Possession, Custom and Social Order: Property Rights in a Fragile State

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ABSTRACT. Lawyers trained in stable socio-political contexts tend to overlook or underestimate the importance of social order in considering fundamental concepts of property such as possession. This article argues that the evolution and effect of possessory rules is closely linked to systems of authority and their relationship with social order. In fragile state environments, different types of possessory rules will have different effects on competitive racing for rights or authority relating to land. While complex or ambiguous rules will increase opportunities for rent-seeking by state actors, they may also serve to channel claimants away from violent contests over land. Conversely, while bright-line formulations may reduce the information costs of property, they may also crystallize latent conflicts at the local level, particularly when they deny the claims of powerful groups. This argument is illustrated by reference to the war-torn circumstances of East Timor, and its recent efforts to base determinations of land ownership on claims of long-term possession. The article concludes that, while fragile state circumstances give greater prominence to questions of social order, property systems in stable socio-political environments are likely also to retain imprints from earlier concerns for social ordering.

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INTRODUCTION

Contemporary peace-building efforts in countries such as Iraq, Afghanistan and Sudan involve fragile states and influential tribal systems. State-building requires strategies of accommodation or co-option relating to custom, including customary systems for the governance of land. Yet property systems in fragile states can fall into chronic instability as claims of possession and abandonment interact with entrenched patterns of ethno-political conflict. Historical cycles of war and population displacement create endemic disputes over the possession of land, which entangle with longstanding tribal conflicts, which then merge with post-conflict races for political authority. In these circumstances, the accommodation of custom may crystallize tensions over the property implications of possession and undermine the attempt at peace-building itself.

This article explores the relationship between possession, custom and social order by reference to the fragile state circumstances of East Timor. In property terms principles of respect for possession are said to provide an easily understood response to the potential for disorderly resource competition. The oft-cited example is that of the first car to enter a one-way bridge; it has the right of way as any other rule would be highly productive of social disorder. Most animals appear to resolve territorial conflicts through principles of respect for prior possession. There seems to be a basic human understanding that first possession is connected to entitlements. Even where there is no possession, some economists claim that a

2 John Braithwaite, Sinclair Dinnen, Matthew Allen, Valerie Braithwaite and Hilary Charlesworth, Pillars and Shadows: Statebuilding as Peacebuilding in Solomon Islands 103, 113-116 (2010) (discussing political networks based on kinship relations in post-conflict Solomon Islands – so called ‘wantokism’ – as both “a problem” and “a cultural resource for tackling governance challenges”. ‘Wantokism’ is closely related to land disputes, which were a root cause of the armed conflict from 1999 to 2001, and remain a constraint in building both peace and state capacity). See also Roger Mac Ginty, Hybrid Peace: The Interaction Between Top-Down and Bottom-Up Peace, 41 SECURITY DIALOGUE 391, 404-405 (2010) (discussing the relationship between global and local actor cooperation and stability in post-conflict states such as Afghanistan and East Timor); Roy, supra note 1, at 174-5 (discussing US policy on Afghan warlords in the context of state-building and legitimacy); El Zain, supra note 1, at 528 (discussing the state’s cooption of ‘tribal’ forms of legitimacy). In relation to land see Conor Foley, Housing, Land and Property Restitution Rights in Afghanistan, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS: A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM 141, 162-6 (Scott Leckie ed., 2009) (discussing the legitimacy of customary law and its role in land disputes in Afghanistan).
3 See e.g. Liz Wily, Land Rights in Crisis, Restoring Tenure Security in Afghanistan, AFGHANISTAN RESEARCH AND EVALUATION UNIT, 61-2 (2003) (myriad warlords, militias and tribal groups have gained, lost and regained territory as result of chronic war, regime change and population displacement in Afghanistan).
6 Krier, supra note 5, at 154-55 (discussing Sugden’s application to the human context of evolutionary explanations for the relationship between first possession and expectations of entitlement).
rule of first possession can discourage disorderly racing for rights to resources when potential claimants choose not to race because they acknowledge one party as the most likely to obtain possession.\(^7\)

Game theory suggests that social order can emerge autonomously from spreading patterns of respect for possessory claims, without a necessary need for interpretation or enforcement from sources of public authority.\(^8\) Possessory norms develop as a result of mutually reinforcing expectations of respect for possession.\(^9\) Yet possession of itself cannot be a basis for social ordering without acts that are interpreted as possessory by other prospective users,\(^10\) or a system of authority that ascribes the character of possession to certain acts of resource use and control.\(^11\) Possessory rules may have a range of effects on social ordering, not only because of the interpretive nature of possession, but because possessory claimants have a natural tendency to affiliate with sources of public authority. In fragile state contexts the relationship between possession of land and competition for political authority, in circumstances of post-conflict racing for control of resources, may result in chronic disorder rather than spontaneous forms of social ordering.

The structural characteristics of possessory rules will affect the relationship between possession, property and social order. There are different types of possessory rules with different degrees of bright-line or ‘fuzzy’ characteristics.\(^12\) For example, a rule that ownership follows actual possession is relatively easy to interpret and administer because it involves enquiry into current acts of resource use and control alone. However, this bright-line rule will encourage disorderly racing for resource control, as the rewards of obtaining possession encourage violent acts of dispossession.\(^13\) The more common formulations of possessory rules elevate first possession over actual possession, and thus provide remedies for dispossession, or allow for abandonment and deemed transfer of possession.\(^14\) These rules require a greater degree of specialized enquiry, including complex distinctions between actual and legal possession. While a preference for bright-line rules of possession is consistent with the limited interpretive and enforcement capacities of fragile states, the question for social ordering purposes remains: how does a fragile state establish bright-line legal rules of

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\(^8\) Sugden, Spontaneous Order, supra note 4; Sugden, THE ECONOMICS OF RIGHTS, supra note 4, at 62; McDowell, Spontaneous Order, supra note 4, at 796 (discussing Sugden's argument that self-enforcing rules of property can evolve in a state of nature without any formal laws or system of government).

\(^9\) See infra Section I.A (noting the relationship between Fredrick Hayek’s work on social norms and game-theoretic explanations for social ordering). This approach to rules of first possession allows little room for analysis of the possessory rule itself, or its relationship with sources of interpretive or enforcement authority.


\(^11\) See Alice Tay, The Concept of Possession in the Common Law: Foundations for a New Approach (1964) 4 MELB. UNIV. LAW REV. 476-97 (possession describes a physical fact, which is subject to interpretation, while also operating as a conclusion of entitlement from a source of adjudicatory authority).

\(^12\) See Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577 (1988) [hereinafter Rose, Crystals and Mud] (discussing different examples of ‘crystal’ and ‘mud’ rules of property).

\(^13\) See e.g. Krier, supra note 5, at 155-56 (noting that under game-theoretic conditions resource claimants will engage in violent acts of dispossession when the rewards of obtaining possession exceed the costs of violence).

\(^14\) See generally the discussion in JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 103-21 (3d ed. 1993). For well known case examples see Pierson v. Post 3 Cai. R. 175, 2 Am. Dec. 264 N.Y. 1805 (hunter in hot pursuit assumed to have rights against an interloper who took possession of the fox’s carcass if the hunter had prior possession of the fox); Swift v. Gifford, 23 F. Cas. 558, 559 (D. Mass. 1872) (No. 13, 696), (under the “fast-fish/loose-fish” rule a whaling ship loses possessory rights should the harpoon line to a killed or captured whale become unattached.)
possession when there are diverse customary interpretations of possession, and substantial
post-conflict risks of disorderly racing for control of resources?

All else being equal, relatively bright-line rules of possession are less prone than complex
rules to pluralism and contestation in their interpretation. Yet, as the experience of land law
development in East Timor suggests, bright-line rules may not emerge because of the nature
of the resource and its histories of occupation and claim, or because of political economy
considerations relating to the balancing of competing interest groups. This inability to
develop bright-line rules is often the paradox of land policy in a fragile state. While bright-
line rules of possession may be more manageable once property information moves beyond a
close-knit interpretive context, the political and social ordering implications of rule-making
may result in interpretable 'fuzzy' rules that stabilize the State by providing rent-seeking
opportunities for powerful state-connected actors. In the interpretive possibilities of rule
complexity, the introduction of fuzzy law may establish pathways for competitive racing for
resources that favor members of State-connected elites.

In fragile or fragmented sociopolitical environments, different types of possessory rules will
have different effects on competitive racing for rights or authority relating to land. While
complex laws will increase opportunities for rent-seeking by state actors, they may also serve
to channel claimants away from violent contests over land. A possessory rule that
incorporates the possibility of abandonment may reduce the risks of physical conflict between
prospective claimants, because it offers the prospect of success through resort to adjudicative
institutions and claims of lost legal possession. In contrast, simple rules may limit the
pathways for interpretive claim and leave disgruntled claimants with the alternative of violent
action, either against persons in possession, or against institutions claiming authority over the
interpretation of rules. Complex rules may thus develop in response to the dictates of social
order, and the political characteristics of the interpretive and enforcement environment. In
fragile state environments, in particular, there is a potential trade-off between the greater
interpretable and administrative costs of complexity, and the capacity of complex rules to
provide alternatives to violent disorder. In other words, while complex rules may contribute
to competitive racing in relation to land, through pathways of rent-seeking activity, they may
also channel racing activity into forms of interpretive contestation rather than violent acts of
possessory conflict.

Part I of the article reviews law-and-economics literature on the relationship between
possession and social order. Game theorists argue that rules of first possession were
important to circumstances of order without law in the Californian goldfields as they
provided bright-line signals of likely success in the event of competition for a mining claim. However, the Californian first possession rules had fuzzy elements because they allowed the
possibility of abandonment based on failure to meet work requirements. The rules had a
social ordering imperative: they sought to maintain cooperative first-comer/latecomer

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15 See e.g. DoUGLASS NoRTH & JOSEPH WAllIS & BARRY WEnGAST, VIOLENCE AND SOCIAL ORDERS: A
CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 77-78 (2009) [hereinafter NoRTH
ET AL., VIOLENCE AND SOCIAL ORDERS] ("Clear property rights make land more valuable, but they may also
reduce the ability to use land as a tool to structure elite… in fragile natural states, the flexible redistribution of
landownership and control can be used as a tool to balance interests within the [dominant] coalition, especially
as the balance of power shifts among prominent members."). See infra Section I.F. for further discussion on the
relationship between state fragility and the development of fuzzy roles of property.

16 See e.g. Richard O. Zerbe and C. Leigh Anderson, Culture and Fairness in the Development of Institutions in
the California Gold Fields, 61 JOURNAL OF ECONOMIC HISTORY 114, 133-34 (2001) (applying game theory to
explain the social ordering effects of first possession rules in the Californian goldfields).
relations by meeting the demands of new entrants for rights to unworked claims. The article argues that rule complexity in California evolved to promote social order, in circumstances of competitive racing for rights to resources, while also sowing the seeds of future disorder because competing claims of dispossession and abandonment, involving contested interpretations of ambiguous work requirements, led to a proliferation of disputes over mining entitlements. The system of order without law created by the mining associations did not last long before it dissolved in part under the weight of disputation over the interpretation of the complex possessory rule itself.

Rule complexity developed in the Californian goldfields as a direct response to fears of social disorder rather than concerns for efficient resource extraction. While increased access to unworked claims improved private returns from extraction, there were no net gains from accelerated extraction because gold is a finite resource, exploitable just as efficiently under freehold private property arrangements. The implication that fuzzy possessory rules correlate with concerns for social order, at least in circumstances of feared disorder, challenges Ellickson's hypothesis that in close-knit community contexts more complex rules may emerge where the increased costs of their interpretation are outweighed by increased rewards for resource use efforts. This article suggests a different hypothesis: in circumstances of potential disorder, a close-knit community may develop complex possessory rules where the increased potential for order outweighs the increased costs of interpretation. Rule complexity arises from concerns for social order, notwithstanding that the consequence of complexity may be a stable environment for resource use efforts.

Does this hypothesis of a relationship between possessory rules and social order apply when possessory rules move beyond a close-knit community context? Can a fragile state adopt complex customary rules of possession, with proven social ordering characteristics, in order to support its own peace-building or state-strengthening endeavors? Henry Smith suggests an information cost approach to custom and law: where complex customs are recognized by law, either the process of communicating property information is made more costly for remote third parties, or standardization is required to strip the custom of its informational complexity. Comparatively simple default rules have a "gravitational pull" once property information moves beyond a close-knit community context. Yet, while bright-line legal formulations of custom may reduce information costs, they may also crystallize latent

17 See Andrea McDowell, *Spontaneous Order*, supra note 4, at 771, 772 ("Claim jumping was not antisocial in itself and did not carry a stigma; it was the normal way to acquire a claim. One of the main purposes of the local mining terms was to specify when a claim became "jumpable.").
18 From 1851 onwards there was increasing resort to the courts, and then the system of mining licenses established by the General Mining Law of 1872: see *infra* Section I.B.
20 See Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 *JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION* 83 (1989) [hereinafter "Ellickson, *Wealth-Maximizing Norms*"]. The Californian goldfields example is not necessarily inconsistent with Ellickson's hypothesis of wealth-maximizing norms in a close-knit community context. While there were no net social returns to accelerated resource extraction, there were net benefits to members of the norm-generating community. Nevertheless, the focus on social ordering in this article highlights trade-offs for rule complexity that owe more to issues of social authority and avoidance of violent conflict than context-specific techniques for efficient resource use efforts. This argument is developed by reference to complex ancestral first possession norms in East Timor: see further *infra* Section II.A.
22 *Id.* at 27.
conflicts at the local level, particularly when they deny the claims of powerful groups. Land law will also trend towards complexity because of the political economy demands of rule formulation in a fragile state environment, including the need to accommodate political interests with the capacity to destabilize the state.

Part II applies these thoughts on possession, custom and social order to the war-torn circumstances of East Timor. It begins with a description of different Timorese perspectives on possession in rural districts. In customary areas there are complex principles of ancestral first possession, where relationships with land are determined by reference to descent and proximity to a mythical first settler. In some areas of rural East Timor, the opening of new land under colonial supervision limited the influence of customary authority and led some land claims to be based not on ancestral first possession principles, but on histories of actual possessory acts involving clearing land and digging irrigation channels. These types of possessory claim are affiliated with state rather than customary authority, which has made them vulnerable to regime change and forced displacement in the turbulent history of East Timor. Part II illustrates cycles of dispossession, grievance and re-possession in a fragile state context with reference to a number of land disputes lodged for mediation with the Land and Property Directorate of the Government of East Timor.

