

THE CONNECTION BETWEEN A PROPERTY-BASED LEGAL SYSTEM AND NATIONAL PROSPERITY: EXAMPLE FROM A DIVIDED GERMANY REUNIFIED

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## I. INTRODUCTION

Fifteen years have passed since the reunification of Germany, or the incorporation of the former German Democratic Republic (East Germany or GDR) into the Federal Republic of Germany (West Germany or FRG),<sup>1</sup> a sufficient period to permit appropriate evaluation of the economic impact of over forty years of separation between the two parts of a previously unified nation. The significance of evaluating this period of separation and the ensuing years of reunification transcends its meaning to the German people because of the growing conviction among the world's nationbuilders that a certain legal regime provides the maximum impetus for increasing the wealth of nations.<sup>2</sup> Neither the private market nor capitalism more fundamentally explains the conditions for economic growth, which are more closely related to that which frames and enables both phenomena in prosperous nations everywhere—the broad and adequately enforced legal institution of private property.<sup>3</sup> Such an institution has been in place in the Federal Republic of Germany, both during division and since reunification, whereas East Germany lacked this institution.

Before World War II, all Germans shared the same economy, educational opportunities, and cultural identity.<sup>4</sup> Consequently, the division of Germany into two nations and its subsequent reunification furnish an excellent opportunity to measure whether the socialist elimination of private property in the production and distribution of resources or a broader and more liberal private property regime makes for an economically wealthier society. This

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<sup>1</sup> The reunification occurred in 1990. Since that time, the reunified nation has been called the Federal Republic of Germany (FRG).

<sup>2</sup> See generally O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L L. 673 (2003).

<sup>3</sup> Although the private market and capitalism are important to wealth formation, the functioning of these institutions is premised on an adequate private property system. See, e.g., Edgar L. Feige, *Underground Activity and Institutional Change: Productive, Protective, and Predatory Behavior in Transition Economies*, in TRANSFORMING POST-COMMUNIST POLITICAL ECONOMIES 21, 22 (Joan M. Nelson et al., eds., 1997) ("Every market presupposes the existence of property rights to be traded."). "Capitalism" refers to a system in which there is a private property in the organized production and exchange of resources, and as such, it is a subset of the more explanatory term "property."

<sup>4</sup> See, e.g., Joachim Ragnitz, *Lagging Productivity in the East German Economy: Obstacles to Fast Convergence*, in COHESIVE GROWTH IN THE ENLARGING EUROLAND 94, 94 (Michael Dauderstädt & Lothar Witte eds., 2001) (stating that prior to World War II, "the East German region was highly industrialized and productivity reached more than 90 per cent of the level achieved in the West German industrial sector").

Article asserts that during the separation, virtually the only significant difference affecting the economies of West and East Germany concerned the broadly defined institution of property, which applied privately to production in West Germany and publicly to production in East Germany, and that this difference caused a vast disparity in per capita wealth between the two nations. In other words, particular economic policies did not cause the wealth disparity between the two nations; rather, it was caused by the difference in the nations' legal foundations, specifically by the failure in East Germany to permit a private property in the production of the goods and services that are the measure of wealth. The discussion of property that follows does not and should not be taken to maintain that a private property system is somehow inherently more morally desirable than a public property system (or any other system). This Article only argues that a private property system produces more of whatever resources are adequately protected by a secure private property right. In other words, the Article does not attempt to justify any particular applications of property right, but merely explains the legal conditions that are required, insofar as is known, for national wealth formation.

Legal scholars often regard the term "property" as too ambiguous for meaningful usage,<sup>5</sup> a view sufficiently pervasive to necessitate advancing a singular understanding of property that is both historically and analytically robust. Nations wishing to develop their economies need to grasp the essential legal context that has framed economic success in prosperous nations rather than adopting specific common law or civil law rules applying property to particular resources. For this reason, this Article defines "property" as an exclusionary legal relationship among persons (and between persons and the state) with regard to limited resources<sup>6</sup> and "private property" as the property relationship as applied to individuals or groups in their private capacities rather than to the state or to publicly common groups.<sup>7</sup> Further, the limited resources that are the objects to which property applies have a very broad, almost unlimited range, and historically, the objects of property have included even aspects of one's person, including how one expresses physical and mental faculties in productive activities.<sup>8</sup>

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<sup>5</sup> See *infra* notes 9-12 and accompanying text.

<sup>6</sup> See *infra* notes 21-25 and accompanying text.

<sup>7</sup> See *infra* pp. 580-81.

<sup>8</sup> John Locke, James Madison, and John Stuart Mill all believed that people have a property interest in themselves. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 27 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) (asserting that one is "proprietor of his own person"); 6 *THE WRITINGS OF JAMES MADISON* 101 (Gaillard Hunt ed., 1906) (observing that one

Part II of this Article develops the essential understanding of private property, focusing on property as an exclusionary right and establishing this view through both history and analysis. Part III examines the increasing evidence associating adequate private property systems with prosperity, and it also briefly considers what factors do *not* significantly account for maximum wealth creation. Part IV looks at the property systems underlying West and East Germany. Part V considers economic data from West and East Germany during separation and from the Federal Republic of Germany following reunification, concluding that in greatest measure, the property systems of West and East Germany accounted for the economic strength of the former and the relative economic weakness of the latter, even as following reunification, the property system of the Federal Republic of Germany has lifted the territories of the former East Germany to near economic parity with the rest of Germany.

## II. THE MEANING OF PROPERTY

An appreciation of the foundational role of property in the economic development of modern economies requires a definition of "property"; however, many legal scholars consider this term an elusive "chimera of an entity,"<sup>9</sup> the meaning of which has disintegrated<sup>10</sup> under the complexities of the modern marketplace, leaving a multiplicity of property forms almost as infinite in variety as a Sanskrit verb.<sup>11</sup> For some of these commentators, property has come to mean little more than relationships of power between the rich and the

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has a "property in the free use of his faculties"); JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 371 (Ronald Winch ed., Penguin Classics 1988) (1848) (stating that property encompasses "the right of each to his (or her) own faculties"). Although one may be tempted to refer to the right that people have in themselves as "liberty," rather than "property," *see, e.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting) (stating that "liberty [liberty to work] is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment"), both concepts—liberty and property—have an exclusionary basis and can be conceived as two sides of the same coin; however, such a reduction is not necessary for the thesis of this Article.

<sup>9</sup> J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 1 (1997) (explaining the views of various commentators).

<sup>10</sup> *See generally* Thomas C. Grey, *The Discentegration of Property*, in *PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., Nomos No. 22, 1980).

<sup>11</sup> *See* Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938).

poor, the “haves” and the “have nots.”<sup>12</sup> To the contrary, this Article asserts not only that property is a keystone for understanding how the people of nations become economically prosperous but also that the term has a relatively straightforward essence.

The *Oxford English Dictionary* (*OED*) gives the first definition of property as the “condition of being owned or belonging to some person or persons,”<sup>13</sup> i.e., ownership, and the second definition as “that which one owns; a thing or things belonging to or owned by some person or persons.”<sup>14</sup> According to the *OED*, this latter definition, which also includes the secondary variant meaning of “a piece of land owned,”<sup>15</sup> did not come into widespread usage until the seventeenth century.<sup>16</sup> It is in large measure this definition which makes it difficult to grasp what it is about a legal system that maximizes conditions for wealth production. Once it is accepted that property means ownership rather than objects that one owns, much that adds perplexity to the subject vanishes. When resources themselves are thought of as property, it becomes possible to assert that the law grants the rich more “property” than the poor, leading to debates about the justice and morality of such inequality. When property is understood as a legal right, however, then all persons enjoy the same right, even though some accumulate—primarily through their productive efforts—more resources than others. Additionally, if objects themselves are property, and people’s attitudes vary regarding which objects constitute property, then property has no fixed meaning. This Article maintains that the most fruitful approach is to regard the meaning of “property,” a legal right, as constant and fixed, although acknowledging that the objects or resources to which property applies vary somewhat over time. This approach allows nations to appreciate that how they apply a fixed legal right to resources determines whether or not conditions are being set for maximum production of those resources.

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<sup>12</sup> E.g., JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 260 (1990) (maintaining that property “hides a structure of power and insulates it from democratic debate”); Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, in *PROPERTY*, *supra* note 10, at 3, 5 (asserting that property “often seems . . . a form of power that allows us to exploit other people”).

<sup>13</sup> THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2327 (1971).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

The concept of property arises because resources—anything that people may need or want—are limited at any point in time,<sup>17</sup> making it advantageous to have a system both for determining the allocation of limited resources and for encouraging the new production of resources. The limited resources themselves, however, are not most meaningfully conceived as property; “property” is the law of ownership that identifies who gets what and that gives incentive to new resource production. Over the past century, the resources that people need and want have become increasingly conceptual in nature.<sup>18</sup> For example, land, perhaps the most basic resource, historically supported labor-intensive activities of simple farming, manufacturing, and living, but now is used increasingly for the information-based, resource-generating activities of modern economics. Relatively little land goes into producing the silicon chips that enable computers, new drugs that cure disease, hardy hybrid seeds, or financial products of all kinds. What produces these new resources is predominantly mental rather than physical labor.<sup>19</sup> Nevertheless, while the types of resources, both physical and information-based, have proliferated in the last several centuries, the nature of property—the right of ownership—has not changed in its essential meaning but only in its application, usually at the cusp of new resource development. Although the types of tangible and intangible resources used by nations have proliferated greatly over the last few centuries, the operational concept of property under which the resources are allocated among persons has remained arguably constant.

