

ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES

The Role of Law

Edited by **Megan M. Carpenter**



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Texas Wesleyan School of Law, USA

ELGAR LAW AND ENTREPRENEURSHIP

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Entrepreneurship and Innovation in Evolving Economies

ELGAR LAW AND ENTREPRENEURSHIP

Series Editors: Shubha Ghosh, *Vilas Research Fellow and Professor of Law, Honorary Fellow and Associate Director, INSITE, University of Wisconsin School of Law* and Robin Paul Malloy, *E.I. White Chair and Distinguished Professor of Law and Director of the Center on Property, Citizenship and Social Entrepreneurism at Syracuse University, US.*

The primary goals of this series are two-fold. The first is to develop the theoretical foundation for law and entrepreneurship. As to this goal, central research questions involve but are not limited to developing an understanding of the various meanings of entrepreneurship. Although superficially associated with the creation of a profit-making business enterprise, the concept of entrepreneurship extends to any motivation and effort to create something new. What does it mean to create? In what sense is an enterprise or project new? Is creation a process or an instantaneous, unpredictable event? What are the channels of creativity and in what venues does it occur? Is creativity in art, science, and business a coherent whole or completely different exercises? These questions serve to define the contours of entrepreneurship and its relationship to law and legal institutions.

The second goal is to translate the theoretical understanding of law and entrepreneurship into concrete policy. At one level, this goal entails identifying key legal policy levers (taxation, property rights, competition policy, financial regulation, contract law) that structure and direct entrepreneurship. At a deeper level, the second goal mandates a detailed institutional analysis of successful and unsuccessful entrepreneurship activity. This deeper goal invites an inquiry into the definitions of success and its measures. These definitions and measures, in turn, provide a benchmark for accessing and defining implementable policies.

At its core, the Law and Entrepreneurship series examines the role of law and legal institutions in promoting and sustaining entrepreneurial activity.

Titles in the series include:

Creativity, Law and Entrepreneurship
Edited by Shubha Ghosh and Robin Paul Malloy

Entrepreneurship and Innovation in Evolving Economies
The Role of Law
Edited by Megan M. Carpenter

For my dad.

And for people who fight for what can be in places where others are
focused on what has always been.

MMC

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Foreword

Franklin G. Snyder

Exactly one hundred years ago the British Distributivist Hilaire Belloc wrote that “[t]he control of the production of wealth is the control of human life itself.”¹ In the ensuing century, this control has increasingly been exercised by governments, which today pervasively regulate every aspect of wealth production. In the 21st-century United States there is not a single significant economic decision made by a producer or consumer that is not affected directly or indirectly by government controls.

Because the American government generally exercises such controls via laws applied through its legal system, and because in America lawyers enjoy monopoly power over the legal system, lawyers inevitably play an enormously important role in the process. Lawyers are the group in society who as judges and advocates manipulate² the legal system on behalf of their clients, whether government or private entity. What the law *should be* may perhaps be a legislative question (in which non-lawyers are allowed to have a say), but once the legislative text is settled, nearly all the rest of its implementation will be in the hands of lawyers. Legislators may pass statutes, but, as Chief Justice Marshall said, “[i]t is emphatically the province and duty of the judicial department to say what the law *is*.”³ As the American judicial department is totally under the control of lawyers,⁴

¹ Hilaire Belloc, *The Servile State* (1912).

² “Manipulate” has something of a bad connotation, but I am using it in its broader sense, that is, to move, arrange, and operate things by hand, to achieve a desired (often therapeutic) result. It is in this sense that a chiropractor manipulates one’s spine. Unfortunately, I have not found another word that carries this broad meaning but does not carry the negative connotations. While some lawyers do in fact “manipulate” facts and laws in the most pejorative sense—lawyers are no more honest than most other groups in society—even such therapeutic things as qualifying a family for Social Security benefits involve “manipulation” in the sense I use it here.

³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

⁴ Any citizen, regardless of background, can become a Member of Congress, a Cabinet official, or a lobbyist, and exercise substantial influence over the legislative and executive branches. But with some trivial exceptions, only lawyers can become

virtually every decision about who will be punished or rewarded by the government will ultimately be made by lawyers.