Part II then describes a number of unsuccessful attempts at drafting a new land law for the independent state of East Timor. In the various legislative drafts there has been a noticeable trend towards complexity, including a partial move from restitution of pre-independence rights to recognition of rights based on possession, and increased recognition of community-based relationships with rural land. While this complexity will challenge, if not overwhelm, the interpretive capacities of state agencies, it does reflect compromises among international advisers and state actors that in part are aimed at avoiding bright-line measures that would destabilize or de-legitimize the state. However, bright-line characteristics remain in the draft law as a result of the application of possessory principles to areas of ancestral customary domain. This bright-line measure is likely to cause conflict between tribal groups and displaced peoples who have been in long-term occupation of customary land. Part II argues that the dynamics of state fragility, including the prominent role of international legal advisers, have created a focus on state-strengthening but not necessarily on social ordering in customary districts.

Part III concludes that legacy relationships between possession and social order deserve greater attention in the literature on possessory rules of property. Efficiency-oriented theories of property suggest a preference for bright-line rules as interpretive simplicity reduces the costs of information transmission to a broad property audience. In this conception, rule complexity is justified when increases in efficiency of resource use outweigh the increased costs of rule interpretation and enforcement. An alternative approach suggests that rule complexity emerges in response to concerns for social justice, including in particular relief against undue hardship. This article suggests that the sources of rule complexity in property systems may lie not only in contemporary considerations of efficiency or equity but in

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24 See Rose, *Crystals and Mud*, supra note 12, at 597-604 (considerations of equity and relief against disproportionate loss are a cause of trends towards complexity or ambiguity in property rule formulation); see also Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 717-20 (1980) (discussing the important role of fuzzy standards, rather than bright-line rules, for responses to fraud and sharp practice).
historical concerns for social ordering. Social ordering implications may also mean that bright-line rules take on a high degree of interpretive complexity as they traverse plural sub-systems for property regulation.

I. The Ordering Effects of Possession and Custom

Game theory suggests a causality of possessory norms and social order by reference to stylized hypothetical encounters between two property claimants. Each party is not sure whether the other will adopt an aggressive approach (a "hawk" strategy), or a passive approach (a "dove" strategy). Where expectations of success are symmetrical, the two parties will settle into a war of attrition in which they both attempt aggressive hawk strategies in a calculated effort to test the endurance of the other party, while leaving open the option of surrendering to the other claimant at any stage of the resource competition. Whenever there is an asymmetry of confidence, the parties will move to adopt hawk and dove strategies that reflect their mutual perceptions of likely success. Competing claimants are likely to surrender in order of confidence in their claim. The greater the prominence of the asymmetry the more likely respective hawk-dove strategies will emerge early in the prospective war of attrition. Moreover, because wars of attrition can be costly in net terms, both parties would prefer a property rule that assigns the roles of dove and hawk a priori, particularly if the rule means that each player good chance of winning in at least half their confrontations.

Possessory principles are said to lend themselves to asymmetrical understandings of likelihoods of success, because possession provides a clear and understandable sign of an ongoing connection with a resource. Those who have incurred costs to obtain possession may be expected to assert their possessory relationship with a resource more fiercely than those who simply wish to obtain possession. This leads to mutually reinforcing expectations of relative success, with first possessors more likely to defend their claims with confidence and aggression, and other claimants more likely to forego their own claims in order to search for possessory claims elsewhere. Property rules favoring possession thus provide the parties...

25 North American scholarship on rules and standards has been heavily influenced by Duncan Kennedy's groundbreaking analysis in 1976, which set out a basic dichotomy between individualist preferences for bright-line rules, and altruistic preferences for fuzzy standards: Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976). The ensuing rules/standards debate has not incorporated basic questions of social order (although there has been some consideration of the relationship between fuzzy rules and cooperative behaviour: see e.g. Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade, 104 Yale L.J. 1027, 1034-35 (1995).


27 See Sugden, THE ECONOMICS OF RIGHTS, supra note 4, at 62; Sugden applies the evolutionary analysis of Maynard Smith to the human context. Maynard Smith noted that, where there are net costs to conflict, animals may adopt a strategy based on a rule of thumb: if possessor play hawk; if intruder played dove. For a discussion see Krier, supra note 5, at 152.

28 See Krier, supra note 5, at 152-3 (noting the importance of shared and unambiguous perceptions of asymmetry); Sugden, THE ECONOMICS OF RIGHTS, supra note 4, at 65-86; see also Richard McAdams, A Focal Point Theory of Expressive Law 86 Virginia Law Review 1683 (2000) (legal rules can shape expectations by assigning a priori roles).

29 McDowell, Spontaneous Order, supra note 4, at 795 (“Both would prefer a rules that allows them to predict the role that the other will play…”).

30 See Sugden, THE ECONOMICS OF RIGHTS, supra note 4, at 83-86, 97; Krier, supra note 5, at 155 (“Possession is… usually unambiguous, and thus provides a clear indication of the status of any claimant”).

with an shortcut to avoid a war of attrition, particularly when there is uncertainty as to respective prospects of success in the game of resource competition. \(^{32}\) Once both parties expect the other to follow a possessory rule, there is a natural tendency towards cooperation as it is costly to break the cooperative pattern. \(^{33}\) This argument owes much to Hayekian notions of spontaneous order. \(^{34}\)

### A. Possession and Order in the Californian Goldfields

An iconic example of Hayekian ordering is said to be the development of order without law in the Californian goldfields between 1848 and 1849. \(^{35}\) The 19th-century Californian gold rush involved large numbers of miners entering an area that had recently been annexed by the United States from Mexico. \(^{36}\) There were no courts, police or jails, and only a small military force. \(^{37}\) Mexican law did not apply as from February 12, 1848, and there was no US federal mining law until 1852. \(^{38}\) Between 1848 and 1849 rapid increases in the gold mining population served to create an unregulated race for control of resources. \(^{39}\) Then, throughout

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32 Zerbe and Anderson, supra note 16, at 134 (analyzing the first possession rule in the Californian goldfields).


34 See F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY (1979).

35 See Clay and Wright, supra note 19, at 177 (“The mining districts of the California gold rush have long [been] celebrated as remarkable examples of orderly institution-formation in the absence of formal legal authority”); McDowell, Spontaneous Order, supra, note 4, at 771 (“This article seeks to explain the stability of a mining claim system in the early years of the California gold rush, a system developed and administered by the miners themselves in the absence of any formal law or government”); JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 11 (1987) (no generally applicable mining law in California in 1848 and no authority stemming from a higher government); Andrew P. Morriss, Hayek & Cowboys: Customary Law in the American West 1 NYU J. L. & LIBERTY 35 (2005) [hereafter Morriss, Hayek & Cowboys] (applying Hayek’s legal theory inter alia to mining associations in the American West).

36 Gold was first discovered at Sutter’s Mill in California in January 1848. On February 2, 1848, the United States and Mexico signed the treaty of Guadalupe Hidalgo, which ended the so-called Mexican War and ceded California to the United States: see Clay and Wright, supra note 19, at 159-69; In June 1848 there were around 5000 people working in the gold mines. By December 1849 there were approximately 40,000, and by 1852 100,000, gold miners in California: see Clay and Wright, supra note 19, at 158; Morriss, supra note 32, at 47-8; Zerbe and Anderson, supra note 16, at 114.

37 McDowell, Spontaneous Order, supra, note 4, at 771 (“when gold was discovered on January 24, 1848, the territory had none of the usual legal institutions such as a legislature, courts, police, or jails”); Morriss, Hayek & Cowboys, supra note 32, at 47 (“the small military force present was unable to provide law for the massive influx of people”); Andrew P. Morriss Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law, 33 LAND & WATER L. REV. 581 (1998) (“Unfortunately, the military government proved unequal to the task of establishing, let alone enforcing, law and order. It simply did not have the manpower”).

38 The Senate deleted Article X, which guaranteed the protection of Mexican land grants, when it ratified the treaty of Guadalupe Hidalgo on March 10, 1848. Article V established the border between the US and Mexico: see the Treaty of Guadalupe-Hidalgo [Exchange copy], February 2, 1848; Perfected Treaties, 1778-1945; Record Group 11; General Records of the United States Government, 1778-1992; National Archives. See also Clay and Wright, supra note 19, at 159-160 (“No federal mining law was in existence at the time gold was discovered... [T]he federal government abandoned all administrative apparatus and enforcement machinery pertaining to minerals on the public domain in 1846”). Congress passed a General Mining Law on 10 May 1872.

39 See Clay and Wright, supra note 19, at 160 (describing the race westward of thousands of fortune-seekers "in the belief that gold was free for the taking, subject neither to government control nor to private landownership"). Andrea McDowell, From Commons to Claims: Property Rights in the California Gold Rush, 14 YALE JOURNAL OF LAW AND HUMANITIES 1, 4-5 (2002) [hereafter McDowell, Commons to Claims] (the miners "managed without private property rights in land during 1848, the first year of the gold rush, when the mining region remained a commons"); Morriss, Hayek & Cowboys, supra note 32, at 47-48 ("[a]s California's
1849 American miners developed mining codes that established a high degree of order despite the absence of legal order and the competitive nature of the rush for gold itself.\textsuperscript{40}

Umbeck argues that mining code order was underpinned by violence or the threat of violence, particularly in the form of widespread gun ownership.\textsuperscript{41} McDowell, and Zerbe and Anderson, take a different view: they contend that the mining conditions of relative order had little to do with sanctions and were examples of spontaneous ordering.\textsuperscript{42} According to McDowell, the mining rules did not require internalization as norms, or enforcement by implicit sanction. They were simply "rules of the game", created and if necessary cast off as items of convenience in a game of resource competition.\textsuperscript{43} Zerbe and Anderson similarly assert that American cultural norms of fairness and democracy, including Lockean notions of reward for possessory efforts, provided focal points that guided initial patterns of behavior and predictions of behavior, which then serve to establish cooperative alternative to costly resource conflict.\textsuperscript{44} Focal points are norms, beliefs or expectations shared by resource claimants prior to commencement of a competitive game, which allow mutual predictions of likely outcomes in the event of conflict.\textsuperscript{45} The shared nature of the basis for predictions encourages one claimant to forego the option of conflict based on assessment that he or she is likely to lose a game of resource competition.

Almost all the Californian mining codes had a rule of first possession that granted rights to the first person to dig a hole and stake a claim.\textsuperscript{46} The claim extended to an area surrounding the hole, and was maintained by leaving tools in the hole, or meeting requirements to continue working the claim.\textsuperscript{47} The right to jump claims was also defined by reference to loss

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\textsuperscript{40} See e.g. McDowell, Commons to Claims, supra note 36, at 4-5 ("In the first months of 1849 'the miners developed and codified rules that...[included] strict limits on claim size, notice and work requirements, and, in many cases, prohibitions against holding more than one claim at a time"); McDowell, Spontaneous Order, supra, note 4, at 771 ("When diggings looked promising... those who were on the spot held a meeting to pass a more detailed mining code for that particular area...[they] chose a chairman, appointed a committee to draft a code, and a short time later, approved it by majority vote").

\textsuperscript{41} See J. Umbeck, A THEORY OF PROPERTY RIGHTS WITH APPLICATION TO THE CALIFORNIA GOLD RUSH (1981).

\textsuperscript{42} See McDowell, Spontaneous Order, supra, note 4, at 773 (The mining rules "were largely self-enforcing, as in Robert Sugden's game theory of "spontaneous order"); Zerbe and Anderson, supra note 16, at 114, 115 (Applying game theory to argue that cultural norms better explain the miners' behavior than Umbeck's theory of sanctions supported by widespread gun ownership).

\textsuperscript{43} See McDowell, Spontaneous Order, supra note 4, at 801 (The miners did not need to internalize any norms of property; and in fact, the variation in the rules from camp to camp suggests that property rules were adopted and cast off as readily as the rules of a game").

\textsuperscript{44} Zerbe and Anderson, supra note 16, at 115-6, 128.

\textsuperscript{45} Id., at 115-6 ("A focal point provides a coordination mechanism that, prior to the play of the game, has mutual significance to the players based on their common past experiences. These experiences, socially or culturally derived, help players to "know" what to do, and to be able to predict what other players will do."). See also Sugden, THE ECONOMICS OF RIGHTS, supra note 4, at 70-1; Sugden, Spontaneous Order, supra note 4, at 88-90.

\textsuperscript{46} McDowell, Commons to Claims, supra note 36, at 27-8 ("The first arrivals... had the first choice of claims, while the others were allowed to make their selections in the order of the date of their arrival"); Zerbe and Anderson, supra note 16, at 133-5 ("First-come, first-served procedures were used by the California miners in establishing the choice of claims").

\textsuperscript{47} McDowell, Commons to Claims, supra note 36, at 15 (By late 1849 "it was generally recognized that a miner could have a 'claim', that is, exclusive use of a certain portion of ground for mining purposes... and that tools left on the ground constituted sufficient notice that it was claimed").
of possessory entitlements, including various types of failure to meet work requirements. Zerbe and Anderson characterize the first possession rule as a game-theoretic focal point because American miners shared cultural beliefs in reward for labor and the merits of associative democracy. McDowell also adopts game-theoretic analysis to suggest that the first possession rule created asymmetrical expectations of success in the event of competition, while providing new entrants with the option of obtaining new rights by digging a claim elsewhere.

It is significant that the first possession norm in the Californian goldfields did not lead to rights of private property in perpetuity, but to possessory entitlements that were subject to rules of abandonment. The norm had fuzzy elements as it required determination of failure to meet work requirements. An alternative bright-line rule in the goldfields, involving rights in perpetuity rather than the possibility of abandonment, may have slowed the process of extraction, as claims were left unworked, but would not have reduced the total gains from extraction of a finite resource. Clay and Wright persuasively argue that the inclusion of rules to legitimate claim-jumping was a response to the competitive racing nature of the gold mining activity itself. Each miner quickly worked a site to determine its potential, before digging new holes elsewhere in search of a more productive site. As new entrants filled the mining camps, the right to work unworked claims became a major flashpoint for potential social disorder. The need to minimize newcomer/latecomer conflict provided the basis for rules that allowed new entrants to obtain rights to unworked claims.

Clay and Wright conclude that the mining codes of California provided order, in the sense that they minimized conflict, but failed to provide secure forms of property rights. The requirements to maintain the working of a claim were complex and ambiguous. They compelled mining associations, and later the courts, both to define "work" and to identify legitimate reasons for non-work, which served to generate a high level of disputes and litigation from 1851 onwards. The rules relating to possession and abandonment were not

48 McDowell, *Spontaneous Order*, supra note 4, at 778-779 ("The restrictions on claim holders also defined the rights of claim jumpers, since a miner who held too large a claim, or failed to provide notice, or did not meet the work requirements could be dispossessed by anyone"); Zerbe and Anderson, supra note 16, at 132 ("Agreements among miners in a district provided restrictions on the number of days a miner could leave a claim or requirements for the minimum number of days a miner had to work the claim"); Clay and Wright, supra note 19, at 164 (In a sample of 52 early mining codes the existence of work requirements was 'nearly universal').

49 Zerbe and Anderson, supra note 16, at 133 (Zerbe and Anderson state that "[f]irst-come, first-served procedures can serve as focal points to avoid conflict because they appear to be fair.").

