as a limit on alienability – perhaps precluding sale of the “family home” in divorce or preventing its seizure in bankruptcy.

More broadly, property ownership is often accompanied by obligations arising from other areas of law. Tax obligations are the most ubiquitous and familiar. In the United States property taxes are routinely used as the primary source of financial support for local government as well as primary and secondary education. These could, of course, be otherwise financed – just as other social purposes might well be financed by property taxes of various kinds. Taxes on transfer of property, including value added taxes and sales taxes, also impose social obligations on property owners and may restrict the speed with which property changes hands. Moreover, the use of property tax for these local purposes has all manner of policy implications, among other things on the distribution of (at least non-stigmatized) commercial property, shopping malls, office complexes and so forth. We might also think of property taxation as a mechanism to encourage dispossession when property is not used productively, akin to very familiar doctrines of adverse possession.

Finally, every Western property system permits the imposition of obligations to sell or relinquish ownership of property for public purposes. Property may be condemned as uninhabitable or unsafe or expropriated. Temporary use by others may be compelled for safety or other public purposes, with or without compensation. Although taxation is generally distinguished from a public taking requiring compensation, at some point, given an owner’s use preferences and rates, any tax burden may become confiscatory. Moreover, regulatory changes often alter property values or eliminate property rights altogether. In a dramatic example, when slavery was abolished in the United States, owners were not compensated. Similarly when the right to nominate priests was eliminated from the entitlements of property ownership, when public consumption and sale of alcohol was banned during prohibition, or when restrictions are placed on the sale or use of guns, tobacco or other products.

Of course *some* public takings and new regulations may well be compensated. Some may be voluntary rather than compulsory. The point is that a regime of property rights without property duties, and the ability of the state to rearrange those duties, is unknown in the West. What matters for economic and social policy is how those duties are designed and allocated.

## **5. Initial allocation and the subsequent rearrangement of entitlements.**

Property law – and private law more generally – is a particularly important site for thinking about social, political and economic strategy in a developing society at moments in which the legal and economic order is being reorganized in what is likely to be a once-in-a-generation way. Property rights truly are foundational for economic life and how you set them up powerfully inflects the development trajectory in a society like China which has, over the last generation, substantially transformed the rules about who can do what to whom and with what. At such moments in particular it is useful to strategize carefully about the dynamic relationship between modes of property allocation and economic performance. The economic analysis of law has much to offer in comparing the potential consequences of various rule changes. We need to be careful, however, to understand the limits of economic analytics – or to notice the moment when the analytic is transformed into a looser rule of thumb, default suggestion or hunch. This is particularly true when the opportunity arises to establish a new property regime.

Economic analysis offers a variety of analytics for assessing the efficiency of resource allocation within a society. Much law and economics literature frames efficiency in static terms, focusing in one or another way on the economy's ability to maximize productivity within constraints. An initial allocation of factors and institutions is treated as exogenous or given, and analyses focusing on dynamic efficiency are less common. It is easy to see, however, that different initial allocations and limitations may lead to different rates of growth and different distributional outcomes for the society as a whole – differences which may compound over time, and may be of crucial importance for “development,” however we may define that term. We know that with different factor endowments we expect different development outcomes. The possibility of gains from trade even for societies with an absolute disadvantage in the production of all goods does not alter the significance of factor endowments. Different initial allocations may place a society on alternative – even if equally efficient – economic paths with very different growth rates or patterns of distribution.

It is easy to think about factor endowments in physical terms – how much arable land, how skilled a labor pool, how much capital, what technology, and so forth. Once we begin to add social endowments and institutions to the list – how effective a government, how comprehensive an educational system, what forms of money, what modes of accounting – we increasingly recognize that endowments

treated as exogenous limits may often be subject to change through strategy.<sup>46</sup> More public goods might be provided, institutions could be strengthened or changed, technological innovations could be encouraged, and so forth.

The crucial point about private law is this: at base, *all* factor endowments are also legal entitlements. A nation only has agricultural or mineral endowments if the entitlements of economic actors vis-à-vis one another are arranged in such a way as to facilitate exploitation and sale of ore, sunshine, water, seeds and more. Land is only a resource if and to the extent it can be exploited for gain. Someone, some legal entity or some group has to be able to defend, whether formally or informally, their exclusive productive use of a resource and be able to offer the produce for sale. Establishing a regime of private entitlements – rules about property, contract, finance, corporate authority, and obligations – is the process by which the initial factor endowment and institutional limitations are established. In a sense, all we ever buy and sell are entitlements – to use, destroy, profit from, assets of various kinds. In this sense, private law is always present at the creation.

The neo-liberal legal orthodoxy recognizes this – that is why they place property rights front and center. But, as we have seen, calling for “strong and clear property rights” tells us almost nothing about how to allocate initial private law entitlements so as to promote development. Should resources be concentrated or dispersed, should their use be exclusive or shared, ought those with neighboring plots be able to undermine one another’s profitability through competition, or ought ownership to imply exclusive access to particular markets, and so on. Do we want to encourage the emergence of large national firms or many small holdings? These large strategic questions of political economy, crucial for thinking about growth and development, are bound up with distributive questions implicated in the allocation and definition of entitlements.