This constant essence of property is still difficult to grasp, however, if ownership is specified in terms of possession, use, and disposition—terms often used to describe a “bundle of rights” that owners have in their resources.<sup>20</sup> The “bundle of rights” language causes confusion because if

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<sup>17</sup> It is important to emphasize that resources are limited only at a point in time. Over time, the available resources that people need and want are almost unlimited, and thus generation of the greatest wealth comes primarily from nations with an adequate framework for promoting production of new resources rather than from nations aggregating to themselves a disproportionate share of truly limited resources.

<sup>18</sup> Federal Reserve Chairman Alan Greenspan, Remarks at the 2003 Financial Markets Conference of the Federal Reserve Bank of Atlanta (Apr. 4, 2003), <http://www.federalreserve.gov/BoardDocs/speeches/2003/20030404/default.htm> (“In recent decades . . . the fraction of the total output of our economy that is essentially conceptual rather than physical has been rising.”).

<sup>19</sup> For example, U.S. economic growth does not depend significantly on raw materials development. Alan Greenspan observed: “Over the past half century, the increase in the value of raw materials has accounted for only a [small] fraction of the overall growth of U.S. gross domestic product.” *Id.*

<sup>20</sup> The “bundle of rights” (or, alternatively, bundle of “sticks,” in which the sticks are

possession, use, and disposition rights are all required for property ownership to exist, then when one of the rights is missing, what is left? If possessors cannot dispose themselves of bald eagle feathers or prescription drugs, do they have no property right in these resources? Should the law characterize an easement over land, which involves no possession of the land at all, as property? When the state limits uses of land, is the state taking property? If lessees have legal possession of apartments, do they own them? Do bailments convey a property interest? What is the nature of the holding in a trust?

Most of these property conundrums are artifacts of legal language and create perplexity primarily when property is thought of as an object or as various rights. If property is viewed not as an object or a bundle of rights but as a single negative right—the right of legal exclusion<sup>21</sup>—the conundrums are largely, if not totally, resolved, and the property system as a mechanism for ordering and generating resources becomes much clearer. When property is regarded as the legal right of exclusion over resources, then owners can control the resources, use them, or dispose of them. Generally speaking, owners can do anything with their resources that does not trespass on or infringe upon the resources of other owners, including the state. When people can legally exclude others from some resource, then possession, use, and disposition of that resource become resources themselves, things that other people might want or need, which owners can legally prevent others from interfering with, infringing upon, or trespassing on, and which become objects to which the exclusionary right applies rather than being property themselves.<sup>22</sup> The legal

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property “rights”) analysis of property possibly dates to 1888. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 455 n.40 (1997) (citing the usage in JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN* 43 (1888)). The U.S. Supreme Court first used “bundle of rights” in reference to property in 1937. *Steward Machine Co. v. Davies*, 301 U.S. 548, 581 (1937) (“Indeed, ownership itself . . . is only a bundle of rights and privileges invested with a single name.”).

<sup>21</sup> As Justice Oliver Wendell Holmes asserted, “Property depends upon exclusion by law from interference.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”). For an extensive examination of the exclusion thesis, see Thomas W. Merrill, *Essay, Property and the Right to Exclude*, 77 *NEB. L. REV.* 730 (1998); Reed, *supra* note 2, at 684-90; cf. PENNER, *supra* note 9, at 72 (maintaining that the “exclusion thesis is a statement of the driving analysis of property in legal systems”). *Contra* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 *ARIZ. L. REV.* 371, 396 (2003) (arguing that exclusion is merely “the formal means by which Anglo-American legal rules identify and protect the substantive core of rights [the rights of acquisition, use, and disposal] that constitute property”).

<sup>22</sup> The exclusionary boundaries of property apply not only to the physical contours of objects

essence of property systems is the right of exclusion. To the extent and only to the extent that people can exclude others from something do they have property in it.<sup>23</sup> Therefore, referring to property as a bundle of rights when the single right of exclusion encompasses the entire bundle is unnecessary and needlessly confusing,<sup>24</sup> especially when explaining the concept of property to those who do not grasp the salutary economic effect that a system of exclusionary right can have on a developing economy.

That the right to exclude others constitutes the essence of property has deep roots both historically and analytically. Property has always concerned drawing exclusionary boundaries around resources and having the legal expectation that the state will protect owners from trespass, theft, and robbery.<sup>25</sup> Importantly, however, the concept of property as premised on legal exclusion does not explain precisely which resources are the object of the exclusionary right. Property systems in prosperous nations usually allow people an exclusionary right over *whatever* they can acquire—including the increase from production and sale—without trespassing on the equal property

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but also to various actions that an owner can take. Professor Thomas W. Merrill recognizes, “[I]f one starts with the right to exclude, it is possible to derive most of the attributes [such as possession, use, and disposition] commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusive right.” Merrill, *supra* note 21, at 740; *cf.* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 19 (1977) (“The right to possess . . . may be understood . . . simply as the right to exclude others from the use or other benefits of the thing.”).

<sup>23</sup> Merrill, *supra* note 21, at 730 (“Give someone the right to exclude others from valued resources . . . and you give them property. Deny someone the exclusion right and they do not have property.”).

<sup>24</sup> The purpose for defining “property” as the right of exclusion is not to convince common law scholars that this definition explains every vagary of centuries-old legal language. This Article merely asserts that exclusionary right is the identifiable essence of property which elucidates what it is about legal systems that provides the maximum framework for generating the greatest wealth of nations.

<sup>25</sup> Boundary trespasses to all resources “proper” to one or some persons but not every person constitute the central civil wrong in Western legal systems, as illustrated in Frederic W. Maitland’s observation that trespass is the “fertile mother of actions.” FREDERIC W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 48 (A.H. Chaytor & W.J. Whittaker eds., Univ. Press 1965) (1909). As for theft and robbery, the very earliest compilations of law, such as the Code of Hammurabi and the Biblical Ten Commandments, protect owners from these central criminal wrongs. *See, e.g.*, 2 THE BABYLONIAN LAWS 17, 21 (G.R. Driver & John C. Miles eds. & trans., 1955); Vernon L. Smith, Speech at the Nobel Banquet (Dec. 10, 2002), <http://nobelprize.org/economics/laureates/2002/smith-speech.html> (asserting that “[t]he ancient Judeo Commandments: Thou shalt not steal or covet the possessions of thy neighbor . . . provide the property right foundations for markets”).



right of others, including acquisition through first possession, exchange, accession, confusion, and gift. In light of the vast numbers of actual and potential resourceful objects, the precise contour of property boundaries in resources is virtually always a matter of some dispute in society, but the property system works because most people know most of the time what constitutes a trespass against what others own and thus refrain from trespassing. Law enforcement authorities and courts exist to protect property boundaries, to compensate owners for occasional injurious infringements (generally to the economic value of a resource), and to resolve issues of uncertain boundaries, often with regard to the uses that owners make of their resources.

All societies recognize some applications of private property to resources. For instance, the Constitution of the former Soviet Union guaranteed the private property right of citizens as applied to personal items,<sup>26</sup> and this right was enforced by Soviet anti-theft laws. What the Soviet Union—and socialism generally—prohibited was private property in the use of resources for production and exchange. The Soviet state held a public property in the resources of production and exchange, meaning that the state had an exclusive monopoly over organized manufacturing. Even very primitive societies with extensive forced sharing of resources usually allow some private property; for example, they permit hunters an exclusive right to their bows.<sup>27</sup>

A comprehensive system based on private exclusionary right is absent, however, in much of the world. In many of the world's poorer nations, endemic corruption at all levels of the state renders daunting any effective systemic change based on the equal exclusionary right of all under the rule of law. In addition to the corruption, these nations often erect substantial legal barriers against the use of resources productively, for example, by imposing prohibitive business licensing requirements,<sup>28</sup> thus effectively denying people

<sup>26</sup> PETER STEIN & JOHN SHAND, *LEGAL VALUES IN WESTERN SOCIETY* 216 (1974) (quoting the Soviet Constitution of 1936: “[T]he personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law”). The East German Constitution likewise guaranteed a limited private property in resources. See *infra* notes 93-103 and accompanying text.

<sup>27</sup> See, e.g., James Woodburn, *Sharing Is Not a Form of Exchange: An Analysis of Property-Sharing in Immediate Return Hunter-Gatherer Societies*, in *PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION* 48, 53 (C.M. Hann ed., 1998).

<sup>28</sup> See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM SUCCEEDS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (examining the economically

a property in the productive use of their resources. Poor nations also tend to lack adequate law enforcement for protecting owners' resources and fair and impartial mechanisms such as courts for resolving boundary disputes and awarding compensation for various trespasses.<sup>29</sup> Path dependence can make it easy or difficult for nations to implement property systems adequate to the task of alleviating poverty by giving incentive to the maximum generation of wealth, but whether easy or not, the creation of stable exclusionary right systems are arguably necessary to sustain conditions conducive to modern productive economies, as the following section illustrates.

