Some Caution about Property Rights as a Recipe for Economic Development

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Over the last years, enhancing the security of property rights has become something of an *idée fixe* among global development policy experts. Strengthening the protection of private property rights has become a standard part of the recipe offered by outside experts to developing societies, including 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. A number of historical studies have recently emerged to challenge that quite general historical claim and I will not review that literature here. Suffice it to say that it is far from clear that the most aggressive periods of industrialization and growth occurred in the places and at the times when property rights were most clear and most aggressively protected. Indeed, there are any number of good counter-examples, and the story becomes yet more complex as soon as one begins to be very specific about what "strong property rights" means in any detailed way. It turns out societies have grown – and failed to grow – with a wide variety of attitudes toward private property.

The goal of this chapter is a different one --- less an historical analysis of the relationship between private property and economic development in the West than a reflection on the history of debate about the meaning and even the possibility of "strong property rights" in law in the first place. It turns out that within the Western legal tradition, it has never been entirely clear what "strong property rights" mean and there are good intellectual reasons for thinking that some of the most common lay impressions conveyed by that phrase are simply incoherent when translated into technical legal regimes. Of course, summarizing the controversies which have beset professional debate about "property law in the history of the west" would be an absurdly ambitious project. What I do hope to provide is some indication for the range of ideas *within* the legal profession about property, particularly within the United Statesean tradition, which might be thought to draw conventional wisdom about the centrality of "clear" or "strong" property rights" for economic development.

The first point worth noting is that property law in every developed society is the sedimented remnant of a complex history, full of struggle, both political and economic, over the form of society and the modes of economic production. Crucial to the idea of "strong property rights" is some idea about how those rights came into being and were allocated in the first place. Property law is everywhere understood to rest on an *initial and ongoing allocation of resources and of the future return from resources* which might be done in a variety of ways. It bears repeating – having "strong property rights" says nothing about *who* ought to have just what rights against *whom* in relationship to *what.* A strong property rights regime relies upon a strategy of allocation and entitlement which may arise out of the political and social history of a society, or may be imposed and reallocated for one or another reason. In this sense, one can always start over. New kinds of rights can be invented for new kinds of actors in new relationships to new kinds of knowledge or resources and existing rights can and have often been

reallocated, either slowly or quite precipitously as part of a conscious project of social and historical renewal or struggle.

As one might expect, the result is not at all a uniform system. Across the "West," different people have had different rights against different others with respect to various resources at various times as the struggles of economic and political life have continued. 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. And it happened everywhere in slightly different ways. The result is therefore not a simply or coherent Western system of property, but a dense network of entitlements reflecting specific social histories of allocative struggle.

Property law in every Western society is not only different in its allocation of rights and duties and in the relative powers of various players. The law relating to property in each society rests within a broader legal context which affects the meanings these rights have. Moreover, the law affecting the use of property is no where the exclusive concern of "property law." Numerous adjacent legal regimes affect the meaning of property rights in every system --- laws about taxation, bankruptcy, consumer protection, zoning, family law, corporate governance, environmental regulation, and many more.

It is easy to imagine that property rights stand at the base of a pyramid, modified by whatever public regulation has been added on top. There is much to this – property rights are nowhere unrestrained by a regulatory framework. But property law, even if we understand it as the private base to which public regulation is added, is itself also embedded in a framework of private law and procedure. These arrangements change the meaning of property rights for people who enjoy them. Procedural and institutional arrangements make it easy for some and difficult for others to mobilize the state to protect their property interests, and property rights are, in the end, only as strong as one's ability to bring the state into play as their enforcer. Property rights also vary with different 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. Property and contract are mixed together in all sorts of ways. A contract t regime which 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.

It often seems that "strong" property rights are best reinforced by a "strong" contracts regime. But this way of thinking obscures the range of choices which need to be made about just *how* these regimes ought to be strengthened when they interact with one another. The classic example is the potential conflict between a factory owner's "strong" property right to exclude trespassers and his workers "strong" 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 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 with various distributional trade-offs and possible effects on the mode and efficiency of production.

It turns out that 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 a societies productive resources. 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? "Strong property rights" are neither an escape from these questions nor a ready-made answer. Property law is one place in which struggles over these questions has been carried out. In this short essay, I introduce the kinds of choices which have been illuminated by debate within the legal field about property rights.

I. Property and Sovereignty – the relationship between public and private order

This is an ancient issue, which arose 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, civil and common, there has been a continuing struggle over the relationship between public and private arrangements.

At different moments there has been a more or less vivid distinction between public and private law, at least in the eyes of legal theory. 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 be put together in many ways, reflecting different social, economic and political arrangements. In the feudal period, for example, land tenure and personal homage were combined in a range of specific legal doctrines. For example, the feudal baron sometimes had the right to determine the marriage of his ward or to nominate the local priest. These arrangements differed from place to place over time. At the start of the nineteenth century, public sovereignty and private right were combined in various ways. Indeed, the idea of a single unified "sovereignty," universal in its absolute authority over territory emerged only late in the century. Prior to that sovereigns routinely deferred to rights established elsewhere, including property rights, and to the rights of other sovereign entities with which them came into contact. Many types of entities exercised sovereign and property rights – think only of the East India Tea Company, or the many privateers who conducted warfare for booty under license from one or another sovereign power.

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. The history of twentieth century legal thought in 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.

Speaking very generally, since the industrial revolution, legal theorists have experimented with a range of accounts for the relationship between public and private. For some, the point has been 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 those 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 and by narrowing the opportunities for agents 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 funcational "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.

Over the last century, lawyers working in the United Statesean tradition 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 was made more possible as jurists came to share the background idea that property law arrangements are forms of power which entail coercion by the state. Once this became commonplace, it was more difficult to keep them distinct from public power and the opportune to see public and private arrangements as interchangeable ways to reach a given objective. 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.

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.[1] The property rights of owners placed others under a legal duty to make due without which would be enforced by the state should they trespass or seek to convert another's property for their use. 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."[2]

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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"[3]

> "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." [4]

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." [5]

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 – 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 ell us where these lines should be drawn."[6]

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 general 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.

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[4] Ibid.

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[6] Ibid at

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

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.

