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David Kennedy
Harvard Law School

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Some Caution about Property Rights as a Recipe for Economic Development

David Kennedy

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In recent years, enhancing the security and clarity or formality of property rights has become something of an *idée fixe* among global development policy experts. The legal orthodoxy which has accompanied neo-liberal economic prescriptions routinely affirms that "clear and strong" property rights are a prerequisite to a functioning market economy and that stronger and more formal property rights will promote efficiency and growth. It is not surprising that strengthening property rights has become a standard part of the recipe offered by outside experts for China, often on the basis of an assertion that a strong private property tradition has historically been responsible for robust growth and development in today's most developed industrial societies.

This is more ideological assertion than careful history, however. Western economies have experienced periods of aggressive industrialization and economic growth with a wide range of different property regimes in place. Throughout the West, property rights have always been embedded in a complex legal fabric which modifies their meaning and qualifies their enforcement. As one sorts through the technical details of any Western legal regime, moreover, it is notoriously difficult to say just which entitlements are "clear" or "strong." No property law regime is composed solely of "rights"--- there are always also lots of reciprocal obligations, duties and legal privileges to injure. Since all entitlements involve at least two economic actors – the one with a right, the other under a duty – what is strong and clear to one may well seem weak and vague to another.

Nor is there a compelling analytic supporting the suggestion that "clear and strong" property rights lead inexorably to market efficiency or economic growth. 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. In fact, most proposals for "strong and clear" property rights rest, at least in part, on lay conceptions about the legal order which are simply not warranted. These include ideas like the following:

- That "property rights" have an ideal form which can be disentangled from the warp and woof of social and economic struggle in a society;

- That "private order," including property rights, and "public regulation" can and ought to be cleanly separated, the one supporting the market, the other potentially distorting it;

- That that "strengthening" property rights has no distributive implications, if only because property law concerns the "rights" of individuals over

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things rather than complex relations of reciprocal rights and duties among people with respect to things;

- That concerns about social uses and obligations are only properly pursued outside the property regime, through social regulation of one or another sort;

- That in a well functioning market economy, all "private" rights can and will be freely rearranged by market forces, rendering decisions about their initial allocation unimportant;

- That the *formalization* of property rights leads cleanly to both efficiency and growth, eliminating the need for policy judgment about the desirability of alternative uses and distributional arrangements.

Each of these six 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 a critical domain for engaging, debating and institutionalizing development policy, but it is not a substitute for strategic analysis and political choice. Property law is everywhere a *mix* of formal rules and quite discretionary standards, of strong entitlements to act and obligations restricting one's ability to act, just as property law is everywhere embedded in a complex combination of public and private legal regimes. The result is a dense fabric of rules and procedures for *adjusting* competing claims on and uses for a society's productive resources.

In short, 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 simple one place in which struggles over these questions has 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.

I. Property and the history of struggle over modes of economic life.

Property in a market economy has no ideal form separate from the warp and woof of social and economic struggle in that society. Before "property rights" can be strong or weak, they must be allocated and defined – a process which in every Western society has been inseparable from struggles over political and social objectives. Moreover, property law is itself a dynamic social institution embodying an ongoing process of technical definition and redefinition. In every society this technical process has been influenced by

a wide range of ideas about what law is and how it works. Different modes of technical definition influence the codification and implementation of the entitlements that emerge from social and political struggle. As a result, property law in every developed society is the sedimented remnant of a complex history, full of political and social struggle over the form of society and the modes of economic production.

A pattern of allocation and entitlement may arise out of the long political and social history of a society or may be imposed in a moment of reallocation – as is being contemplated in China. In this sense, given the political will and opportunity, one can always start over. 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. New kinds of entitlements – new rights, new duties, new privileges and obligations --- have been invented for new kinds of actors in new relationships with respect to new kinds of knowledge or 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. The difficulty, of course, is that those with entitlements from round one will often be able to exercise disproportionate political, economic or legal influence in round two, making it more difficult to begin again and placing a premium on getting it as close to right as possible whenever the opportunity for reallocation arises.

