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### Empty Moscow Stores: A Cautionary Tale for Property Innovators

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# Empty Moscow Stores

## A Cautionary Tale for Property Innovators

*Michael Heller*

The transition from “Marx to markets”<sup>1</sup> offers a cautionary tale to property innovators. Breaking up ownership in new ways can destroy rather than liberate the social and economic value that old-fashioned private property can deliver. The accidental laboratory of post-socialist transition reveals surprising property rights results.

Under socialism, governments stifled markets and often left store shelves bare. One promise of transition was that new entrepreneurs would acquire the stores, create businesses, and fill the shelves.<sup>2</sup> However, after several years of reform, storefronts often remained empty, while flimsy metal kiosks, stocked full of goods, mushroomed on Moscow streets (Rapaczynski 1996). Why did new merchants not come in from the cold?

This chapter argues that even if the initial endowment of property rights were clearly defined, corruption held in check, and the rule of law respected (e.g., Gray, Hanson, and Heller 1992; Frydman and Rapaczynski 1994; Shleifer 1994), storefronts would remain empty because of the way governments are creating property rights. Transition regimes have often failed to transfer to individuals a coherent bundle of rights that represents full ownership of storefronts or other scarce resources. Instead, those regimes have ratified the expectations of powerful socialist-era stakeholders by making them rights-holders in the new economy. Fragmented rights were made alienable in the hope that new owners would trade them to more productive users. In a typical Moscow storefront, one owner may hold the right to sell, another to receive sale revenue, and still others to lease, receive lease revenue, occupy, and determine use. No one can set up shop without collecting consent from the other owners.

Empty Moscow storefronts are a stark example of anticommons property, a type of property regime that may result when initial entitlements are created as disaggregated rights rather than as coherent bundles of rights in scarce resources. More generally, one can understand anticommons property as the inverse of commons property. In a commons, by definition, multiple owners

may each use a given resource and no one may exclude another (Michelman 1982). When too many owners have such rights of use, the resource is prone to overuse—a tragedy of the commons (Hardin 1968; but see Ostrom 1990). Familiar examples include depleted fisheries and overgrazed fields.

In an anticommons, by my definition, multiple owners may each exclude others from a scarce resource and no one has an effective right to use. When there are too many owners holding rights to exclude, the resource is prone to underuse—a tragedy of the anticommons. Legal and economic scholars have mostly overlooked this tragedy, but it can appear whenever governments create new property rights. Empty Moscow storefronts are a vivid example of the tragedy of underuse.

The goal of this chapter is to introduce the anticommons as a useful new tool for property theory. The text first situates anticommons property in a property theory framework and then presents an empirical study of the creation and resolution of anticommons property across a range of Russian property in transition. The final section briefly applies the anticommons idea to puzzles beyond Russian real property transition. Whether an anticommons tragedy emerges in a developed or transition economy, and whether it lasts for a short or long period, societies can avoid its social costs by creating more coherent initial entitlements. The difficulties of overcoming a tragedy of the anticommons suggest that property theorists and policymakers should pay more attention to the content of property bundles, rather than focusing only on the clarity of rights.

## A Property Theory Framework

Property theory has long worked with categories such as private property and commons property (Kennedy and Michelman 1980; Waldron 1985). However, anticommons property has scarcely figured.<sup>3</sup> This section makes the anticommons more accessible for property theory.

### *Private Property*

Theorists usually note three elements as essential to defining private property: (1) Private property is understood as comprising a core bundle of rights chosen from the infinite relations that may exist among people with respect to a scarce resource (Hohfeld 1923; Honoré 1961; Gray 1980). (2) Ownership of private property includes the possibility that an individual can control the core bundle, such that the owner's decision on inclusion or exclusion will be treated as relatively final by society (Michelman 1982). (3) Owners may break up the core bundle subject to constraints on fragmentation that keep objects available for productive use, in an alienable form, and with a clear decisionmaking hierarchy among owners (Michelman 1982; Ellickson 1993).

Of course, even in settled market economies, the boundaries of private property may remain unclear despite the web of legal rules, institutions, and informal norms (Barzel 1989). Ambiguity may also arise because of unresolved conflicts and changing values regarding ownership, such as how far the government may restrict certain land uses without compensation (Heller 1999). Nevertheless, most workaday activities that require property exchange take place without negotiation over the definition of the thing being exchanged or of the constitutive rights of the property bundle. If people thought deeply about the property they used, perhaps they would see that even the core meanings are historically contingent and indeterminate (Kelman 1987). However, the everyday perspective on property masks its mysterious character.

### ***Anticommons Property***

Theorists have usually used the term “commons property” to describe a property regime that is not private property. For example, Michelman describes a commons as “a scheme of universally distributed, all-encompassing privilege . . . that is opposite to [private property]” (1982:9). More generally, as Barzel notes, the standard economic analysis of property has “tended to classify ownership status into the categories all and none, the latter being termed ‘common property’—property that has no restrictions put on its use” (1989:71). Thus, property theory traditionally dichotomizes commons (nonprivate) property and private property. This dichotomy is too limited to capture the diversity of real-world property relations. More generally, property relations are better characterized as a triumvirate of commons, private, and anticommons.