The idea of property as a source for communal and civic obligations has a wide range of legal expressions. Property may, for example, be held in "trust," placing fiduciary obligations on trustees for 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 a widow and child's share. This communal element in the property system is often expressed as a limit on alienability -- perhaps precluding sale of the "family home" in divorce with custody or preventing the sale of a home in bankruptcy. Indeed, in England, the ability to dispose of land by testament upon death of the "owner" begins only with Henry VII and is everywhere restricted.

More broadly, property ownership is often accompanied by tax obligations – in the United States most dramatically to support local government and to fund 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.

III. Property and the struggle over modes of economic life

In contemporary debates, it often seems that establishment of a "strong property rights" regime is a *pre-condition* to a productive and efficient economic order. In fact, struggles over the meaning and allocation of property rights have always been an ongoing part of broader struggles over the nature of political and economic order. There are numerous familiar historical examples. 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. The earlier struggle across Europe to "enclose the commons" everywhere accompanied and facilitated a transformation in the agricultural system of production. Struggles over these transformations often appear as legal struggles. By the end of the nineteenth century, there was little common land left in Germany, which provides the context for Proudhon's famous observation that "property is theft." Nineteenth century Germany jurists 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, of its interaction with banking and bankruptcy law. For example, if a farmer is unable to pay commercial debts, does he lose the farm to the big city bankers, or is there an exclusion in bankruptcy for the "family farm?" Similar questions of property law have arisen 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? 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. The most 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 an d production, presenting difficult choices of economic policy. It was possible to design a regime of "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, and a similar struggle is underway in the field of entertainment.

One key lesson from the enclosure moment is that it is not only a matter of who gets the property --- the land or the water. Legal arrangements can speed or slow changes in modes of economic order. With more duties to 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, and 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. 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. Lawyers are adept at disaggregating ownership rights and transforming them into transactions – 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. These rearrangements may be made more or less difficult, sped or slowed. The idea that speeding them and multiplying them promoted economic growth and was a necessary part of the transformation from a productive to a service economy lay behind the current crisis in mortgage backed securities.

Each of these struggles over a nation's economic direction and priorities had numerous important dimensions. It was not all about law, of course. At the same time, none of these struggles took place *on top of* an existing and well settled regime of "clear" or "strong" property rights. They were all also struggles about which property rights should be clear and which should remain murky, how rights should be combined with duties, when rights should give way to public – or to other private – interests. Each was a matter of pull and tug, and none were cleanly resolved. The result is a legal order bearing the residue of these struggles and the compromises, stable or otherwise, in which they terminated. In this sense, property rights are less a legal "system" than a historical record of winners, losers and social accommodation in these economic and political struggle over a nation's direction.

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

To this point, I have been considering "property rights" largely from an external perspective – what do they do, who has them, how are they arranged for social and economic purposes, how do they participate in political struggles, and so forth. At each point, it has turned out that the call for a regime of "strong property rights" oversimplifies. We repeatedly discover choice – whose property right, how strong, set against what countervailing duties and powers, and so forth. Lawyers have also though much about the process by which legal professionals *reason* about property rights. This is important because having a property right, strong or otherwise, is just the first step. It must be enforced and implemented, and this requires professional interpretation in particular circumstances. Over the century and a half, meditation on the internal analytics of property rights, the modes of analysis by which rights can be connected to results in judicial work, has also generated reasons to be skeptical about the call for "strong property rights." The main idea here is that "property rights" are not univocal --- they may be implemented in more than one way, making it questions of economic and political choice "all the way down" as they say.

Let me introduce a few core ideas about property rights which are familiar to lawyers and which may be helpful here. First, legal professionals do not conceptualize a property right as a relationship between a person and a thing, but rather as a relationship between two people concerning a thing. I may say that I own my home, but what this means is that I can enforce a series of rights – to remove a trespasser and enforce my exclusive use of the home, to enforce a contract to sell my home and prevent others from selling it without my permission, enforcing my exclusive right to alienate the home, and so on. In this sense, we think about property rights distributing or allocating rights and duties among people with respect to things --- by giving one party a *right to exclude* and placing the other under a *duty not to trespass* for example. 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 for that use of state force. In this sense, property law analytics can bring issues of social and economic choice to the surface.

Moreover, from a legal point of view, 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. A great deal of creative legal analysis goes into 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 yes, they may arrange rights in lots of ways, but 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 when parties, including the state, will 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. 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.

In this process, it is often important to assess the *hierarchy* among various sticks in the bundle of rights which may conflict with one another. Moreover, the state will often need to set a baseline --- perhaps by choosing between property law or by contract. Should the state enforce the *underlying meaning* of the right or recognize its rearrangement by contract, for example? At these points, lawyers often have the experience that their modes of legal analysis run out. Between two rights, between two duties, which may be interpreted to be in play, it is difficult on legal grounds alone to determine which one should prevail. In similar fashion, there is no compelling reason internal to law for preferring either property or

contract as the baseline terrain for setting rights and duties. Indeed, the ability to reframe property entitlements through contract and contract rights through property is itself a basic legal reasoning skill. As a result, at these points, legal analysis *itself* often turns towards other vernaculars, of ethics or policy or instrumental purpose.

In this sense, legal analysis has internalized a whole series of debates which will be familiar to economists, sociologists, psychologists, moral philosophers and other social scientists. 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 and it is difficult to get to the end of a legal argument without at some point departing the world of logic and encountering such a policy vernacular. This makes it difficult, of course, to make sense of the idea that sound economic policy requires *strong* or *clear* property rights. Lawyers cannot figure out what that means in particular cases without themselves relying on political and economic ideas.

The role "policy argument" in legal analysis has differed over time – two hundred years ago moral ideas and ideas about good government flowed easily in and out of legal materials. In the twentieth century much comes from the heightened power of social science and the emergence of technical expertise as a component in modern economic management. But there are also reasons internal to law which support this turn to policy. The most important is the emergence in the late nineteenth and early twentieth century of a widely shared background assumption that there were conflicts, gaps and ambiguities in legal materials which could not be resolved by logical deduction alone. At different moments and in different places, this assumption has had more or less grip. But it has been important and widely shared enough to fill the legal field by the late twentieth century with analytic stuff from other social sciences.

The loss of faith in deduction arose from a variety of sources. The nineteenth century effort to link every outcome back to a system of high level principles had strained deduction to the maximum. The effort to distill ever fewer principles to account for legal rules revealed ever more often how potentially applicable legal principles conflicted with one another. In the specific field of property, lawyers also increasingly realized that one might "enforce" property rights and consolidate ownership of property in a variety of different ways. One crucial idea bearing on this realization is worth repeating here: the importance of the legal entitlement to injure without paying compensation.