As the law and economics tradition has grappled with the significance of law and institutions, these questions have tended to slide off the table. It is difficult to understand precisely how this has happened. In part it occurs because law and economics has, by and large, not been focused on development, “modernization,” “industrialization,” or even economic growth. These raise questions of rupture, institutional reorganization and social transformation which seem unlikely in the developed economies that are the context and preoccupation of law and economics scholarship. In part, it happens as economic analysis drifts into economic argument and a careful second best welfare analysis of the impact of proposed rule changes on efficiency gives way to default rules of thumb or slogans about the reliability of public versus private action. And it results in part

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<sup>46</sup> See, for example, Biondi, Yuri, *The problem of Social Income: Another View of the Cathedral*, Symposium of the Adolf A. Berle, Jr. Center on Corporations, Law and Society, Seattle, 21-22 January 2011.

from the rather limited way in which law and institutions are in fact taken into account in the existing literature.

Much law and economics analysis proceeds by distinguishing the desirable if utopian or heuristic situation of Pareto efficiency that might be achievable in the absence of transactions costs – no party can be made better off without making someone else worse off – from our fallen world in which market imperfections, information problems, transaction costs and underinvestment in public goods are ubiquitous. In this frame, the role for law and policy is either to compensate for market imperfections or to create the outcome which would most likely have been achieved had economic actors been able to get there on their own. This frame has serious limits. First, these things are easier to claim are happening or will happen than to measure or assess in analytic terms. When it comes to the analysis of proposed rules, “market failures” often turn out to be in the eye of the beholder. The result has been a vernacular we might call “market failure policy analysis,” through which proposals for changes in legal rules are justified. This is quite often more bluster than analysis and drifts easily toward ideology.

The more significant limit comes from an overall disinterest in distributive questions and from the tendency to ignore the distributive significance of law in the initial definition of entitlements. In my experience, the idea that “strong” rights might substitute for answering complex strategic questions about competing development paths is strengthened by two related, but mistaken ideas. The first is that one ought to begin by focusing on achieving efficiency – in the sense that, given factor endowments, resources within an economy are moving steadily towards their most productive use – and leave questions of distribution until later. Imagining distribution as *later* encourages one to think about distribution in general as a rather limited compensatory or corrective project, linked to ideas about justice or fairness or equity, rather than seeing distribution as foundational for forms of political economy and paths to development.

This separation of efficiency and distribution is familiar, if contested, in economics. It makes little sense once we try to translate it into legal terms. There is simply no way to “get efficiency right” without relying on some initial definition and allocation of entitlements. These may be exogenous to the economic model, but they cannot be exogenous to the design of a legal and economic order. Put another way, there would be no price system absent the legal capacity to own, bargain and contract. Setting up such a scheme *distributes* access to resources and establishes the capacity and respective powers of economic actors. How one does it influences what happens next. Entrenching some powers and players at the expense of others will influence the direction of an economy’s development as well as the outcome of future social and political struggle over policy. Factor endowments are routinely treated as exogenous because there simply is no economic analytic for establishing an “efficient” initial allocation. In

the real world, however, it must be done, and doing so requires policy, social and economic strategy.

It is important to stress that most economic analysis of legal rules focuses on efficiency rather than growth. This may sound like deferring distributive concerns – “growing the pie before cutting it” – but it is quite different. Indeed, there is no reason to think that the move to an efficient allocation of resources will lead to more than a one time increase in income. If you are interested in “development,” this may simply not be enough. It is easy to imagine a society moving from an inefficient to an efficient allocation of limited resources and ending up in another stable, but still rather low level equilibrium. Indeed, it may well be that growth and development require the introduction of inefficiencies. Whether efficiency leads to growth will often depend on who reaps the efficiency gain and what they are permitted to do with it – questions whose answers will often be rooted, in turn, in the allocative structure of private law entitlements.

The second and related idea lending support to the “strong and clear property rights” recipe is the notion that in the general run of things, no matter how entitlements are initially allocated, we can count on market actors to rearrange them so as to maximize the productive use of a society’s physical assets.<sup>47</sup> As a result, the initial allocation of rights is relatively unimportant, just as the details of a private law regime are less important than the fact that whatever rights are established be “clear” so that the transaction costs of their rearrangement will be as low as possible.

It would be excellent if this turned out to be true – we could avoid any number of social and political struggles about just how to set up the legal regime. Unfortunately, this idea is also mistaken. It is certainly true that when markets

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<sup>47</sup> In both legal and economic literatures, Ronald Coase is often cited for the proposition that regardless of how entitlements are initially allocated, things will work out fine in the end if economic actors are allowed a free, unregulated hand in their rearrangement. It is important to remember that this is not what Coase said. He proposed a model in which economic actors could be expected to rearrange entitlements efficiently, but it was a model which he acknowledged departed from the real world of economic policy in crucial respects – most importantly, the absence of transaction costs and the free tradability of all entitlements. See R. Coase, “The Problem of Social Cost,” 3 *Journal of Law and Economics* 1 (1960), reprinted with introduction and bibliography in David Kennedy and William Fisher, eds., The Canon of American Legal Thought, (Princeton, 2006) at pages 355-400. It was his focus on transaction costs which opened the door to a productive tradition within the economic analysis of law. See, for example, Guido Calabresi and Douglas Melamed, 85 *Harvard Law Review* 1089 (1972), reprinted with introduction and bibliography in Kennedy and Fisher, *infra*, at pages 403-442. Coase was less concerned about entitlements whose sale or transfer was itself subject to legal specification. Such limits, however, form at least part of every property right. For an analysis of the strengths and weaknesses of Coase’s ideas in the context of global regulation, see Danielsen, Dan, “Local Rules and a Global Economy: An Economic Perspective,” 1 *Transnational Legal Theory* (March 2010) pages 49-115.