50 See McDowell, *Spontaneous Order*, supra note 4, at 796.

51 Clay and Wright, supra note 19, at 177.

52 Clay and Wright, supra note 19, at 157 ("Because miners were continually looking for new and better sites even as they worked their present holding, mining district rules were as much concerned with procedures for abandonment and repossessence of claims as they were with protection of the rights of existing claimholders"); see also McDowell, *Spontaneous Order*, supra note 4, at 779 ("Claim jumping was not a criminal offence offense; it was a routine feature of gold digging...").

53 Clay and Wright, supra note 19, at 157 ("[M]iners were in a “race” to discover a limited number of high-yield, non-renewable deposits in the Sierra").

54 Id., at 162-3 (analyzing the relationship between “standard procedure for entry into gold mining” – through the jumping of claims – and the high turnovecompetitive racing conditions of gold-mining.”).

55 Id., at 178 ("The mining codes… may be said to have established order, where far worse scenarios may readily be imagined. But ‘order’ is not synonymous with secure property rights").

56 Id., at 162-164 (2005). ("Work rules in gold mining associations compelled districts (and later the courts) to define ‘work’, and to identify legitimate reasons for non-work (such as illness and lack of water), thereby generating an endless stream of disputes and litigation... on the spectrum between secure property rights and use-it-or-lose it, the mining codes were at an extreme end in favor of the latter").
necessarily enforced by the miners themselves, who were reluctant to intervene in *inter partes* conflicts.\textsuperscript{57} The mining associations dissolved in circumstances of disputation relating to the possessor rule, and its application to claims of abandonment.\textsuperscript{58} Somewhat ironically, the system of order without law in California led to a degree of disorder, not only because of the increased numbers and heterogeneity of miners, but because of the fuzzy nature of the rule on which order was initially based.\textsuperscript{59}

**B. Possession and Efficiency: The Development of Complexity in Whaling Norms of Capture**

The Californian goldfields suggest a relationship between fuzzy possessory norms, involving complex determinations of abandonment, and social ordering in circumstances of competitive racing for resources.\textsuperscript{60} Robert Ellickson explores the development of complex or ambiguous norms in a different way: fuzzy norms may develop in close-knit community contexts to increase the relative efficiency of resource use.\textsuperscript{61} His examples include 19th century British and American whaling communities, which developed different norms to govern the acquisition of property rights in particular types of whale.\textsuperscript{62} While all these norms were based on notions of first possession, they differed significantly both as to the interpretation of capture - when first possession was deemed to arise - and as to the determination of loss or abandonment of possessory entitlements. Ellickson hypothesizes that, in close-knit circumstances, the development of more complex norms, involving greater transaction costs in the form of interpretive specialization and potential for disputation, only takes place if these increases in the costs of transacting are outweighed by increases in the relative efficiency of resource use. In economic terms, the increased transaction costs of rule complexity are outweighed by greater reductions in deadweight losses (i.e. under-rewarded

\textsuperscript{57} Id., at 168 ("In a sense all miners had an interest in rule enforcement, and one might have expected that informal methods could be effective, even where formal mechanisms did not. But third-party enforcement was essentially a public good, and suffered from classic problems of under-supply and free-riding").

\textsuperscript{58} McDowell, *Spontaneous Order*, supra, note 4, at 801 ("In later years, the amount of litigation exploded… a letter published in the *Sonora Herald* in 1852 indeed said that the conditions set on holding a claim practically invited litigation because they were so fuzzy.").

\textsuperscript{59} Clay and Wright, *supra* note 19, at 178 (2005). ("[T] he claim system codified by the mining districts also institutionalized claim jumping, and by so doing fostered insecure rights and chronic litigation, which spilled into the courts very early in the process").

\textsuperscript{60} Krier hypothesizes that property rights first emerged among early humans as a product of game-theoretic processes of deference to possession, rather than as a product of authoritative allocation through institutional design. As resource values rose - and became worth fighting for - autonomous property processes were no longer sufficient to maintain social order, and governance mechanisms formed to allocate property rights through a process of institutional design: see Krier *supra* note 5, at 157-59. This article makes a related argument: game-theoretic analyses are useful because they illustrate the relationship between possessory principles and social order. However, possessory principles are not necessarily bright-line precursors to strategic behavior involving rational resource participants. There are a number of complex elements to the relationship between possession and orderly or disorderly resource use outcomes, including the interpretable nature of possession, the socially constructed nature of possessory rules, and the entanglement of possessory claims with systems of authority.


\textsuperscript{62} Ellickson, *supra* note 20.
Prior to 1800 British whalers operating in the Greenland fishery developed a “fast-fish/loose-fish” rule, in which a claimant owned a whale so long as the whale was fastened by line to the claimant’s boat. As long as the harpoon held fast to the whale and remained connected by a line to the boat, the owner of the boat had exclusive ownership of the whale. If the whale was to break free, dead or alive, it was treated as a loose-fish and was again free to be claimed. The fast-fish/loose-fish rule was relatively bright-line in nature: it created an easily understandable commencement point for a property claim, based on the visible and ascertainable nature of a connecting line between the whale and the boat. Property entitlements were acquired, and lost, by reference to this clear possessory act. The rule also encouraged resource use efficiency as it rewarded the first whaler to lodge a harpoon, which was "the hardest part of the hunt", while allowing for loss of possession (i.e. loss of the connecting line), which rewarded those who expended effort on finding unattached dead whales.

In American fisheries, where the sperm whale predominated, local whalers developed a “iron-holds-the-whale” rule. While this rule also conferred a right of property on the whaler to first harpoon a whale, it did not require the line to remain connected to the boat. The property entitlement would subsist so long as the claimant remained in fresh pursuit of the harpoon-bearing animal. The entitlement could be lost if the whaler were no longer in fresh pursuit, or another whaler had begun to “cut into” the captured carcass. Ellickson suggests that the difference in possessory norms, as between British and American whalers, may be explained by the fact that the right whales hunted by British whalers off Greenland were relatively slow and docile compared to the sperm whales hunted by the Americans. The American “iron-holds-the-whale” rule responded to the increased likelihood that the harpoon line would have to be cut in order to save the boat from sinking under pressure from a fast-moving sperm whale. The rule increased the relative efficiency of resource use by reducing the risks of death or injury to sailors, and damage to the boat.

The “iron-holds-the-whale” rule provided American whalers with the incentive to make the first strike on a sperm whale, while encouraging innovations such as drogues (floats separated from the boat and attached to the whale by line) and waifs (poles planted into dead whales to signify ownership and collected later). At the same time, the norm required determinations of “freshness of pursuit” and therefore was more complex and open to interpretive contestation.

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63 Id. at 84. Ellickson is careful to limit his hypothesis of wealth maximizing norms to close-knit community circumstances (see ELLICKSON, ORDER WITHOUT LAW, supra note 56, at 167). Moreover, the maximization of wealth applies to community members but not necessarily to community outsiders: Id. at 169
65 While the bright-line nature of the rule could create unfairness – e.g. if a dead whale broke loose in a storm – it avoided difficult questions of retention of legal possession notwithstanding loss of actual control. On the issue of bright-line signaling, it is interesting to note that a whaleboat and its mother ship each hoisted a flag to signal the harpooning of a whale: see Deal, supra note 59, at 201.
66 Ellickson, Wealth-Maximizing Norms, supra note 20, at 89-90. Ellickson also discusses whaling norms in ELLICKSON, ORDER WITHOUT LAW, supra note 56, at 191-206.
67 Ellickson, Wealth-Maximizing Norms, supra note 20, at 90.
68 Id. at 91.
then the fast-fish/loose-fish rule. Consistent with his hypothesis of wealth-maximizing norms, Ellickson suggests that the “iron-holds-per-whale” rule developed in American fisheries because its advantages in terms of greater efficiencies of resource use, including reduction of risks and encouragement of innovation, outweighed the disadvantages of increased ambiguity and potential for disputation. Close-knit communities of whalers - the primary audience for property norms relating to captured whales - were able to understand and apply relatively complex rules of possession because they were expert in matters relating to whaling, and were subject to informal sanctions in the form of reputational loss or ostracism. Even beachcombers, happening upon the beached carcass of sperm whales, could understand and follow whaling rules of capture because of their own links with local groups of whalers.

C. Possession and Social Order: A Competing Consideration to Resource Use Efficiency?

Social ordering considerations are implicit in aspects of Ellickson’s analysis because social order allows reward for resource use efforts, which may then serve to outweigh the increased costs of rule complexity. However, in circumstances of feared disorder, the relevant trade-off may not directly involve rule complexity and increased reward for resource use efforts, but increased complexity and increased potential for social order. The consequence of social order may be increased resource use efficiency, but the cause of rule complexity remains fear of disorder. In these circumstances, rule complexity may not necessarily have a direct correlation with the nature of a resource and its associated modes of exploitation, but with the nature of the resource users and the political economy of rule formulation. For example, the customary societies of East Timor have evolved complex norms of ancestral first possession in response to fears of social conflict, in a context of regular in-migration, rather than as a direct response to resource-specific issues of agricultural cultivation. The East Timor example suggests that the cost/benefit calculus of norm complexity has a broader canvas than reward for resource use efforts, and includes issues relating to reproduction of authority, identity and social precedence.

The relationship between fuzzy rules and social order challenges orthodox economic conceptions relating to the development of property rights. In classic Demsetzian terms, rising resource values create crystalline delineation of resource entitlements as a response to increased risks of conflict and over-exploitation. Merrill and Smith have stated that ownership - the classic bright-line rule of property - is the tried-and-true method of handling potential conflicts among large numbers of resource claimants. This article argues that

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69 Id. at 91-2.
70 Id. at 94.
71 Id. at 93-4.
72 See e.g. Ellickson’s description of a “good neighbor” norm in Shasta County, California, which suggests an underlying relationship between norms and social order: ELLICKSON, ORDER WITHOUT LAW, supra note 56, at 52-62).
73 See further infra Section.
74 Rose makes a related point: the existence of fuzzy rules challenges economic predictions that rising resource values will induce increasingly bright-line rules of delineation: see Rose, Crystals and Mud, supra note 12, at 577-78.
76 See Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357, (“the tried-and-true method of handling potential conflicts over resources among large numbers of claimants is to create in rem property rights – rights that give one person (the owner) the ability to exclude all other claimants to the resource.” Id. at 374).
increased risks of competitive racing for valuable resources, in circumstances of increased numbers and heterogeneity of perspective resource users, are more likely to produce fuzzy rules of resource allocation to accommodate the demands of competing categories of claimant, at least in circumstances where the enforcement environment is unable to impose bright-line rules of allocations on all prospective users. Moreover, where there is instability in the enforcement environment, attempts to impose a bright-line mechanism for property allocation may serve to channel claimants into extra-legal attempts at dispossession, which may elevate disputes over entitlements to land into political conflicts over the authority to make determinations relating to land.

D. The Transition from Custom to Law: Towards Crystalline Forms of Property?

In a close-knit community context it is well-established that local customs can prevent over-exploitation of resources - the so-called tragedy of the commons - and provide sufficient reward for efforts to exploit resources. But how does the state create legal space for complex forms of community custom? Ostrom’s influential work on common property highlights the role of legal systems in defining the community unit and its scope of jurisdiction, and supporting its rule-enforcement and conflict-resolution mechanisms. With a supportive regulatory framework, a close-knit community can self-generate rules to solve common pool resource management problems. Yet even Ostrom acknowledges the undeveloped nature of analytical frameworks concerning law and community custom, in part because of differentials in cognitive understandings at different levels of resource governance.

Henry Smith suggests that the relationship between custom and law reflects a concern with the informational demands of custom once it travels beyond a close-knit originating community. There is a communicative trade-off between the efficiency of information flows, and the potential efficiency of local customs. As a general rule, custom can be adopted without a great deal of standardization when the audience is limited, or there are low informational demands on the prospective audience. However, in cases of customs relating to property, the potential audience is often extensive as those interested in purchasing, valuing or using resources can extend far beyond the members of a local community, and can include state interests in taxation or the provision of services or infrastructure. This broad audience will incur significant costs in identifying property interests under customary regimes. Judges, bureaucrats and other sources of interpretive authority will also face informational costs in the process of ascertaining and interpreting localized custom.

78 See OSTROM, supra note 72, at 90. Ellickson suggests that constitutional norms within a close-knit community may allow recourse to formal law when it has collectively cost-minimizing and welfare-maximizing benefits: ELICKSON, ORDER WITHOUT LAW, supra note 56, at 254-58.
79 See ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 257-258 (2005) (noting the need for researchers to learn the “language” of different levels and units of resource governance).
80 See Smith, Community and Custom, supra note 21.
81 Id. at 5-6.
82 Id. at 13, 30 (citing legal treatment of mining custom as an example of adoption without significant change) and at 21 (“Custom that impacts only community members is easier to incorporate into property law than equivalent customs that would require processing by third parties”).
83 Id. at 21-2 (discussing the information costs of legal enforcers and duty-holders).
According to Smith, where efficient but information-rich customs are recognized by law, either the process of communicating property information is made more costly for remote third parties, or the custom must be stripped of its informational complexity through a process of modification and standardization.84

Smith’s illustrations of the relationship between custom and law include the legal treatment of customary mining rules in the United States.85 The 19th century Californian mining rule of first possession was adopted by the US courts as the doctrine of *pedis possessio*, which applies to mining exploration before discovery of minerals and acquisition of a patent under the General Mining Law of 1872.86 As with its customary predecessor, the *pedis possessio* doctrine includes the possibility of abandonment: possessory rights are lost once a prospector stops work and moves to another claim, at which point another prospector may obtain a property interests through the taking of possession. This aspect of mining custom has been criticized on the basis that under modern mining conditions there are benefits in multiple exploration of claims, and significant costs that prevent simultaneous exploration of those claims.87 Nevertheless, in *Geomet Exploration, Limited v. Lucky Mc Uranium Corporation*,88 the Supreme Court of Arizona applied the *pedis possessio* rule to recognize rights to claim the workings of a mining company that had moved on to another exploration area. Smith suggests that the court did not relax the customary requirements for ongoing work of a claim during the exploration phase, because in circumstances of absence of the possessor the informational demands of ascertaining property entitlements were too great for prospective users to bear.89 A rule modification allowing for abandonment would create greater information costs because possession would not set the visible and measurable limits of entitlement, in circumstances where there was no other low cost mechanism for ascertaining entitlement (such as a register for mining exploration claims).