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. Property has, in this sense, two logics --- you need another reason. Similarly, there is no logical way to decide whether owning a factory implies the right to exclude as trespassers all those who would do business with or seek to organize your workers, or whether their freedom of contract implies a privilege to invite organizers to cross your land for these purposes. You need another reason.[7]

The result has been a century of discussion *within* the legal field about what these other reasons might appropriately be. In that period, lawyers have learned a variety of styles of welfare economic analysis, of moral persuasion, and of reasoning about the nature of their society, its needs and possible futures. They have dragged various bits and pieces of economic or other expertise into their world, putting them to use against the background of their own professional consciousness about what law is, how it works, how legal reasoning persuades and so forth.[8]

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[7] It is customary, and correct, to trace these insights to Wesley Hohfeld, and these examples to Walter Wheeler Cook….cite

- [8] For a history of "modes of consciousness" undergirding the surface arrangement of legal argument which is particularly useful for understanding the distortions brought about when economic arguments are brought into the legal field, see: Duncan Kennedy, three globalizations. Kennedy contrasts three broad moments in United Statesean legal consciousness which he terms "Classical Legal Thought" (1850-1900, characterized by a sharp distinction between private and public powers seen as "absolute powers absolute within their spheres," the professional ambition to integrate doctrines around central principles such as the "will theory" and a relative preference for formal rules, limited judicial discretion, and deductive legal reasoning); "The Social" (1900-1950, characterized by belief in the analysis of social conditions to yield doctrinal results, a relative faith in social needs and functions and in ideas like "modernization demands interdependence" as guides for interpretation, a loss of faith in deduction, embrace of self-consciously policy oriented vernaculars, a weakening of the public/private distinction as an analytically persuasive tool, a tendency to impose duties and soften rights, to expand exceptions and interpret in light of what seemed immanent social purposes, and to rely upon standards, expert and judicial discretion and custom); and "modern legal thought" (1950-2000, characterized by awareness of competing goals, the felt need for "balancing" and for judicial and administrative management, openness to eclectic and divergent policy vernaculars, and an expansion of legal vocabulary to include interdisciplinary policy ideas from law and economics, sociology, morality). It is easy to see that different strands of welfare economics will be easier and harder to get going in the legal field in each period. Pigovian analysis, focusing on the internalization of "social costs" will make more sense against the background of a "social" legal consciousness, just as the Coase theorem and its progeny focusing on transaction costs and market failures will resonate more easily in the later period.

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. In a classic early example, Calabresi and Melamed treated the relationship between neighbors favoring competing property uses as a paradigmatic legal question (as had Coase), and dissolved all possible doctrinal responses into a simple grid. 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. As a result, there are a half dozen possible outcomes to a suit by a complaining neighbor.

> 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

I introduce this scheme to give a sense for the range of ideas now circulating in the legal field in the aftermath of this analysis. Calebresi and Melamed introduced three types of consideration for judges to consider, which they termed "efficiency," "distributional concerns," and "other justice considerations." . In the years since Calebresi and Melamed introduced this idea, legal scholars have proposed numerous ways to make these choices. In the years since, 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 (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.

V. Disentangling legal, economic and ideological arguments about development policy: the case of postwar land reform.

Legal analysis has come to embrace, in its own way, modes of thought developed in ethics and economics and politics. At the same time, however, when interpreting a project of legal reform, it is terribly difficult to disentangle economic, political and legal motivations and justifications. It would be easy, as a lawyer, to respond to the call for "clear property rights" by turning the question back to economics and politics – which rights (with which exceptions) for whom, where, when, to bring about what kind of economy and what kind of society? But this reversal is unlikely to be any more satisfying. In fact, legal policy emerges from a kind of stew of political, economic and legal considerations. In specific situations, these are promoted and struggled over by specific interests – but those interests are also understood and expressed in a general atmosphere which makes some legal arrangements the focus of reform attention, some changes easy to imagine and others more difficult to think of, let alone implement. Post war land reform offers a good example for the difficulty of imagining that "clear and strong economic analysis" will be any better than "clear and strong property rights" as a way forward.

In the postwar period, the significance of legal choices in the construction of development policy is easy to see in the case of land reform programs, precisely because they foreground the kinds of legal changes that may be hidden in other policy fields. Land reform is law reform -- a change in the law about who can do what with which parcels of land. One might expect choices among legal details to be made by the light of economic theories of development. In the event, however, postwar land reform projects reflected the push and pull of political and ideological considerations. This was often more evident in the details of a land reform scheme than in the decision to undertake land reform in the first place. Although policy-makers often did argue for "land reform" as a tool for economic development, the specific choices they made in designing land reform programs often suggest the larger significance of ideological and political considerations.

In general, the policy objectives made salient by postwar economic thinking leaned against prioritizing land reform. Income inequality was not seen as a significant obstacle to development, at least initially. Indeed, the goal was to squeeze savings from the rural areas for reallocation to industry and underutilized rural labor was understood as a resource for industry.

Moreover, the hard currency earned from primary product exports was desperately needed for the import capital equipment and technical know-how. It seemed unlikely that land reform or expropriation of the plantations would increase production – if anything, land reforms seemed likely to stifle the only goose available for laying golden eggs. According to Bulmer-Thomas, there was no evidence that poor productivity in Latin American domestic use agriculture or the inefficiencies of export oriented agriculture like livestock over the previous century had been linked to land-tenure concentration.[9]

Nevertheless, ideas from the development economics of the day were sometimes used to justify and interpret land reform initiatives. Land reforms which reallocated land resources to primary product export crops or encouraged agricultural production might help maximize hard currency earnings or to stimulate the production of food. This seems to have been the result of the 1932 Mexican land reforms, which led to large increases in agricultural productivity for export and domestic consumption, although it is difficult to disentangle the impact of the land reforms from simultaneous state and private investment in irrigation and infrastructure and a nearby U.S. market.[10] If large landowners, whether foreign or domestic, were not utilizing their land for purposes consonant with the national development plan, or were squandering the national surplus by repatriating profits abroad or importing foreign luxury goods, one instrument to redirect those assets and capture those gains might well be land reform – although the effectiveness of land reform in promoting these objectives would need to be compared with import restrictions, incentive schemes, taxation and other policy instruments.