work well, actors do respond to price signals and rearrange entitlements to shift resources to more productive uses. In this sense, we might think of all entitlements as “partial” or “incomplete” – what they mean depends on what people do with them, how others respond, how official agencies interpret them, and so forth over time. Whenever we analyze the impact of entitlement allocations we must think in socio-legal terms, aware of the ways in which economic actors will respond to our definition of rights and duties – will they rearrange them, ignore them, respect them, and so forth. Of course, not all entitlements are for sale or subject to private rearrangement. How and under what conditions this will be possible may be determined by the formal or informal ways in which entitlements are defined and limited. You may not sell your bodily organs, empty the coffers of a trust without regard to the named beneficiaries or, in some cases, sell what are seen to be family assets in divorce even if they are held in your name. More importantly, markets for entitlements routinely fail and transaction costs are ubiquitous. Consequently, in normal situations, we ought not to expect entitlements to flow seamlessly to their most productive use

It might be possible to try to allocate entitlements so as to mimic as closely as possible the allocations which we predict might result from bargaining in the absence of transaction costs and market failures. But this is not at all easy to do, as a generation of law and economics scholarship in the United States has made abundantly clear. Moreover, an initial allocation of entitlements may establish a pattern of relative wealth and poverty which renders the price system an unreliable mechanism for allocating resources to their socially most productive use. Where differences in initial income are extreme, wealth effects may mean that a market price sends completely different signals to the current owner and the potential purchaser. A variety of other cognitive biases may similarly impede transactions in entitlements. These well known difficulties with price formation are both analytical or theoretical and practical. As a practical matter, there is every reason to believe difficulties of this type are, if anything, more pronounced in developing societies.

The idea that we need not worry too much about initial allocations is often expressed in a more cautious version, which begins to slide from analytic to practical rule of thumb. One often hears it said that in the great run of cases one can probably count on market forces to reallocate for efficiency more confidently than one can count on government policy to do so. Of course it is true that governments can be terribly inept. We might expect comparative empirical analysis of government and market failure to be helpful here. Unfortunately, the complexity of such an analysis in the real world is so great that it is far more common for the analytic to give way at this point to the more general hunch that private parties are more likely to get things right by the light of the price

system than are bureaucrats navigating by ideology. However, the move from analytic to hunch itself opens the door to ideology.

In any event, we will have to rely on government for enforcement of the initial allocation enacted by the private law regime – and it will matter how they do it. There is simply no escaping the problem that we have no analytic for assessing the efficiency of the *initial* allocation. In a sense, entitlements can only ever be *rearranged* by markets through buying and selling. Doing so presupposes a regime of property and contract which defines what it means to own, to buy and to sell. Before we bargain over the price of a particular entitlement, we need to know whether this or that person has the capacity to own or to sell it. We will only be able to bargain once we know just what the state will routinely enforce – whether, for example, ownership entails the privilege to use one’s property so as to undercut the value of a neighbor’s property or whether his ownership entails the right to force you to desist. Or whether ownership entitlements survive when assets lie fallow, whether entitlements can be alienated at all, or without preserving a share for kin or country, whether owners may or may not remove the assets from the economy by waste or investment abroad and more. Before we can begin to bargain about price, moreover, we will also need to know whether gifts and promises to pay are enforceable, whether prices must be “just,” whether duress vitiates consent, and thousands of other details of what it means to buy and sell settled by contract law.

It might seem plausible to move through the legal order, testing each rule to see whether it allocates authority in a way which mimics what market actors would do in the absence of transaction costs, while holding all the other rules constant. Ultimately, however, in doing so we would still need to treat some ground rules as axiomatic to a market. This is easy to see if we think about all assets being held in common or all laborers being slaves. Without *someone* having the right to exclusive use and sale, or without economic actors having *some* capacity to participate legally in market activity, it would not be possible to analyze how market forces would operate to reallocate entitlements even in the absence of transaction costs. As soon as we speak of someone having capacity, however, we are in the soup of allocation – who, against whom, with respect to what, under which conditions and so on.

At some point, in other words, the initial allocative decisions simply are no longer exogenous to economic analysis. They require social, political and economic judgment. Property law is the place where these judgments are written into the fundamental structure of the market – but “strong and clear rights” gives us insufficient guidance to do this well. We will need economic, political and social strategy which cannot be derived from what market actors would do once the machine is turned on any more than it can be derived from the “nature” of property. You cannot count on the market to reverse engineer its own most

efficient origin. There is no substitute for a careful dynamic analysis of the developmental consequences of various patterns of entitlement. With that, you can design a property regime.

## **6. Property law analytics: “clear” property rights and the call for formalization.**

Among development policy makers, it is common to attribute the apparent effectiveness of legal regimes in modern and developed societies to the clarity of rules and procedures. It therefore seems sensible in developing economies to urge that informal arrangements be written down and written rules leave as little room for interpretive flexibility as possible so that their implementation will be predictable and automatic. Unfortunately, calls for the “formalization” of private entitlements, like general calls for ever stronger property rights, only obscure the distributive choices involved in constructing a private law regime – choices which ought rather to be carefully analyzed for their impact on economic growth and development.