It is thus not surprising that the question of what law and lawyers can do to stimulate desirable economic activity has received a good deal of attention from legal scholars. This new volume of original essays is a significant contribution to that discussion. The individual essays are of high quality, but one of the volume's chief virtues is its breadth—the essays range from how to improve the training of lawyers, to how lawyers can better serve clients, to specific policy prescriptions about how laws can encourage certain kinds of desirable economic effects. Several of the contributions reflect the personal experiences of the authors in their own efforts to achieve these things, and their remarkably open and honest assessments of what did and did not work. While each of the contributions can and does stand on its own, reading them together in this volume allows a non-specialist reader to make interesting and valuable connections between such apparently disparate issues as how to conceive of the rule of law in international trade, how to transform a Rust Belt urban economy, and how to start a small technology business.

The editors who assembled these contributions have done an admirable job in encouraging a wide range of views. This diversity means that both proponents and opponents of greater government intervention (or of particular types of intervention) are likely to find substantial food for thought. There are certainly success stories here, such as the revitalization of Pittsburgh⁵ and a successful law school entrepreneurship clinic,⁶ but there are also honestly acknowledged failures, such as the past history of state-sponsored venture capital funds⁷ and the attempt to create an intellectual property community from scratch through development of a

judges. Judges, in return, set the requirements for and control the admission of new lawyers. Judges and lawyers together set the accreditation policies for law schools, the graduates of whom are (with similarly trivial exceptions) the only persons eligible to become lawyers. And only lawyers can appear on behalf of others in judicial proceedings.

⁵ Michael J. Madison, 'Contrasts in Innovation: Pittsburgh Then and Now', in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 7).

⁶ Patricia H. Lee, 'The Role and Impact of Clinical Programs on Entrepreneurship and Economic Growth', in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 9).

⁷ Brian Krumm, 'State Legislative Efforts to Improve Access to Venture Capital', in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 2).

law school IP clinic.⁸ Yet on closer inspection things are not so clear—there are (as the authors are careful to point out) valuable lessons to be drawn from the failures and reasons for at least some doubts about the successes.

Different readers are also likely to take different lessons from the other contributions, many of whose policy prescriptions have not yet been tried. Reading these essays together allows us to evaluate them on a deeper level. For example, the thoughtful discourse on the “strategic” role of lawyers⁹ can inform our understanding of what their role should be (and how it can be encouraged) in “regional innovation ecosystems”¹⁰ while simultaneously drawing attention to the contrast between what law schools generally teach and what lawyers do in practice. The fascinating story of one law professor’s near-Herculean quest to become an entrepreneur¹¹ not only shows up the gaps in legal education—this trained lawyer who teaches in the business law field candidly admits she was unable to understand virtually any of the advice given to her by a successful entrepreneur she consulted—but illuminates on a micro level the struggles that the law on a larger scale has had to face in trying to create an innovation-friendly, background legal regime,¹² support the rule of law in economic affairs around the world,¹³ and foster economic justice.¹⁴ An economy, after all, is nothing more than the aggregate of all of the individual decisions made

⁸ Michael Risch, ‘IP and Entrepreneurship in an Evolving Economy: A Case Study’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 8). The clinic Professor Risch describes was most certainly not a failure, but its aims, as he explains, have changed over time.

⁹ Shubha Ghosh, ‘The Strategic Lawyer’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 5).

¹⁰ Sean M. O’Connor, ‘Transforming Professional Services to Build Regional Innovation Ecosystems’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 4).

¹¹ Elizabeth Townsend Gard, ‘The Making of the Durationator®: An Unexpected Journey into Entrepreneurship’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 11). Like Professor Townsend Gard, I have been a business entrepreneur and can testify to the extraordinary complexity of the choices she has to face.

¹² Eric J. Gouvin, ‘Of Small Businesses and Entrepreneurs: Toward a Public Policy that Supports New Venture Formation’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 3).

¹³ Andrea L. Johnson, ‘The Rule of Law, Privatization, and the Promise of Transborder Licensing’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 10).

¹⁴ Steven D. Jamar and Lateef Mtima, ‘A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship’, in *Entrepreneurship and Innovation in Evolving Economies: The Role of Law* (*infra*, Chapter 6).

by its participants, and these contributions remind us that the smallest and largest decisions are inevitably bound together.