I define “anticommons property” as a property regime in which multiple owners hold effective rights of exclusion in a scarce resource. This definition departs from previous definitions along three dimensions:

1. *Universality of rights of exclusion.* Because others define an anticommons to include only situations in which everyone has a right to exclude (Michelman 1982; Ellickson 1993), they have missed the existence of real-world anticommons property, in which a limited group of owners has rights of exclusion. Nonuse can occur even when a few actors have rights of exclusion in a resource that each wants to use.
2. *Implication of nonuse as optimal.* Although perpetual nonuse of property may be optimal in a few situations, there are more situations in which nonuse results but is not socially desirable. For most resources that people care about, some level of use is preferable to nonuse, and an anticommons regime is a threat to, rather than the epitome of, productive use.
3. *Formality of rights.* Multiple rights of exclusion need not be formally granted through the legal system for anticommons property to emerge.

## THE TRAGEDY OF THE ANTICOMMONS

Like the familiar tragedy of the commons, resources held in anticommons form are prone to waste. The tragedy of the commons is that rational individuals, acting separately, may collectively overconsume scarce resources. Individuals find that they benefit by consumption, even though their use imposes larger costs on the community. Using my definition, an anticommons is prone to the inverse tragedy. A tragedy of the anticommons can occur when too many individuals may exclude each other from a scarce resource. The right to exclude is valuable precisely because others want to use the resource and will pay something to collect the right. The tragedy is that rational individuals, acting separately, may collectively waste resources by underconsuming them (even after accounting for effects on the environment, neighbors, and future generations).

By itself, the appearance of anticommons property is not necessarily a problem for the efficient use of resources.<sup>4</sup> First, in a world without transaction costs, owners should rearrange initial endowments through *ex post* bargaining in markets (Coase 1960). Such bargains would put resources to productive use, perhaps by bundling anticommons rights into private property.<sup>5</sup> Of course, we do not live in a transaction-costless world, as Ronald Coase (1988) recognized. If many people can block each other from using a resource, they must incur at least the transaction costs of identifying and bargaining with each other to put the resource back to use. These transaction costs may result in ownership remaining fragmented and resources being wasted.

A second reason that the appearance of anticommons property may not matter for efficient use can be understood by analogy to commons property. Ostrom (1990) has shown that people may be able to manage nonprivate property efficiently by developing and enforcing stable systems of informal norms. Efficient, informal management of property in anticommons form could develop over time and could promote certain communitarian values—such as cooperation among dwellers in a residential community—that may be lost in other property regimes (Rose 1986).

Third, some resources may be most efficiently held as anticommons. This assertion corresponds to the idea advanced by Rose (1986) that roads and waterways sometimes may be more efficiently held in commons than in private property form. Using my definition of an anticommons, one could imagine familiar property rights arrangements, such as a scheme of restrictive covenants in a residential subdivision, to be a form of anticommons property with owners holding multiple vetoes to block community level change. To the extent that creating such a scheme increases property values more than it imposes negative externalities, the developer's decision to convert land to anticommons form can be an efficiency-enhancing move.

Finally, property theorists have shown that the efficiency of a property regime cannot be derived *ex ante* from a limited set of axioms, such as the

assumption of rational, self-interested individuals (Kennedy and Michelman 1980; see also Rose 1990; Krier 1992). The real-world effect of multiple rights to use an object or multiple rights to exclude others from use is not a theoretical absolute, but is instead an empirical matter. Expectations about overuse or underuse of property, and our policy responses, must be grounded in experience and observation.

## The Gradient of Property in Transition

Socialist legal systems organized property in a fundamentally different way from private property systems (Gray, Hanson, and Heller 1992; Feldbrugge 1993). For example, socialist law did not have the legal concept of “real estate”—defined as land and those things permanently affixed to it, such as buildings. One could not point to a sharply defined piece of real estate and say that it belonged to a particular entity. Instead, the state owned all land—the “hard core of state property” (Feldbrugge 1993:247)—indivisibly with no right of alienation. For administrative convenience, the government allocated complex use rights to state organizations. In resolving conflicts among users of state property, dispute-settlement mechanisms accorded primacy to state socialist expediency, rather than to abstract legal principles. Legal tools such as land registries were not maintained.<sup>6</sup>

The absence of real estate as a legal category suggests three elements that distinguished socialist property laws from market legal systems and set the stage for the emergence of an anticommons: (1) *Hierarchy*. Whereas market legal systems tend to dichotomize among types of property (for example, real and personal, or tangible and intangible) and to focus on the scope of individual rights, socialist law categorized property according to the type or identity of the owner (Gray et al. 1993). State socialist property was at the top, followed by cooperative and personal property in decreasing order of protection (Mozolin 1993). (2) *Objects*. The category of socialist property included the objects of greatest economic value in socialist society. Because all productive assets were in principle “unitary” and belonged to “the people as a whole,” socialist law did not delineate physical and legal boundaries that would be familiar in a private property regime (Butler 1983). (3) *Ownership*. Instead of assigning a single owner to each object, socialist law created a complex hierarchy of divided, coordinated rights loosely comparable to Western trust ownership (Feldbrugge 1993). Central-planning mechanisms coordinated uses; state arbitration courts, formally, and the Communist Party, informally, resolved conflicts. Thus, most valuable assets in socialist countries began the transition to markets with indistinct boundaries and overlapping ownership.