As one might expect, the result of a society's history of struggle over property is never a uniform system – and usually one quite specific to that country's social, economic and political experience. Western societies differ in the definition and allocation of various entitlements and duties and in the relative powers of various players. As fortunes have shifted in ongoing economic and political struggles, different people have had 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. Once allocated, a regime of entitlements in turn helps structure the next round of social struggle. 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. 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.

Moreover, Western legal regimes have routinely had a variety of quite different property regimes in place at the same time, which often apply to different kinds of entities and assets. 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. Family members often have a variety of different relationships to assets held, in one or another way, by the family itself. And so on. 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.

There are numerous familiar historical examples. 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. 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. Once entitlements have been transformed, different players with different interests were in place, in turn transforming the social and political context for further development.

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." 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, 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? In the contemporary American West, struggle 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.

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? 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. How quickly should emulation be permitted and new discoveries put in competition? The struggle over the European Union software directive in the late nineteen eighties placed Europe between a Japanese and an American model of innovation and production, presenting difficult choices of economic policy. 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 against generics? A similar struggle is underway in the fields of art and entertainment. 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 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.

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 the 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 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. The emergence of commodity markets blended contract entitlements with property ---

"futures" began as warehouse receipts for agricultural produce which became a tradable commodity themselves. Sometimes this leads to standardization and more formal terms for property and contract --- the grading of grain and other agricultural commodities to permit it to be traded without inspection, the private or public inspection and guarantee of weights and measures to facilitate transactions has 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 none 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.

II. Property and sovereignty: the fusion of private and public order.

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 toward which they negotiate reflects the relative allocation of legal powers.

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). In many conventional accounts, the relationship between the legal regimes of *dominium* and *jus* 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" traditions influenced by the Roman law tradition, more weight is given to public law elements in the legal 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. And property law is more accurately described as a relationship between people enforced by the state which concerns an asset than as a legal relationship between a person and a thing.

Speaking very generally, since the industrial revolution, legal theorists have proposed a range of accounts for the relationship between public and private. Some have sought to strengthen the public at the expense of the private by insisting upon the priority of legislation or regulation or by identifying and expanding the points within private law at which officials charged with implementing 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 treating private rights as constitutional limits upon sovereign powers or otherwise 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.

Conceptually, at different moments legal professions have understood public and private law to be more or less distinct from one another. Looking back at the institutional arrangements in place in practice, it is difficult in any period 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. 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. 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 emerged only late in the 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.[1] The history of twentieth century legal thought in

[1] Duncan Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, in The *New Law and Economic Development: A Critical Appraisal*, eds. David Trubek and Alvaro Santos (Cambridge:

both civil and common law jurisdictions may be said to have been 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.

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.[2] 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."[3] 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,"[4] 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." [5]

Cambridge University Press, 2006); and Duncan Kennedy, 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).

[2] Robert Hale, "Coercion and Distribution in a Supposedly Noncoercive State," *Political Science Quarterly* 38 (1923): 470-494.

[3] Morris R. Cohen, "Property and Sovereignty", *Cornell Law Quarterly* 13 (1927-28): 13.

[4] Ibid.

[5] Ibid.

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 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." [6]

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."[7]

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 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. The law 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

[6] Ibid. at 17.
[7] Ibid. at 19.

governance, environmental regulation, and many more. In this sense, the use of economic resources is nowhere 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. Moreover, property rights also vary when combined with different "private law" regimes of contract and tort or obligation. 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.

III. 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. 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. 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.

Once we think of a property right as a relationship between two people, moreover, it is clear that the state also has a role as the enforcer of the rights of one against the other. 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 injuction 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.[8]

[8] This set of choices was elaborated in an early classic in the "law and economics" literature: Guido Calabresi and Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 Harvard Law Review 1089-1128 (1972). In the years since Calebresi and Melamed introduced a typology identifying these choices, legal scholars have proposed a wide range of rules of thumb to resolve this type of allocation problem so as to maximize economic performance. They have proposed assigning the initial entitlement to the party who is the cheapest cost avoided to promote information discovery, using property rules where transaction costs are low (a bowdlerized reading of the Coase hypothesis: doesn't matter to whom they are assigned initially) and liability rules where transaction costs are high (multiple parties, holdouts, freeloaders); allowing distributional concerns to encourage placing entitlement on the weaker or poorer party initially; favoring inalienability rules for such "moralisms" as intentional torts, and more. There is nothing in the nature of property and nothing in "strong" or "clear" property rights which would give any indication about how this problem should be resolved. 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.