It was only when the structure of local political economy came to be seen as a potential obstacle to development --- as in Cardoso and Falleto's analysis of "enclave" economies linking domestic and international capital – that a serious development related justification for land reform emerged in the development economics literature. In such a theory, however, everything would depend on the specifics of the situation and the structure of the land reform. Landlords – some landlords – might well be allies or even financiers of national industrial development. Land reform would need to be carefully tailored to break up constellations of economic and political power which posed obstacles to the appropriate modes of insertion into the global economy while creating incentives for speeding the emergence of a range of entrepreneurial activity able to generate national economic growth. This kind of economic theory might offer guidance in designing the details of a land reform scheme – arrange the incentives and requirements to open space for entrepreneurial capital accumulation, for example.

In the postwar period, however, the association of land reform with import substitution industrialization was more a matter of loose ideological fit than careful economic analysis. In crude terms, 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. As a result, land reform programs were often designed in ways cut loose from attention to economic

[9] Victor Bulmer-Thomas, The Economic History of Latin America Since Independence, (second edition, Cambridge University Press, NYC, 1995, 2003, page 126)

[10] Bulmer-Thomas, page 241.

development objectives.

And land reforms were a popular component in postwar development policy across the developing world, from Japan and Korea, through the Philippines, South Vietnam, Burma, or Pakistan to Iran, Egypt and Algeria. Land reform programs were carried out across Latin America in the nineteen fifties and sixties, in later years often with the blessing of U.S. foreign aid professionals concerned about rural poverty. And, of course, the reorganization of land ownership and use was a key component in government policy across the Soviet bloc. The reasons were more political than economic. The rural poor were not only a reserve army of surplus labor for an emerging industrial sector – they were also a potential source of political instability, a base for political power, and the embodiment of a powerful ethical and ideological claim. At the same time, of course, there were political interests on the other side – the rural landed classes, their families and allies among the national elites, foreign corporate land-owners and their national governments. Whatever the economic justifications for these various plans, it would be more accurate to see land reform programs as the result of contending political forces than as the expression of an economically inspired policy objective.

As a legal matter, the phrase "land reform" obscures more than it illuminates. There are numerous choices to be made – choices which may be guided by development objectives, by ideological commitments and political struggle, or by legal ideas about what property "is" and how a property law regime ought to operate. As a practical matter, land reform may be more or less far-going, 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. As a policy tool, land reform has lots of moving parts. 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. In the postwar period, land reforms differed quite dramatically in all these ways.

Where land reform emerged as the result of a struggle among political or ideological objectives, we would expect that struggle to be reflected in the details – one or another force would have won the battle over each of the component parts, resulting in an elaborate, if rarely balanced, compromise. On the other hand, were land reform to have been designed to implement a clear objective rooted in an economic theory of development, we might expect policy makers to have fine-tuned the details of the policy instrument to reflect those objectives, in light of that theory. During the period, there was a literature about the relationship between details of land reform – paying compensation, allocating land to individuals, families or communities, and so forth – and economic objectives. But most of the discussion focused rather 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. In many places, the impact of compromise was a gap between the rhetoric and reality of the land reform programs. In many Latin American countries, it was ideologically compelling to announce far-reaching expropriation, nationalization and land reform, while the programs actually implemented went less far in ameliorating income inequality in large part because of resistance from competing political interests. [11] Bulmer-Thomas reports that the ineffectiveness of most Latin American land reforms in either increasing production or lessening income inequality resulted from the fact that most regimes had an interest in announcing reform, but not in following through.

> Land reform was widely attempted in the 1960s, but for most governments it was a cosmetic exercise designed to ensure compliance with the Alliance for Progress. Reluctance to attempt anything more radical was due not only to the political influence of the landowning class but also the the fear that redistribution would undermine export earnings, for agricultural exports came disproportionately from large estates. Indeed, these fears proved to be justified in those republics (e.g. Chile and Peru) in which significant land reform was attempted from the 1960s onward. Furthermore, Mexico was so concerned with avoiding any negative impact on agricultural exports from land reform that public expenditures (e.g. irrigation) and credit were concentrated on the largest farmers – whose share of agricultural income rose accordingly."[12]

The presentation of land reform as either "effective" or "ineffective" depending on whether it "went far enough" is typical – but also obscures much. 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

[11] For an interesting overview of land reform programs which focuses on their internal legal structure, from a contemporary perspective, see Roy L. Prosterman and Tim Hanstad, "Land Reform in the Twenty-First Century: new Challenges, New Responses," Seattle Journal for Social Justice Volume 4, Issue 2, Spring/Summer 2006, at 763.

[12] Bulmer-Thomas at 310-311.

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 were it not for the stubborn.

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 land holding or using patterns.

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. Their relative autonomy from contemporary economic ideas about development, the obvious breadth of questions raised in their design and the ease with which one can translate those choices into ideological markers removed from economic analytics, all make it easier to see them as the product of political or ideological struggle and compromise. But policy instruments it has become routine to treat as the simple expression of an economic theory – tariffs, subsidies, licensing schemes and the rest of the import substitution industrialization program --- were no less the product of political struggle and compromise every place they were tried. In parsing the legal choices made during their implementation it may also be possible to separate economic calculation from the politics of ideology and interest.

Discretion and penalties

Of the many issues about which legal experts had, by the nineteen fifties, developed serious methodological debates, two of particular importance tended to be overlooked in the design of import substitution policy. These are the level of official discretion built into the policy instrument and the extent to which the policy instrument is designed so as to maximize compliance with its terms. The first comes up in a variety of ways, but is best known to lawyers as the choice between relatively strict rules and broader standards as mechanisms to guide decision-making. Does the statute tell you what to achieve, but leave the means to those who must implement, or specify things more precisely? Should one express the substantive objective in vague terms – "reasonable," "proportional," "productive" – or spell things out more precisely? How precise is the standard by which administrative or judicial decision making is itself to be assessed? The second is most familiar as a question of remedy – how high a penalty is

necessary to maximize compliance? The death penalty for smuggling?

Legal experts in the period knew that every legal arrangement could be designed to be more or less rule-like, and more or less forceful in its effort to be followed – able to penetrate the social context more or less deeply. Looking back, it seems that different import substitution regimes seemed to have preferences for one or the other side in these fundamental choices. But these choices were rarely debated strategically – habits emerged. If often seemed that the most "effective" policy instrument would always be the one which minimized discretion and heightened penalties so as to maximize compliance. As a result, import substitution schemes often became progressively more rigid and forceful.