When property is organized along the hierarchy of socialist legal protection, a striking and previously unreported trend emerges. Within a given

national regime, the more protection property received under socialist law, the less successful its performance has been in a new market economy.<sup>7</sup> It is difficult for existing transition literature to explain this inverse correlation between protection and performance. For example, the level of administrative corruption, judicial incapacity, and clarity of rights is reasonably consistent across types of real estate within any given national real property market. Yet residential real estate, which received relatively less protection under socialist law, appears to be performing better than commercial real estate, which received relatively more (compare Struyk 1996 with World Bank 1996).

The working hypothesis in this section is that private property emerges less successfully in resources that begin transition with the most fragmented ownership. In such resources, poorly performing anticommons property is most likely to appear and persist. In contrast, private property emerges more successfully in resources that begin transition with a single owner holding a near-standard bundle of market legal rights. In such resources, the transition from a socialist to a market economy occurs more smoothly (F. 9-1).<sup>8</sup>

To hold reasonably constant a number of alternative explanatory variables, this chapter focuses on four Russian real estate examples. These examples constitute a more significant portion of national wealth than observers often realize (World Bank 1996). For example, in market economies, the value of commercial real estate often exceeds the value of the industrial plant and equipment. Housing is an even larger share, accounting for about one-third of reproducible national wealth in market economies. Each point along the gradient of property in transition suggests lessons about the nature of anticommons property and possible routes to rebundling it as private property.

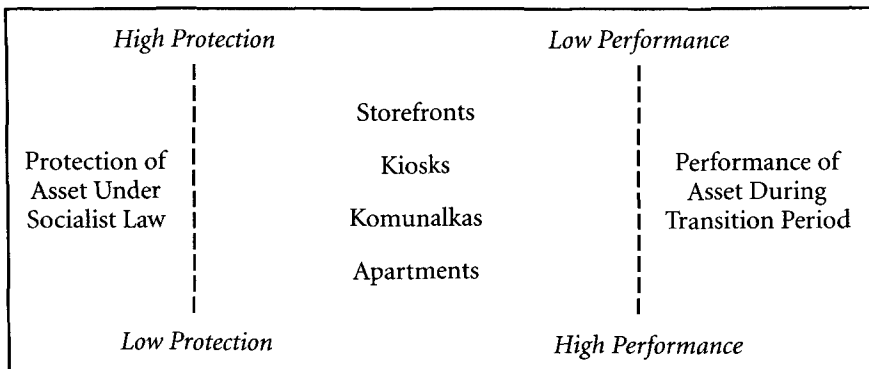


Figure 9.1 The gradient of property in transition.

### ***Case Study of Empty Stores in Moscow***

Stores in socialist regimes were notoriously bare because of an economic policy that disfavored production of consumer goods. Although the transition to markets took root in the early 1990s and storefronts were privatized, many storefronts in Moscow unfortunately remain empty. On the streets in front of these empty stores, however, new entrepreneurs set up thousands of metal kiosks that they rapidly filled with goods.<sup>9</sup> The presence of kiosks can be seen as a visual and analytic indicator for measuring a transition country's progress from anticommons to private property. In Poland, for example, anticommons property in commercial real estate lasted less than a year before kiosks disappeared. By contrast, in Russia, kiosks remain an important presence on the streets. Why have Moscow merchants not completed the move from kiosks into stores? The answer lies partly in the legal regime surrounding commercial real estate.<sup>10</sup>

Within the legal and institutional context of the Moscow storefront, the main actors are a wide variety of state and quasi-state organizations. In a monograph on commercial real estate markets in Russia, Harding (1995) notes that the initial assignments of state property to different levels of government were opaque and varied. Local and regional government agencies emerged as the key players, with nearly monopolistic control over property such as commercial real estate. Privatization ratified some existing socialist and informal use rights while it superimposed a new set of market ownership rights. As a result, in post-socialist Russia, a heterogeneous set of owners has been thrown together in any given store (T. 9-1). No owner in the new market economy held a bundle of rights that resembled any of the wide range of workable bundles that appear in well-functioning market economies.

Table 9-1 also suggests further complexities for transition in Moscow storefronts. First, multiple parties may share most rights. In this example, multiple owners must agree among themselves to exercise their "ownership stick" in the property bundle. Second, local government agencies may be distinguished from the bureaucrats who occupy decisionmaking roles and control use of the property. Officials may exchange leases at below-market rents for bribes. Even if only one party opposes use, that party may be able to block others from exercising their rights. The Moscow storefront thus meets my definition of anticommons property. The tragedy of the storefront anticommons is that owners waste the resource when they fail to agree on a use. Empty stores result in foregone economic opportunity and lost jobs. As of 1995, about 95 percent of commercial real estate in Russia remained in divided local ownership, and much was unused (Rapaczynski 1996).