### III. EVIDENCE OF PROPERTY'S PRIMARY CONTRIBUTION TO WEALTH CREATION

Several hundred years ago the nations of the world were almost all uniformly impoverished.<sup>30</sup> Larger nations with superior military force may have conquered smaller nations and appropriated their easily moveable resources, but the wealth advantages thus provided did not substantially raise general living standards in the larger countries, certainly not for long. For instance, in many ways, the material living standards of the average European colonist arriving in the New World were no higher than those of the Native Americans whom they conquered.<sup>31</sup>

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deleterious effect of the state imposing substantial licensing roadblocks to the use of resources for business purposes in a private property context). Perhaps more than anyone else, de Soto has helped bring public attention to the adequate institution of property as the primary institution supporting maximum economic development in poor nations.

<sup>29</sup> See, e.g., Christopher Clague et al., *Institutions and Economic Performance: Property Rights and Contract Performance*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT 67, 80 (Christopher Clague ed., 1997) (asserting that lack of adequate property and contract enforcement "are an important part of the explanation of why some countries prosper while others do not").

<sup>30</sup> See, e.g., Douglas C. North, *Centennial Lecture: Why Some Countries Are Rich and Some Are Poor*, 77 CHI.-KENT L. REV. 319, 320 (2001) (stating that "[f]ive or six hundred years ago, everyone was poor by present standards, but the difference between countries was much smaller").

<sup>31</sup> For evidence that the New World (Western Hemisphere) was more populated and arguably even richer than Europe, see generally JAMES WILSON, *THE EARTH SHALL WEEP: A HISTORY OF NATIVE AMERICA* (1998). Consider as specific evidence of European living standards that France, one of Europe's wealthier nations, suffered forty-seven "general famines" from 1400 to 1700. I FERNAND BRAUDEL, *THE STRUCTURES OF EVERYDAY LIFE: CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY* 74 (1981).

Today, however, a significant fraction of the world's nations enjoy many times the per capita incomes of most other countries, a phenomenon related to the emergence in those prosperous nations of property systems that encourage rather than suppress private activities that produce new resources which people want and need. In the studies here summarized, the term "property" is not precisely defined, but the concept of property should invariably be taken to refer to an exclusionary right such that the owners' boundaries extend only to resources—including resources of possession, use, and disposition—from which they can legally exclude others. To conclude otherwise is largely to conflate the right of ownership with the resources which are owned, an approach that has little explanatory power for helping nations which lack adequate private exclusionary systems to understand what it is about prosperous economies that sets the strongest foundation for new resource production.

A 2004 study measuring the economic impact of property protection finds that from 1980 to 2000 for the approximately 100 countries for which statistics were available, the top twenty-four countries with the highest protection of property averaged \$25,716 per capita whereas the twenty-one countries with the lowest such protection averaged \$3094 per capita.<sup>32</sup> In considering this evidence, notice two further points. First, an additional 100 or so countries for which statistics were not available likely furnished their citizens an even weaker property right than those averaging \$3094 of per capita income. It has been estimated that "[h]alf the world's people still live on less than \$2 a day,"<sup>33</sup> or under \$800 per capita annually.

Second, note that the authors of the 2004 study specifically attributed higher per capita incomes not only to "protection of property rights" but also to "unbiased enforcement of contracts, independence of the judiciary, and the rule of law."<sup>34</sup> Because this Article considers (1) the enforcement of how owners exchange resources (contract), (2) the separation of institutions that judge property infringements and determine property boundaries (independent judiciary) from more political branches of government, and (3) a general and equal legal opportunity (rule of law) to acquire property-protected resources simply to be features of an adequate property system, the Article reasonably

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<sup>32</sup> JAMES GWARTNEY & ROBERT LAWSON, *ECONOMIC FREEDOM OF THE WORLD: 2004 ANNUAL REPORT* 36 (2004), <http://www.freetheworld.com/2004/efw2004complete.pdf>.

<sup>33</sup> President George W. Bush, Remarks at the Inter-American Development Bank (Mar. 14, 2002), in 38 WKLY. COMPILATION OF PRES. DOCS. 419, 420, available at <http://www.gpoaccess.gov/wcomp.v38no11.html>.

<sup>34</sup> GWARTNEY & LAWSON, *supra* note 32, at 36.

attributes all of these multiple features to that single system. Indeed, a 2002 study recognized that "economic freedom," which is what the authors mean by the presence of these multiple features, is equivalent to "property rights protection, broadly conceived."<sup>35</sup>

Another study found that between 1985 and 1995, in those nations where the property right strengthened most, the annual gross national product (GNP) grew at an annual rate of 2.9%, but in those nations where the property right weakened most, GNP averaged a 1.9% annual decline.<sup>36</sup> If a property system applied to private productive activities outperforms a system that does not adequately protect such production by only 2% annually, in 34.5 years the former system has doubled the production of the latter and in a little over 200 years has a sixty-four-fold greater production. Most of the world's prosperous nations have framed their economies with strong property systems for between 150 to 300 years, powerfully suggesting why these nations have far wealthier economies than poorer countries. A 1988 analysis of all studies then extant determined that stronger, property-based economies grew at three times the annual rate of weaker such economies.<sup>37</sup>

Although some critics principally associate the effects of a private property system with protection of the resources of the rich,<sup>38</sup> the most salient economic and social result of a private property system that protects land ownership and the production and exchange of resources may be on the totality of resources enjoyed by the poor.<sup>39</sup> The income of the poorest 10% of the population in nations with the strongest private property protection is "much greater" than it is in nations with the weakest recognition and enforcement of ownership.<sup>40</sup>

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<sup>35</sup> GERALD P. O'DRISCOLL, JR. ET AL., 2002 INDEX OF ECONOMIC FREEDOM 37 (2002).

<sup>36</sup> JAMES GWARTNEY & ROBERT LAWSON, ECONOMIC FREEDOM OF THE WORLD: 1977 ANNUAL REPORT 34 (1997).

<sup>37</sup> Gerald W. Sully, *The Institutional Framework and Economic Development*, 96 J. POL. ECON. 952, 952 (1988).

<sup>38</sup> Clague et al., *supra* note 29, at 80 (asserting that "[t]here is a widespread perception that secure property rights and effective contract enforcement benefit primarily the rich").

<sup>39</sup> See, e.g., TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 202 (1998) (maintaining that if property laws are applied generally and equally "they will work above all to the advantage of the poor"); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 210 (1997) (stating that "property rights create wealth" and that "[t]ime and again it has been shown that economic growth can do more than welfare and employment programs to benefit the disadvantaged"). That the adequate legal institution of private property will unleash economic growth for the poor is the basis for the approach taken in DE SOTO, *supra* note 28.

<sup>40</sup> Clague et al., *supra* note 29, at 83-84.

A billion people in the world—almost all of them in weak private property nations—survive on a dollar a day or less, \$365 annually,<sup>41</sup> when the official poverty level for an individual in the United States—a strong private property nation—is over \$9000 a year,<sup>42</sup> more than twenty-five times as much, an enormously significant economic difference even allowing for variations between buying power in the United States and other countries due to costs of living. Perhaps this substantial difference in relative poverty levels is best summed by the statement attributed to an Indian youth: “‘I am going to move to America,’ he vowed. ‘I want to live in a country where the poor people are fat.’”<sup>43</sup>

The association between a certain kind of property system and economic prosperity, including relative prosperity for the poor in such a system, might be merely correlational, not causative, yet analyses of other suggested causes for the dramatic differences in economic well-being between rich and poor nations have been largely and convincingly discounted. Greater natural resources, superior education and technology, ideal population densities, a history of colonial abuses, and trade aggrandizement do not appear to be substantially responsible for the greater wealth of some nations as contrasted with others.<sup>44</sup> Nor is the laissez-faire private market alone or coupled with financial sector development and high rates of investment in equipment and machinery adequate to establish maximum conditions for sustained national wealth generation.<sup>45</sup> Following the collapse of the former Soviet Union and

<sup>41</sup> Gregg Easterbrook, *Safe Deposit: The Case for Foreign Aid*, NEW REPUBLIC, July 29, 2002 (recognizing that 1.2 billion people in the world live on a dollar or less per day).

<sup>42</sup> Lynette Clemetson, *More Americans in Poverty in 2002, Census Study Says*, N.Y. TIMES, Sept. 26, 2003 (citing the U.S. Census standard for measuring individual poverty in the United States).

<sup>43</sup> DINESH D’SOUZA, THE VIRTUE OF PROSPERITY 75 (2000).