Jurists, however, were well aware in the period that this was not always how things worked. A great deal depends upon how much you are seeking to interrupt existing social practices. Is the point to harness custom to a policy objective, or break the back of the custom? Should economic policy free ride on normal commercial or agricultural practices, or seek to interrupt them? Moreover, sometimes reducing discretion with a stricter rule offers more opportunities to slip the collar of compliance – if there is no room to maneuver in the interpretation, the rule may simply be worked around or ignored. One needs a strategic sense about these responses by officials and others to the working of the rule system – is the work around more or less effective in mobilizing savings or generation development than the rule itself would have been? More discretion within the legal order may allow a more effective adjustment to changing circumstances and improve penetration – how much do we trust the lower level officials to share our objective?

In every period there has been a well developed legal vernacular for debating the shape of legal instruments. For example, it is not clear that the legal design goal should always be to maximize compliance, even if we knew that stricter penalties were a sure-fire way to improve compliance. In the legal field, the impact of stricter penalties is intensely debated, in terms which are at once vaguely ideological (stricter penalties – right wing/individualist), rooted in highly context specific sociological data and observations, and reflective of diverse professional attitudes about what makes a legal system effective and just, or maximizes its contribution to various social objectives, including economic efficiency.

Similarly, lawyers know that there are many ways to enforce legal entitlements, however easily laymen think first of criminal sanctions. It may be that those who trade currency outside the national bank are committing a crime, come under the authority of the police and prosecutorial authorities, and ultimately the penal or other sanctioning system. But there are other ways to structure the restriction on currency trading. The bank's monopoly authority in a fixed exchange rate regime may be enforced through private remedies instead, through torts or property or other civil regulatory machinery. Various private rights of action may be created for those harmed by the illegal trade, with various penalties, including the payment of damages measured in various ways. Credit or other services may be denied those who cannot show that their funds have been procured through the appropriate channels. Moreover, whatever system is devised, penalties may be more or less --- death penalty for black market trading? Punitive damages? Fines? Re-education? A sharp warning and surveillance? Or perhaps amnesty and

recruitment to the state apparatus.

The severity of the punishment and the degree of prosecutorial or judicial or prison discretion ought to be matters of development strategy. Legal experts in every country have grappled with such issues from many perspectives, assessing the impact one way or the other on the integrity of the legal order, the level of violation in the society, the recidivism rate and so forth. In putting together a scheme of fixed exchange rates, it is also possible to think about these issues from a *development* perspective – in the terms of the postwar era, which way of proceeding will promote growth? From this perspective, it is not at all clear the goal should be to bring the best legal science to bear on making rules effective – penetrate the social context. Sometimes there are advantages to be gained by modulating the impact of policies. This is easiest to see by thinking about the potential advantages of discretion by agents of the state. Prosecutorial discretion, in the right hands, may mobilize the population to national objectives more effectively than strictly enforced criminal rules. This is particularly true where baseline rules capture an enormous number of potential violators in their net. If everyone in the society is always already in violation of tax rules, selective prosecution, or the threat of selective prosecution, can be an instrument of mobilization, of incentivizing engagement in the development plan.

In a similar fashion, the tolerated level of non-compliance present with every rule might be reimagined not as a "failure to penetrate" or "resistance," but as an aspect of strategy. A tolerated black market may be an effective and administratively simple way to maintain a dual exchange rate. Those who change money on the black market are, in effect, paying a tariff on their imports – the tariff revenues go not to the state, but to the moneychanger. As development experts, we would then need to compare a single fixed rate system and tolerated non-compliance with the management of a multiple exchange rate system, with a system of import licensing, and with a tariff scheme, in terms of its administrative costs, effectiveness, and ability to transform revenues into productive investment. Between the death-penalty for black market trade and tolerated non-compliance lie a range of middle positions. Some money changers could be given a privilege to violate the normal rule. These privileges might be formalized through a licensing process, managed as a discretionary grant or by auction, and so forth.

Economists often did have ideas about such things. In the period, it was widely understood that the economic effects of non-compliance might well be salutary in many cases, or at least not worth the effort required to perfect the compliance machinery. Black-markets can perform important functions, just as an informal fee structure for administrative service may be more effective than other taxing schemes to harness earnings for investment. In political terms, slippage between the regulation and its implementation can allow the room necessary to permit politically significant constituencies to accept development policies which might otherwise be so adverse to their interests that they could not be implemented. If the upper middle class can bribe the custom's official once in a while to bring consumer goods from abroad, or change money on the black market to purchase luxury imports, they might well tolerate a quite restrictive regime, and the price they pay, if not as high as the tariff wall, will still go to the state employees managing the border.

At the same time, however, development economists shared a generally favorable attitude towards more precise rules which was at odds with much of the contemporary legal theory in the north, if consistent with professional attitudes among lawyers in many developing societies. In part this arose from their favorable attitudes towards Fordist mass production industry. The productivity gains arose from the specialization and routinization of work made possible in modern factories, an idea which seemed to apply by analogy also to administrative bureaucracy. The less discretion, the more automaticity, in the process, whether industrial or administrative, the more effectively resources could be mobilized for social objectives. It was common for economists to remark on the cultural obstacles to disciplined rule following which seemed an obstacle to industrialization. Attitudes would need to become more rational, consequentialist, if people were to have the discipline to step up to the productivity levels made possible by the modern factory. Although it was certainly possible to imagine substituting labor for capital in the industrialization process, this was generally thought to be a dead end – the point was to make a small number of workers more productive, slowly drawing down the surplus labor stock as they could be absorbed into industry. As a result, discretionary models of organization were stigmatized as 'traditional,' filled with slack, unable to translate the policy objectives faithfully into practice. In factories you needed an assembly line, in the bureaucracy you needed rules.

Hirschman was the most prominent economist to speculate about the impact of the organization of work on cultural attitudes. He famously argued that one should not wait for traditional attitudes to change, one should implement modes of organization which allowed as little "latitude in performance standards" as possible, with catastrophic consequences for failure, to ensure there would be incentives for those involved to discipline themselves into having the right attitudes. To this end, developing economies should "skip steps" to import more advanced industrial processes in which the process itself left less room to tolerate deviation without provoking the kind of failures which would be noticed and opposed by everyone else in the system.