Over time, store by store, entrepreneurial property bundlers may convert an anticommons by negotiating with all the holders of rights of exclusion. Indeed,



Table 9.1

<i>Owners of storefront rights.</i>	
Property Right	Owner
Right to sell	Local Administration Property Committee Committee for Architecture and Historical Preservation State Enterprise or Institute (as Balance-Sheet Holder) Budget Organization Relevant Council
Right to receive sale revenue	Federal Government Regional Administration Local Administration Property Committee Committee for Architecture and Historical Preservation
Right to lease	Property Committee State Enterprise or Institute Maintenance Organization
Right to receive lease revenue	Relevant Administration Property Committee Committee for Architecture and Historical Preservation State Enterprise or Institute Maintenance Organization
Right to determine use	Planning Committee Property Committee Balance-Sheet Holder
Right to occupy	Workers' Collective

evidence suggests that this process is happening already in Russia.<sup>11</sup> However, the market route to bundling rights might fail altogether if the transaction costs of bundling exceed the gains from conversion, or if holdouts block bundling. The alternative route to bundling is for government to intervene by redefining and reallocating property rights. Local governments could exert more control over their subordinate agencies and transfer rights to or consolidate rights in the equivalent of a “sole owner,” a single public decisionmaker able to act as an owner on behalf of the local government. However, existing rights-holders, including local government agencies and the private actors who have invested in reliance on the current property regime, may cling tenaciously to their rights. At an extreme, transition governments might defend badly designed property rights and then wait for the market to sort out the

problems, or they might intervene radically in the market and undermine investor confidence.<sup>12</sup>

#### MOVING ALONG THE GRADIENT: KIOSKS, APARTMENTS, KOMUNALKAS

Storefronts represent only one point along a gradient of socialist property in transition. Experience at other points along this gradient suggests possible paths into and out of the tragedy of the anticommons. This section first moves outside to examine street kiosks then upstairs to study residential real estate in individual apartments and *komunalkas*.

*Street Kiosks.* Kiosks provided an early solution to the problem of establishing commercial outlets in a country desperately short of retail services. Indeed, the market for kiosks and storefront real estate are linked. The success of kiosks may have reduced pressure to overcome the anticommons in stores. What explains the persistence of the anticommons in stores, in contrast to the resolution of the anticommons on the streets?

During the early years of transition, kiosk merchants were also faced with an anticommons: a property regime in which numerous parties, holding both formal and informal rights, could block street access. However, by the early 1990s, merchants could acquire informal rights on the streets to set up commercial outlets. Kiosk merchants negotiated around the anticommons regime through ex post contracting: they reached corrupt agreements with local government rights-holders and entered into protection arrangements with the mafia.<sup>13</sup> By contrast, storefronts continue to remain relatively empty, despite entrepreneurs' willingness either to follow formal procedures or to bribe city officials and to pay protection money to criminal organizations. By routinizing corruption, kiosk entrepreneurs quickly reduced the transaction costs of assembling quasi-private bundles of rights:

[R]egular payments must be made to local officials and a powerful mafia. . . . "You have to pay bribes to get financing," Karlamov [a kiosk owner] said. "You have to pay bribes to get permission to put your kiosk up on a promising site. And even after things are all set up, you have to pay bribes to make sure they don't close you down. The mafia is the easiest of all to deal with. They don't charge too much, they tell you exactly what they want up front, and when an agreement is made, they live up to it. They don't come back asking for more. . . . The hardest part was finding out who was the right person to bribe," he explained. "At first, we had no idea who could do what, so we began visiting the local prefect's office almost every day. We gave candy and other presents to people we met there, and eventually they directed us to people who could help." (Gallagher 1993:1)

Creation of commercial space through corruption and mafia protection can be reasonably stable over time when procedures become routinized and entrepreneurs come to rely on formal forbearance and informal ex post assembly of anticommons rights into private property rights.

However, the kiosk system does not generate the levels of economic activity that could be achieved by a well-functioning retail sector. Hernando de Soto (1989), a leading theorist on the connection between law and economic development, discusses this issue indirectly. Noting the prevalence of the informal economy in developing countries, he makes two points. First, he argues that the vibrant informal economy should be viewed as an important contribution to the overall economic performance, rather than a drain. Second, and just as importantly, he contends that commentators should not mistake vibrancy for optimality, either along efficiency or distributive dimensions. People are in the informal economy because the formal legal system drives them there. For de Soto, “third world under-development” arises from the combination of badly specified formal property rights and their ex post rearrangement through illegal contracts. The informal economy represents the triumph of ingenuity in the face of bad law. De Soto argues that a better solution would be to create the “good law” that characterizes successful economies, such as property registries and inexpensive enforcement of long-term contracts.