<sup>44</sup> See generally TIMOTHY J. YEAGER, INSTITUTIONS, TRANSITION ECONOMIES, AND ECONOMIC DEVELOPMENT 16-17 (1999) (explaining why internal economies rather than the trade aggrandizement asserted by “dependency theory” causes countries to become wealthy or to remain poor); Clague et al., *supra* note 29, at 81-83 (giving examples of why education is not a key to understanding national economic development); Transcript of Federal Reserve Chairman Alan Greenspan’s Answer to Senate Finance Committee Member Charles Schumer, THE MAIN WIRE, Feb. 12, 2004 (stating that natural resources are a “very minor” cause of national economic prosperity); Reed, *supra* note 2, at 676-83; Mancur Olson, Jr., *Distinguished Lecture on Economics in Government*, 10 J. ECON. PERSP. 3 (1996).

<sup>45</sup> In the modern prosperous nation, a successful private market, financial institutions like banking and securities exchanges, and the potential for substantial equipment investment become possible only after an adequate property-based legal system is in place.

the subsequent creation in Russia of a private market unsupported by an adequate property system, the economy declined 41% in the next seven years.<sup>46</sup>

Path dependence—the social, political, and legal inertia engendered by cultural beliefs and habits—certainly affects national economic outcomes,<sup>47</sup> but in relation to the potential for economic prosperity, path dependence simply indicates that specific cultural paths raise or lower the costs of enforcing a property-based legal system, rather than suggesting that some alternative system might outperform an adequate system of exclusionary right. When cultural beliefs, for example, support obedience to law and hard work, as they did in Japan at the end of World War II following General MacArthur's institution of a modern property right in land,<sup>48</sup> a property-based legal framework for production will likely energize a moribund economy more effectively and at less cost than when systemic political and legal corruption has set a national population on a path that will make it difficult and costly to implement and enforce a property system. Deep-seated religious and racial conflicts can also doubtlessly erect obstacles to economic growth,<sup>49</sup> even in private property-based, well-enforced legal systems; however, it is the legal property system protecting private resources rather than any particular set of cultural (including religious) beliefs that seems to be required for catalyzing the greatest economic growth.<sup>50</sup> Nations desiring to develop their economies should understand that they need to apply a stable right of private exclusion to whatever broad spectrum of actual or potential resources they want to increase

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<sup>46</sup> DE SOTO, *supra* note 28, at 215.

<sup>47</sup> North, *supra* note 30, at 329-31. See generally CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

<sup>48</sup> Peruvian economist Hernando de Soto has referred to General MacArthur's property-titling program in post-war Japan, which ended the largely feudal land system and unleashed Japanese economic growth, as "magnificent." Liam Halligan & Phillip Carter, *Business Focus*, SUNDAY TELEGRAPH (London), June 6, 2004.

<sup>49</sup> See generally AMY CHUA, *WORLD ON FIRE* (2003).

<sup>50</sup> Recent studies have associated the likelihood of national economic growth with certain religious beliefs. See generally Robert J. Barro & Rachel M. McCleary, *Religion and Economic Growth Across Countries*, 68 AM. SOCIO. REV. 760 (2003); Luigi Guiso et al., *People's Opium? Religion and Economic Attitudes*, 50 J. MONETARY ECONOMICS 225 (2003). Certainly, the type of path dependence associated with religious attitudes supporting cooperation with others, obedience to law, thriftiness, and respect for authority contribute to lower transaction costs in implementing enforcement of a property-based legal system; however, it is the adequate, secular exclusionary right, rather than any particular religion, that generates the greatest potential for economic growth. For example, predominately Christian Mexico is relatively poor economically whereas the predominately Christian United States is relatively wealthy economically.

and recognize that path dependence does not obviate the necessity for achieving this.

Why a system of private exclusionary right produces more than a system, for instance, under which people are expected to produce according to their abilities and share according to community needs may be connected to something quite deep in human nature concerning human mating practices and the inordinately long developmental period of human children that requires substantial contributions of parental resources.<sup>51</sup> Whatever the reason that seems to make a private exclusionary right to acquire, hold, and develop new resources more effective in creating wealth than other known methods, it is a prime tenet of economics that people act consistently in their self-interest,<sup>52</sup> and it does not require a big leap to grasp that a system of exclusionary right gives incentive to productive effort by ensuring that self-interested producers can control what they produce. When it is further understood that economies are not lifeboats requiring a fair method for dividing up ever dwindling supplies of resources but open-ended resource cornucopias dependent for producing new wealth primarily on abundant inputs of willing human efforts, it becomes more evident why it is desirable for nations concerned with raising per capita incomes to give maximum incentive to those efforts through the exclusionary right. Individuals or individual groups that produce more than they can consume must trade in order to further benefit themselves, but in trading under conditions of competition, they will unavoidably benefit the common economic good as measured in terms of a greater per capita quantity and/or quality of resources that are available at overall lower prices. The private property system that gives maximum incentive to production brings additional economic benefit not only to those producing new resources but to society overall.

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<sup>51</sup> For an extended discussion of this view of evolutionary psychology, see Reed, *supra* note 2, at 701-06. The thesis that the economic success of an exclusionary right system is tied to evolutionarily manifested human behavior is for good reason highly controversial. It is nonetheless consistent with all of the evidence that humans will actively produce more across the broad spectrum of modern economies when they privately control the resources produced. Of course, cooperation, compassion, and sharing should be encouraged in society, but these admirable human behaviors do not seem to be enough to produce wealthy nations without the addition of a well-enforced institution of exclusionary right.

<sup>52</sup> *E.g.*, North, *supra* note 30, at 324 (stating that “[i]n economies we assume everyone is rational. By rational, in the pure sense, we mean that people know what is in their self-interest and act accordingly.”).

General studies establishing the economic advantages of a legal system premised on a broadly applied and enforced exclusionary right in productive resources are important but also significant are specific national accounts of the link between property and prosperity. No better national illustration of this link exists or is likely to exist than in the case of Germany, a nation that was economically devastated at the end of World War II, divided into two countries by the victorious Allies, then reunited after forty years. In the case of West and East Germany, the excellence of the illustration lies in the fact that prior to their division, the peoples of Germany were of common language, culture, law, education, and economic situation, including access to material resources, agriculture, and health services. After the division, virtually the only significant change that occurred lay in the legal (and related political) nature of the respective property-based systems that founded the economies of West and East Germany. Now, some fifteen years after the reunification of Germany, the economic effects of the division and reunification in terms of applying property to productive resources can be examined.

The following sections discuss the property systems in West and East Germany and focus on the economic impact on the people of the former East Germany of incorporation into the Federal Republic of Germany, under a legal system that strongly applies and enforces property rights in productive resources. Throughout the discussion, note that the term "private property" refers to the legal right to exclude others, including in most instances the state itself, from a wide array of both tangible and intangible limited resources, not the least of which are the resourceful actions that owners take in relation to their other resources. For the purposes of the subsequent discussion, property is a right, not the object of the right, and only to the precise extent that owners have a right to exclude others from a given object do they have a property in it.

#### IV. THE PROPERTY SYSTEMS OF WEST GERMANY AND EAST GERMANY

Prior to the political division of Germany in 1947, the territories of East and West Germany were one Germany subject to one set of laws, laws which traced their origins to the Roman codes.<sup>53</sup> The German adaptation of Roman

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<sup>53</sup> Otto Krings, *Dingliche Rechte [Property Law]*, in *DAS ZIVILRECHT IN BEIDEN DEUTSCHEN STAATEN—UNTERSCHIEDE, PARALLELENENTWICKLUNG, VERGLEICH [CIVIL LAW IN BOTH GERMAN STATES—DIFFERENCE, PARALLEL DEVELOPMENT, COMPARISON]* 171, 182 (Gottfried Zieger & Klaus Westen eds., 1988) [hereinafter *ZIVILRECHT*] ("Property law in the Civil Code



law, specifically the adherence to the Romans' strong conception of property,<sup>54</sup> was consistent with prevailing trends in Europe, as reflected in Article 17 of the 1789 French Declaration of the Rights of Man and Section 164 of the 1849 Frankfurt Constitution. The drafters of these documents, following in the traditions established by legal scholars in the Age of Enlightenment, understood the connection between property and liberty and integrated this concept into their works.<sup>55</sup> The Constitution of Germany [Grundgesetz (GG)] is based on the principles of civil liberty and equal property rights for all and provides a broad exclusionary right to property owners, while allowing free and beneficial use of resources, subject to reciprocal rights of third parties.<sup>56</sup> However, the Soviet occupation of East Germany meant that the property law of East Germany was influenced by Soviet legal principles,<sup>57</sup> especially as they applied to the production and distribution of new resources. A break was made from the liberal Civil Code [Bürgerliches Gesetzbuch (BGB)], part of the West German legislative code, towards the more restrictive socialist Civil Code [Zivilgesetzbuch (ZGB)], part of the East German code of laws, to comport with the political realities in the East.<sup>58</sup> Property law in East Germany began to differentiate between social production resources and private consumption resources, a distinction which did not exist in West Germany.<sup>59</sup> The following section has the limited goal of demonstrating selected constitutional and statutory provisions, emphasizing that whereas West Germans enjoyed the private property right applied to production and distribution, East Germans did

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derives from Roman law without substantial modification.”).

<sup>54</sup> THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ: KOMMENTAR LOSEBLATTSAMMLUNG [CONSTITUTIONAL COMMENTARY, LOOSELEAF COLLECTION], lfg. 22, art. 14, rn. 18 ff fn. 10, p. 20 (1983).