> …the greater or smaller extent of latitude in standards of performance (or tolerance for poor performance) [is] a characteristic inherent in all production tasks. When this latitude is narrow the corresponding task has to be performed *just right;* otherwise, it cannot be performed at all or is exposed to an unacceptable level of risk (for example, high probability of crash in the case of poorly maintained or poorly operated airplanes). Lack of latitude therefore brings powerful pressures for efficiency, quality performance, good maintenance habits, and so on. It thus substitutes for inadequately formed motivations and attitudes, which will be *induced* and generated by the narrow-latitude task instead of presiding over it. ….. According to my way of thinking, the very attitudes alleged to be preconditions of industrialization could be generated on the job and "on the way," by certain characteristics of the industrialization process.[13]

According to Hirschman, just as one should not expect attitudes to precede their usefulness, it would be a mistake to imagine that a well functioning public administration could emerge before

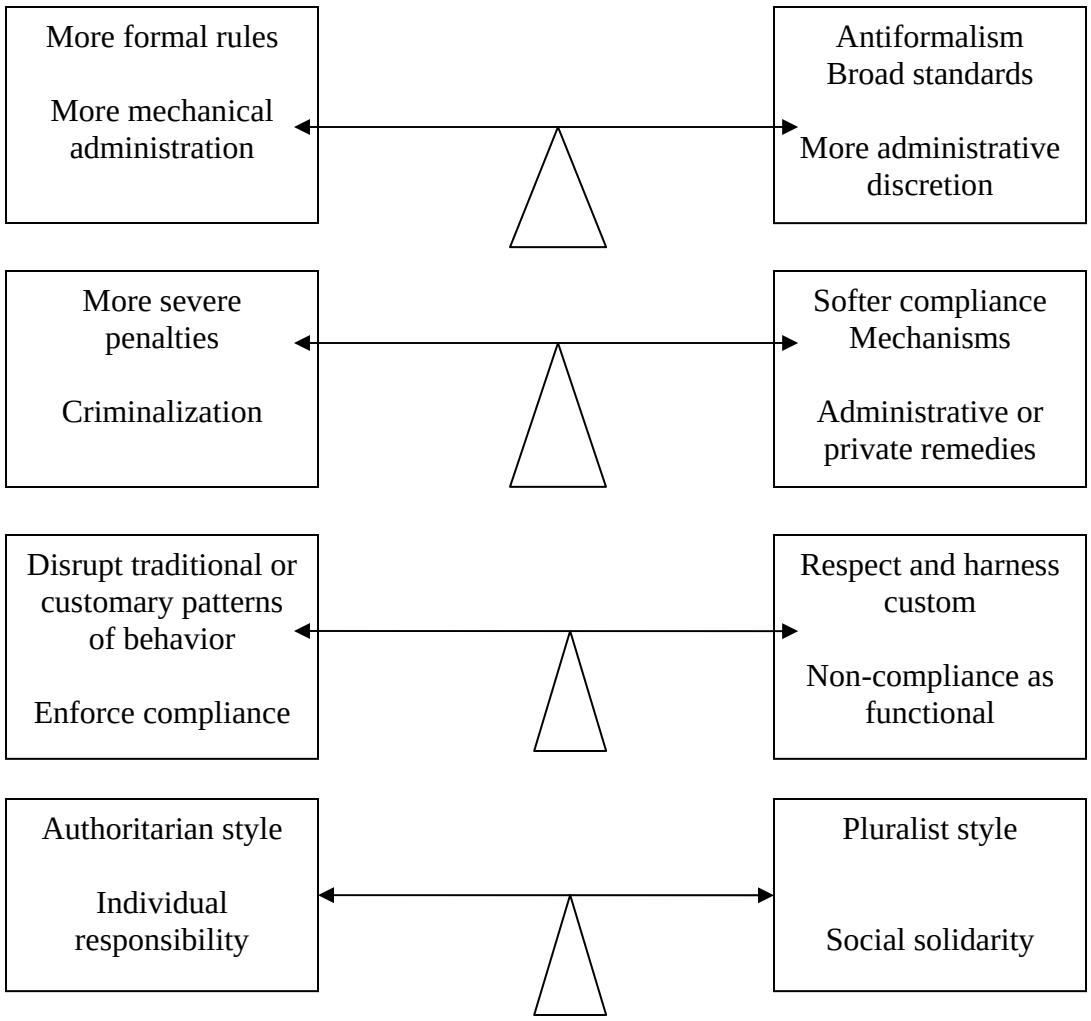
[13] Hirschman, The strategy for Economic Development, postscript at page 227.

the habits of bureaucratic regularity had had the opportunity to be learned in industry. Looking back, of course, it is easier to see how this might have been translated into a preference for a quite authoritarian administrative style. It is possible to communicate and instill administrative discipline by routinely lining up those who miss their targets before a firing squad.

This general preference for tight rules and severe penalties was often shared, however, by legal professionals in the developing world, who were often trained to think of their work in formal and instrumental terms. Within the developing South, when they occurred, debates about the structure of policy instruments were generally carried on in a more political or ideological vernacular, as implicating in some way the *nature* of the state. Given the complexity of the policy apparatus necessary to implement import substitution industrialization, it is odd that there was so little professional debate about these matters of design. Moreover, at a time in which development policy was understood to be all about distribution, it is surprising that more attention was not paid to the distributive effects of various policy instruments, constructed in different ways. It is as if there is something in the instrumental idea about law which foregoes these assessments of its instrumental potential.

At the same time, however, legal thinkers in the North were developing quite different views. They were often critical of ideas about law which seemed instinctively to overvalue formal rules and restraints on discretion or ignored the potential significance of social customs, legal privileges to injure others, and tolerated non-compliance. Legal modernization seemed to imply an opening up of the legal fabric, broader standards enunciating objectives, and greater discretion for administrative and judicial actors in the implementation. These professional cadres would need to be trained in the arts of pragmatic policy making, and be given the discretion to transform national development objectives into reality, deepening the ability of public intention to penetrate the social fabric. Of course, it is easy to see how this could also be a recipe for authoritarianism. In the event, the implicit legal theory in the mainstream development profession in the early years was more formal instrumentalism than discretionary pragmatism. As law and development experts from the North became active in the South, they propagated more pragmatic styles of legal consciousness.