*Individual Apartments.* The creation of private property in apartments lies at the opposite end of the protection and performance gradient from storefronts.<sup>14</sup> New markets in apartments have been remarkably successful across the former socialist world, not only in terms of raw numbers of units sold, but also, more importantly, in the private property relations that have been created (Struyk 1996). Apartments provide a useful counterpoint to storefronts, in part because the physical space is often identical. In a typical Russian apartment building, the ground floor may be commercial, while the matching units directly above are residential. Thus, the difference in performance can be attributed more to the legal regime and cultural milieu in which the object is embedded than to intrinsic physical distinctions in the space.

In socialist legal regimes, the standard property bundle for apartments was divided between private and public actors (Struyk and Kosareva 1994). Local governments or enterprises assigned apartments to individuals in a form that gave strong occupancy rights during a tenant’s lifetime and some rights to pass the apartment to certain family members on death. Various government departments held the balance of rights, but no one could sell or lease the unit at market rates. After 1991, residential privatization laws offered to the sitting tenant, either for free or for a very low price, the ownership and control rights previously held by the state. Combined with preexisting personal property

rights, privatization gave tenants control of a property bundle in apartments recognizable to a Western condominium owner.

One price of achieving these well-functioning bundles is that governments have ignored certain distributive goals. In the apartment privatization process, most people were given apartments with negligible or negative net present economic value because of poor maintenance, high energy costs, or bad locations (World Bank 1995b). The large number on waiting lists, particularly young families living in their parents' homes, simply lost out. By contrast, a small number of well-connected *aparatchiks* (high officials of the old regime) used their previous positions to receive high-value, well-maintained apartments in city centers. Privatization of housing was not distributively just in terms of market values conveyed, but it did discourage *aparatchiks* from blocking reform and it was administratively manageable. Also, from a property rights perspective, housing privatization was a coherent process. Unlike storefronts, in which many parties had some rights, apartments were conveyed in the form of near-standard market legal bundles.

Some Western legal academics tried to persuade governments to make the trade-off differently: namely, to achieve more distributive justice by dividing the windfalls from privatization more equally. For example, Duncan Kennedy, a leading critical legal scholar, proposed dividing rights to equity and capital appreciation among sitting tenants and local governments (Kennedy 1994). These proposals were not well received and were not implemented during the early 1990s when there was great enthusiasm for a *laissez-faire* version of capitalism. Even tenants who were net losers in the privatization process often rejected such proposals because of an apparent consensus on what constitutes an ordinary property bundle in a market economy. Tenants resisted proposals that kept governments involved in their lives and diverged from their understanding of private property (Heller 1994). The apartment example suggests that there may be a trade-off between avoiding anticommons tragedy and achieving distributive goals in the initial creation of property rights.

*Communal Apartments.* *Komunalkas* are a subset of apartments that have engendered a special loathing across the former Soviet Union where they were prevalent.<sup>15</sup> Many *komunalkas* were large pre-Communist apartments, well-situated in downtown apartment buildings. At some points in Soviet history, several dozen people might have shared one *komunalka*, with each family, comprising up to three generations, assigned one room. Kitchen and bathroom facilities were shared. During privatization, tenants received ownership rights in their room and, indirectly, the right to block others from the apartment's most valuable use as a single-family or office space.

This division of rights in the communal apartments helps introduce the

concept of a spatial anticommons, distinct from the legal anticommons discussed so far. In a spatial anticommons, such as a *komunalka*, an owner may have a relatively standard bundle of rights, but too little space for ordinary use. By contrast, in a legal anticommons, such as a storefront, substandard bundles of rights are allocated to competing owners in a normal amount of space.

In the case of *komunalkas*, the apartment *qua* apartment remains empty so long as any room-owner can effectively veto use. Entrepreneurs, often in partnership with one of the existing tenants, quickly discovered that the well-situated *komunalkas* could be converted to single-family use by exchanging the owners' rights to rooms for complete apartments on the city outskirts. Converting the *komunalka* from anticommons to private property can create a huge gain for the existing tenants and the bundler to divide after paying the transaction costs of conversion. Whether the deal takes place is an empirical question that depends on the entrepreneur's ability to keep costs of conversion low and to sell the apartment high. In practice, many *komunalka* owners wanted a place of their own, not just a room with a view.

In this sort of multiparty bargain, each tenant is a monopolist with an incentive to engage in familiar types of strategic behavior, such as holding out for the bundling surplus. Entrepreneurs have often been able to keep down the transfer of the economic rents from conversion and total transaction costs by coercing *komunalka* owners:

The trend is particularly noticeable in the centre of [Moscow], where competition for prestigious addresses among members of Russia's emerging business class and well-heeled foreigners has sent prices soaring. The area has many former mansions that the Bolsheviks converted into barracks-like communal apartments after the 1917 revolution. And for the enterprising developers there is only one obstacle to reconverting those once-elegant buildings to high-quality private housing: the current tenants. (Gray 1994:17)

Rather than walk away from a deal, deviant property bundlers may reveal their reserve price by murdering holdouts. An unintended consequence of creating anticommons property during privatization of communal housing has been the creation of a group of elderly *komunalka* tenants who are particularly vulnerable to predatory bundlers. The brutal effects of overcoming the *komunalka* anticommons may have unnecessarily discredited market reforms generally.