Because the editors expect that the German sources in this Article primarily will be utilized by German-speaking researchers, the citations of certain sources are in the format used in German practice, with the exception of sources for which *The Bluebook* provides a format. See THE BLUEBOOK 151-55, 262-65 (17th ed. 2000).

<sup>55</sup> MAUNZ & GÜNTER DÜRIG, *supra* note 54.

<sup>56</sup> See generally GRUNDGESETZ [GG] [Constitution] (F.R.G.). The National Socialists briefly refocused German law, placing the interest of the collective above the interest of the individual. See KARL HEINZ SCHWAB & HANS PRÜTTING, SACHENRECHT [PROPERTY LAW] 133 (2002).

<sup>57</sup> See generally R.O. CHALFINA, DAS PERSÖNLICHE EIGENTUM IN DER UDSSR [PERSONAL PROPERTY IN THE USSR] (1976).

<sup>58</sup> Norbert Jakob, *Die neuer Entwicklung des Zivilrechts in beiden deutschen Staaten* [The Recent Development of Civil Law in Both German States], in ZIVILRECHT, *supra* note 53, at 1, 8.

<sup>59</sup> Kringe, *supra* note 53, at 185.

not, and that this disparity constitutes the basis of the per capita wealth differential between the two German states.<sup>60</sup>

### A. Property Law in the Federal Republic of Germany

The law of the Federal Republic of Germany employs a broad conception of private property in general and in production in particular,<sup>61</sup> the root of which lies in Article 14 of the German Constitution.<sup>62</sup> In a fundamental decision, the Federal Constitutional Court stated:

Property is an elementary basic right, which is closely linked to the guarantee of personal freedom. In the framework of basic rights, the function of property rights is to insure their bearer a degree of freedom of action and thereby enable him to shape his life in a self-reliant manner. The constitutional guarantee of the legal institution of property serves to secure these basic rights.<sup>63</sup>

The German scholar Günter Dürig calls property "objectified liberty."<sup>64</sup> Professor Klaus Westen sees the foundation of the law of the Federal Republic of Germany in "private autonomy," comprised of freedom of property, freedom of contract, and freedom of commerce.<sup>65</sup> Professors Karl Heinz Schwab and Hans Prütting describe property as the foundation of the economic and social

<sup>60</sup> See Klaus Westen, *Funktion, Inhalt und Schranken des Zivilrechts in beiden deutschen Staaten* [*Function, Content, and Limitation of the Civil Law in Both German States*], in *ZIVILRECHT*, *supra* note 53, at 15, 30 ("The GDR itself, with its conception of civil law, created certain impediments and obstacles to a more open and variable economic policy.").

<sup>61</sup> See ERNST R. FÜRICH, *WIRTSCHAFTSPRIVATRECHT* [BUSINESS CIVIL LAW] 235 (2001).

<sup>62</sup> Article 14 states: "(1) Property and inheritance are guaranteed. Contents and limitations are given by law. (2) Property creates obligation. Its use is subject to public welfare. (3) Taking by eminent domain is lawful for a public purpose." GG art. 14. Thus, Article 14 has the dual purpose of guaranteeing the integrity of private property as well as protecting private property from interference by private third parties and the government. ROLF SCHMIDT, *GRUNDRECHTE* [CONSTITUTIONAL LAW] 393 (2004).

<sup>63</sup> *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BverfGE] [Federal Constitutional Court] 24, 367 (389) (F.R.G.).

<sup>64</sup> Günter Dürig, *Verfassungsrechtliche Eigentums Garantien* [*Constitutional Guarantees of Property*], in 2 *STAATSLERIKON* [STATE ENCYCLOPEDIA] 1080 (1958) ("vergegenständlichte Freiheit").

<sup>65</sup> Westen, *supra* note 60, at 18 (stating that there are "fundamentally no limits to the freedom [to own]").

order, as well as essential personal development and private autonomy.<sup>66</sup> The opinions of these scholars, taken together with the view of the Federal Constitutional Court, make it clear that property is a right with a dual character. Property both encourages persons as owners to make a living by using private resources directly for personal and economic gain and guarantees such owners space for action free from the intervention of third parties.<sup>67</sup> A relatively free use of resources protected by the right of exclusion is the cornerstone of successful capitalist societies, and is limited principally by the exclusionary right of others. A “proper” exclusionary right is the foundation of the chain of production and enables owners to reap the fruits of their entrepreneurial efforts. The German Constitution as interpreted by the courts recognizes the importance of this right.

Because property is a broad right, it is not defined by inclusion of appurtenant rights, but instead is delimited by specific exceptions,<sup>68</sup> i.e., if the legislature has not declared a specific limitation, the existence of the exclusionary right must be assumed.<sup>69</sup> In the Federal Republic of Germany, the property right is most easily abridged when a social purpose such as eminent domain can be formulated,<sup>70</sup> with eminent domain predicated upon a finding of public benefit.<sup>71</sup> Public welfare limitations on the use of resources are contemplated in the constitutional guarantee of property.<sup>72</sup>

Beyond Article 14 of the German Constitution, property rights are limited by a number of laws. For example, section 903 of the BGB, allows the owner of a thing to “use it as he pleases and exclude others from all influence.”<sup>73</sup> The rights granted by section 903 are often described as rights of complete dominion,<sup>74</sup> subject only to limits on ownership rights imposed by “other laws and the rights of third parties.”<sup>75</sup> The BGB, like the German Constitution, stands out with its clear and broad language, and Otto Krings opines that private autonomy is the hallmark of the BGB.<sup>76</sup> The limitation placed on

<sup>66</sup> SCHWAB & PRÜTTING, *supra* note 56, at 134, 135.

<sup>67</sup> Krings, *supra* note 53, at 171 (citing BVerfGE 24, 367 (389)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; see also GG art. 14, para. 2 (Begrenzung der Sozialbindung).

<sup>71</sup> SCHMIDT, *supra* note 62, at 393; Krings, *supra* note 53, at 171. Eminent domain strongly suggests that although property is an individual right, its purpose is general social benefit.

<sup>72</sup> GG art. 14; SCHMIDT, *supra* note 62, at 393.

<sup>73</sup> BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] § 903 (F.R.G.).

<sup>74</sup> Krings, *supra* note 53, at 173.

<sup>75</sup> § 903 BGB.

<sup>76</sup> Krings, *supra* note 53, at 173.

ownership by the rights of third parties is to be expected and is not incompatible with the broad guarantees of Article 14 and section 903, since a system of exclusionary right can come to full fruition only if the rights of all holders are afforded the same recognition under law. Other limitations refining the application of the exclusionary right, for example in sections 904,<sup>77</sup> 910,<sup>78</sup> and 226<sup>79</sup> of the BGB; building and zoning codes; and environmental protection laws<sup>80</sup> protect the rights of remote third parties.

Section 903 only applies to tangibles,<sup>81</sup> but a number of other statutes cover a great variety of intangible ownership interests.<sup>82</sup> For example, interests in the nature of debts, such as mortgages, unsecured debts on land, and debts on personal property are covered by sections such as section 1204 of the BGB. Freedom of construction is guaranteed and arises from the German Constitution.<sup>83</sup> Patents, copyrights, and trademarks are likewise protected.<sup>84</sup> Private ownership also applies to causes of action,<sup>85</sup> hunting licenses,<sup>86</sup> leases,<sup>87</sup> and the right to run a business.<sup>88</sup> Owners are granted broad recovery rights for infringements and violations of their exclusive interests,<sup>89</sup> and the enforcement of property interests is ensured by an adequate number of attorneys<sup>90</sup> and a

<sup>77</sup> § 904 BGB (creating in non-owners privileged emergency use rights).

<sup>78</sup> § 910 BGB (governing the rights of owners of neighboring land).

<sup>79</sup> § 226 BGB (prohibiting the use of rights in general for fraud).

<sup>80</sup> Krings, *supra* note 53, at 171.

<sup>81</sup> OTTO PALANDT, BÜRGERLICHES GESETZBUCH [CIVIL CODE] § 903 (64th ed. 2005). Things, as the object of property and covered by section 903 of the BGB, have to be spatially delimited; air, flowing water, groundwater, rain, snow, light, electricity, uninstalled computer programs, the living human body, and customer lists are examples of resources not covered by section 903 of the BGB. *Id.* §§ 90.1, 90.2; RG 86, 14 MueKo/Holch m 20; BORMANN/BORMANN DB 91, 2642; Redecker NEUE JURISTISCHE WÖCHENTLICH [NJW] [NEW LEGAL WEEKLY] 92, 1739; JUNKER, NWJ 93, 2437; KARLSR NJW 96, 201; AA MÜLLER-HENGSTENBERG NJW 94, 3129.

<sup>82</sup> GG art. 14; SCHMIDT, *supra* note 62, at 395. *See generally* DIETER SCHWAB, EINFÜHRUNG IN DAS ZIVILRECHT [INTRODUCTION TO CIVIL LAW] 147 (11th ed. 1993).

<sup>83</sup> GG art. 14; SCHMIDT, *supra* note 62, at 395.

