

Property Law in the West

- Absurdly ambitious title and topic
- Complex and diverse history
- Result of economic and political struggles
- Every national system different and internally differentiated, affected by adjacent regimes
- Mix of public and private order, of strong entitlements as well as duties and exposure to injury

Five topics (among many)

- I. Property and Sovereignty -- Public and Private Order
- II. Ownership and use: the social productivity of assets
- III. Property and the struggle over modes of economic life
- IV. Property law analytics: what is a “property right”?
- V. Some worries about “rule of law” and property formalization as a development strategy.

Property and Sovereignty

- Roman Law: Imperium vs dominium, dominium vs. jus
- Feudalism: fusion of land tenure and personal homage
- Classical laissez-faire
- 20th century

Possible relationships

- Superiority of public (regulation, social law)
- Superiority of private (Lochner, constitutional limits on developmental state)
- “Equality” of two equivalent domains
- Functional “partnership” for market efficiency, public goods, social purposes

Property as coercion: Robert Hale

- Property is a relationship between two people *and the state*.
- State enforces the exclusion of one by the other
- Policy of avoiding “coercion” or promoting “autonomy” cannot be achieved simply by preferring private to public ordering.

Property as Power: Morris Cohen

- “We must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.”
- Property allocation determines “future distribution of the goods that will come into being... The owners of all revenue-producing property are ... grantedpowers 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.”

Morris Cohen

- “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.”

Here begins a century long relationship between legal and economic analysis. How should we think about this relationship?

Cohen's caution:

- “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.”

Fine tuning

- Intellectual property – how much protection to stimulate innovation? But when to limit protection to promote competition and ensure productive use of inventions?
- Anti-monopoly power, compulsory licensing, “abuse of a dominant position”

Ownership and use: the social productivity of assets

- Medieval roots
- Communal and civic obligations: trust, family law, property taxation
- Dispossession for non-use, restrictions on alienability
- Expropriation with / without compensation
- Regulatory taking?

Property and the struggle over modes of economic life

- Enclosing the commons
- Industry vs agriculture
- Finance vs farmers / West vs. East
- Extractive industries vs other uses
- New property forms / new allocative issues
- Divisions within industries
- Scarc resource regimes: water

What is a “property right?”

- A relationship between two people and the state
- “Property is a bundle of rights”
- Key discovery: the significance of the entitlement to uncompensated injury

Wesley Hohfeld

- Duties are correlated with Rights
- Privileges are correlated with “No Rights”
- Should we give the owner a right and impose a duty on the neighbor? OR should we give the neighbor a “privilege”?
- Property has two logics.

Three episodes in legal
reasoning:
Duncan Kennedy

- “Classical Legal Thought” 1850-1900
- “The Social” 1900 – 1950
- “Modern Legal Thought” 1950-2000

An example of the complexity of modern legal thought: Calabresi

Nuisance law:

- Plaintiff can get an injunction against nuisance
- Plaintiff cannot get injunction but gets damages
- Plaintiff gets nothing

Calabresi encourages us to
consider:

Who is “favored?” Who gets the initial
entitlement?

How should law protect that entitlement?

He distinguishes three rule types

- Property rules: one party can act until bought out at negotiated price by another
- Liability rules: one party can force the other to act or desist at a price set by a judge – act and pay damages
- Inalienability rules: one party has an entitlement which cannot be sold

Assignment of
Initial Entitlement

Method of Protecting
the Entitlement

	Plaintiff	Defendant
Property Rule	Option #1	Option #3
Liability Rule	Option #2	Option #4
Inalienability Rule	Option #5	Option #6

- Option 1: plaintiff gets injunction. For the defendant to do the noxious act, he must negotiate purchase of the right from the plaintiff.
- Option 2: plaintiff has a right to prevent defendant's noxious act, but defendant can override it by paying a judicially specified price: (unintentional torts: you can negligently run someone over but you have to pay damages")
- Option 3: plaintiff gets no relief – for the plaintiff to stop the noxious act, he must pay the defendant a bargained for price.

- Option 4: plaintiff can get defendant to stop, but only by paying a judicially determined sum: example: real estate developer gets injunction against cattle feed lot but must pay the price of relocation
- Option 5: plaintiff has the right to stop noxious act and defendant can't override at any price
- Option 6: defendant has a right to noxiousness that he cannot alienate to plaintiff

How to decide?

- Efficiency concerns: (how to define, what baseline, judged by parties or state?)
- Distributional concerns: equality and “just desserts”
- “Other justice considerations”

Further discussion in the literature.....

- Focus on “cheapest cost avoider” – smoke out information by initial allocation of entitlements
- If transactions costs low, use property rules, and initial allocation is less significant
- If high transactions costs, use liability rules
- Implement distributional concerns in preliminary allocation
- Use inalienability for “moralisms”
- And so on.....

Property law “formalization” as a
development strategy

Some worries:

- Obscures choices internal to property regime
- Understates role of discretion / informality / permission to injure
- Baseline problems
- Obscures range of alternatives within the developed West
- Reduces attentiveness to path dependence

More worries

- Discourages the more complex analysis required to arrange “bundle of rights” for productivity
- Underestimates link to other institutional forms and other legal regimes in the society
- Blunts opportunity to use property law to choose among alternative, perhaps equally efficient or productive, economic models