What allowed anticommons property in well-situated *komunalkas* to be overcome while ground-floor stores in the same buildings often remain empty? The different outcomes are explained in part by five factors relating to the transaction costs of bundling and strategic behaviors of owners locked in bilateral monopolies:

1. *Public or private owner.* The transaction costs of negotiating with private owners may be lower than those of negotiating with state and corporate parties.
2. *Number and homogeneity of owners.* There are fewer owners with more homogeneous interests in *komunalkas* than in stores, with the result that transaction costs are lower and intimidation against *komunalka* owners is more effective.
3. *Property boundaries.* Even without condominium-like laws, people generally seem to agree that the living area of each apartment is the core object of value. By contrast, store boundaries are not as transparent. A single bakery, a chain of bakeries, or all local retail stores may constitute the relevant object of property.
4. *Spatial or legal anticommons.* Overcoming a spatial anticommons such as in a privatized *komunalka* is potentially less difficult than overcoming a legal anticommons, in which rights are difficult to exchange credibly.
5. *Starting point in transition.* Tenants in *komunalkas* began the transition to markets holding more of the familiar bundle of property rights than did owners of property such as storefronts. Stores often began empty, as part of the holdings of bankrupt state and local organizations.

For each point along the property gradient, governments may be tempted to create anticommons property, perhaps to respond to pressure by existing stakeholders or to address short-term distributional concerns. Rather than assigning a usable bundle in a scarce resource to a sole owner, governments may assign rights in an object to multiple owners, so that many people can get a piece of each pie. After initial entitlements are set, institutions and interests coalesce around them, with the result that the path to private property may be blocked and scarce resources may be wasted. Bundling property rights to avoid anticommons tragedy is one element that may determine whether countries move up to First World prosperity or spiral down to Third World dependency.

## Applications and Implications

Empty storefronts are not an idiosyncratic artifact of post-socialist transition. Anticommons property appears more often than might at first be expected, in guises ranging from the trivial to the tragic.<sup>16</sup> It may emerge both in transition and in developed market economies whenever governments define new

property rights and fail to terminate old ones. This section sketches four applications to show the range of the anticommons idea (see also Heller and Eisenberg 1998; Heller 1999).

### ***Rapid Enterprise Privatization and Slow Restructuring***

Enterprise reform has been the most discussed, and most puzzling, point in the literature on the transition from socialism. Despite rapid privatization of state-owned enterprises, many of these newly private firms have not yet begun to restructure their operations in a market-oriented direction. The anticommons prism might usefully reflect on this puzzle.<sup>17</sup>

In Russia, for example, the fragmentation of ownership of the socialist firm might help to explain the slow pace of change. Privatization broke up the socialist bundle of corporate governance rights among a heterogeneous set of managers, workers, and local governments (Boycko, Shleifer, and Vishny 1995). These new owners may now hold excessive rights of exclusion, such that each prevents the others from restructuring corporate assets. To gain support for rapid privatization from socialist-era stakeholders, Russia may have transferred socialist ownership at the state level to anticommons ownership at the plant level.

By contrast, China has experienced tremendous economic growth, particularly among “township and village enterprises,” apparently without “clearly defined” property rights (Li 1996). While analysts such as Andrei Shleifer (1994) suggest that clarifying rights will prove essential to continued growth, the anticommons perspective suggests that clarifying property rights may be only part of the story. Political and fiscal decentralization in China may have kept the core bundle of property rights relatively intact at the local level. Even though rights are not “clearly defined,” perhaps a sole decisionmaker can exercise effective control over assets of each “township and village enterprise.” If further research confirms this hypothesis about Chinese enterprise reform, the content of bundles of control rights may be even more important than the clarity of those rights during transition. These Russian and Chinese enterprise examples suggest that transition policy should focus on the particulars of property bundling during political decentralization and enterprise privatization, the paths by which anticommons property is either formed or avoided.

### ***The Quaker Oats Big Inch Land Giveaway***

This application borrows from one of the most successful promotional gimmicks in advertising history to show how market legal systems prevent individuals from creating spatial anticommons property. In a 1955 radio broadcast,

the fictional “Sergeant Preston of the Yukon” promised every child who purchased a box of Quaker Oats cereal a deed for one square inch of land in the Yukon (Greene 1987). The advertising executive who thought up the idea flew to the Yukon and bought about 19 acres on behalf of Quaker Oats. Quaker Oats then transferred the land to a subsidiary that subdivided the land into square-inch parcels, printed up deeds, and packed them in 21 million specially marked boxes of cereal, which flew off the shelves.

The 21 million deeds live on and have generated a lore of their own. One deed owner offered to donate his 3 square inches to create the world’s smallest national park; another declared independence on his. One young boy sent the local title office four toothpicks so they could fence in his inch, neglecting to note that the “language on the deeds said that each owner must acknowledge the right of every other owner to cross his inch at will” (Greene 1987:\$5, at 1). Unfortunately for deed holders, Quaker Oats never registered the subdivision and never paid taxes on the land, which reverted as a whole to the Canadian government in the mid-1960s.