<sup>84</sup> *See* BVerfGE NJW 1999, 2880 (2881); BVerfGE NJW 2001, 1784.

<sup>85</sup> BVerfGE 92, 262 (272).

<sup>86</sup> BUNDESGERICHTSHOF [BGH] [Supreme Court] NJW 2000, 3638 ff.

<sup>87</sup> BVerfGE 89, 1 (6-7).

<sup>88</sup> GG art. 14; SCHMIDT, *supra* note 62, at 396; SCHWAB, *supra* note 82, at 165.

<sup>89</sup> § 823 BGB ("A person, who intentionally, or negligently [i.e., recklessly or carelessly], unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.").

<sup>90</sup> Germany has 100 lawyers per 100,000 inhabitants. By comparison, the United States has 230, England and Canada 130, Italy eighty and France fifty-five lawyers per 100,000 inhabitants.

well-developed judiciary.<sup>91</sup> Like the United States and other prosperous nations, the Federal Republic of Germany recognizes and adequately enforces a broad exclusionary right in the production and distribution of new resources.

### *B. Property Law in East Germany*

Based on Marxist philosophy,<sup>92</sup> the property law structure in East Germany differed markedly from that in the Federal Republic of Germany,<sup>93</sup> and the Constitution of East Germany marked a broad departure from the property right established under the Constitution of Germany and the BGB. The preamble of the East German Constitution stated that “the German Democratic Republic is a socialist state of workers and farmers.”<sup>94</sup> In Articles 9, 10, and 11, the East German Constitution created a clear division between social property (the equivalent of public property) and private property. Article 9(1) provided that “the economy . . . is based on social property in the means of production.”<sup>95</sup> In Article 10, the East German Constitution declared that social property represented collective ownership by the people, although only the state and not the individual could direct the use of and own the profit from socially-owned resources.<sup>96</sup> Private property applied to non-productive resources was permitted by Article 11.<sup>97</sup> Articles 12 and 13 included means of production and transportation in the definition of social property and

UWE WESEL, RISIKO RECHTSANWALT [RISK: LAWYERS] 62 (2001).

<sup>91</sup> Germany has 270 judges per million inhabitants. By comparison, the United States and England only have eighty judges per million inhabitants. *Id.* at 21.

<sup>92</sup> DIETER BIRK, DAS PERSÖNLICHE EIGENTUM DES BÜRGERERS IN DER DDR [PERSONAL PROPERTY OF CITIZENS OF THE GDR] 15 (1973); *see also* FRIEDRICH ENGELS, HERR EUGEN DÜHRINGS UMWÄLZUNG DER WISSENSCHAFT [MISTER EUGEN DÜHRINGS' CHANGE OF SCIENCE] 160 (1948) (claiming that the balance of resource ownership can be recreated by disowning the capitalists, the original disowners); MARTIN POSCH, ZUEINIGEN THEORETISCHEN GRUNDFRAGEN DES SOZIALISTISCHEN ZIVILGESETZBUCHES [ABOUT CERTAIN THEORETICAL SOCIAL CIVIL LAW] 267 (1975) (stating that private property law in East Germany was supposed to mirror property structures envisioned by Karl Marx and Friedrich Engels).

<sup>93</sup> The following discussion is based on the Constitution of 1968 and the East German Civil Code [Zivilgesetzbuch (ZGB)] of 1974, which were in effect at all relevant times before unification.

<sup>94</sup> VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK [VERF] [Constitution] pmbl. (1968) (G.D.R.).

<sup>95</sup> VERF art. 9(1).

<sup>96</sup> VERF art. 10.

<sup>97</sup> VERF art. 11.

forbade private ownership of productive resources.<sup>98</sup> Article 14 prohibited the creation of unions or trade associations.<sup>99</sup>

The East German Constitution thus created two categories of property: social and private.<sup>100</sup> While the East German Constitution applied social property to the means of production, transportation, and distribution, there were no specific guidelines as to which resources private property applied. Article 11 merely stated that private property was to "satisfy the East German material cultural needs of the citizenry."<sup>101</sup> Looking beyond the Constitution for a definition, the ZGB held in section 23 that private property applied to wages and savings, among other resources.<sup>102</sup> One thing, however, seems relatively clear: social property and private property were not on an equal footing, but were altogether distinct.<sup>103</sup>

Social property was the basis of the state-planned East German economy. Under the Constitution, as soon as resources were implicated in the production process, they could not be privately acquired.<sup>104</sup> The uses derived from social property right were limited to serving the socialist planned economy in supporting all citizens.<sup>105</sup> Socially-owned resources could not be the subject of a mortgage or any other security interest,<sup>106</sup> and social resources were in practice non-transferable because of a broad prohibition on private use and ownership,<sup>107</sup> although in rare cases, citizens were granted permission to use socially-owned resources to build a dwelling or to plant a garden.<sup>108</sup>

Private resources in East Germany were generally used in daily personal life, but even so, private resources had to be used in accordance with social requirements imposed by the state.<sup>109</sup> The creation of mortgages and security interests in private resources were proscribed, and sales were subject to price guidelines set by law.<sup>110</sup> The Grundstuecksverkehrsverordnung (GVVO)

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<sup>98</sup> VEF art. 12-13.

<sup>99</sup> VEF art. 14.

<sup>100</sup> Westen, *supra* note 60, at 20 (stating that the private autonomy of East German citizens in their property is limited to the non-productive use of resources).

<sup>101</sup> VEF art. 11.

<sup>102</sup> § 23 ZGB.

<sup>103</sup> Kringe, *supra* note 53, at 176.

<sup>104</sup> *Id.* at 178.

<sup>105</sup> §§ 18, 21 ZGB.

<sup>106</sup> § 20, para. 3 ZGB.

<sup>107</sup> *Id.*

<sup>108</sup> *See, e.g.*, § 287 ZGB.

<sup>109</sup> § 284, para. 2 ZGB.

<sup>110</sup> *See, e.g.*, § 30 ZGB; Jakob, *supra* note 58, at 9-10. Jakob relates the case of an owner

[Property Transfer Regulation],<sup>111</sup> Wohnraumlenkungsverordnung (WLVO) [Dwelling Directional Regulation],<sup>112</sup> and Gewerberaumlenkungsverordnung (GewLVO) [Commercial Directional Regulation],<sup>113</sup>—the codes of East German law—contained an extensive catalogue of limitations on the use of privately-owned resources. It was the goal of the licensing regimes instituted by these laws to ensure that private use of private resources did not conflict with overarching socialist goals. Under the GVVO, for example, transfers of land or interests in land were to be denied if the transfer tended to concentrate ownership in violation of social interests,<sup>114</sup> and if the local government unit within which such private resources were located was granted a right of first refusal over them.<sup>115</sup> Similar restraints on alienation were contained in the WLVO and the GewLVO. In addition to these laws, rents were frozen by the state at 1939 levels<sup>116</sup> and the control of landlords over real estate was severely curtailed.<sup>117</sup> Since the right to use and dispose of private resources was severely curtailed, East German citizens merely enjoyed a possessory property right in such resources. While actions in the nature of trespass existed to enforce the possessory right,<sup>118</sup> owners in East Germany were deprived of the most beneficial property right granted in West Germany: the right to use private resources for the generation of profit. If property is conceived as an exclusionary right, one can say that the citizens of East Germany had *no property* in the productive use of their private resources.

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selling a house for 60,000 Mark despite the fact that the official appraised value was 22,350 Mark. Jakob, *supra* note 58, at 9-10. The seller was required to remit her profits to the state and the buyer was given the option to rescind the transaction. *Id.*

<sup>111</sup> VERORDNUNG UBER DEN VERKEHR MIT GRUNDSTUECKEN - GRUNDSTUECKSVERKEHRSORDNUNG [GVVO] VOM. 15. DEZEMBER 1977 [Regulation Concerning the Transfer of Real Property of Dec. 15, 1977], GB1. I 1978, No. 5 at 73.

<sup>112</sup> WOHNRAUMLENKUNGSVERORDNUNG (WLVO) VOM. 16 OKTOBER 1985 [Regulation Concerning Dwelling Directions of Oct. 16, 1985], GVB1. I, 301; DB VOM. 16 OKTOBER 1985, GVB1. I, 308.

<sup>113</sup> GEWERBERAUMLENKUNGSVERORDNUNG (GewLVO) VOM. 6 FEBRUAR 1986 [Regulation Concerning Commercial Directions of Feb. 6, 1986], GVB1. I, 249.

<sup>114</sup> § 3, para. 4, letters c, d GVVO.

<sup>115</sup> § 11 GVVO.

<sup>116</sup> Kringe, *supra* note 53, at 180.

<sup>117</sup> Jakob, *supra* note 58, at 8. Dietmar Funke, *Das Wohnmietrecht in beiden deutschen Staaten [Landlord-Tenant Law in Both German States]*, in ZIVILRECHT, *supra* note 53, at 79.

<sup>118</sup> Richard Motsch, *Schadensersatz und ungerechtfertigte Bereicherung in den beiden deutschen Staaten [Liability and Unjust Enrichment in Both German States]*, in ZIVILRECHT, *supra* note 60, at 143.