Whaling customs provide a similar example of legal adoption of possessory customs without a significant degree of standardization or change.90 The whaling rules of capture were relatively settled and the applicable audience remained whalers and at times beachcombers only. Unlike the case of land, remote third parties were not generally interested in determining ownership rights to dead or captured whales. In Henry Smith’s terms, the informational demands of whaling customs, in the light of their prospective audience, were not such as to require their modification and standardization through law.91 In other circumstances the US courts have modified or replaced custom in order to reduce

84 *Id.* at 23-4. This argument is an application of a key aspect of Smith’s wider scholarship, namely that law is generally subject to an informational trade-off, involving complex communication to a close audience (as in contract) and standardized or formalized communication to a broad audience (typical of property), see Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).
85 See Smith, *Community and Custom*, supra note 21, at 32-3.
87 *Id.*, at 1036-7.
89 Smith, *Community and Custom*, supra note 21, at 34. (This approach has the advantage of ease of communication to more extensive audiences).
90 The fast-fish/loose-fish rule was adopted by the English Courts from the 18th century onwards, Deal, supra note 59, at 207 (discussing Littledale v. Scarth, 1 Taunt. 241, 243 (1788)). However, Deal also notes a later trend away from the rule in English decisions, as a response to consideration of farmers and reward for possessory effects, see Deal, supra note 59, at 216-219. Examples of the adoption of the iron-holds-the-whale rule by US courts include Swift v. Gifford: 23 F. Cas. 558, 559 (D. Mass. 1872) (No. 13,696), discussed in Smith, *Community and Custom*, supra note 21, at 28-9.
91 Smith, *Community and Custom*, supra note 21, at 27-9
informational costs for community outsiders. For example, in the fox-hunting case of *Pierson v. Post* the court declined to follow the hunting custom favoring the first hunter to find and pursue a fox. The majority formulated a possessory rule that granted rights to the first hunter to take possession of the carcass. Rose suggest that the adoption of a rule of capture, rather than the norm of fresh pursuit, arose from the majority’s preference for a “clear rule” that also provided reward for labor in most cases. While hunting custom may have rewarded in all cases the hunter who expended effort on finding the fox, and engaged in fresh pursuit, the interpretive costs of judicial determination of fresh pursuit, and the relative simplicity of the alternative possessory rule, outweighed the reward for effort incentives of the adoption of custom.

These US examples suggest a number of information-based principles for the design of property laws relating to custom. Custom may not require modification either when the prospective audience remains small and close-knit, the modification would serve to increase informational complexity, or the custom itself has a high degree of invariance to context. Custom may require modification where it is rich in contextual complexity, and the prospective audience extends beyond the originating community. If custom is not modified, in these circumstances, there will be increased costs of information transmission to remote third parties. Where custom does require modification to reduce information costs, Smith argues that relatively simple default rules, such as bright-line principles of possession, have a “gravitational pull” once the audience for property information extends beyond a community of connected resource users. This preference for bright-line rules of possession arises from their characteristics as lower cost mechanisms for the transmission of property information.

**E. Contested Interactions between Custom and Law: the Development of Legal Pluralism**

Economic explanations for the transition from custom to law tend to assume that resource users will migrate to standardized legal versions of custom as a result of their relative institutional efficiency. For example, Posner argues that customary systems act as efficient institutional responses to environmental risks, in circumstances where no other social insurance mechanism is available. This efficiency explanation suggests that the introduction of more efficient arrangements, including state systems of law and public administration, will lead to a decline in the use of customary mechanisms. Users of non-state mechanisms will migrate to state institutions because they provide a low-cost means to enforce rights of contract and property, while also providing alternative forms of social insurance.

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92 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).
93 Rose, *Possession*, supra note 10, at 77. See also Krier, *supra* note 5, at note 77 (the majority in *Pierson v. Post* preferred a rule of capture of a rule of hot pursuit “for the sake of certainty”).
94 Smith, *Community and Custom*, supra note 21, at 27-8 (describing informational efficiency of general defaults such as the first possession rule in whaling custom (i.e. the “fast-fish/loose-fish” rule), and trespass exclusion rules in cases of straying cattle); see also Merrill and Smith, *supra* note 61, at 39.
95 This efficiency explanation for institutional transitions is reflected in Harold Demsetz’s thesis of evolution towards private property: see Demsetz, *supra* note 71. Customary rights are not crystalline in nature because they vest in members of a locality or kin group, rather than an “identified owner”: see Rose, *supra* note 73, at 741-49 (also noting different approaches to custom in British and American jurisprudence).
96 Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. & ECON. 1, 10-19 (1980) (Where there are no state-based mechanisms to enforce contracts and provide social security and other services, groups of resource users will tend to coalesce in close-knit communities that can enforce agreements and provide their own forms of support - including access to alternative sources of land - as insurance against lost livelihoods or attacks by outsiders).
97 For an analysis of this argument, see Michael J. Trebilcock, *Communal Property Rights: The Papua New Guinean Experience*, 34 U. TORONTO L.J. 388-90 (1984) (noting that while there will be less reliance on
thus argues that private ordering examples in the American West, including the gold mining codes of California, did not survive as the frontier settled because the state had a "competitive advantage in providing law, derived from its ability to cross-subsidize the production of services". Unlike private ordering systems, the costs of which are borne by users, the state was able to spread the costs of legal order over the general taxpaying populace by funding police, prosecutors, courts, military outposts and the like.

Members of a customary community will face barriers to calculating the costs and benefits of resort to law, particularly where the interpretive costs of a law are high relative to the cognitive frameworks of custom itself. While there will be situational attempts to take advantage of new legal opportunities, there will also be an aversion to uncertainty that creates a form of social entropy, a residual loyalty to the familiar. Customary group members may variably interpret or misinterpret the standardized custom offered by State law, notwithstanding its low-cost and bright-line characteristics, because there are social, cultural, linguistic or geographic obstacles to accessing legal information. Even in circumstances where cognitive understandings of custom and law have a degree of consonance, group members may continue to pursue their own information-rich versions of custom, notwithstanding attempts at legal standardization, because of the self-interest of influential actors in the community, or a collective interest in the continuation of custom or customary forms of authority as an alternative to imposed state authority. The result may be diverse interpretations of standardized custom, at multiple levels of resource and public governance.

In property matters there are zero-sum considerations that may lead some claimants - who would otherwise lose in a state-administered system - to assert the continuing legitimacy and relevance of customary institutions. Where the state is unable to impose a unitary system of property adjudication and enforcement, and customary systems retain a degree of social authority, disputants may resort to multiple sources of interpretive authority, and multiple formulations of custom, to maintain their claims of property rights in land. This

customary structures as alternative insurance or security arrangements evolve, the patterns of substitution and future relationships of custom, market and state are difficult to predict). See also Robert D. Cooter, Inventing Market Property: The Land Courts of Papua New Guinea, 25 LAW & SOCIETY REVIEW 771-80 (1991) (analysing evolution of customary property arrangements without recourse to law, and noting the failure of legislative mechanisms for the conversion of customary rights to freehold in Papua New Guinea).

98 Morriss, Hayek & Cowboys, supra note 32, at 62.

99 Id., at 62-3.

100 See Daniel Fitzpatrick & Susana Barnes, The Relative Resilience of Property: First Possession and Order Without Law in East Timor, 44 LAW & SOC. REV. 205 (2010) [hereinafter Fitzpatrick & Barnes, Relative Resilience of Property] (describing the reconstitution of property rights by reference to familiar principles of custom after population displacement caused by armed conflict in East Timor); See also SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 50 (1978) (describing tensions between processes of regularization and situational adjustment in property relations).


103 Id. at 1040; see also Philippe Lavigne Delville, Harmonizing Formal Law and Customary Land Rights in French-Speaking West Africa, in EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA 97 (Camilla Toulmin & Julian Quan eds., 2000) ("[In West Africa,] legal pluralism, deriving from the colonial era causes a degree of uncertainty about land rights and leads to conflicts for which the many different arbitration bodies (customary, administrative and judicial) are unable to find lasting solutions.").
phenomenon is described in the literature on postcolonial land relations as legal forum shopping, although it also often involves a degree of legal principle shopping, including as to the formulation of "rules" of custom. At the same time, there may be "shopping forums" where sources of authority - state and non-state - compete for interpretive and adjudicatory influence over contested property claims. In these competitive circumstances, authority is constituted by the capacity to attract, interpret and purport to resolve matters relating to the control of resources. Property and authority have mutually constitutive aspects, which is important as more efficient property institutions may not evolve through institutional competition because volatility in authority structures leads to instability and cyclical conflict in property arrangements.

The literature on postcolonial land relations highlights the considerable amount of time and effort spent by individuals on asserting property claims through authority and legitimation systems outside of law, including households, clan groups, religious systems, local government, village courts, non-governmental organizations, human rights commissions and parliaments. Where the social arena for property legitimation work together, through nested systems of hierarchy and supportive legal space for private ordering, there is a coherent politico-legal order that restricts opportunities for chronic conflict over possessory claims to land. Where the prevailing sociopolitical order is unstable, overlapping and fragmented there is an increased likelihood of property contestation across multiple sources of socio-political authority. Chronic land contestation in postcolonial environments thus correlates with high transaction costs that prevent consolidation of fragmented property institutions into coherent systems of socio-political ordering. Even when the state develops sufficient capacity to guarantee certain property claims, a process of regime change may revive land claims that derive support from old grievances relating to dispossession, and new

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104 Fitzpatrick, Evolution and Chaos, supra note 98, at 1015.
107 In societies where land is a central source of wealth and identity, the capacity to control decisions relating to land remains a fundamental basis of socio-political authority. The mere act of authorizing certain rights to land constitutes a process of recognizing the authority of the decision-maker: Franz von Benda-Beckmann, Scapegoat and Magic Charm: Law in Development Theory and Practice, in ANTHROPOLOGICAL CRITIQUE OF DEVELOPMENT: THE GROWTH OF IGNORANCE 127-30 (M. Hobart ed., 1993).
108 See CHRISTIAN LUND, NEGOTIATING PROPERTY IN AFRICA 14 (2002) (“If hitherto hegemonic institutions which have guaranteed property rights cease to be sufficiently powerful the property they previously guarantee becomes uncertain.”).
110 JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 142 (1996) (“[T]he authorization of political power by sacred law and the sanctioning of law by social power are effected uno acto. In this way, political power and binding law emerge as the two components that make a legally organized political order.”).
111 There are drivers of institutional efficiency in plural institutional environments that will affect transitions from custom to law. As Ellickson notes, property sub-systems face substantial competitive pressures to minimize exit by their members: ELICKSON, ORDER WITHOUT LAW, supra note 56. However, evolution towards efficiency may be disrupted by too many sources of authority, just as too many sources of property can prevent efficient transactions. This argument is an extension of Heller’s anticommons thesis to circumstances of chronic land contestation: Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 HARV. LAW REV. 621.
opportunities provided by the change in political authority itself. In these circumstances, transitions from custom to law will be determined not only by the costs of legal information, and the relative efficiency of legal order, but by the constitutive nature of the relationship between property and authority and differences in rule interpretation across multiple social sub-systems.

F. Custom and Law in a Fragile State Context: Competitive Racing and the Dynamics of State Stabilization

The potential for variable and contested transitions from custom to law is heightened in fragile state contexts. Fragile states tend to have plural systems for property ordering and a high degree of competitive racing for control of resources.112 A fragile state cannot impose or implement policy at the local level without interacting with relatively influential systems of non-State ordering. It is likely to have no monopoly on violence, or have the coercive capacity to prevent outbreaks of violence.113 The citizens of a fragile state may not identify themselves as citizens of a national entity,114 but as members of sub-groups distinguished by language, geography and ethnicity. In these circumstances, the state may attempt to co-opt non-state systems through notions such as "customary law" or even "community-based natural resource management".115 At the same time, local systems may co-opt and reflexively accommodate the state, particularly in terms of references to law and the language of rights. The result will not be transition from custom to law but a hybridized set of arrangements, at the confluence of state and non-state systems, that leave considerable room for well-informed agents to negotiate new arrangements relating to land and natural resources.116

The negotiability of property in fragile state contexts is compounded by circumstances of competitive racing after war and population displacement. Armed conflicts that cause large-scale population flight can create conditions that favor disorderly forms of competitive racing

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112 I. William Zartman, Introduction: Posing the Problem of State Collapse, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 1, 5 (William Zartman ed. 1995) ("As the authoritative political institution, [the state] has lost its legitimacy, which therefore up for grabs...").
113 See, e.g., FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 6-7 (2004) (reversing Max Weber’s definition of the state as the authority with the 'legitimate use of force within a given territory’ to highlight the lack of “enforcement” capacity as a central characteristic of state failure); Derick Brinkerhoff, Rebuilding Governance in Failed States and Post-Conflict Societies: Core Concepts and Cross-Cutting Themes, 25 PUBLIC ADMINISTRATION AND DEVELOPMENT 1, 4 (2005) (State failure includes a “breakdown of law and order where state institutions lose their monopoly on the legitimate use of force and are unable to protect their citizens...").
114 Zartman, supra note 108 ("As a symbol of identity, [the State] has lost its power of conferring a name on its people and a meaning to their social action").
115 See, e.g., J Alexander Thier, A Third Branch?: (Re)establishing the Judicial System in Afghanistan, BUILDING STATE & SECURITY IN AFGHANISTAN 69, 79 (Wolfgang Danspeckgruber & Robert P. Finn, eds., 2010) (discussing the formal and informal judicial systems in Afghanistan: "[At] the local level the courts frequently refer litigants to customary forums to resolve disputes from inheritance to murder...); see also, Mara Goldman, Partitioned Nature, Privileged Knowledge: Community-based Conservation in Tanzania, 34 DEVELOPMENT AND CHANGE 833, 834 (2003) (“CBC [Community Based Conservation] devolves natural resource management to local communities and hence is often referred to as community-based natural resource management. However, in the process, the ‘community’ is often reified and presented as an ‘organic whole’... Communities, viewed as small and homogeneous units, are seen as better positioned to realize conservation goals”).
116 Roger Mac Ginty, supra note 2, at 405 (“The Afghan case does not allow for clear-cut distinctions between the traditional and the modern, or the Western and non-Western. Instead, it depicts a picture of multiple compromises as local and international actors grapple with the limitations to their power and legitimacy.”).
for control of resources. The opportunity to obtain possession and the incentive to claim property, in combination with basic social needs for access to housing and livelihoods, may create races for possession and violent conflicts over acts of possession. The opportunities created by regime change, including the potential for control of the legislative process, will encourage racing for public authority relating to land. The phenomenon of competitive racing for property rights has been analyzed in a number of contexts, including homesteading settlements in the American West, applications for patents, rights to oil and gas, and mining claims in the Californian goldfields. These examples illustrate the potential waste and cost of competitive racing, as resources are dissipated in the act of racing, or rights are obtained before the resource is ready for production. The examples from East Timor set out below suggest that competitive racing for rights after armed conflicts may also be channeled through wasteful conflicts over possession, possessory rules and possessory authority.