Well-functioning market economies contain a number of mechanisms that encourage owners to create high-value anticommons property and that limit owners’ ability to create a low-value anticommons. As a profit-maximizing firm, Quaker Oats had an incentive to create the most valuable Big Inch anticommons that it could. Thus, the legal regime allowed Quaker Oats to create anticommons property as to some uses of the land, while the land was kept as private property for other purposes. In addition, the requirements that owners incur the costs of registering title and paying property taxes, and the subsequent loss of the land for failure to do so, functioned as powerful mechanisms to return the low-value spatial anticommons to a usable private property form. Private property rules ensure that decisions by private owners to create anticommons property will not paralyze the alienability of scarce resources for too long or diminish their value too drastically.

### ***Post-Earthquake Reconstruction of Kobe, Japan***

Unlike in the Quaker Oats case, the mechanisms to prevent emergence of anticommons property have failed dramatically in Japanese land markets. When these mechanisms fail and governments accidentally create anticommons property, then interests vest and the consequences can last for decades or more. Japan’s residents pay the highest prices for housing in relation to income of any industrialized country in the world, in part because of the “world-class tangle of real-estate laws, a thicket that makes New York’s labyrinth of rent regulation look simple by comparison” (Sapsford 1996:A1). In Japan, the costs of failure to prevent the emergence of anticommons property appeared recently during the rebuilding following the 1994 Kobe earthquake. The \$30 billion that quickly



flowed into the city had mixed results. Highways were rebuilt because the underlying land was held in undivided state ownership. Much of the rest of the city still lies in rubble because “a single angry tenant can block urban renewal. And does” (Sapsford 1996:A1).

Anticommons property has appeared because of mistakes in Japanese land laws enacted after World War II. Under these laws, some land in Kobe has been divided to the point where there are “thousands of parcels the size of a U.S. garage,” and a building “can be based on a plot that is actually dozens of smaller parcels thrown together by developers” (Sapsford 1996:A1). In one block of Kobe, over 300 renters, lessees, landowners, and subletters own often-overlapping claims, and each one must agree before rebuilding can go forward. According to a city official, “[i]t’s like trying to get thousands of little corporate presidents to agree on one plan” (Sapsford 1996:A1). Once anticommons property has been created, it is difficult to find a way out. Japan faces a set of historical and cultural constraints on local government intervention, such as reluctance to use eminent domain power. Instead, several years after the Kobe earthquake, seven out of ten buildings remain damaged or in rubble; rebuilding plans are set, but are blocked by owners. “[T]he only bargaining chips left to the participants in this debate are property rights” (Sapsford 1996:A1). The effect of bad real property law spreads beyond housing costs:

The whole system is a drag on the economy and can even pose trade barriers. Japan’s bad loan crisis will take years to mop up, in part because squatters and deadbeat debtors have such strong rights to stay put. Tokyo’s Narita Airport is still unfinished 18 years after opening, because farmers refuse to give up land. (Sapsford 1996:A1)

### ***Fractionation of Native American Allotted Lands***

The facts behind the Supreme Court decision in *Hodel v. Irving* (481 U.S. 704, 1987) graphically illustrate how government mistakes may create anticommons property in the United States and how difficult it is to rebundle property later. In the 1880s, Congress enacted a series of Land Acts that dismantled many Native American reservations and allotted communal lands to Native American individuals. Partly to protect Native Americans from white settlers, the United States held individual ownership in trust, so the Native Americans could not alienate or partition the parcels. In practice, individuals transferred land interests primarily on death.

As the Court noted in *Hodel*, “The policy of allotment of Indian lands quickly proved disastrous for the Indians. . . . Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time” (481 U.S. at 707). As early as 1928, Congress realized that the program was not working and that “[g]ood, potentially productive,

land was allowed to lie fallow, amidst great poverty, because of the difficulties of managing property held in this manner” (481 U.S. at 707). Reforms finally ended further allotment, but could not solve the problem of the millions of allotted acres. One particularly egregious tract, Tract 1305 of 40 acres, recently produced \$1,080 in annual rents and was valued at \$8,000. The Bureau of Indian Affairs spent \$17,560 annually to find and pay the 439 owners and to manage the property. The Court noted that the fractionation had become “extreme” and “extraordinary” by the time Congress passed the 1983 Indian Land Consolidation Act. Section 207 of this Act tried to consolidate these fractionated parcels by providing for low-value allotment interests to return to the tribe when the allotment owner died.

Once governments create anticommons property, it may be difficult for them to redefine rights without either paying compensation or suffering a blow to their credibility. In the American constitutional context, given current takings jurisprudence, the Court found *Hodel* to be a relatively easy case. The Court held that “the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property (the small undivided interest) to one’s heirs.” (481 U.S. at 716) Because the Court considered the fractionated interest to be ordinary private property, it took away one potential mechanism by which the government could reassemble allotted land into usable form. It is difficult to imagine how Congress or the Native American tribes can overcome the tragedy of the allotment anticommons and ever return these resources to productive use.<sup>18</sup>

## Conclusion

Anticommons property is prone to the tragedy of underuse. Governments must take care to avoid creating anticommons property accidentally when they define new property rights. One path to well-functioning private property is to convey a coherent bundle of rights to a single owner, rather than dispersing rights to exclude among multiple owners. When owners of standard bundles subsequently fragment ownership, market legal systems deploy numerous safeguard mechanisms to ensure that rights can be rebundled and that resources can be put back to use reasonably quickly. When these mechanisms fail, anticommons property can become entrenched, even in developed market economies. Neither markets nor subsequent regulation will reliably convert an anticommons into useful private property, even if rights are “clearly defined” and contracts are subject to the “rule of law.” The experience of anticommons property in transition economies suggests that the content of property bundles, and not just the clarity of rights, matters more than we have realized. We pay a high price when we inadvertently create anticommons property.