Absent a right of property in productive activity, there was no need for extensive protection of intangible objects in East Germany. Without competition from the private market framed by property, the application of ownership to patents, copyrights, and trademarks was merely an academic idea that did not have an impact on government-controlled markets. It is unclear how well the laws of East Germany were enforced in general,<sup>119</sup> but one must suspect that fear of the power of the state and secret police contributed to a degree of legal obedience.<sup>120</sup>

The previous discussion suggests that the broad right of private property conferred on citizens of West Germany was not mirrored in East Germany due to a rigid division between social and private ownership. The connection between the political and legal systems of the two states is obvious.<sup>121</sup> This review of East German property doctrine reveals that the private property right of its citizens was limited to the possession and non-productive use of resources and that no private exclusionary right applied to production.

## V. THE ECONOMIC IMPACT OF GERMAN REUNIFICATION

### A. *The German Economies at the Time of Reunification*

Less than half a century of a divided Germany is adequate to suggest the powerful impact that the presence or absence of the exclusionary right in the production of what people need and want can have on the economy of a modern nation. The separation of a common people following World War II based primarily in an economic sense on whether or not the populations enjoyed private property in the production and subsequent distribution of resources provides the closest approximation to a controlled experiment of the wealth effects of the exclusionary right. However, since little accurate information is available on the East Germany economy during the period of separation<sup>122</sup> it is not until incorporation of East Germany into the Federal

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<sup>119</sup> East Germany had as many judges per capita as West Germany. WESEL, *supra* note 90, at 135.

<sup>120</sup> The number of lawyers in East Germany was extremely low. In 1989, West Germany had eighty-seven lawyers per 100,000 inhabitants, while East Germany had 3.5 lawyers per 100,000 inhabitants. The number of prosecuting attorneys, however, was the same in West and East Germany. Since reunification, the number of private attorneys has increased exponentially in the former East Germany. *Id.*

<sup>121</sup> Westen, *supra* note 60, at 15.

<sup>122</sup> Leslie Lipschitz, *Introduction and Overview*, in GERMAN UNIFICATION—ECONOMIC



Republic of Germany that measurements revealed the productive differences in the two economies.

What is known is that at the time of reunification the West Germany economy was one of the most powerful in the world with high per capita income for its citizens.<sup>123</sup> There was strong demand for the goods and services produced by private companies, which had high levels of capacity utilization, abundant internal company resources, and large profits.<sup>124</sup> The federal government of West Germany was operating with a budgetary surplus and the national savings rate exceeded national investment by some 4.5% of GNP,<sup>125</sup> while the country had attracted net foreign investments of \$300 billion.<sup>126</sup>

If West Germany was prospering at the time of reunification, East Germany was not. Although East German economic statistics were mostly unreliable,<sup>127</sup> by reunification more dependable economic analysis had become feasible. Relative to West Germany, the best available data indicates that East Germany had only about one-tenth the GNP of its neighbor,<sup>128</sup> two-fifths the per capita income,<sup>129</sup> and one-third the average wage and labor productivity.<sup>130</sup> In addition, at reunification the East German enterprise system was heavily indebted with considerable obsolescence in both structure and products.<sup>131</sup>

ISSUES 1, 3 (Leslie Lipschitz & Donogh McDonald eds., 1990) [hereinafter GERMAN UNIFICATION] (“Although the statistics on demographics and on the characteristics of the labor force and its distribution by sector were reliable, historical data on income, output, prices, and the financial situation of enterprises provided little guidance to the economic situation.”); see also Thomas Mayer & Gunther Thumann, *German Democratic Republic—Background and Plans for Reform*, in GERMAN UNIFICATION, *supra*, at 52 (stating that economic performance was in fact much worse than the official figures); PHILLIP J. BRYSON & MANFRED MELZER, THE END OF THE EAST GERMAN ECONOMY—FROM HONECKER TO REUNIFICATION xii (1991) (stating that it was doubtful that even top East German leaders themselves knew how badly things were going. Economic reports were regularly embellished, statistics managed, and the leadership told what they wanted to hear.).

<sup>123</sup> In 1990 the per capita incomes of West German citizens ranked seventh in the world. Deutschland Online, Nov. 4, 2005, [http://www.magazin-deutschland.de/issue/standort\\_6-04\\_ENG-EI.php](http://www.magazin-deutschland.de/issue/standort_6-04_ENG-EI.php).

<sup>124</sup> Lipschitz, *supra* note 122, at 1-2.

<sup>125</sup> *Id.* at 2-3.

<sup>126</sup> *Id.*

<sup>127</sup> See *supra* note 122.

<sup>128</sup> Lipschitz, *supra* note 122, at 3-4 (at that time the population of East Germany was roughly one-fourth of that of West Germany).

<sup>129</sup> *Id.* (calculated from the fact that East Germany had two-fifths of the population of West Germany but one-tenth of its GNP).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

"Luxury goods" were largely unavailable to consumers and the general range of products available was limited.<sup>132</sup> Economic infrastructure, including the rail system, highways, and telecommunications facilities were requiring extensive renewal,<sup>133</sup> and enormous environmental problems plagued East Germany, especially in the chemical sector.<sup>134</sup> Finally, the East German pension system upon which the working population relied was severely underfunded.<sup>135</sup>

### *B. The Economy in the Former East Germany Following Reunification*

Immediately after reunification, real net output of the German economy initially shrank. In 1990 the West German per capita GNP was DM 40,200, while reunified Germany's per capita GNP in the following year was DM 34,990.<sup>136</sup> A year after reunification, output in the territories of the former East Germany had completely collapsed, and the industrial base had virtually disintegrated,<sup>137</sup> resulting in high unemployment.<sup>138</sup> Because of the sudden exposure to western competition, only one out of 116 former East German state-owned combines was in position to cover long-term costs and compete in a private market.<sup>139</sup> Without subsidies many businesses would have faced immediate closure. Out of the entire stock of government-owned enterprises, only fourteen companies, representing 8.2% of the workforce, were able to

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<sup>132</sup> *Id.* at 4.

<sup>133</sup> See, e.g., M. Donald Hancock, *Economic and Political Performance: Patterns and Prospects*, in GERMAN UNIFICATION: PROCESS AND OUTCOMES 245, 248 (M. Donald Hancock & Helga A. Welsh eds., 1994).

<sup>134</sup> *Id.*

<sup>135</sup> The importance of this revealing fact is that approximately half of the West German subsidy to the eastern population upon reunification went to bolster this economic shortfall.

<sup>136</sup> Roland Czada, *The German Political Economy in Flux*, in TEN YEARS OF GERMAN UNIFICATION: TRANSFER, TRANSFORMATION, INCORPORATION? 151, 157 (Jörn Leonhard & Lothar Funk eds., 2002) [hereinafter TEN YEARS OF GERMAN UNIFICATION].

<sup>137</sup> Carsten Hefeker & Norbert Wunner, *Great Expectations, Hard Times: A Political Economic History of German Unification*, in TEN YEARS OF GERMAN UNIFICATION, *supra* note 136, at 168, 168.

<sup>138</sup> See, e.g., Hancock, *supra* note 133, at 249 ("From the attainment of the monetary, economic, and social union on 1 July 1990 through November 1992, the size of the workforce in the former GDR shrank from 9.2 million workers to approximately 6 million. The number of farmers was reduced by half (to 160,000).").

<sup>139</sup> Hefeker & Wunner, *supra* note 137, at 172.

cover short-run costs.<sup>140</sup> As a result, industrial production fell by 28% in 1990 and an additional 30% in 1991.<sup>141</sup>

Emerging from the initial shock, however, the economy in the territories of the former East Germany has experienced substantial real growth since reunification. The real GNP in the territories of the former East Germany grew from Euro 215.4 billion in 1991 to Euro 291.8 billion in 2002.<sup>142</sup> Relative to per capita GNP in the territories of the former West Germany, real GNP in the territories of the former East Germany increased from 49% to 66% from 1991 to 2002.<sup>143</sup> Growth in annual per capita GNP in the territories of the former East Germany has outpaced development in the territories of the former West Germany (see Figure 1),<sup>144</sup> and wages have risen from less than 33% to approximately 75% of wages in the territories of the former West Germany.<sup>145</sup>

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
West	0.7	-1.4	2.0	1.5	0.7	1.4	0.9	0.7	0.8	0.3	0.6	0.7
East	23.0	14.8	8.8	2.5	3.9	2.9	0.2	2.0	2.3	1.3	1.8	2.1

FIGURE 1 – ANNUAL INCREASE IN GERMAN PER CAPITA REAL GNP

### C. Discussion

The incorporation of East Germany into the Federal Republic of Germany should in no way be conceptualized as a mixing of the two institutional frameworks of the respective states, but rather it should be grasped as a merger of the territories of East Germany back into the Federal Republic.<sup>146</sup> The guiding institutions of reunification have been those of the Federal Republic of Germany, and the most basic institution has been an adequately established and enforced legal exclusionary right as applied to the production and distribution of resources. It must be emphasized that the economic success of

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> BUNDESMINISTERIUM FUER WITSCHAFT UND ARBEIT [MINISTRY FOR ECONOMIC AND LABOR], WIRTSCHAFTSDATEN NEUE LANDER [ECONOMIC DATA FOR THE NEW STATES] 3 (2004) [hereinafter WIRTSCHAFTSDATEN] (Figures are given in 1995 prices to correct for inflation).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 4.