There is a long tradition of associating legal “formality” with industrial capitalism and economic growth. The relative formality of a legal order might be assessed in various ways:

- the extent to which the rules of the legal order fit together into a comprehensive and orderly system – the lack of legal pluralism
- the precision and determinacy with which legal reasoning is able to link outcomes to rules, subordinate rules to rules, and rules to broader principles through deductive logic
- the prevalence of rules (18 years of age) as opposed to more general standards (“mature,” “reasonable”) in the body of legal doctrine,
- the significance and priority of the written or official legal order over informal or customary arrangements for dispute settlement, problem solving or rule making
- the effectiveness of the administrative bureaucracy – decisions at the top generate results at the bottom – and the absence of discretion among public officials

The link between each of these attributes of the legal order and economic growth remains tenuous. For jurists these issues often loom large and are the subject of intense controversy. The focus of those debates, however, is rarely development or growth. Nor is there a consensus within the legal community on whether it would be either possible or sensible to aim for a legal order which

leaned heavily toward the “formal” on each of these dimensions. Proposals for “clear property rights” nevertheless seem loosely tethered to each of these ideas. Indeed, in discussions of development policy, the call for clear property rights can substitute for careful analysis of these various ideas.

The idea seems to be that at the very least, clear property rights would mark a step towards a more orderly and comprehensive legal system, more precise and determinate in its resolution of disputes, less dependent upon shared local knowledge to interpret standards and less dependent upon bureaucratic discretion or the whims and limitations of the informal economy. In this view, the formalization of property rights could only improve the rationality and effectiveness of bureaucratic instrumentalism, as well as the reliability and predictability of arrangements made among private actors, while promoting openness and transparency for both public agents (through bureaucratic regularity) and private actors (through price signaling and the reduction of transaction costs). In short, formality has often been treated as a kind of cure-all elixir, capable at once of restraining bureaucratic discretion and creating markets. Moreover, formalization carries some of the moral fervor of individualism, responsibility and democracy. Formality promises to make the exercise of state power open and predictable, the rights and commitments of all citizens easy to understand, interpret and enforce without the need for further policy judgments or the expertise of professionals.<sup>48</sup>

This can all sound sensible – until you try to define a technical regime to implement it and assess its’ development impact. Developed societies differ a great deal in the relative formality of their legal arrangements and every developed legal regime is a complex mix of formality and informality. The urge to “formalize” law in the developing world downplays the important role of standards and discretion in the legal orders of developed economies and the importance of the extra-legal or informal sector (we might rather call it “private ordering” or “business practice”) in modern economic life. It is easy to treat clarity as an aspect of the entitlement itself – how it is phrased, how it is memorialized in writing. In fact, in every system, the clarity of entitlements is an interaction between their formulation and a process of interpretation and enforcement, both by legal institutions and, more importantly, by the social and business community. Clarity is a relative, dynamic and interactive matter, everywhere dependent upon a relationship between official and unofficial patterns of behavior.

We know that excessive formalism (“red tape”) can sometimes pose an obstacle to economic performance. Anyone who has ever tried to argue with a customer service representative will understand that clear rules – particularly

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<sup>48</sup> A classic statement of this position is found in Hayek, Friedrich *The Constitution of Liberty*, University of Chicago Press (1960).

where there are lots of them – can also empower bureaucratic agents, enhance their discretion, eliminate transparency and slow economic life. As was noted above, Max Weber long ago pointed out the puzzle that industrial development seemed to have come first to the nation – England – with the most confusing and least formal system of property law and judicial procedure.<sup>49</sup> Karl Polanyi famously observed that rapid industrialization may have been rendered sustainable – politically, socially and ultimately economically – in England precisely because law slowed the process down.<sup>50</sup>

We also know that legal pluralism can sometimes be a good thing, opening space for alternative modes of economic organization and offering opportunities for private ordering to develop practices which can cross jurisdictions. It can be healthy for a business to deal with markets structured by different legal arrangements, strengthening habits of private ordering. Although it can often seem that “modernization” requires the unification of national economic life, often the reverse has been true – growth has arisen in a particular place and circumstance and been transferred elsewhere through complex and dynamic social and economic processes rather than common rules. Common rules may prevent the emergence of particularly favorable conditions for the emergence of a particular industry. The desirability of a common private law for a common market remains hotly contested in Europe, whose experience is different again from the United States. The answer is less clear for the developing world. The official legal order can only increase its internal systematicity and its penetration of everyday life at the expense of other arrangements, presided over by other actors. It is not at all clear that either path leads inexorably toward development.

It is clear, however that the emergence of an ever more scientific and systematic official legal order will empower a professional class of jurists to manage that system. Often, it seems, this is precisely the point. Important decisions ought to be removed from both the administrative bureaucracy and from the authorities of the informal or customary sector. This might well be a good idea – but we would need to know a great deal more about the development strategies of these new managers. This will be difficult to come by where the legal order arranges itself precisely so as not to confront the distributive or developmental implications of its decisions. Indeed, we might say that from a development perspective, the move to formalization is often a move toward policy obscurantism rather than transparency.

This is all the more likely to be the case when a legal order’s claims to be systematic are technically overdrawn – where there are significant gaps, conflicts or ambiguities in the legal materials requiring at least implicit reference to policy

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<sup>49</sup> *Infra* note 2.

<sup>50</sup> See *infra*, note 26, Polanyi, Karl, *The Great Transformation: The Political and Economic Origins of our Time* (1944) New York. Rinehart, (1957, c 1944)

for the resolution of claims about the meaning or enforceability of entitlements. That has been the experience of every developed private legal order. Where the formal nature of the system is partly a myth – where there is more discretion than meets the eye – it might make developmental sense to obscure rather than confront the policy choices being made, but this would require demonstration.

