Introduction

- "Property law in the history of the West" --- an absurdly ambitious title/topic.
  What I hope to provide is some indication of the range of ideas *within* the legal profession about property, with a focus on the US tradition.

- Property law is the sedimented remnant of a complex history, full of struggle, both political and economic, over the form of society, the mode of economic production. Property law has everywhere been recognized as an *initial and ongoing allocation of resources and of the future return from resources.* As such, it has been at the center of struggles over forms of economic and political life. The result is nowhere a simple or "coherent" system, but reflects the history of these allocative struggles.

- Property law in every Western society is different. In the relative powers of various players. But also in the way the property regime fits into the broader legal and institutional structure. For example, in the mix of functions performed variously by property and *adjacent regimes* – taxation, bankruptcy, consumer protection, zoning, environmental regulation, and many more.

- Property law is everywhere a *mix* of private and public modes of ordering, a *mix* of formal rules and quite discretionary standards, a *mix* of strong entitlements to act and obligations restricting one's ability to act. The result is a complex fabric of rules and procedures for *adjusting* competing claims on and uses for the societies productive resources.

- Let me say a few things about five topics:

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

I. Property and Sovereignty – Public and Private Order

- An old issue: in Roman law, the relationship between *dominium (*rule over things by an individual) and *imperium* (the rule over individuals by the prince), and the relationship between the regime of *dominium* and *jus.* Early empire – dominium was rather separate, by late empire, subsumed in the jus. On impression which results: common law tradition separates them more fully, while civil law tradition gives more weight to public elements.

- Actually, the story is more complex. In every Western tradition, there has been a struggle over the relationship, and at different times, we have

    - A more or less vivid distinction between public and private – or at least the THEORY that that is what we have – practice in each period more complex

        - Feudalism: fusion of land tenure and personal homage (feudal baron had right to determine marriage of the ward, nominate the priest….)
        - Classical laissez-faire: theorized as a strong public/private distinction
        - 20th century: a story of their re-connection.

- Several possibilities in the modern era, since industrial revolution:
  - superiority of public (regulation, social law)
  - superiority of private (Lochner, constitutional limits on development state, judicial review)
  - "equality" in different domains (nineteenth c.)
  - functional "partnership" for market efficiency, public goods…

- Property as Coercion: Robert Hale. Property as Power: Morris Cohen.
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  - Hale: stresses the role of the state in private law arrangements: property is a relationship between two people and the state which enforces the exclusion of one by the other.

  - Cohen: because property is the state sanctioned right to exclude, it is also the power to compel service for use – or the payment of rent. "We must not overlook the actual fact that dominion over things is also imperium over our fellow human beings."

  - Cohen: property is more than a protection of possession – it also determines the
    "future distribution of the goods that will come into being… 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."

- Cohen: therefore, "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: "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 ell us where these lines should be drawn."

- Cohen was attentive to fine-tuning issues: how firmly to set intellectual property rights to stimulate innovation – but not to prevent productive use of the knowledge: "patents for processes which would cheapen the product are often bought up by manufacturers and never used." How to combine with – anti-monopoly power, "abuse of a dominant position," compulsory licensing.

II. **Ownership and use: the social productivity of assets**

- Also medieval roots in struggle over church lands – "is it your property even if you don't use if for society? Result: property has always also been about duties, understood in various ways. Duties to cultivate, to allow tenancy. Duties to prevent dangerous conditions, provide lighting/safety (tenement owners), poor laws and "rates."

- Property as a source for communal and civic obligations.

    - Property held in "trust." Fiduciary duties of trustees for beneficiaries of the trust. Constructive trust (e.g. for marital property pending divorce). Note: importance of family law – widow, children's share. Family law as a private social welfare scheme to prevent becoming wards of the state. Slaves, servants, children, spouses.
    - Limits on alienability: preserve "family home" in divorce with custody, not force sale of home in bankruptcy. Ability to dispose of land by testament upon death begins only with Henry VIII – remains restricted.
    - Broader scale: in US, local property tax funds primary/secondary education – note impact on local distribution of (at least non-stigmatized) commercial property, shopping malls, office complexes.