Moreover, we might resolve this issue "clearly" (no music after ten) or leave it more open to later interpretation (no unreasonable noise). 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. As we think about penalties and enforcement mechanisms, we have the opportunity to make the initial rule 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 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.

As a result, it is simply meaningless to say that property rights *in general* are "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" --- 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 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. 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 wooly. 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 what business wants or needs in the way of a legal regime to be productive.

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. There will be 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, heath-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 --- calling 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.

IV. **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 VII and remains everywhere restricted. 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 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 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.

V. 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 society like China which is re-arranging its legal and economic order in what is likely to be a once-in-a-generation way. It will be useful to strategize carefully about the 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.

Neo-classical economics offers a variety of analytics for ensuring the efficient allocation of resources within a society. Economic efficiency means efficiency within constraints. An initial allocation of factors and institutions is treated as exogenous or given. It is easy to see 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. 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 --- we increasingly recognize that endowments treated as exogenous limits may often be subject to change through strategy. More public goods might be provided, institutions could be strengthened, 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 has to be able to defend their exclusive productive use and offer the produce for sale. Establishing a regime of private entitlements --- rules about property, contract, finance, corporate authority, and obligations --- is the process by with 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?

In my experience, the idea that "strong" rights might substitute for answering such question even when making initial allocative decisions is strengthened by two related, but mistaken ideas. The first idea is that one ought to focus first 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. 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.

Moreover, it is important to recognize 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. 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 requires 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. 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 work well, actors do respond to price signals and rearrange entitlements to shift resources to more productive uses. When we analyze the impact of entitlement allocations we must always 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. 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.[9]

The best we are usually able to do is to allocate entitlements so as to mimic as closely as possible the allocations which we can predict might result from bargaining in the absence of transaction costs and market failures. This is itself 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.

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 be get things right by the light of the price system than are bureaucrats navigating by 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

[9] 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 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 limitation . Such limits, however, form at least part of every property right.

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 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.

VI. 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 precise economic justifications for legal formality nevertheless remain vague. Seen as a general quality of the legal order, formality has been thought to improve the rationality and effectiveness of bureaucratic instrumentalism, ensure reliability and predictability among private actors, promote openness and transparency for both public agents (through bureaucratic regularity) and private actors (through price signaling and the reduction of transaction costs). Indeed, 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 will 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.

This can all sound sensible – until you try to define a technical regime to implement it. In fact, 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. Sometimes excessive formalism ("red tape") can seem an obstacle to economic performance. Indeed, the urge to "formalize" law downplays the role of standards and discretion in the legal orders of developed economies and the importance of the informal sector in economic life. 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. Polyani famously observed that rapid industrialization may have been rendered sustainable --- politically, socially and ultimately economically --- in England precisely because law slowed the process down.

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. This was certainly the case in the post-transition economies of East and Central Europe. 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.

Moreover, the association of development with formalization downplays the range of possible legal formalizations, each with its own winners and losers. Formalization

allocates understanding and shifts access to resources compared to the situation prior to formalization. A clear title may make it easier for me to sell my land. The impact on 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 harmonisation 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.

Conclusion: 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 instead. 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. 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 be 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, may be more or less effectively implemented, and may be extended beyond its formal terms by popular support, or resisted tooth and nail on the ground. In the postwar period, land reforms differed quite dramatically in all these ways.

None of these choices 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 could clarify which approach to each issue is most likely to generate development in specific situations. To the extent this is true, 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, postwar land reform in developing countries reflected far more the pull and push of political and ideological struggle. 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 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 then 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, more far-reaching programs were possible. 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 if 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 heterogenous 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.

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 right 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.