Moreover, in the same way that standards (fair use, reasonable) can often align the formal legal order more readily with changing business practices, the informal sector – a sector governed by norms *other* than those enforced by the state or which emerge in the gaps among official institutions – is often a vibrant source of entrepreneurial energy. In many developed and developing economies, the dynamic economic life of diasporic and ethnic communities often relies on a certain distance from formal state power. Even the commanding heights of the developed economies are often self-consciously anti-formal – from the “old boy’s network” to free trade zones. Businessmen in developed economies routinely disregard or sidestep the requirements of form or the enforceability of contracts. Indeed, the American “Uniform Commercial Code” explicitly sought to reflect the needs of businessmen precisely by reference to the “reasonableness” of contractual arrangements as that broad term is understood in the business community.

Arguments for formalization of entitlements routinely downplay the range of ways to do so, each with its own winners and losers, and the impact of the choice on development. Formalization of entitlements – giving me a title to my home – allocates understanding and shifts access to resources. That is the point of doing it, after all. Where the entitlements of various parties to the home have previously been unclear, formalization can function as a somewhat blunt edged dispute settlement system. If others had settled and well understood claims or expectations in customary or informal practice, formalization will be a reallocation. Formalization is rarely framed in these terms precisely because doing so might seem to require an individualized assessment of whether it made sense to allocate access to the resources or resolve the dispute in this way. The idea of formalization is to decide these things wholesale – in the name of modernization, development and growth.

A clear title may make it easier for me to sell my land while condensing all the entitlements to the sale in my hands or cutting off other claimants with whom I may have been sharing the home or who may think they have one or another settled right to its use. There are lots of ways to do this, of course – we could also clarify the rights of the squatter at the same time and give him a lease. How we do it will make a difference. Moreover, the overall impact of formalization on, say, the price of land is less clear. Formalization of my title might make my land cheaper or more expensive for my neighbor to buy depending upon the value we each place on clarity and the range of other modes

of property available. The reliable enforcement of contracts might make me more likely to trust someone enough to enter into a contract. This also may increase – or decrease – the price they can demand for their promise. In the absence of formalization, perhaps I would need to pay a premium to ensure he performed – or perhaps his promise would be worth less if I needed to procure the public good of clarity and enforcement on the private market.

Formalization may reduce or eliminate the chance for productive economic activity for some economic actors. Although clear title may help me to sell or defend my claims to land, it may impede the productive opportunities for squatters now living there or neighbors whose uses would interfere with my quiet enjoyment – or the access members of my family have traditionally had to the same parcel. Clear rules about investment may make it easy for foreign investors – but by reducing the wealth now in the hands of those with local knowledge about how credit is allocated or how the government will behave. An enforceable contract will be great for the person who wants the promise enforced, but not so for the person who has to pay up. As every first year contracts student learns, it is one thing to say stable expectations need to be respected, and quite another to say whose expectations need to be respected and what those expectations should legitimately or reasonably be. To say anything about the relationship between legal formalization and *development* we would need a theory about how assets in the hands of the title holder *rather than* the squatter, the foreign *rather than* the local investor will lead to growth, and then to the sort of growth we associate with “development.”

Moreover, the relative “clarity” of property rights will often be in the eye of the beholder. For local entrepreneurs, informal and technically imprecise arrangements may be far more comprehensible and predictable than any formalization, while a clear set of non-discretionary rules about property, credit or contract might make a foreign legal culture more transparent to me as a potential foreign investor. Formalization was often the substantive development program urged upon nations by foreign direct investors. At the same time, formalization of titles – like the adoption of international standards and accounting procedures – may render an economic sector altogether incomprehensible for many economic actors who had previously been active in it. Conventional forms of credit may simply dry up – and there is no guarantee formalization will give rise to a dense enough market to generate new forms of credit responsive to new forms. Although formalization might encourage foreign and discourage local participation in an economic sector – like real estate – it might also discourage foreign investors who might otherwise jump the knowledge barrier to participate in the local market.

In short, the economic consequences of formalization will depend upon a very localized assessment of who benefits and what they do with their new

knowledge about and access to resources. In land reform, ought title to be given to the “head of household,” to “the family,” to the “matriarch,” or to the community in common? Before formalization, each may have had some call on the resources of the land. Formalization may place all the eggs in one basket. Whether farm production or urban sprawl – and ultimately GDP – will rise or fall may depend upon just which basket that is.

Moreover, it will not always be the case that increased formality strengthens an owner’s title. Indeed, although they are often conflated in discussion, the case for formalization is distinct from that for “strong” property rights. Sometimes an owner’s entitlements will be strengthened by the use of a standard rather than a rule – the right to use my property in any “reasonable” way may well be “stronger” than more precise enumeration of prohibited and permitted uses, depending upon the surrounding cultural meanings of “reasonable.” When a tangle of precise local rules can only be manipulated by insiders, foreign investors may prefer to rely on vague standards which are given meaning in routine business practice where they come from. Similarly, non-owners may well prefer the ability to make “fair use” of copyrighted material to an enumeration of permitted excerpting practices.

For development policy, it is not enough to defend “formalization” as a technical matter of “good law.” The form of property protection everywhere raises allocative and distributional questions requiring political or economic analysis to resolve. All too often, formalization offers itself as a substitute for all the traditional questions about who will do what with the returns they receive from work or investment, how gains might best be captured and reinvested or capital flight eliminated, how one might best take spillover effects into account and exploit forward or backward linkages. Or questions about the politics of tolerable growth and social change, about the social face of development itself, about the relative fate of men and women, rural and urban, along different policy paths.