- Modes of dispossession if property not used: adverse possession, taxation. Note: property tax came very late to England – early 20th century! (tax reform 1910, property simplification 1925!).

- Expropriation: with compensation for public purpose. Taxation – not a taking. Regulatory taking? Slavery abolished, no compensation to owners. Abolition of the right of advowson (right to nominate priest) – no compensation. Prohibition – no compensation to distilleries. Tobacco or gun regulation – no compensation.

III. Property and the struggle over modes of economic life

- Some examples: struggles for political/economic power.

- Enclosing the commons. In Germany this was a nineteenth century worry: was land held in common "before" the village, or had it been taken and now could it be reallocated? By 1890, little common land left in Germany – this is the context for Proudhon's midnineteenth century observation that "property is theft." Result: slowing the process, adding duties towards tenants. Settling the West: homesteading, titling, removing native inhabitants.

- Industry vs. agriculture. Complicated feudal law (fee-tails, copyhold estates, etc) and restraints on alienation and testamentary power seen to slow transformation of landed aristocracy –make industrialization sustainable politically/socially? Should state be on the side of shift from agriculture to industry? How do you do this – encourage alienability, prevent nuisance uses by extractive/industrial users.

- Finance vs farmers, East vs. Midwest/west. Interaction of property law with banking law, bankruptcy law: (if farmer can't pay commercial debts, does he lose the farm to the big city bankers?) Again questions of taxation

- Extractive vs other uses: environmental, recreational. Private use of public domain powers, private use of public lands, national parks

- New forms of property: blending contract entitlements with property -- "futures" start as warehouse receipts. Standardization of terms: grading grain, inspection of weights and measures, to facilitate Chicago market. Markets in organs, biotech, babies

- Divisions within industry: intellectual property – EU software directive, placed the EU industrial powers between

an American and a Japanese software production model, or between big pharma and generic manufacturers.

- Allocative land regulatory schemes --- water allocation schemes in the West.

- None of these struggles have been cleanly resolved – it has been a matter of pull and tug, different in various places: result is less a system than a historical record of winners, losers and social accommodation in these struggles.

IV. Property law analytics: what is a "property right"?

- Some basic ideas about property rights.

    - A property right is *not* a relationship between a person and a thing, but a relationship between two people concerning a thing. Property rights therefore distribute or allocate by giving one party an *entitlement to exclude* the other from use.

    - A property right is not a relationship between two people alone, but between *two people and the state,* which enforces the rights of one against the other

    - Property is a "bundle of rights." Ownership includes, for example, 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.

    - One Result: the *hierarchy* of rights among various sticks in the bundle must be determined, either by property law or by contract. This is one site for the merger of property and contract – should the state set

the *underlying meaning* of the right, or should it be set by contract? What is the baseline?

- Key discovery: the significance of the entitlement to uncompensated injury.

  - Hohfeld: "basic jural relationships" include Duties correlated with Rights and Privileges correlated with "No Rights"
  - Significance: need to choose whether to legalize "ownership" by imposing a duty on the other party not to injure the owner, or by granting the neighbor a privilege to injure the owner.
  - Result: a century of discussion about how to decide – various styles of welfare economic analysis, moralizing, distributional considerations.

- Three periods in the history of legal reasoning about property: Duncan Kennedy

- "Classical Legal Thought" 1850-1900
  - Sharpened distinction between private and public power, seen as "absolute powers absolute within their spheres." Police power and private power.
  - Integration of doctrines around central principles: "The will theory"
  - Relative emphasis on formal rules, limited judicial discretion, deduction

  Unrealistic as a sociological description, powerful as an ideology – some elements still there as argumentative pieces

- "The Social" 1900-1950

  - Social conditions yield doctrinal results: interdependence/modernization

- Critique of deduction, embrace of "policy"
- Weakening of public/private distinction
- Imposition of duties, softening of rights
- Expanding exceptions, addition of regulation, immanent social purposes.
- Standards, discretion, custom

- Modern/eclectic/pragmatism 1950-2000
  - Competing goals, balancing, procedures, judicial/administrative management
  - Neo-formalism
  - Expansion of legal vocabulary to include interdisciplinary policy ideas: law and economics, sociology, morality
  - Market failure analysis: law preventing or compensating for defective private ordering. Disparities in bargaining power?