In a fragile state there are incentives for legal advisers to formulate laws by reference to presumptive views of state viability, projected into the future, and not necessarily as context-specific responses to risks of competitive racing by state-connected actors for control over resources. Land laws that strengthen the State are consistent with donor objectives relating to international security and development. Land law can be central to the territorialization of state power as it includes certain projections and assumptions of state sovereign authority. In James Scott's well-known expression government officials "see like a state" and interpret complex social relations with land through a legal lens of abstraction and objectification, as rights enforceable in autonomous terms, without the necessity of reference to cultural context or originating systems of authority. In similar vein, international legal advisers may also "look for a state" to facilitate strategies of exit and the achievement of program outputs.

Fragile states tend to form what North, Wallis and Weingast call "limited access orders",

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117 For an overview see Daniel Fitzpatrick & Susana Barnes, The Relative Resilience of Property, supra note 96, at 224-5.
118 Terry L. Anderson & Peter J Hill, Cowboys and Contracts, 31 J. LEGAL STUD. 489 (2002); Douglas W. Allen, Homesteading and Property Rights; or "How the West was Really Won", 34 J. LAW & ECON. 1 (1991).
122 Luck, supra note 7.
123 See Patrick McAuslan, Making law work: restructuring land relations in Africa, 29 DEVELOPMENT AND CHANGE 525, 525-7 (1998) (discussing the seminal importance of land reform to donors and from within recipient countries, wherein the reform of land law cohabitates seamlessly with ‘good governance’).
125 See, e.g., Debra McDougall, The Unintended Consequences of Clarification: Development, Disputing, and the Dynamics of Community in Ranongga, Solomon Islands, 52 ETHNOHISTORY 81, 83 (2005) (“The legal articulation of property rights in the Solomons... aims to transform complex, crosscutting, localized relationships into rights that are commensurable, predictable, and knowable to outsiders. It is an endeavor that has made little headway in the Solomons.”).
126 See, e.g., JOHN BRAITHWAITE, SINCLAIR DINNEN, MATTHEW ALLEN, VALERIE BRAITHWAITE AND HILARY CHARLESWORTH, PILLARS AND SHADOWS: STATEBUILDING AS PEACEBUILDING IN SOLOMON ISLANDS 6 (2010) (“[The] focus has been on rebuilding the core pillars of the central state to the comparative neglect of the specific factors that fuelled conflict.”).
where dominant state-affiliated coalitions restrict access to sources of rents, including control over natural resources. The imperative to stabilize the state leads to co-option of actors who could otherwise destabilize or de-legitimize the state. The co-option process is facilitated by inducements based on control over the machinery of the state. Co-opted members of dominant coalitions have incentives to deliver state largesse to their sources of non-state authority, including patron-client networks that provide them with the capacity to exercise or threaten violence. In these circumstances, the sovereign state assumptions of land law will suit coalition members engaged in races to extract rents from state control over resources. High levels of interpretive discretion relating to private property also allow state-connected actors greater opportunities for rent-seeking behavior. As the development of land law in East Timor suggests, the political economy of rule formulation in fragile states may result in bright-line rules of state title to public land and fuzzy rules of possessory rights to private land. This result complicates transitions from custom to law because state claims to land can overlay customary claims, creating contested local interactions in strong custom/weak state contexts.

II. POSSESSORY CONFLICTS AND RULE COMPLEXITY IN EAST TIMOR

A. Possessory Customs and Social Order in Traditional Timorese Culture

Case studies from East Timor support the hypothesis of this article that the development of possessory norms is correlated with concerns for social order, particularly in circumstances of potential racing for control over resources. Typically, customary systems in East Timor are based on complex mythologies of ancestral first possession, where authority over land is claimed by lineages or “houses” that trace descent to a founding ancestor and a common source of identity. Subsequent settlers define rights to land by reference to relationships with origin groups, particularly as a result of alliances created through repeat marriage interactions between "wife-giver" and "wife-taker" groups. This cultural mechanism for

127 Douglass North & Joseph Wallis & Barry Weingast, Violence and the rise of Open-Access Orders, 20 JOURNAL OF DEMOCRACY 55, 59 (2009) (“Individuals and groups with access to violence form a dominant coalition, granting one another special privileges. These privileges—including limited access to organizations, valuable activities, and assets—create rents. By limiting access to these privileges, members of the dominant coalition create credible incentives to cooperate rather than fight among themselves.”).
128 Id. at 108 (“In a natural state, each non military elite either controls or enjoys privileged access to a vital function, such as religion, production, resources, trade, education, or the administration of justice. Because of their positions, privileges, and rents, the individual elites in the dominant coalition depend on the regime to keep entry limited.”).
129 NORTH ET AL., VIOLENCE AND SOCIAL ORDERS, supra note 15, at 42 (“Patron-client networks dominate the organizations within fragile natural states, and they are usually networks capable of using violence.”).
130 Id., at 77 (“Land is the primary asset in agrarian societies. Access, use, and the ability to derive income from land therefore provide a rich set of tools with which to structure a dominant coalition and its relationship to the wider economy.”).
131 Fitzpatrick, Evolution and Chaos, supra note 98 (discussing the development of contested forms of access to land in the Third World).
132 Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 206 (summarizing ethnographic literature on origin houses in East Timor).
"bringing the outsider in" has acted as an institutional technique to manage in-migration in circumstances of population mobility and tribal warfare. The close-knit nature of East Timor's customary systems meets Ellickson's criteria for successful social ordering without the necessity of recourse to law. Yet, in contrast to Ellickson’s hypothesised correlation between norm complexity and wealth-maximisation, the core ordering principle of ancestral first possession correlates with concerns for social ordering in circumstances of in-migration, rather than the relative efficiency of shifting cultivation, which remains the predominant form of resource use in rural East Timor.

Shifting cultivation requires the assertion of control over a relatively large area, to allow movement of plots, and hence tends to be associated with common rather than private property systems. Ancestral first possession norms in East Timor support socio-political control over relatively large areas of ancestral domain, which then serves to support shifting cultivation techniques. But there is no direct correlation between complex aspects of first possession norms in East Timor and reward for effort, or incentives for innovation, in relation to shifting cultivation. While the consequences of norm complexity may be a stable environment for mobile cultivation techniques, the driver of complexity is a desire to reproduce authority and maintain orderly social relations in circumstances of in-migration, exogamous marriage relations, and regular tribal warfare.

Ancestral first possession principles have also had a strong ordering influence in East Timor's historical circumstances of colonization, war and military occupation. Fitzpatrick and Barnes adopt game-theoretic analysis to conclude that the signaling and ordering functions of Timorese principles of ancestral first possession encourage property claimants to nest their claims in customary structures rather than engage in disorderly racing for rights and authority.

Indonesian archipelago); ELIZABETH B. TRAUBE, COSMOLOGY AND SOCIAL LIFE: RITUAL EXCHANGE AMONG THE MAMBAI OF EAST TIMOR (1986) (discussing “male” and “female” houses of origin among the Mambai ethnolinguistic group of East Timor).

134 Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 218-26 (discussing in-migration and cultural incorporation techniques in the village of Babulo, Lautem District); James J. Fox, Installing the ' Outsider' Inside: An Exploration of an Austronesian Cultural Theme and its Social Significance (1997) [unpublished manuscript, on file with author] (Exploring cultural techniques and metaphors for incorporating immigrants into customary group hierarchy); Andrew R. McWilliam Customary Claims and the Public Interest: On Fataluku resource entitlements in Lautem, in EAST TIMOR: BEYOND INDEPENDENCE, 165 (D Kingsbury & M Leach eds., 2007) (exploring in-migrations and customary notions of precedence on the Eastern district of Lautem).

135 The origin houses of East Timor are kin-based structures with a high degree of member homogeneity, regular interaction and access to monitoring and information on resource use activity, with internalized norms of cooperation supported by sanctions such as shaming, ostracism and – most powerfully – fear of sickness arising from lack of respect for ancestral spirits and the spirits of the land: see generally the discussion in Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 219-20. For examples of Ellickson’s work on the preconditions for successful private ordering see ELLICKSON, ORDER WITHOUT LAW, supra note 56, at 192-204 (whaling norms), 115-20 (cattle farming in Shasta Country); see also Robert Ellickson, Property in Land, 102 YALE L. J. 1336-44 (1993).

136 For a discussion of shifting cultivation in East Timor, see Joachim Metzger, Man and Environment in Eastern Timor, AUSTRALIAN NATIONAL UNIVERSITY DEVELOPMENT STUDIES CENTRE MONOGRAPH No. 8 (1977).


138 See Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 222-3.

139 McWilliam, supra note 126 (exploring ethnographic elements of the “historical capacity of East Timorese society to reproduce itself in the face of systematic adversity”).

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relating to land. Principles of ancestral first possession have acted as resilient sources of social ordering in East Timor because they provide a visible signal of relations with land, which are interpreted by in-migrant property claimants as focal points to avoid costly conflict and secure access to resources. However, Fitzpatrick and Barnes do not suggest that ancestral first possession principles should be understood in a bright-line sense, as non-contingent precursors to rational decision-making by resource claimants. Timorese origin principles are contextualised social constructions rather than matters of objective historical fact, and are thus vulnerable to competing interpretations of first possession and possessory authority.

The interpretability of possessory principles is illustrated by the emergence of contested constructions of possession and possessory authority in some areas of rural East Timor. As a result of colonial Portuguese land clearing policies, many individual claims to land in fertile lowland areas are based not on customary allocation pursuant to ancestral first possession narratives, but on histories of actual possessory acts including clearing and digging irrigation channels, combined with the grant of a hoe by village government officials. These types of possessory claim are affiliated with village government systems established by the Portuguese colonial regime, which has made them vulnerable to displacement and regime change in the turbulent history of East Timor. Prior to independence in 2002, East Timor experienced periods of Portuguese, Japanese, Indonesian and United Nations administration. Each change of regime coincided with mass population displacement, which in turn created a high degree of dispossession, relocation and secondary occupation. Ensuing regime changes then led to attempts at re-possession, often in conjunction with claims that prior possessors were collaborators with the previous regime.

Beginning in the early 20th century, and gathering momentum after World War II, the Portuguese sought to restrict shifting cultivation by customary groups and to clear new areas, particularly in the fertile lowlands of the southern coast, for rice fields and other forms of intensive cultivation. These activities contributed to gradual population movement and concentration into more closely settled residential communities adjacent to sealed roads. The Portuguese administration induced much of this migration to facilitate colonial taxation, security and agricultural development projects. The administration established a system of hamlet and village heads to ensure payment of head-tax, and organize labor for Portuguese agricultural development projects. In the context of land clearing and settlement

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140 Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 216-26.
141 Id. at 234.
142 See Fox, supra note 125, at 135-6 (discussing constructed nature of notions of origin and precedence among Austronesian groups of the Eastern Indonesian archipelago). With evidence of human settlement in East Timor dating back 30,000 years, most customary groups in East Timor are unlikely to have been the first in their area, and some reported first possession narratives incorporate mythical justifications for the displacement of earlier groups: see further Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 213-4.
144 Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 232-3.
146 See RENE PELISSIER, TIMOR EN GUERRE, LE CROCODILE ET LES PORTUGAIS (1996) (discussing punitive Portuguese military expeditions against rebellious Timorese groups); J. TAYLOR, EAST TIMOR: THE PRICE OF FREEDOM, 10-11 (1999) (discussing efforts to extend colonial control into the mountainous interior of East Timor).
147 GUNN, SUPRA NOTE, AT 35-6.
movement, these village government mechanisms began to overlay and at times suppress customary systems of land allocation and authority.\textsuperscript{148}

The extent of origin group authority had not necessarily been tested in lowland areas cleared under Portuguese supervision, because historically the land was forested and at most used for hunting only. As a result, access to cleared land was not necessarily determined through customary mechanisms, but by village heads acting under authority from the Portuguese administration.\textsuperscript{149} The Portuguese did not issue formal documents of title to those who had cleared land, but did often provide a hoe or other type of agricultural implement. These agricultural tools became important symbolic manifestations of property claims as subsequent generations experienced mass displacement as a result of war and invasion.\textsuperscript{150} While the intrusion of colonial authority structures was more marked in districts with large Portuguese military posts, even areas with a relevant degree of isolation from the colonial administration experienced settlement movements and associated increases in the land-related authority of village heads.\textsuperscript{151} The result was an emerging plurality of authority over land as village heads and other officials favored by the Portuguese administration were not necessarily elders or even members of senior origin group lineages.\textsuperscript{152}

Pluralist local authority structures were a feature of European colonial systems of indirect rule, which clothed designated local "chiefs" or "village heads" with forms of administrative authority under the colonial state.\textsuperscript{153} It is well-established that this authority, at times justified and characterized as a recognition of "custom", was a creature of colonial convenience and rarely a reflection of pre-colonial arrangements.\textsuperscript{154} Some local actors favored by colonial arrangements often used associations with the State to further their own claims of rights and authority relating to land. Other local actors claimed legitimacy on the basis of constructed notions of custom, and asserted land claims in contradistinction to colonial arrangements.\textsuperscript{155} In contexts of decolonization and regime change, the result has been a close relationship between property and plural sources of local authority, and an interaction between possessory claims and competition for political authority, in many postcolonial systems.\textsuperscript{156} The

\textsuperscript{148} Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 226-32 (describing interactions between customary and village government mechanisms in the village of Babulo, Viqueque District); DANIEL FITZPATRICK, LAND CLAIMS IN EAST TIMOR (2002) [hereinafter, FITZPATRICK, LAND CLAIMS] (providing an historical overview of war and displacement in East Timor).
\textsuperscript{149} See e.g., the case-studies of land disputes on the Uato Lari coastal plain set out in Section II.B., infra.
\textsuperscript{150} Id.
\textsuperscript{151} See e.g., McWilliam, supra note 126 (noting population concentration trends in Eastern district of Lautem).
\textsuperscript{152} See K. SHERLOCK EAST TIMOR: LIURAI S AND CHEFES DE SUCO; INDIGENOUS AUTHORITIES IN 1952 (1983) (discussing village governance findings of Rego, an East Timorese anthropologist and colonial administrator).
\textsuperscript{153} Sally Engle Merry, Law and Colonialism 25 LAW & SOCIETY REVIEW 897 (1991) ("customary law… was not a relic of a timeless colonial past but instead an historical construct of the colonial period").
\textsuperscript{154} SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS 316-317 (1986) (discussing hybridized socio-legal arrangements in Tanzania, “something that is not to be mistaken for the ‘customary’ system that was in being a hundred years ago.”).
\textsuperscript{155} Merry, supra note 143, at 918 (“At least in British colonial Africa, local educated elites… seized the law and helped to construct a ‘customary law’ responsive to their new economic needs. Colonial officials, in response, sometimes sought to revive a precapitalist law derived from a traditional past to enhance stability… some pockets of custom and non-Western law remained and even flourished despite the efforts of colonial officials to them.”).
\textsuperscript{156} See Christian Lund Negotiating Property Institutions: On the Symbiosis of Property and Authority in Africa in NEGOTIATING PROPERTY IN AFRICA, 11 (K. Juul & C. Lund eds., 2002) (“Struggles over property are as much about the scope and constitution of authority as about access to resources.”); Sara Berry, Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa in THE POLITICS OF POSSESSION: PROPERTY, AUTHORITY AND ACCESS TO NATURAL RESOURCES, 24-25 (Thomas Sikor & Christian
following description of land conflicts in the north-eastern district of Viqueque in East Timor illustrate cycles of property instability as a result of the relationship between possession and authority in a fragile postcolonial state context. The description is based on 21 case files, prepared by the Land and Property Directorate of the Government of Timor Leste in Viqueque.