Over the last years, enthusiasm for formality in legal arrangements has supported various reforms associated with the opening of local economies to global economic forces. In international discussions of economic policy, formalism has meant strict construction of free trade commitments, the harmonization of private law so as to eliminate “social” exceptions susceptible to differential judicial application, the insulation of the international private law regime from national judiciaries, the simplification and harmonization of national regulations, the substitution of privately adopted rules for public law standards, the development of a reliable system of bills of lading and insurance to permit contracts “for the delivery of documents” rather than goods – eliminating rejection for nonconformity, and the formalization and standardization of international payments systems and banking regulations. At the national level, formalization has meant the regularization – and reduction – of local

administrative discretion, the simplification of procedures for access to credit or administrative permission to engage in economic activity, the adoption of internationally recognized accounting, safety and other regulatory standards, as well as of private and commercial law regimes familiar to foreign investors, and the extension of formal land tenure regimes to markets and assets traditionally managed informally.

Although each of these reforms could be seen, at least in some cases, to involve a relative increase in the formality of entitlements, it is difficult not to conclude that they hang together more comfortably as elements of a general project to disestablish the development state and open markets to private investors. In that project, sometimes it will be useful to render some entitlements more formal – while others will need to be relaxed or simply left alone. Conspicuously absent is a nuanced analytic capable of distinguishing entitlements due for formalization from those better left as is. Rather, there is something mesmerizing about the idea that a formalization of entitlements *in general* could somehow substitute for struggle over these issues and choices. This may be why one rarely hears carefully calibrated demands for clarity here, but not there, of these entitlements, but not those. It is in this sense that what may have begun as an analytic devolves into program or slogan.

## **7. Analytics and ideology in the case for entitlement reform.**

We probably ought not to be surprised that policy makers repeatedly fall back on general ideas about “strong” and “formal” entitlements when making development policy. It is extremely difficult to link a rigorous economic analytic to the detailed choices involved in constructing a legal regime. Moreover, it is not as if lawyers themselves know how to make the necessary allocative decisions. In constructing a legal regime, it will often be necessary to choose between two entitlements and, ultimately, two different social actors. For more than a century, in such situations, legal analysts have turned to other fields for insight about what to do. It would be a relief if one could decide simply by preferring strong to weak rights, formal to informal legal arrangements – and end up with economic efficiency, growth and development!

Lawyers long ago realized that they cannot figure out how to make technical decisions about the structure of private entitlements without assistance from the best political and economic ideas. As a result, lawyers have internalized a whole series of debates which are familiar to economists, sociologists, psychologists, moral philosophers and other social scientists. The “economic analysis of law” represents one such strand – lawyers borrowing bits of analysis

from economics to help resolve technical choices within the legal field. Lawyers do not always do this well, of course. It would be more accurate to say that a variety of slogans and lay versions of economic or social theories have become part of the standard analytic repertoire of the legal profession. But the practice of referring to economic analysis makes it all the more puzzling when economists return the favor by proposing that difficult questions of economic policy be solved by implementation of “good law,” “strong rights” or “clear entitlements.”

It turns out that for both disciplines, the pretense that legal regimes are designed by the light of careful analytics is exaggerated. In both fields, we often find ideology posing as analysis or empirical necessity. Although we know that the most robust analytic models and comparative empirical studies often fall short when it comes time to settle policy disputes in new situations, much argument about what to do continues to proceed as if it were grounded in analytic necessity confirmed by empirical truth. What we find instead are a range of default commitments held more tenaciously than analytics or empirical study would support. In argument about policy, it is all too common to find distinctions which require choice or judgment treated as natural, general propositions asserted to support quite specific policies through lengthy – and often unspecified – chains of deduction and causation, favorite policies and policy projects promoted absent evidence or clear analytic connection to an expected benefit, habits of mind which render many costs invisible, naturalize contestable outcomes or overstate potential benefits. We need to begin to situate calls for “clear and strong property rights” in this domain of what we might call policy dogmatics. In this field, propositions sink easily into background consciousness, unmoored from defense and immune to refutation. As such, they often become part of a larger conversation about politics which is conducted in quite self-consciously ideological terms. The interesting point is not that a program like “clear and strong property rights” is merely the analytic expression of some interests over others, but that it drifts away from any exploration of precisely whose interest would, in fact, be served by its implementation in a given situation.

Land reform offers a good example. The economic and political significance of law is easy to see in land reform programs, precisely because land reform is law reform – a change in the allocation of entitlements among people with respect to land. In many developing societies, land reform has been a recurring practice and is a perennial development program. It is not atypical to find that in one period it seemed urgent to consolidate land tenure so as to empower settlers over indigenous peoples – or collectives over the landed peasantry – to enhance agricultural productivity and rural modernization. In another period, it may have seemed equally urgent to de-concentrate land holdings so as to unleash more productive and entrepreneurial farming practices and eliminate a land-holding elite obstructing modernization and development. In

recent years, titling programs have been advanced to empower urban or exurban squatters in the informal sector against the public or private entities holding title to the land on which they have built to transform informal habits of use into capital which can be sold or mortgaged in the formal economy. Each of these waves of land reallocation has been defended as part of a general strategy for development. In each instance, the many unavoidable choices which go into a land reform program have been made very differently in various places. The outcomes have also varied a great deal. The complexity of land reform efforts makes it far more likely that general arguments about what “makes sense” will trump careful analytic or empirical evidence about just how to proceed in a particular case, even if that evidence were available.