- An example of the complexity of allocating entitlements: Calebresi and Melamed. Re-organizing the doctrinal categories to reflect and encourage their economic assessment.

  - Nuisance law: when can owners annoy neighbors? C/M expand the range of doctrinal alternatives. Traditionally lawyers saw three options:
    Plaintiff can get an injunction against nuisance
    Plaintiff cannot get injunction but gets damages
    Plaintiff gets nothing

  - C/M consider both who gets entitlement – who is "favored," and
    how the law protects that entitlement.

- C/M argue that law can protect entitlement three ways:
  --- Property rules: one can act until bought out at negotiated price
  --- Liability rules: one can force the other at a price set by a judge
  --- Inalienability rules: one with entitlement can't sell right

Method of Protecting the Entitlement	Assignment of Initial Entitlement: Plaintiff	Assignment of Initial Entitlement: 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 pursue noxious act, he must negotiate purchase of the right from the plaintiff.

Option 2: plaintiff has the entitlement to prevent defendant's noxious act, but defendant can override it by paying a 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 noxious act, he must pay defendant a bargained for price.

Option 4: plaintiff can get defendant to stop only by paying a judicially determined sum: Spur Industries: developer gets injunction against cattle feed lot but must pay the price of relocation

Option 5: plaintiff gets right to stop noxious act and defendant can't override

Option 6: defendant has right to do noxious act that he cannot alienate to plaintiff

- How to allocate? C/M propose three types of considerations:
  - Efficiency (how to define, what baseline, judged by parties or state?)
  - Distributional concerns – both equality and "justness" of what one gets
  - "other justice considerations" – religious preferences, accommodations, etc.

- The types of propositions debated in the ensuing literature:
  - Assign entitlement to the party who is not the cheapest cost avoided to promote information discovery
  - If transaction costs low, use property rules – doesn't matter to whom they are assigned initially
  - If transaction costs are high (multiple parties, holdouts, freeloaders) use liability rules, not property rules

- Distributional concerns might lead you to place entitlement on the weaker/poorer party initially
- Inalienability rules are great for "moralisms" – intentional torts
- Liability rules might not be optimal, even with high TC since they must be set by a judge, costs of doing so and of error – e.g. encouraging "punch and pay" --- must be included in analysis

V. Some worries about "rule of law" formalization as a development strategy.

- Analysis of legal entitlements *could* focus attention on political and economic choices. "Capital" is a legal institution. Owning and contracting are key to productive allocation.

- The claims for formalization: necessary for transparency, for information and price signaling, to facilitate alienation of property, to reduce transaction costs, to assure security of title and economic return, to inspire the confidence and trust needed for investment.

- Meanings of formalization:

  - scheme of clear and registered title
  - contractual simplicity and reliable enforcement
  - private law of clear rules rather than vague standards
  - legal reasoning by deduction: less discretion in administration of justice
  - absence of regulatory overlay – avoiding public "rent seeking"
  - private law oriented to owners and sellers, rather than users and buyers

- Difficulties
  - Obscures choices internal to property regime: More transparent to *whom?* Property for squatter *or trespasser?*
  - Understates role of discretion in developed legal orders: UCC "reasonableness" standard, "English exception:" UK industrializes with feudal land tenure system, Polyani: law rendered industrialization socially sustainable
  - Undervalues informal sector and the *permission to trespass or injure* in every economy
  - Baseline problems: distinguishing laws imposing "costs on the transaction" and those "supporting the transaction" – perhaps by formalizing. Distinguishing prices "distorted" by regulation from prices "bargained in the shadow" of regulation
  - Obscures range of alternatives in the West, reflecting different resolutions to the management of social/economic/political conflict
  - Reduces attentiveness to path dependence by focusing on initial allocation rather than future powers associated with that allocation
  - Discourages the more complex analysis necessary to arrange the various elements in the "bundle of rights" so as to encourage efficient productivity
  - Underestimates the relationship between property rights and *other institutional forms* and *other legal regimes* in the society
  - Obscures the opportunity to choose among alternative, perhaps equally efficient or productive economic models through property right allocation