<sup>145</sup> Henning Klodt, *Public Transfers and Industrial Restructuring in Eastern Germany*, in TEN YEARS OF GERMAN UNIFICATION, *supra* note 136, at 211, 212.

<sup>146</sup> Lipschitz, *supra* note 122, at 5.

reunification for the territories of the former East Germany has in its essence been primarily due neither to the Federal Republic of Germany's political democracy nor its free market capitalism—although both these institutions are important—but to a strong private property institution in production. Stable political democracy may be a salient indicator of economic prosperity but only as it provides for the adequate enforcement of the private exclusionary right under the rule of law. Free market capitalism is the preferred system of every prosperous nation, but as the Peruvian economist Hernando de Soto observes, the reason “why capitalism succeeds in the West and fails everywhere else”<sup>147</sup> is due to the investment climate of certainty and the economic energy of incentive fostered by private property in productive resources.<sup>148</sup> A free market itself, without the sustaining legal framework of private property, could hardly have engendered the substantial economic growth that has taken place in the former East Germany.<sup>149</sup>

Nor has that growth been dependent on subsidies from the prosperous territories of the former West Germany. Although sizable financial transfers were initially necessary to buffer the total collapse of the industrial sector in the territories of the former East Germany,<sup>150</sup> it is important to analyze the nature of federal subsidies in the eastern economy to understand that the former East Germany has developed genuine property-based growth. From 1991 to 2003, cumulative direct federal economic support to the territories of the former East Germany amounted to 315.5 billion Euros.<sup>151</sup> Larger figures have recently been reported, but those numbers include the large payments required to bring the decimated pension funds of former East German citizens up to West German standards and to institute an unemployment insurance regime.<sup>152</sup> To meet these needs of the former East Germany, social transfer

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<sup>147</sup> This is the subtitle of de Soto's most recent book. See *supra* note 28.

<sup>148</sup> The need in economically developing nations for unleashing the developmental power of a property-based legal system is the subject of DE SOTO, *supra* note 28. See also HERNANDO DE SOTO, *THE OTHER PATH* (1989).

<sup>149</sup> Consider as evidence the economic debacle that occurred in Russia after the collapse of the former Soviet Union. See *supra* note 46 and accompanying text. Russia had the trappings of a free market but not an adequately established and enforced private property system.

<sup>150</sup> Klodt, *supra* note 145, at 213.

<sup>151</sup> WIRTSCHAFTSDATEN, *supra* note 142, at 18.

<sup>152</sup> Gabor Steingart, *Aufbau Ost durch Abbau West: Helmut Kohl—Kanzler des Niedergangs [Structure the East by Dismantling the West: Chancellor Helmut Kohl—A Policy of Decline]*, SPIEGEL ONLINE, Apr. 5, 2004, available at <http://www.spiegel.de/politik/deutschland/0,1518,294097,00.html> (last visited June 28, 2005) (stating government figures that the cost of unification amounted to Euro 1.25 trillion); see also Klodt, *supra* note 145, at 211 (arguing that

payments did rise dramatically after reunification.<sup>153</sup> The estimated transfer payments from the western to the eastern territories amounts to about DM 140 billion annually;<sup>154</sup> however, as the GNP in the former GNP recovered from the shock caused by the transformation, the relative importance of the transfers, measured as a percentage of GNP, declined.<sup>155</sup> While the absolute size of the transfers did not decrease, their size relative to GNP in the former East Germany decreased,<sup>156</sup> indicating independent growth when considering also a rising East Germany. Additionally, in light of the fact that the great majority of the transfers went into creating social security benefits,<sup>157</sup> the significance of subsidies to growth in the former East Germany further decreases. From 1991 to 1998, transfers to social security accounts in the former East Germany nearly equaled 50% of the total transfer payments; federal business subsidies accounted for less than 25% of the transfers.<sup>158</sup>

The problems confronting Germany in the decade after unification are the consequence of an unprecedented legal, economic, and political merger of two highly disparate industrial societies,<sup>159</sup> but the problems are not insurmountable. It is true that the western population of the Federal Republic of Germany complained of the taxation necessary to bring the eastern population to social welfare standards and that the population of the former East Germany have suffered economic dislocation, unemployment, and psychological stress upon

“public transfers do not only contribute to reconstructing the eastern German economy, but are also associated with undesired side-effects that significantly disturb the catching-up process and, thus, tend to stabilize the gap between eastern and western Germany” by inhibiting the evolution of a viable, market-oriented economy in the former East Germany).

<sup>153</sup> Czada, *supra* note 136, at 159.

<sup>154</sup> Hefeker & Wunner, *supra* note 137, at 169. Hefeker and Wunner decry that hardly any signs of a self-sustaining economic recovery exist in the former East Germany, especially in light of predictions that would have suggested a quick recovery for the former East Germany. It is the opinion of the authors of this Article that Hefeker and Wunner are distracted by the political promises made by politicians in the Federal Republic of Germany immediately after the reunification. Chancellor Kohl's famous promise of “flourishing landscapes” still rings in everybody's ears.

<sup>155</sup> Klodt, *supra* note 145, at 213.

<sup>156</sup> *Id.* at 211 (indicating net transfers as percentage of GNP in the former East Germany of 51% in 1991, 43% in 1992, 40% in 1993, 35% in 1994, and 33% in 1998).

<sup>157</sup> *See id.* at 214.

<sup>158</sup> LUTZ BELLMAN & MARTIN BRUSSIG, AUSMANN UND URSACHEN DER PRODUKTIVITÄTSLÜCKE OSTDEUTSCHER BETRIEBE DES VERARBEITENDEN GERWERBES [EXTENT AND CAUSES FOR THE PRODUCTIVITY GAP OF EAST GERMAN MANUFACTURING COMPANIES] 53 (1998).

<sup>159</sup> Hancock, *supra* note 133, at 245.

losing their prior positions in a command economy.<sup>160</sup> It is likewise correct that economic policies which led some investors to speculate in real estate in the former East Germany instead of job-creating businesses may have sent other investors to Poland and its neighbors.<sup>161</sup> One cannot expect that the effects of more than forty years of central command economy are swept away without tax burdens and some individual hardships. It may take the former East Germany many more years to catch up with the rest of the Federal Republic of Germany, but with growth already far outpacing federal subsidies, the former East Germany is well on its road to property-based prosperity.

## VI. CONCLUSION

In summary the chief difference between West and East Germany lay in how the two countries implemented their property systems. West Germany enjoyed a well-established and well-enforced private exclusionary right applied to the uses of productive resources, whereas East Germany took a public (social) property approach to production and distribution. So central is the concept of property to all societies that it is appropriate to attribute the economic deficiencies of East Germany to how it applied property and the economic improvement of the eastern Germans following incorporation in the Federal Republic of Germany to the economic benefits brought by the general application of private property to the productive process. Although specific economic policies like interest rate adjustments or tax incentives may be important to the fine tuning of a property-based private market, it is the stable application of the legal exclusionary right in ordering the production of resources that provides the certainty necessary for a successful market in the modern nation.

The legal realists and critical studies legal scholars who have attempted to deconstruct property and its application under the rule of law to mere power relations have missed the point that the attempt—even theoretical—to tear

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<sup>160</sup> Czada, *supra* note 136, at 156; *see, e.g.*, Steingart, *supra* note 152.

<sup>161</sup> *See* Marcus Walker & Matthew Karnitschnig, *Eastern Europe Eclipses Eastern Germany*, WALL ST. J., Nov. 9, 2004, at A18. Note, however, that higher economic growth rates in some eastern European countries when contrasted with growth in the former East Germany may be accounted for by the fact that countries like Poland, Hungary, and the Czech Republic started from a lower GNP economic base than East Germany, and thus equivalent real growth among all the countries would translate into a much higher percentage GNP growth rate in those poorer countries, a differential growth rate that Walker and Karnitschnig rely upon to make their point. *Id.*

down institutional structures which order society in relation to needed and wanted resources and to stimulate new production without rebuilding something in its place is an ultimately nihilistic enterprise. Although in the final analysis, “property” is just a word that can be manipulated by legal realists, critical studies scholars, and free market economists alike, its usage throughout history permits an essential functional understanding of it as a right of exclusion, a legal construct permitting one or some but not all persons to keep others from interfering with resources, including the resources of human action, as long as the resources of all are respected. The objects to which property applies do not have a priori status but derive from history and a general understanding that whatever resource or range of resources society wants to increase maximally should be made objects of the exclusionary right.

To have an essential understanding of property is to appreciate why some nations are prosperous while others are poor, but this understanding does not itself suddenly create the wealth-generating capacity of a property-based legal system. Many problems of initiating this institution and overcoming prosperity-defeating path dependence remain. However, if the goal is to foster maximum conditions for self-sustaining, productive economies for the world’s poor, the adequate implementation of property is *sine qua non*.