B. Possession and Dispossession on the Coastal Plains of Viqueque

Most land disputes lodged with the Land and Property Directorate of Viqueque district in East Timor involve claims of possession and dispossession resulting from the clearing of the coastal land under colonial supervision. Beginning in 1938, and gathering pace in the 1950s, the Portuguese authorities instructed the heads of two upland villages - Afalocai and Uitame - to gather their people and clear land for rice cultivation on the Uato Lari coastal plain. The land was cleared and planted for irrigated rice cultivation. Working with hamlet heads, the village heads mapped and divided the land among those who took part in the clearing and cultivation efforts. Those who occupied the rice fields developed under village government supervision still seem to have acknowledged the overarching ritual and spiritual authority of elders from the local origin group known as Vessoru-Uitame. But the acknowledgement of customary land stewardship did not necessarily extend to recognition of authority over the use or generational transfer of land. The rice-fields are claimed on the basis of heritable individual rights, notwithstanding that these rights were never translated into documentary rights of statutory ownership.

In 1959 the head of Afalocai village took part in a rebellion against Portuguese rule. The rebellion was centered in Viqueque district and included a number of other village heads with kinship ties to a senior customary leader affiliated with the Japanese during World War II. The rebel leaders were the subject to claims of association with pro-Japanese collaborators. The rebellion was defeated by Portuguese forces, with the assistance of pro-Portuguese Timorese militia from other districts. The militia burnt houses and seized livestock, and the people of Afalocai fled to the nearby Matebian Mountains. The village head of Afalocai and his family were imprisoned in Angola. Between 1960 and 1962 the administrator of Uato Lari sub-district allocated the vacant rice fields to the pro-Portuguese militia, who had not otherwise received any pay from the colonial regime. The allocation also served as a

Lund eds., 2009) (“the recent upsurge [in Africa] in claims to land based on ancestry, origin, or ‘custom’ has as much to do with politics as with access to economic resources.”).

155 Copies of these case files are held on file with the author.

156 Susana Barnes, Field notes on Uato Lari March 2006 (copy on file with author). While the land fell within the claimed ancestral domain of the Vessoru-Uitame customary group, much of it had been used at most for hunting and fishing and the Vessoru-Uitame elders were not directly involved in the allocation of land cleared and cultivated by the villagers of Afalocai and Uitame.

157 Id.

158 Gunter, supra note 133, at 30-33.

159 See case notes: Case 1, Soares and Others v. Sipain and Others; Case 6, Umakiik Vesoru Uaitama village v. Monteiro; Case 9, Fernandes v. Sipain and others; Case 10, Claim by Menezes; Case 11, Ribeiro v Menezes; Case 12 Claim by Ribeiro; Case 13, do Rosario v. Soares; Case 14, Claim by Magalhaes; Case 15, da Costa v. Kaidawala & Kaidawalari; Case 17, Claim by Napoleon Menezes; Case 20, Menezes v. Soares; Case 20, Menezes v. Soares; Case 21, Menezes v. Lekui and others; Case 21, Menezes v. Lekui and others; Case 25, Claim by Amaral and others.

160 Gunter, supra note 133, at 34; see also 10, Claim by Menezes; Case 13, do Rosario v. Soares; Case 16, Soares v. Adelino and others.

161 Some pro-Portuguese militia invited family members to occupy the Afalocai rice fields. In one case, and pro-Portuguese militia reportedly demanded the sale of coastal land, and seized the land with support from
tactic to secure Uato Lari as an area under Portuguese control. The new possessors undertook repair of damaged infrastructure and a further round of clearing and planting land. They also did not receive documentary proof of title from the colonial administration.

In 1972 the head of Afalocai village, who by then had been released from prison in Angola, lodged a claim with the Uato Lari sub-district administrator for the return of some land to Afalocai village members. This claim was granted. The remainder of the land seized after the 1958 rebellion was left in the possession of pro-Portuguese forces and their descendants, who continued to improve the irrigation and infrastructure of the rice fields. In 1980, during the period of Indonesian occupation, the dispossessed people of Afalocai made another claim to local forms of government authority. By this time a number of customary leaders from Afalocai had prominent roles in the Indonesian administration. This appeal resulted in a gathering of hamlet heads from Utame village who decided that some land should be returned to the pre-1959 possessors. Other land was returned by order of the Indonesian-appointed sub-district head of Uato Lari and, in one case, by an Indonesian court. According to some pro-Portuguese claimants, some of the land subject to restitution orders included areas first cleared and cultivated by their forebears after 1962. Some Afalocai claimants also allege that some land was never returned, notwithstanding acts of first clearing and cultivation before 1958.

In 1999, a vote for independence by the people of East Timor triggered an outbreak of violence by pro-Indonesian militia, instigated and supported by the Indonesian military, that displaced most of the population. Indonesian forces departed as an Australian-led international force restored order in November and December 1999. In early 2000, a number of descendants of pro-Portuguese militia took advantage of the Indonesian withdrawal to
claim or take possession of Uato Lari land held by their forebears from 1962 to 1980. Some of the land was vacant as a result of the 1999 displacement. \textsuperscript{171} Other areas of land were seized by force. \textsuperscript{172} Those re-occupying the land alleged Afalocai collaboration with the Indonesian occupiers, while associating themselves with the pro-independence Timorese resistance movement. \textsuperscript{173} In circumstances of regime change favoring the re-occupiers, the dispossessed Afalocai did not engage in large-scale confrontations to recover their possession, although there was a great deal of social tension and some outbreaks of violence. \textsuperscript{174}

In June 2000 a team from the UN transitional administration in East Timor (UNTAET) visited Uato Lari sub-district to mediate possessory disputes involving the people of Afalocai. Based on training from Canadian experts, the mediators focus on obtaining interim agreements that the disputants not engage in violence, while the dispute awaited hearings before the new courts of East Timor. \textsuperscript{175} This limited approach achieved a degree of success in terms of forestalling further violence. However, the National Parliament has yet to pass a law to resolve competing claims to land in East Timor. \textsuperscript{176} There are 21 unresolved cases documented in the Land and Property Directorate archives of Viqueque district, and most Uato Lari claimants appear to be waiting for the proposed new land law of the independent state of Timor Leste before determining their next property claim steps.

\textbf{C. Moving Towards Law: International Principles of Property Restitution in East Timor}

The war-torn history of East Timor has created multiple bases for land claims, and a legacy of contestation over past events of possession and dispossession. The potential bases for claims to land in contemporary East Timor include custom, possession, Portuguese title documents, Indonesian title documents and eminent domain. \textsuperscript{177} In rural districts, these categories of claim are greatly affected by circumstances of widespread displacement in Portuguese and Indonesian times, with large numbers of relocated peoples now living on land claimed by customary groups. \textsuperscript{178}

The 2005 United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the "Pinheiro Principles") provide that "states shall demonstrably prioritize the right to restitution as the preferred remedy for displacement, and as an essential

\textsuperscript{171} See case notes: Case 1, Soares and Others v. Sipain and Others; Case 3, Pinto v. Vicente; Case 11, Ribeiro v Menezes Case 16, Soares v. Adelino and others; Case 24 Claim by Ribeiro
\textsuperscript{172} See case notes: Case 2, Claim by de Costa Case 8, Sarmento v. Duarte; Case 10, Claim by Menezes; Case 12 Claim by Ribeiro; Case 13, do Rosario v. Soares; Case 14, Claim by Magalhaes; Case 15, da Costa v. Kaidawala & Kaidawalari; Case 19, Patricio v. Soares; Case 20, Menezes v. Soares; Case 21, Menezes v. Lekui and others
\textsuperscript{173} Gunter, supra note 133, at 37.
\textsuperscript{174} Id.
\textsuperscript{175} See Daniel Fitzpatrick, Mediating Land Conflict in East Timor in COMMONWEALTH GOVERNMENT OF AUSTRALIA (AUSAID), MAKING LAND WORK: RECONCILING CUSTOMARY LAND AND DEVELOPMENT IN THE SOUTH PACIFIC (2008) (Under Law No 1 of 2003, the Land and Property Directorate has jurisdiction over disputes relating to land and property).
\textsuperscript{176} Id., see infra Section II. C.
\textsuperscript{177} See FITZPATRICK, LAND CLAIMS, supra note 138. While on current statistics only around 8% of claimed land parcels are contested, these figures cover urban and peri-urban areas in districts targeted by a USAID-supported claims collection process. There has been no systematic claims collection in rural districts (Interview, 8 October 2010, Nigel Thomson, Chef de Mission, USAID Strengthening Property Rights in Timor-Leste Project [Ila Ria Nai – “Our Land”] 2008-2010).
\textsuperscript{178} See e.g. Fitzpatrick & Barnes, Relative Resilience of Property, supra note 96, at 226-32 (describing effects of relocation on customary land in village of Babulo).
element of restorative justice”, and that refugees and displaced persons have a right to restitution where they were “arbitrarily or unlawfully” deprived of housing, land and/or property. With a somewhat different emphasis, the 1998 United Nations Guiding Principles on Internal Displacement require competent authorities to protect property lost through displacement against illegal appropriation, occupation or use, and to establish the conditions and means to allow internally displaced persons to return voluntarily and safely to their homes, or else to resettle voluntarily in another part of the country.

Restitution of property rights seems to provide a relatively bright-line response to the problem of population displacement. There is no great interpretive complexity to a rule providing that those who were displaced should go home. Yet East Timor offers a paradigmatic case of potential operational complexity arising from a bright-line restitutuory approach. Some restitutuory programs are directed at reversing “ethnic cleansing” or systematic racial discrimination. Examples include Bosnia-Herzegovina, Kosovo and South Africa, where broadly there is a single category of displaced restitutuory claimant. In East Timor there are multiple categories of potential claimants, including customary groups displaced by the Portuguese, Portuguese era title-holders dispossessed by the Indonesian administration, and Indonesian era title-holders displaced as a result of independence for East Timor. The law could focus on the most recent event of nation-wide displacement, in 1999 when the pro-Indonesian militia embarked on its campaign of violence, but this restitutuory focus with restore titles to Indonesian citizens and pro-Indonesian East Timorese, and thus restore a basic cause of conflict. It would also challenge state capacity to implement a restitutuory program because of the large numbers of post-1999 occupiers of land who did not hold titles to that land in the Indonesian era.

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181 Id., Principles 28, 29, 30. In 2005, the United Nations General Assembly (‘UNGA’) ‘recognized’ the Guiding Principles on Internal Displacement as ‘an important international framework’: see the 2005 World Summit Outcome. GA Res 60/L.1, UN GAOR, 60th session (2005), paragraph 132.
184 For a discussion and overview, FITZPATRICK, LAND CLAIMS, supra note 138, at 1-21.
It seems that crystalline rules of restitution may turn muddy as they are implemented in fragile state contexts. In East Timor, there are multi-agency shortfalls in the capacity to engage in a restitutitional program. The Timorese Courts have limited time and resources to deal with civil matters. The state lacks records of both Portuguese and Indonesian era land titles, in large part because the pro-Indonesian militia burnt most government records in 1999. The police are reluctant to engage in forcible removal of households. There is little money or interest from the government to develop low-cost urban housing for evicted occupiers. There is no urban plan to respond to high rates of population growth and rural-urban migration. In all the circumstances, there is a high risk of program failure should restitution be attempted, in which event large numbers of current occupiers would lack secure rights to land because ownership technically lies with another claimant.

These issues of state capacity took some time to emerge in the various attempts at drafting a land law in East Timor. Until 2006, there was a lawyer's focus on restitution of pre-independence rights to land, with most attention paid to potential competition between Portuguese and Indonesian era titles to land. However, in 2006 political conflict between the Prime Minister and the President degenerated into circumstances of temporary state failure, as elements of the police and army engaged in armed combat, and latent tensions over post-1999 land occupations escalated into large-scale house burning and evictions in Dili. These tragic events highlighted the fragility of the East Timorese state, and the relationship between state stability and post-displacement disputes over the possession of land and housing. There was increased appreciation among legal advisers of the risks of disorder if the state

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186 This phenomenon is an extension of Carol Rose's well-known "crystals and mud" analysis, which noted the cyclical tendency for crystalline rules to change to "mud" (i.e. to complexity or ambiguity), often as a result of judicial action, and then back to crystal as a result of legislative or contractual action: see Rose, Crystals and Mud, supra note 12, at 577-81. Rose also notes that crystalline rules may become muddy if they are over-populated - if the system implementing rule comes by overuse, as where the bright-line benefits of recording property interests creates a proliferation of recorded interests: see Rose, Crystals and Mud, supra note 12, at 596-97. This article makes an analogous contribution: crystalline rules may become muddy in practice when the state is unable to interpret and enforce its low-cost content, as a result of complexity in the property claims environment itself.

187 As of March 2011 there were 18 judges working in the court system of Timor Leste (4 of whom were foreign), see JUDICIAL SYSTEM MONITORING PROGRAM, OVERVIEW OF TIMOR LESTE JUSTICE SECTOR 2010 23-6 (2011). The process of training new East Timorese judges, to replace the Indonesian judiciary, has been understandably slow. See JUDICIAL SYSTEM MONITORING PROGRAM, OVERVIEW OF TIMOR LESTE JUSTICE SECTOR 2005 6-10 (2005) (describing the non-functioning of some District Courts, in part due to judges' training commitments); JUDICIAL SYSTEM MONITORING PROGRAM, OVERVIEW OF THE JUSTICE SECTOR: MARCH 2005 13 (2005) (describing the backlog of civil cases as particularly acute). For a discussion of the difficulties faced by East Timorese judges in resolving land cases, see: Charlotte Williams, Reaching Back to Move Forward: Using Adverse Possession to Resolve Land Conflicts in Timor-Leste, 18 PACIFIC RIM LAW & POLICY JOURNAL 590-2 (2009).

188 The pro-Indonesian militia deliberately burnt most Indonesian government records in 1999, including records held by the National Land Agency. There are records of Portuguese era land title grants in government archives in Portugal, but copies are not held by the government of East Timor: see FITZPATRICK, LAND CLAIMS, supra note 138, at 6-7.

189 Interview, Nigel Thomson, supra note 167.

190 See Daniel Fitzpatrick, Scoping Note for a Potential AusAid Land Program in Timor Leste, 2009 (unpublished, copy on file with the author).