In a general way, professional arguments for and against particular legal arrangements clustered around a rather narrow set of repeating issues, ranging from the narrowly technical to the broadly ideological.



In this way, argument about the structure of legal instruments was loosely analogous to arguments about policy objectives, and to arguments among economic theories of development. Arguments for an economic rupture, or for the exploitation of disequilibrium echoed in a general way arguments for policy instruments which broke with custom or were built of more inflexible rules. But these were only analogies. In fact, it might turn out that a more flexible instrument would be the more effective tool for bringing about a rupture or exploiting a disequilibrium. Without disentangling debate about instruments from more general debate about objectives or economic theories it is difficult to avoid relying on this kind of rhetorical resonance to translate one into the other. Those who specialize in the construction of instruments, moreover, have their own loose preferences and orientations toward one or the other end of these axes. It will be difficult for them to avoid reading those preferences back into their choice among objectives and economic theories. As with economic arguments, moreover, ideas we might classify as

"heterogenous" within the legal field line *further* along these axes than those in mainstream debate, or seek to disrupt this framework altogether with either a more pessimistic assessment of what law can in fact achieve as the instrument of policy, or an alternative conception of the function of law, exogenous to the project of rendering economic policy effective.

Probably all the following text can be eliminated – it is from the new book on the post war period but doesn't seem necessary here:

At the international level, two ideas were taken for granted – the local nature of public law, and the global validity of private law arrangements. Sovereignty seemed to imply that every national state could have whatever public institutional arrangements it desired, and could manage its "own" economy in whatever way seemed sensible. This was the meaning of self-determination, and the focus for thinking about the public international law status of the newly independent nations of the colonial world. At the same time, it was equally clear that if you took something you owned from one place to another, you still owned it. You would be subject to the law of the place when it came to remedies and obligations, but the global economy was possible because the property and contract relationships entered into in one place would, in one or another way, hold elsewhere. These two principles could certainly come into conflict – a local government could expropriate. In the early years, this was regarded as a political, rather than a legal problem. In that sense, speaking quite generally, sovereignty trumped property as a matter of law. The kinds of international law restrictions on sovereign policy autonomy now routine in the global trading regime, the system of bilateral investment treaties, or the globalization of human rights norms and standards were by and large not yet on the horizon.

At the national level, with independence came amnesia about the colonial legal regime.[14] The new regimes in Asia and Africa would mark their break with the past by foregrounding their commitment to national development and the new legal regimes required to that end, and downplaying any continuity with the legacy of colonial law, associated with exploitation. In Latin America, import substitution oriented administrative and legislative regimes had already been put in place before the war – in the 1920s in Mexico, the 1930s in Brazil – both informal and indigenous legal arrangements long since having been disregarded. Development planners from the North imagined a legal culture similar to that they had left behind at home, if, in some way "more primitive." Legal arrangements were simpler, perhaps more formal, and often seemed to run parallel to a separate legal, or quasi-legal world of custom and informal practice. In the North, the informal world of business dealings was coming to be understood as worthy of emulation and support by the law – legal rules should honor business judgment and reflect commercial practice. In the South, the legal environment was imagined otherwise – the goal was to assimilate the informal to the formal, eventually to bring the traditional sector into "modern" modes of legalization. This was not yet a development priority, but it seemed natural to expect that with industrialization and modernization, more births would come to be registered, more property transactions recorded, more income reported, and so forth.

In the 1950s, many scholars from the North – anthropologists mainly – did focus on the

legal culture of developing societies. They were not focused on law as an instrument of economic development, however, and their work was not taken up by mainstream development policy professionals, who were, in any event, not particularly interested in law as a development tool. When anthropologists and legal sociologists studied legal cultures specific to traditional or primitive societies, they tended to search for functional equivalents to public law institutions familiar in the first world – legislation, dispute resolution, and so forth.[15] If anything, their work supported the background idea that traditional and modern societies were different – in ways relevant to economic management – if similar in deeper, functional terms.[16] In a general way, this supported the development idea that although the forms of social arrangement in traditional societies might look different, as a society, there was no inherent reason they could not come to function along modern lines. The influence of this work was not great, however. Traditional law, local law, seemed irrelevant – at best an obstacle – to development.

In most newly independent developing societies, this expanding legal regime was new, and brought with it new legal ideas – replacing colonial law, overturning customary law, offering a largely public law framework for economic exchange. In the Latin American societies which hadembarked on this path already before the war, this program had also come with a new set of legal ideas. The implicit "legal theory" combined a number of ideas. In broad terms, law was understood to be *instrumental* and *purposive*. The purposes came from elsewhere – from the society, from government, from the legislature. Law was subordinate to social purposes – implementing, fulfilling, accomplishing the objectives of the society, rather than expressing a priori limits or historic commitments to be respected or purposes of its own to be achieved. The idea that the context offered resistance or friction to the smooth translation of policy into practice led to the emergence of ideas within legal theory about how could policy could be rendered more effective by narrowing the "gap between law in the books and law in action."

The purpose of the legal order itself was the consolidation of national economic and political authority – often associated with national self-determination and decolonization – rather than, say, the integration of local economic life into a global economy, or the facilitation of private exchange and private ordering through supplemental regulatory interventions. To the extent legal arrangements were understood to have a social purpose, the purpose was something like national "development" -- law was to be interpreted to achieve the developmental purposes of the state. Where these were not express, they could be derived from analysis of the social and economic needs of the society, given its stage of economic development. Distribution was understood to be central to the work of law – allocating resources among social and economic groups – from agriculture to industry, from foreign to local financial institutions – to implement national economic policy objectives.

Within the legal order, public law was far more salient than private law. When people thought of "law," they thought about *legislation* and the pronouncements of the legislature or executive, rather than customary law, contract or property law and the pronouncements of judges. The legal instrument was often an administrative decree. Postwar development

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professionals were quite optimistic about public law and about the capacity of complex administrative systems to translate policy objectives into action – to control border, implement tariff schedules, suppress black markets, control prices or collect taxes. When they designed legal institutions, they thought of public entities, linked to the state apparatus, whether the state owned enterprise, or the licensing or marketing board. The legal difference between military command structures and state apparatuses committed to development was often not large – both were public administrations, often responsive to presidential authority. Constitutional law was about the organization of executive and legislative power. Judicial review was rare. Judicial bodies were subject matter specialized and often internal to administrative structures.