As a technical matter, “land reform” presents numerous choices. It may involve public or private land, acquired through purchase or expropriation or some combination, with more or less compensation to past owners. The compensation may be current or deferred, linked to alternative productive investment or open-ended. Land reform may apply to large or small or all parcels, to parcels used in some ways and not others. The new owners may be selected in different ways, and may have a variety of different entitlements – to use, sell, occupy, till, or rent the land, under conditions or unconditionally, individually or collectively. The land may become public or communal property, may be more consolidated or more dispersed after the reform, and so forth. Land reform may disrupt or solidify existing power dynamics within families, may track or disrupt traditional or customary patterns of land ownership and usage. As a practical matter, land reform may involve more or less land, may involve relocation or not, and, of course, may be more or less effectively implemented

The impact of land reform on development will be a function of the choices made in constructing the regime and, often far more importantly, the larger legal, social, economic and political situation in which the reform effort is taking place. A land reform program may be extended beyond its formal terms by popular support, or may be resisted tooth and nail on the ground. The expectation that a titling program for informal residents will place capital in the hands of the new ‘owners’ which can be used in the formal economy will depend on things like the availability of credit, the opportunities for entrepreneurial investment, broader patterns of urban development, the persistence of kinship obligations, access to infrastructure, and so on. To some extent, a titling program can itself be designed to reflect or compensate for these broader considerations.

None of the choices necessary to establish an effective land reform program can be resolved by reflection on the “nature” of property, or the desirability of “strong” and “clear” property rights. It may be that careful economic analysis or empirical study could clarify which approach to each issue is most likely to generate development in specific situations. Where this is

possible, we might expect land reform programs to reflect careful fine-tuning in light of development objectives rooted in this kind of analysis. In fact, however, this has rarely been the case. Land reform efforts across the developing world in the years after World War II are instructive. In their construction, we find far more the pull and push of political and ideological struggle than careful fine-tuning in light of analytic and empirical findings. As a general matter, land reform was routinely associated with import substitution industrialization, more a matter of loose ideological fit than careful economic analysis. For contemporaneous economic theories of industrialization and growth, after all, the agricultural sector was not in focus. But the expropriation of rural landowners seemed analogous in a general way to the nationalization of industries or natural resources, which were themselves seen as a way to achieve the objective of mobilizing the nation's resources for a big push to industrialization.

Although policy-makers argued for "land reform" as a tool for economic development, the specific choices necessary to design a land reform program came to have connotations associated with ideological and political positions. It was then common for technical choices which seemed ideologically analogous (more or less state, more or less collective management) to be linked together – and decoupled from careful assessment of their many possible economic consequences in particular settings. In literature about the details of land reform – paying compensation, allocating land to individuals, families or communities, and so forth – discussion focused on the significance of these details for the ideological meaning of the reforms – public or private ownership, expropriation with or without compensation – or their likely impact on rural poverty, itself not a priority for the economic development theories of the day.

In the implementation, political opportunity counted for a great deal. Far reaching land reform regimes were implemented in postwar Japan and in regions where the collapse of Japanese colonial rule or occupation allowed land reformers to ignore the interests of the landed, who were no longer politically entrenched. Where relatively strong or authoritarian national regimes were independent of landed interests, as in postwar Taiwan, "far-reaching" programs were possible. Where land-owning classes formed part of the ruling elite, this was less possible, and the details far more modest. As the great ideological division of the world emerged in the postwar years, land reform was often a marker for a regime's political identity. In Mexico, it was remembered and continued as part of a nationalist and socialist tradition linked to the revolution. Where it seemed "left" or "communist" in many places, in Taiwan and Korea it seemed a moderate alternative to what was understood to be going on in China.

As a result, it has become conventional to analyze particular land reform initiatives by reference to the vectors of political and institutional pressure brought to bear on their design, rather than by seeking to reverse engineer the

economic commitments or policy objectives of their craftsmen. One could align all of the various choices involved in the construction of a land reform on a series of related axes in ways which made one axis seem “more radical” than the other. Large scope, the taking of private land, without compensation, giving it to the least well off, to hold communally – taken together, these seem to go “further” than their alternatives. But this is ideology speaking. As a matter of economics, it might well be that these choices do not all cut in the same direction when it comes to increasing or decreasing production or income inequality. Nor is it clear that all the details of the regime line up this way. Take offering the title to individuals or families – it is not clear which “goes further” or is “more radical,” or even which accords with and which disrupts traditional patterns of land holding or use. The presentation of land reform as either “effective” or “ineffective” depending on whether it “went far enough” obscures more than it clarifies.

This frame can make it seem that we know what an *effective* land reform looks like – how far it does and does not “go.” Once we know what land reform was meant to accomplish, any disappointment are easily chalked up to “resistance.” By lumping opposing political interests and economic ideas together with historical inertia, this downplays differences among the objectives, as if reducing rural poverty and stimulating export production would naturally be aligned. Attention to the range of legal possibilities within a land reform regime – and to the dynamic relationship between the legal scheme and those operating in its shadow – may help clarify the distance between land reform as an ideal development policy and land reform as a lived social and political practice. A more nuanced legal analysis, attentive to the interaction of informal and formal legal mechanisms, might have been helpful in ensuring that the more complex strategic objectives proposed by heterogeneous economic strategies of “dependent development,” for example, might have been achieved. Land reform regimes were not exceptional in this regard.