191 Id.

192 For an overview that focuses on land and housing haspects of the crisis, see Andrew Harrington, Ethnicity, Violence, & Land and Property Disputes in Timor-Leste 2 EAST TIMOR LAW JOURNAL (2007).

193 Id.
attempted mass evictions as part of a restitutionary program. As a result, the draft land law of 2009 replaced restitution of titles with recognition of rights based on possession. The 2010 amendments to the draft then re-introduced an element of restitution, largely as a result of compromises among international legal advisers, while retaining a primary focus on recognition of possession.¹⁹⁴

The amended draft land law of 2010 has a great deal of interpretive complexity as a result of the fragile state context of East Timor. The draft law recognizes right to ownership of land where an East Timorese citizen has been in peaceful possession since December 31, 1998.¹⁹⁵ It allows for restitution of Portuguese and Indonesian era ownership titles which, while small in number and scope, nevertheless take precedence over competing claims based on long-term possession.¹⁹⁶ It does not allow for restitution of limited term titles from the Portuguese and Indonesian periods, except where claims based on the titles are not contested.¹⁹⁷ It applies new legal concepts of community land and community protection zones to rural districts, based on conceptual borrowings by international legal advisers from other jurisdictions, including in particular Mozambique.¹⁹⁸ The following account suggests that the layering of complexity is a product of concerns for state stability, including the need to accommodate possessory interests that may otherwise destabilize the state. It also reflects the complex political economy of regulatory development in a fragile state, which requires compromises among diverse interests - including international legal advisers - in order to increase the prospects for legislative approval.

D. The Draft UNTAET Regulation of 2000: Qualified Recognition of Indonesian Era Titles

On 25 October 1999, as the pro-Indonesian militia rampaged after the vote for East Timor's independence,¹⁹⁹ the United Nations Security Council passed Resolution No. 1272, which established the United Nations Transitional Authority in East Timor (UNTAET).²⁰⁰ Article I vested all legislative and executive authority with respect to East Timor, including the administration of justice, in the hands of UNTAET. UNTAET Regulation No. 1 established a governing law for East Timor that maintained the law of the previous regime, namely Indonesia, as modified by certain international human rights standards.²⁰¹ By adopting "the laws of the previous regime" the drafters of UNTAET Regulation No. 1 were careful not to suggest that Indonesia had been the sovereign authority of East Timor. In fact, the wording of UNTAET Regulation No. 1 was almost identical to Regulation No. 1 for the UN mission in Kosovo, which a year earlier had similarly applied the laws of the former Federal Republic of Yugoslavia.²⁰² The primary drafter of UNTAET Regulation Number 1 was a judge from

¹⁹⁴ Copies of the 2009 and 2010 draft regulations are held on file with the author.
¹⁹⁵ Article 19, Draft Land Law 2010. Possession may be combined with the possession of a predecessor, regardless of the form of transition, provided that possession remained continuous and peaceful (article 22).
¹⁹⁶ Article 34, Draft Land Law 2010.
¹⁹⁸ Articles 21-26, Draft Land Law 2010; see infra Section II.B.7 (discussing legal transfer from Mozambique).
¹⁹⁹ For an overview, see FITZPATRICK, LAND CLAIMS, supra note 138, at 5-6
Germany, who had been the legal adviser for the United Nations mission in Kosovo. In the event, the decision to adopt Indonesian law was motivated by practical considerations - to maintain a degree of legal continuity - and was not informed by arguments that Portugal retained sovereign authority over East Timor because Indonesia had a status as a belligerent occupier.

In June 2000 the Land and Property Unit of UNTAET formulated a draft regulation to establish a land commission. The regulation was prepared by lawyers from Australia and Canada, who at that time predominated in the Land and Property Unit. The regulation provided that applications for the registration of land rights, where there was no objection, were to be determined by reference to UNTAET Regulation No. 1, subject to obligations to reject an application where the right had not been acquired in good faith. The reference to UNTAET Regulation No. 1 favored claims based on Indonesian titles, with the qualification that land commission officers were to observe the international human rights standards set out in UNTAET Regulation No. 1. The regulation did not allow for registration of customary claims to land, at least those that were inconsistent with Indonesian law, but did provide for the noting of boundaries and any other information about land that was the subject of a traditional communal right. In effect, the draft regulation recognized Indonesian titles to land while adding a number of interpretive considerations relating to good faith and compliance with international human rights standards.

The recognition of Indonesian era titles to land was based on a lawyer's approach: the draft regulation simply implemented the qualified recognition of Indonesian law in UNTAET Regulation No. 1. Proponents of the draft regulation noted that Indonesian law recognized and converted pre-1975 Portuguese titles in East Timor, which meant that Indonesian law would not necessarily prejudice claims based on Portuguese titles. There were also urgent needs to re-establish a form of land administration, and capture information about ongoing land transactions, which could be done most quickly through the governing legal framework established by UNTAET Regulation No. 1. Yet the political reality was that large numbers of East Timorese would not accept restitution of Indonesian era titles, because of the near-genocidal nature of the Indonesian military occupation. Title-holders from the Portuguese era also opposed the draft regulation because most had not applied for conversion to Indonesian titles. These political considerations led to rejection of the draft regulation by

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203 Id., at footnote a1.
204 Id., at 59. It seems clear that Indonesia had the status of a belligerent occupier, and sovereignty remained vested in the state of Portugal throughout the period of Indonesian occupation, FITZPATRICK, LAND CLAIMS, supra note 138, at 44-76.
205 A copy of this draft regulation is on file with the author.
206 Draft UNTAET Regulation 2000, s.12(d).
207 Draft UNTAET Regulation 2000, s.11(5). The regulation also provided for referral of disputed applications to local resolution mechanisms, including "traditional and local leaders" (s. 18 (3)).
209 From 1974 to 1999 between 15% and 25% of East Timor's population died from conflict-related causes - most as a result of forced displacement by the Indonesian military: see Commission for RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR (CAVR), CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR 44 (2006).
210 The map of land occupation had also changed significantly from the Indonesian period as a result of ad hoc housing occupations in Dili and other urban areas: see FITZPATRICK, LAND CLAIMS, supra note 138, at 9.
the United Nations Transitional Administrator.211

E. Law Number 1 of 2003: The Bright-Line Rule of State Title to Land

East Timor became an independent state in March 2002. In 2003 the National Parliament of East Timor approved Law No. 1 of 2003 on the regulation of state land and abandoned land.212 This law is most significant for its definition of state land. The law defines land held under the "private domain" of the state to include unclaimed private land without an identifiable owner.213 These provisions provide a bright-line default: the burden of proving private title lies with the claimant. It seems there was no trend towards complexity in the definition of state land because the interests of key regulatory agents - political actors, government officials and international legal advisers - converge on the need to strengthen the state.214

Default presumptions of state ownership lie within orthodox common and civil law conceptual frameworks. Yet, in the limited access order conditions envisaged by North, Wallis and Weingast, there are considerable incentives and opportunities for government officials to claim large areas as unowned land to facilitate rent extraction from the grant of state land leases. In post-conflict circumstances there will likely be widespread uncertainties of private ownership because of population displacement, destruction of records, and undocumented forms of land holding. There may be investor interest in agribusiness developments. There will be economic pressures to generate employment and investment. In these circumstances, a bright-line rule on state land may provide a low-cost interpretive pathway for government actors to obtain rents and grant land concessions to investors, who would otherwise face uncertain negotiations with purported groups of private landowners. Yet, at the same time, this application of a bright-line rule is also likely to create conflict with local users and possessors of affected land.215

The legal definition of state land in East Timor includes land acquired by public entities between 1975 and 2002, covering the periods of Indonesian occupation and UN administration, but does not include all land claimed by the Indonesian state.216 This exclusion is significant as the definition of state land in Indonesian law is based on a highly interpretive notion of "state right of control", which in Indonesia is used to claim

213 Law 1/2003, s.12(3). It also provides for temporary state administration of abandoned land, including the grant of leases to land defined as abandoned.
214 The definition of state land in East Timor provides a contrasting perspective to the literature on rent-seeking, which correlates fuzzy rules with enhanced opportunities to capture rents: see Rose, Crystals and Mud, supra note 12, at 591 (citing J. Buchanan, Rent Seeking and Profit Seeking, in J. BUCHANAN, R. TOLLISON, & G. TULLOCK, TOWARD A THEORY OF THE RENT SEEKING SOCIETY, 3, 8-11 (1980)). In circumstances of minoritarian control of the state, they bright-line default rule of state ownership of land may enhance official rent-seeking opportunities by increasing the scope for determinations that land slated for leasing to investors is state rather than privately owned land.
215 For an example see infra Section II.B.7. For a discussion of contested state claims to customary land in Third World circumstances: see Fitzpatrick, Evolution and Chaos, supra note 98, at 996.
216 Law 1/2003, s.16(2). The inclusion of all land claimed by the Indonesian state was set out in an earlier draft, but was not included in the draft approved by Parliament.
approximately 65% of the archipelago as state forest land, notwithstanding the presence of as many as 65 million occupants or habitual users of that land. In East Timor, the controversial nature of Indonesian claims to state land appears to be the primary reason for the limited reference to acquisition by public entities only, and the removal of the broader reference to land acquired by the Indonesian state from an earlier draft of Law No. 1 of 2003. Nevertheless, senior government land officials continue to apply the Indonesian notion of state right of control to claim large areas of East Timor a state land, reflecting their training in Indonesian land administration institutions, and their experience as junior land administration officials during the Indonesian occupation. As a key interpretive community, their expansive views on the extent of state land will shape applications of the law and, as a result, the flow of legal information from the state to its citizens.

Law No. 1 of 2003 requires national citizens, whose land has been illegally appropriated or occupied by third parties, to submit their claims of ownership by 10 March 2004. All private land that has not been the subject of a registered claim by 10 March 2004 is presumed to be state land, and the opportunity to appeal this presumption lapsed as of December 31, 2008. This cut-off date for claims illustrates orthodox legal concerns with limitation periods and finalization of claims, in order to provide a secure foundation for land market activity. Yet approximately 10,000 claims only - almost entirely from Indonesian citizens - were lodged by the 2004 cut-off date. By providing for forfeiture to the state in the event of failure to claim, national and international advisers assumed erroneously that information about registration, and the incentive to register, would induce comprehensive lodgment of claims. The legal advisers saw like a state: they assumed high levels of information flows from the state to its citizens, and a high level of engagement by citizens with the state. In fact there is a high level of informational isolation from the state: very few East Timorese citizens registered their claims and most East Timorese were unaware of the claims registration process itself.

F. The 2005 Draft Law on Private Land Ownership: Restitution and Recognition of Custom

In September 2005 international legal consultants prepared a draft law on private land ownership, under the auspices of a USAID technical assistance program, and in consultation with the Ministry of Justice. The primary drafter was a lawyer from Brazil, one of a number of Portuguese-speaking advisers that, after the departure of UNTAET, became the most influential international advisory group in the Ministry of Justice. In general terms, the 2005 law continued the restitutionary approach of the UNTAET draft regulation. While the 2005 draft limited restitution to ownership titles issued under the Portuguese or Indonesian administrations, it provided for limited term Portuguese or Indonesian titles to act as evidence

218 Interview, Land and Property Directorate Director, 6 October 2010. For an acknowledgement of the role of former Indonesian staff, see the official government overview of Land and Property Directorate, available at http://www.mj.gov.tl/dntp/english/aboutdtp.htm.
219 Law 1/2003, s.12(1).
221 EAST TIMOR LAND LAW PROGRAM, REPORT ON RESEARCH FINDINGS, POLICY OPTIONS AND RECOMMENDATIONS FOR A LAW ON LAND RIGHTS AND TITLE RESTITUTION 28-9, 43 (2004), Id., at 29, 61 (presenting the results of a survey). The survey figure likely over-states the level of national awareness as it was largely conducted in urban areas and rural townships. The 2010 draft land law now re-opens a process from registering claims to ownership of land by Timorese citizens. See infra Section II.C.5.
222 Interview, Nigel Thomson, supra note 167.
for claims to "first adjudication" of ownership.\textsuperscript{224}

Unlike the UNTAET draft regulation, the 2005 draft law allowed for first adjudication of ownership based on "possession and customary rights of ownership", provided there was no applicable Portuguese or Indonesian title claim.\textsuperscript{225} This basis for claim did not establish a bright-line possessory rule, as it required proof of occupation for at least 20 years following "the practices of the community", and was subject to "no well-founded opposition from the community."\textsuperscript{226} The draft law contemplated gradual extension of a government land administration system to all areas of East Timor.\textsuperscript{227} The draft also allowed communities to hold collective title to land and apply customary rules in administering their land, while respecting the principles of equality established in the law.\textsuperscript{228} These provisions layered a degree of complexity on to the restitutionary framework of the UNTAET draft, primarily as a response by international legal advisers to the social reality of customary landholdings in rural East Timor.\textsuperscript{229}

\textbf{G. The Fretilin Government Draft of 2006: State Control and the First Hint of a Possessory Approach}

East Timor's Council of Ministers rejected the 2005 draft law, largely it seems because its provisions on communal title to land inhibited the potential scope of state-owned land. The government commissioned a further draft in 2006, not long before the outbreak of violent conflict in May 2006, which was prepared with the assistance of another Brazilian lawyer. The 2006 draft law provided much weaker recognition of customary relationships with land, as a result of explicit drafting instructions from the Prime Minister.\textsuperscript{230} While the law provided for registration of community property in rural areas, the registered community held a communal right of use only and the land fell within the public domain of the State.\textsuperscript{231} The draft law further provided that traditional institutions had a right of participation - but by implication no right of veto - relating to natural resource expectation.\textsuperscript{232}

As with the 2005 draft, the 2006 draft law provided for the restitution of ownership titles issued by the Portuguese or Indonesian administrations.\textsuperscript{233} However, the law stated that restitution would not take place if there was a third party in possession of the claimed property, who had exercised peaceful possession for at least 10 years or peaceful and undisputed possession in good faith for at least 5 years.\textsuperscript{234} For the first time, then, the 2006 draft law privileged some possessory claims over restitution of Portuguese or Indonesian

\textsuperscript{224} Draft Land Law 2005, article 16. Most titles issued by the Portuguese and Indonesians took the form of limited term rather than ownership interests: see FITZPATRICK, LAND CLAIMS, supra note 138, at 88-9, 158-60. Eligible ownership titles must also have been the subject of registered claim by 10 March 2004, pursuant to Law No. 2003, and also have "evidence of legitimacy" (articles 28, 43).

\textsuperscript{225} Id. Article 51(1).

\textsuperscript{226} Until then, "communities" could continue to resort to customary rules provided they did not conflict with the Constitution and the law (article 3 (5)).

\textsuperscript{227} Draft Land Law 2005, article 3.

\textsuperscript{228} Interview, Nigel Thomson, supra note 167.