Many of these legal ideas were not confined to import substitution development regimes. During the first half of the twentieth century, some of these ideas had become widespread among legal elites in the developed world, starting in Europe and spreading to the United States during the Roosevelt New Deal. Expressed differently in different national traditions, the emphasis on public law and administration, and on the need to temper nineteenth century private law with more "social" elements reflecting national interdependence and solidarity was widespread.[17] This set of legal ideas characterized the consciousness of development economists influenced by New Deal style welfare states in the United States and Europe. In many parts of the developing world, they seemed a workable substitute for the classical legal thought associated with the colonial legacy of the Commonwealth. They had been adopted enthusiastically by the international institutions most associated with development in the pre-war period, the International Labor Organization and the League of the Mandates Commission or the Bruce Report. In Latin America, they had entered legal consciousness from France, often through the emerging fields of both labor law and international law, and were often understood to reflect a particularly "American" or national revolutionary identity.

We might think of development policy asking two sorts of questions of law and legal theory: instrumentally, how can I translate my policy objectives into action, and what limits must I observe in doing so? In this period, the answer to the first we might call *legal pragmatism*, associated with instrumental conceptions of law developed in the interwar period. This legal pragmatism stressed the importance of purposive reasoning to link legal arrangements with social needs and objectives, and focused attention on legislatures and administrative bureaucracies as the creators, consumers and interpreters of law. A wide range of previously settled fields of law were opened to new legislation and interpretation in furtherance of "social" objectives of national "solidarity" required for economic development.

The law was understood to place few limits on development policy. Of course, all these new legal arrangements were unsettling to existing legal entitlements – think of land reform and the property rights of large landowners. The legal vocabulary of "rights" has often been used to slow the emergence of new economic policies. During this period, however, this was infrequent. The main legal idea which prevented acquired "rights" from seeming to present much of an obstacle to development policy was legislative and administrative positivism – the idea that the state could regulate as it pleased, altering private rights, without judicial review.

[17] Insert cite: Duncan Kennedy's "Two Globalizations."

The most significant difference between the legal consciousness of the North and South in this period is that antiformal ideas about the structure of legal rules – an openness to or even preference for standards – and an embrace of social custom and informal private ordering by the official legal order advanced more slowly in the South, coming into their own only in the nineteen sixties and seventies, as they were also absorbed by mainstream public international law. Some national legal cultures were with the antiformal program from the start, having participated in its invention or been influenced by leading jurists of Europe or the United States. For others, the instrumental deployment of development policy seemed to work well with a more formal tradition, rooted in a public law positivism which ensured legislative and executive supremacy. Where antiformalism had seemed essential in the North, and particularly in the United States, to unravel the limits thought to have been placed on the emergence of a welfare state by a formalist private law, a formalism linked to legislative positivism did not have this effect.

In the United States, New Deal social regulation had been systematically opposed, and for some time limited, through judicial review. Judges struck down administrative and legislative initiatives in the name of "rights" to freedom of contract and property. In the United States, elements of nineteenth century legal thought developed in the context of private law had been imported into public law thinking, and were used to define the limits of various public authorities vis a vis one another. As a result, they were readily available to constrain public law expressions of national economic policy. To counter this resistance, American legal realists developed a range of critical analytic tools to demonstrate in particular cases – before courts – that "rights" were neither clear nor compelling enough to permit limits on regulatory initiatives by judicial deduction. Some of these analytic tools were present in the "social" ideas about law that underlay postwar import substitution policies in the developing world — regimes of private right were understood to have numerous conflicts, gaps and ambiguities which could be interpreted by reference to social needs and purposes. But the absence of judicial review and the presence of strong assumptions of legislative and administrative positivism made American legal realism an unnecessary import. The judicial assertion of rights against postwar development policies was by and large a non-problem.

Although these basic instrumental ideas about law were central to the policy imaginations of mainstream development professionals, the more detailed disputes among legal theorists *within* this common set of ideas were far less important. Legal theorists differed on numerous elements of this broad legal framework – precisely what does legislative supremacy entail, how should it be translated into administrative rule-making, how and where should discretion be lodged? How should purposive interpretation be reconciled with more traditional methods of professional legal reasoning? Where in the legal fabric should one insert "social" concerns? How might social needs and purposes be reflected in legal rules – what exceptions would be necessary, what new legal forms and institutions required? What did Kelsen mean here – what should we take Pound to have meant there? But these legal theory debates were generally far removed from debates about development policy, and were rarely linked

directly to them. Development policy was made by politicians and development experts, in the vocabulary of economics. Their legal ideas remained implicit, and debates within the legal academy largely passed them by.

Although these were certainly not the only ideas about law in the air, alternative legal ideas were rarely mobilized to contest mainstream development policy. Some jurists focused on judges and on private rather than public law. But they generally simply kept their distance from the expansion of administrative bureaucracy and legislation. Although their ideas might have been mobilized for dissent from mainstream development policies, this seems to have been quite rare during the postwar period. Such jurists were more likely to confine themselves to their private law subject matter, perhaps focusing on comparative or historical research, or stressing their legal culture's ties to European and Roman law traditions. The tendency was to leave "national development policy" with its messy economic and political choices to others. Private law ideas and elements of the consciousness of classical legal thought would only later be mobilized to resist mainstream development policy.

There were also legal theorists, often associated with one or another strand of Marxism, who focused more on the political and social role of law, for whom Polanyi was more significant than Kelsen or Pound. In a sense, these theorists were bringing endogeneity to economic thinking from the outside, seeing development as rooted in a political process, through which the changes necessary for modernization needed to be rendered politically and socially sustainable. Law in this heterodox vision was a necessary antidote or break on the pace of change, allowing disruption to be metabolized by the society. From this perspective, much that seemed like friction or resistance could be reimagined as productive. Law was necessary as an outside calibrator for the degree of acceptable change. For this to function, of course, some legal institution – legislature, courts, president – would have needed to stand against the implementation of the plan in the name of its ultimate sustainability, softening and slowing its progress. In this period, thinking of this kind was rare. It would only be later that Polanyi's account of law during the industrial revolution as a useful brake permitting the wrenching changes brought by industrialization to be politically metabolized, would seem promising to development professionals – often influenced by economic institutionalism – who sought to challenge mainstream development policies.

VI. Conclusion: some worries about "property right" 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

Policy rhetoric – contestation.