## Notes

1. The term “from Marx to Markets” is widely used in describing transition. I have taught a seminar with this name at Michigan and Yale Law Schools.
2. Paralleling the conventional usage, this chapter uses the term “ransition” to refer to the 28 post-socialist societies that have adopted some market-oriented reforms, but which one cannot yet describe as fully formed market economies (World Bank 1996).
3. Frank Michelman appears to be the first to use the term “anticommons,” though the source has been hard to pin down. A thorough search of the literature revealed few other uses (e.g., Ellickson 1993; Dukeminier and Krier 1998).
4. For standard definitions of efficiency, see Posner (1998).
5. Even in a world without transaction costs, people would not necessarily put an anticommons resource to a unique highest-valued use. Because of cognitive biases, there may be multiple efficient uses depending on prior resource use (Ellickson, Rose, and Ackerman 1995).
6. While working for the World Bank in the early 1990s, I was often asked by transition government officials to help identify reform priorities. I responded that property registries were among the highest priorities as they help clarify ownership, secure finance, and enable taxation.
7. The measure of performance is difficult to quantify given the available data. A comparison of Russian assets with similar assets in developed market economies, however, provides a useful proxy for the concept of performance. While this chapter focuses more on efficiency-related measures, comparing distributive outcomes is equally possible.
8. As a caveat, this gradient is just illustrative of anticommons dynamics. Industrial, agricultural, corporate, and intellectual property could teach additional lessons.
9. Several reporters at the *Moscow Times*, including Ellen Barry and Adam Tanner, traced the rise and fall of Moscow kiosks in the transition years. These articles are available in Lexis.
10. One newspaper article reports: “All this buying and selling takes place on the street because the title to most stores is unclear or because stores are occupied by moribund state enterprises. The sidewalks were free and empty, so the new entrepreneurs moved in” (Lally 1992).
11. A stroll down Tverskaya, one of Moscow’s central shopping streets, today shows relatively few empty storefronts compared with just a few years ago.
12. Michelman (1967) suggests a calculus of settlement and demoralization costs for use in deciding whether a government should compensate for a regulatory change.

13. Newspaper accounts of kiosk enterprises often provide colorful confirmation of the anticommmons arguments in this chapter. For example, Shapiro notes that:

[Andrei, a kiosk owner] has had to bribe tax inspectors, pay protection money to mafia toughs and fork over “gifts” to officials whose approval is needed for a business license. . . . To start his business Andrei needed to get a host of city officials—firefighters, electricians, architects—to sign his permit request. . . . When a date was set for delivery of the kiosk, Andrei and his partner took care of a key business matter: making peace with the “protection” racketeers who have carved Moscow up into fiefdoms and who punish those who resist. (1993:A15)

14. The empirical material in this section is drawn primarily from my work in Russia during the early 1990s where I put together the World Bank Russia Housing Project (World Bank 1995a).
15. Loathing of communal apartments is a common motif in Russian fiction (e.g., Bulgakov trans. 1967; Zoschenko trans. 1963). Zoschenko’s *Nervous People* begins:

Not long ago, a fight took place in our communal apartment. Not just a fight, but an out-and-out battle. . . . The main reason is—folks are very nervous. They get upset over mere trifles. They get all hot and bothered. And because of that they fight crudely, as if they were in a fog. (1963:124)

16. In a recent article, Rebecca Eisenberg and I extend the theory of anticommmons property into biomedical research. We identify an unintended consequence of the trend in biomedical patent policy to grant more rights to premarket research. Paradoxically, more fragmented premarket rights may stifle discovery of the commercial innovations that actually save lives (Heller and Eisenberg 1998).
17. Merritt Fox and I (n.d.) are exploring this phenomenon in an ongoing research project on “Corporate Governance Lessons from Transition Economy Fiascos” sponsored by the William Davidson Institute.
18. In 1984, while *Hodel* was pending, Congress amended §207. In *Babbitt v. Youpee*, 117 S. Ct. 727 (1997), the court struck down this attempt to resolve the anticommmons tragedy. As an aside, in a conversation with the author, Don Herzog suggested that nonuse of allotted lands need not be viewed as tragic. The federal government may have inadvertently created a legal regime that preserves Native American conceptions of trusteeship over

nature. This alternative view highlights the idea that the possibility of “underuse” itself assumes the values of a preexisting market economy. A more detailed analysis of *Hodel* appears in Heller (1999).

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