The history of thinking about the relationship between property and development suggests that analysis of legal entitlements relating to property *could* focus attention on political and economic choices significant for development. “Capital,” like labor, is a legal institution. Owning and contracting are key pieces in productive allocation of resources. The allocative priorities of any economic theory of development will need to be realized on the terrain of law, and an understanding of the moving parts and levers, both in the formal legal system and in its institutional and social realization ought to be quite useful to development policy makers.

At the same time, however, precisely this attention to levers and moving parts ought to make us wary of broad claims for the development magic to be wrought by formalizing and strengthening property rights in general. The claims made for formalization – transparency, improved information and price signaling,

facilitating alienation, reducing transaction costs, assuring security of title and economic return, inspiring confidence and trust needed for investment – are all claims about the desirability of returns to some players rather than others. From a development perspective, it will all depend upon what we can expect those benefiting from the allocations embedded in any particular scheme for improving transparency to do with their new access to resources.

Moreover, the phrase “clear and strong property rights” has been used to refer to a very broad bundle of quite different ideas for the design of a legal order. It has been used to refer to the formalization of customary asset usage, the simplification of bureaucratic schemes relating to entrepreneurial activity or access to credit, the initiation of a scheme for clear and registered land titles, reform of contract law to prioritize simplicity and reliable enforcement (whether through standardized contracts, the legal enforcement of well known business customs, or the displacement of national regulation by private arrangements), the use of rules rather than standards, more deductive and less policy oriented legal reasoning, a reduction in the administrative or judicial discretion necessary to administer the legal order, the elimination of any regulatory overlay on baseline property or contract entitlements, or a private law oriented to owners and sellers rather than users and buyers.

In particular circumstances, many of these might be good ideas – although none of these ideas is straightforward enough to be implemented without encountering numerous further choices with allocative implications. In no sense do they together comprise a plausible, let alone universal, recipe for development. Each of these ideas obscures the many choices internal to property law – more transparent to *whom*, the squatter or the trespasser? Presented as a general recipe, the demand for clear and strong property rights understates the role of discretion in developed legal orders and the importance of standards (like “reasonableness”) even in advanced commercial orders. The use of law to slow or moderate economic change, in the interest of the long run sustainability of development, is likewise underplayed. Moreover, as an analytic matter, the call for clear rights ignores a series of classic baseline problems which must be resolved to interpret those rights – distinguishing laws imposing “costs on the transaction” from those “supporting the transaction,” for example, or distinguishing prices “distorted” by regulation from prices “bargained in the shadow” of regulation.

## **8. Summary and Conclusion**

The arrangement of legal entitlements with respect to assets is a crucial tool for develop policy. For using that tool, “clear and strong” property rights is a misleading recipe. Property rights have no ideal form which could be rendered clear and strong. Their allocation is everywhere a matter of economic, social and

political choice for which no formula can substitute. It is not only that the arrangement of entitlements is inseparable from concerns about social uses and obligations, although this is true. The arrangement of entitlements also constitutes the actors and defines the rules of the game, allocating bargaining power, determining who can do what with which resources and what rents can be captured by what means. A preference for “strong and clear” entitlements is little help in making these strategic choices. Strengthening title, for example, tells us very little about the damage adjacent land owners can do to the value of one another’s property. The definition of “ownership” requires a strategic idea about use. Different decisions about the allocation of entitlements and the meaning of ownership may lead to different development paths, just as different background entitlements provide the baseline for alternative economic equilibria.

Unfortunately, some work in the law and economic field has obscured the necessity for making economic and political choices in constructing a property regime. One often encounters misreadings of Ronald Coase’s famous work which suggest that the allocation of entitlement matters little since economic actors, in a perfect market, will reallocate their entitlements until an efficient allocation has been reached. This ignores Coase’s own preoccupation with the ubiquity of transaction costs and imperfect markets and the consequent need for intermediaries and firms as well as compensatory regulation. Much modern law and economics scholarship begins here and has much to teach development policy makers. Unfortunately, however, the focus on “efficiency” has often obscured the potential to see entitlement allocation as part of the baseline constraints within which an efficient equilibrium may be sought – and to see the potential for each subsequent entitlement adjustment as open to strategy about alternative paths to development and alternative possible equilibria. Distributive policy has too often been relegated to a later stage of compensatory adjustment during which it can seem far less is open for strategic adjustment.

Property rights are indeed central to development strategy. Struggle over their meaning and allocation has been at the heart of political debate throughout the developed world. The call for clear property rights obscures the range of alternative property regimes which have always been at work within the industrialized West, reflecting different resolutions to the management of social/economic/political conflicts. Worrying about the clarity or strength of property rights focuses attention on the current allocation of rights, reducing attentiveness to past and future possible allocations, and making path dependence harder to avoid. The result discourages the more complex analysis necessary to arrange the various elements in the “bundle of rights” so as to encourage efficient productivity, engaging the dynamic potential in both past and possible future allocative arrangements. This in turn obscures the opportunity to choose among alternative, perhaps equally efficient or productive economic models through

property rights allocation, while underestimating the relationship between property rights and other institutional forms and legal regimes in the society which may alter the meaning of those rights in practice.

In short, there are many reasons for adopting a healthy skepticism about claims that clear or strong property rights are necessary or even possible as a path to economic development. Perhaps the most significant consequence of the property rights mantra has been the propagation of a serious misestimation of the allocative role of law. A property regime, like any other legal order, is all about choices. Small and large, these choices cannot be made by reasoning outward from the nature of property or general ideas about what constitutes “good law.” They require economic, social and ethical analysis, and must be made and contested in those terms.

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