\textsuperscript{229} Interview, Ibere Lopez, Legal Adviser, USAID Strengthening Property Rights in Timor-Leste Project.

\textsuperscript{230} Draft Land Law 2006, Article 9(2).

\textsuperscript{231} Id., article 9.

\textsuperscript{232} Id., article 41. Those who acquired land from the holder of a Portuguese or Indonesian ownership title were also eligible for restitution, although this process was to "privilege" those who acquired in good faith (Id., article 39).

\textsuperscript{234} Id., article 47.
ownership titles. This change in approach reflected the emerging belief of the lead Brazilian legal adviser, in particular, that the state lacked the capacity to engage in large-scale urban evictions in order to implement a restitutionary program. This belief proved somewhat prescient given the violent conflict over urban housing in 2006-07.


The violence of 2006-07 led to the fall of the Fretilin government and its replacement by a coalition government headed by Prime Minister Xanana Gusmao (the former President). The Coalition seems to fit the criteria for a limited access order identified by North, Wallis and Weingast. The Prime Minister was the head of the armed resistance to the Indonesian occupation, whereas the Vice Prime Minister until September 2010 - Mario Carrascalao - was the governor of East Timor under the Indonesian administration. These former enemies have combined to form a government that is oriented strongly towards economic development. There have been significant increases in rural land allocations to investors notwithstanding the continuing absence of a legal framework to determine ownership of private land. For example, in 2008-09 the Ministry of Agriculture purported to allocate over 100,000 ha of rural land for bio-fuel developments under Memorandums of Understanding with foreign investors. While there are discussions among East Timorese of rent-seeking explanations for these allocations, it seems they also form part of a rush to establish "facts on the ground" in advance of the proposed law on land.

The current coalition government rejected the draft 2006 land law prepared by the Fretilin government, and commissioned a further draft under the auspices of a second USAID technical assistance project, which again worked in conjunction with the Ministry of Justice. Ironically, the lead drafter was the Brazilian lawyer who had worked on the 2006 Fretilin...

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235 Interview, Ibere Lopez, supra note 220.
236 A striking feature of politics in East Timor is the links between political actors and non-state sources of violence, including martial arts gangs, which correlates with North, Wallis and Weingast’s descriptions of fragile limited access orders: see North, Wallis and Weingast, supra note, at 42. See further James Scambany, A Survey of Gangs and Youth Groups in Dili, Timor-Leste: A Report Commissioned by Australia’s Agency for International Development, AusAid 2-4 (2006) (noting central role of martial arts gangs in the house burnings and forced evictions of 2006-07, and analysing the links between the gangs and various political parties and factions in East Timor.


238 The Government’s Strategic Development Plan 2011-2030 includes a proposal to resettle 5000 families in 8 rural districts to enable irrigated rice cultivation OFFICE OF THE PRIME MINISTER, ON THE ROAD TO PEACE AND PROSPERITY: TIMOR LESTÉ’S STRATEGIC DEVELOPMENT PLAN 2011-2030, 4-197 to 4-201. (April 7, 2010). It also asserts a need to reform land laws to improve agricultural productivity, including in relation to farm land under customary practices.

239 This rush to establish is evident in the large numbers of fences and walls and construction around plots of land and valuable areas of Dili and its surroundings.
draft. The first version of the current draft law was issued in June 2009. It did not allow for restitution of Portuguese or Indonesian titles at all, and provided for ownership based on long-term possession alone. A claimant would receive an ownership right if she peacefully took possession of a vacant property before 26 April 2006, without the authority of the previous possessor; and maintained possession in good faith for at least 5 consecutive years. As noted, the critical influence behind this wholesale shift to recognition of long-term possession was the violent housing conflicts of 2006-07, which highlighted the relationship between state stability and post-displacement possession of land.

In early 2010, the Minister of Justice commissioned Portuguese lawyers to review the 2009 draft law. The Portuguese legal advisers highlighted the importance of state fragility concerns, noting that the attribution of ownership to long-term possessors "avoids mass disposessions (and therefore the social tensions that could arise)". However, the advisers also noted the importance of meeting expectations of ownership, which suggested restitution of Portuguese or Indonesian era ownership titles. They recommended restitution of pre-independence ownership titles while retaining ownership rights based on long-term possession. The draft law now combines restitutionary and possessory principles. Claims of ownership may be based on Portuguese or Indonesian ownership titles and, where there is no such title, on a continuous, peaceful and notorious possession that commenced on or before December 31, 1998. The law also provides that, for the purposes of satisfying the requirements of possession since December 31, 1998, claimants in possession may add possession of their predecessors, provided that possession was continuous and peaceful, regardless of the form of transition.

I. When Bright Line Rules Create Conflict: The Application of Possessory Principles to Customary Districts

In rural areas, customary understandings of possessory entitlements will conflict with the possessory principles of the draft land law. Possessory entitlements in customary districts are embedded in social constructions of origin, exchange and precedence. There is no customary rule or norm that length of time in possession gives rise to property entitlements, as the possessory significance of acts of clearing, cultivation and residence is negotiated with reference to questions of social status and affiliation. In terms of possession, then, any transition from custom to law will not involve standardization or decontextualization but inherent inconsistency of meaning and interpretation. While key actors, including leaders of relocated groups, may adopt legal formulations of possession to enhance their claims to land, and by extension their social authority relating to land, customary elders are likely either to ignore or adopt hybridized interpretations of legal possessory principles. The potential for incomplete, contested and hybridized publication of possessory rules is compounded by the

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240 The drafting process took place with the assistance of a working group that included Timorese lawyers and land experts.
242 USAID advisers supported these recommendations on the basis that Portuguese and Indonesian ownership titles were relatively small both in number and areas covered, as most pre-Independent titles were limited term in nature.
243 See Article 22. It seems that the decision to push the commencement date of possession back to 31 December 1998 was motivated by a desire not to reward ad hoc occupiers of land after 1999, in part because of fears of renewed possessory conflicts in Dili. It may also be that the current coalition government was concerned not to recognize post-1999 claims to valuable coastal land by Fretilin-connected actors.
There are large numbers of relocated peoples living on land claimed by a customary group in East Timor. Many have occupied the land since before 31 December 1998, which entitles them to claim statutory ownership of land provided they have remained in possession, subject to possible exclusion of their claims on the basis on the basis of "mere occupancy" only. Under the draft land law, mere occupants cannot acquire ownership rights to land by means of long-term possession. Mere occupants include people using land with no intention of acting as owners, people "who took advantage of the tolerance of legitimate possessors", and representatives and agents of the legal possessor. These categories of mere occupant potentially include many relocatees from Portuguese or Indonesian times. While definitions of mere occupancy will be complex and costly, and therefore challenging to the interpretive capacities of the East Timorese state, they also offer a regulatory pathway for negotiations over right and authority to land that facilitate local desires to avoid costly resource conflicts.

Unfortunately, the draft 2010 law does not extend the distinction between mere occupants and legal possessors to customary districts. Article 10 (3) defines possessors to include those who reside in, have erected buildings on, or have cultivated land claimed by another party based on the belief of ancestral customary domain, even when rent is being paid to that party. This attempt to create a bright-line rule will be highly contestable as a result of multiple events of population displacement in the history of East Timor. There are two broad categories of persons relocated to customary land during Portuguese or Indonesian times: those who have access to land pursuant to traditional agreement with the origin group; and those who occupied land during the war-torn years of the Indonesian occupation without contemporaneous agreement from origin house elders. While these categories are subject to a number of fine distinctions, and an evolving spectrum of relations between latecomers and first comer landholders, it is clear that entitlement to ownership on the basis of individual possession alone, with unrestricted powers to sell land to other Timorese citizens, will be inconsistent with localized understandings of relocatee rights. In some cases, the bright-line rule is likely to lead to violent conflict between different groups.

The application of possessory principles to customary land in East Timor will be affected further by Chapter V of the draft land law, which creates a new legal category of community protection zones. Community protection zones are areas protected by the State for "the purpose of safeguarding common interests of local communities". A community protection zone does not take the form of a right to property. Individuals, communities and the state may own land in a community protection zone, subject to certain protective safeguards. In a community protection zone, the state has obligations to promote environmental and socio-cultural sustainability, protect community land "from real estate speculation", and ensure

244 Technically a land claimant in customary districts may make a sporadic application for registration of ownership, on the basis of special adverse possession. However, the possibility of sporadic applications in areas not subject to cadastral data is a matter that is to be determined under a law on title registration. In the short-term, the distant nature of the state in East Timor, and the relative lack of access to legal information, also renders it unlikely that claims based on special adverse possession in customary districts will be widespread. The fuzziness of the law "begins a conversation" at the local level, and avoids the potential for conflict generated by a bright-line rule that denies - with the stroke of a pen - one category of claimant.

245 Protection areas have a broad potential reach as they include agricultural areas, either cultivated or fallow, forests, culturally relevant sites, pastures, water springs or areas with natural resources that are shared by the population and necessary for its subsistence: Draft Land Law 2010, (article 21).
non-discriminatory forms of customary practices. Chapter V also requires third-party economic activity in a community protection zone to include consultation with the local community, benefit the local community as a whole, and respect community ways of life and access to natural resources.

The notion of a community protection zone was taken from Mozambican law as a result of conversations among international legal advisers. There was a belief among international actors that key political and bureaucratic figures in East Timor would not support explicit recognition of customary structures, and that a reference to Mozambique would provide legitimacy and a cognitive shortcut for East Timorese political figures who were exiles in Mozambique during the Indonesian occupation. However, it is clear that the interpretation of transplanted law from Mozambique will be a product of information transmission and interactions among a range of interpretive communities, including officials from the Land and Property Directorate. As noted, these officials will interpret community protection zones in a restrictive fashion, by reference to bright-line definitions of state land.

CONCLUSION

Merrill and Smith argue that simple baselines matter in property regulation because property information is costly in nature. A broad audience of regulators and resource users requires information relating to the identification, evaluation and enforcement of property. In a world of positive transaction costs, the informational complexity of property regulation matters for resource use efficiency because, all else being equal, reductions in information costs increase the efficiency of transactions. Moreover, a property rule that establishes ownership - the simplest form of exclusionary entitlement - provides a low-cost solution to the problem of bilateral resource conflicts. In these circumstances, the starting point for property regulation should be simple bright-line defaults, such as a rule or norm of first possession.

249 There was also a belief that the somewhat chequered experience of community land protection in Mozambique would provide a useful template for the implementation of Chapter V in East Timor: Interview Ibere Lopez, supra note 198.
250 See infra Section II.C.2.
251 Thomas W. Merrill & Henry E. Smith, Making Coasean Property More Coasean, JOURNAL OF LAW AND ECONOMICS, [Forthcoming] 31-4 (2011) [hereinafter, Merrill & Smith, Coasean Property]; Harvard Law and Economics Discussion Paper No. 688, Columbia Public Law Research Paper No. 11-262; Merrill & Smith, supra note 72, at 359 (“property imposes an informational burden on large numbers of people… As a consequence, property is required to come in standardized packages that the layperson can understand at low cost.”). See also Smith, supra note 80, at 1108-1113.
252 Merrill & Smith, Coasean Property, supra note 245, at 34 (In a “positive transaction cost world one should expect to find a significant degree of standardization of rights, precisely because this would save on delineation, understanding, and enforcement costs”).
253 Id., at 36 (“For transaction cost reasons we start with sovereign owners exercising the right to exclude over clearly delineated things, and we use this starting point to resolve a wide range of resource conflicts”), and at 35 (In certain circumstances ownership rights to exclude encroachment may be circumscribed or limited to remedies to damages rather than injunctive relief because the result is more efficient in comparative institutional terms for reduction of transaction costs).
254 Merrill and Smith, supra note 245, at 39 (“General norms of possession seem to form powerful defaults”); Smith, Community and Custom, supra note 21, at 27-8 (describing informational efficiency of general defaults such as the first possession rule in whaling custom).
which may be amended towards complexity where the pay-off is a net gain in transactional efficiency.\footnote{One type of pay-off may be greater flexibility in the delineation of entitlements where flexibility results in greater transactional efficiency: Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L.J. 34 (2000). Merrill also suggests that fuzzy rules may be appropriate to high transaction cost circumstances, as where large numbers of people are involved in actual or prospective bargaining over resource use. Where transaction costs prevent the reaching of bargains, a fuzzy rule may provide greater scope for the Courts to determine entitlements based on ex-post assessments of efficiency, which ideally would reflect the bargains parties would have reached if transaction costs were sufficiently low: see Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J.Legal Stud 13, 13-4 (1985).} 

Merrill and Smith presuppose a world where bright-line allocations of ownership rights serve as a presumptive basis for resolving bilateral resource conflicts. Yet the rewards of crystalline rights, and the process of allocating well-defined entitlements, may provoke disorderly races for resource control. Their analysis thus assumes social order - the capacity of socio-political authority to allocate crystalline rights while managing the disorderly implications of competitive racing. In the absence of social order, bright-line allocation of entitlements may not resolve resource conflicts as - ironically - social order requires resolution of basic conflicts over ownership of resources. An economic preference for bright-line rules may be instructive for informational efficiency, but not for the social order required to create preconditions for efficiency. Indeed the paradox is that, in the development of social order, there seems to be a preference for fuzzy rather than bright-line rules of property. Property systems that have experienced social disorder may thus have legacy rules of complexity or ambiguity, even though rule simplicity may facilitate transactional efficiency once social order is established.

Many rules of first possession include fuzzy issues of abandonment, or deemed transfer of possession, to respond to the risk of disorderly races for possession. The evolution and effect of possessory rules is closely linked to systems of authority and their relationship with social order. As a broad conclusion, it seems that principles of first possession can facilitate social order when the interpretive community is close-knit - and remains close-knit notwithstanding conflicts generated by determinations of abandonment - or when the interpretive authority exercises sufficient social control to enforce rules or claims of possession. But they can also be central to social disorder when competition for valuable resources merges with competition for public authority, particularly when there are historical cycles of possession, regime change and dispossession, or when the applicable rule of possession has bright-line characteristics that deny the claims of powerful groups.

Does the relationship between rule complexity and social order imply that property rules may trend towards simplicity and efficiency once the problem of social order has been resolved? Even in stable systems of socio-political ordering, a legal rule may purport to create bright-line versions of custom, or allocation of entitlements, and yet lack bright-line characteristics for all people at all times. There are considerable degrees of interpretability and ambiguity in purportedly simple rules of first possession. Possessory rules may be mediated through narratives of ancestral first possession, contested histories of possession and dispossession, contemporary acts of occupation, the determinations of socio-political organizations, and the formulation of legal rules. They will also take on complexity as they traverse a variety of regulatory, communicative and cognitive frameworks. While simple rules may reduce aggregate information costs across a broad audience, the extent and benefits of cost reduction
may vary considerably across different social sub-systems, with important consequences for rule formulation in all property systems.