Another strength of this volume is, perhaps paradoxically, the way it vividly illustrates the potential conflict between desirable economic goals. Entrepreneurship is not the same thing as innovation, and neither entrepreneurship nor innovation has any necessary connection with creating or preserving “jobs.” Policies designed to spur entrepreneurship may actually reduce innovation;¹⁵ policies designed to encourage innovation may destroy jobs in existing industries;¹⁶ policies whose goal is to preserve jobs may discourage both innovation and entrepreneurship.¹⁷ Laws aimed at any one of these things may actually reduce overall wealth production and may well conflict with social justice goals. Given that resources are finite, every government decision allocating resources to *A* means that they must be taken from *B*, *C*, and *D*. A cautionary lesson from these contributions is that it is very important to understand the goal that one is trying to achieve. In the words of the old proverb, “The man who tries to chase two rabbits at the same time will catch neither.”

Given that most of these contributions are from scholars at American law schools, it is not surprising that these essays would resonate strongly with legal educators. Each of them illustrates lawyers at work, and they throw a strong light on the connection—or, as some might say, the disconnection—between what law students are taught and what they will be doing when they go to work for clients. They illustrate both the strengths and the weaknesses of how law schools go about exercising their responsibility to train the people who will control an entire third of the tripartite United States government.

For those outside the academy, however, the lessons are perhaps even more valuable. The choices that governments make about intervention in the economy, and the way lawyers and judges go about enforcing them, affect the lives of every citizen. And in an increasingly interconnected world, decisions made in the United States (or any major developed country) have consequences for people in every other country. Many of the contributors to this volume offer their own proposals for how these decisions can or should be made. But even those who disagree with the

¹⁵ As in those countries where there are thriving industries built on piracy of intellectual property rights.

¹⁶ Clayton M. Christensen, *The Innovator's Dilemma* (1997). This has become very nearly a cliché, but is still the seminal work on “disruptive technology.”

¹⁷ As can be seen from the very mixed success of governments in trying to prop up uncompetitive domestic industries that face competition from more innovative and entrepreneurial foreign firms.

particular policy suggestions need to understand that the answers we give to the questions raised are going to be crucial to achieving our own ultimate goals, whether those goals are increasing innovation, fostering entrepreneurship, improving international competitiveness, ensuring adequate living standards, creating or preserving “good jobs,” or promoting social justice.

Bosque County, Texas
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1. Introduction

Megan M. Carpenter

In the book *Creativity, Law, And Entrepreneurship*,¹ I discussed growing up with the comforting undertones of the mine reports on radio stations in Appalachia in the 1970s. “*Loveridge, will work. Blacksville, will work. Sentinel, will work.*” For a mining community, the mine reports provided announcements for the workers as to which coal mines (and therefore, which coal miners) would and would not work on any given day. More indirectly, those reports served as an indicator of economic vitality. There was a comfort in hearing those reports in the mornings. There was stability in the mines. Men would set their career path at the age of 18 or 19, and they were thereafter part of a much larger economic engine. Eventually, however, the economic climate shifted. Mechanization of mining activity created less demand for workers. The mine reports did not report “will work” as often. Eventually, the reports stopped altogether.

The small town where I grew up is like thousands of other communities in the United States. This small town had in its boom been dependent upon primary and secondary sector industries—specifically, mining and manufacturing. Because of a decrease in traditional industry, the economy of the town at large began to suffer; this problem was exacerbated in the downtown area when a shopping mall was built outside city limits. By the time I was growing up, the town seemed much closer to bust than boom. The tales recounted to me by my grandmother, tales of a thriving and vibrant community, had long passed. In those days, when her father was the Sheriff and the family lived downtown in the Sheriff’s residence, people would gather and greet each other outside, shop and eat, walk and busy themselves on the downtown streets. As my generation entered high school in the mid-1980s, we walked past shuttered shops to get to the movie theatre. As my generation graduated from college, we knew we had

¹ Megan Carpenter, “‘Will Work’: The Role of Intellectual Property in Transitional Economies,” in Shubha Ghosh & Robin Paul Malloy, (eds), *Creativity, Law, and Entrepreneurship*, Cheltenham, UK, Northampton, MA, U.S.A.: Edward Elgar Publishing (2011).

to seek professional opportunities elsewhere. I watched my peers leave, one by one, and they left nearly always with some measure of wistfulness and a longing to return. I did the same.

Across the United States, primary and secondary sector industries are no longer as viable as they once were—because the particular businesses are no longer profitable, because the underlying resources are no longer as plentiful or desirable, or because human activity is not essential to various aspects of an industry's operations. In character, the foundation of our very economy is changing. As early as 2004, Alan Greenspan noted that the U.S. economy is no longer based on traditional industries, but rather on content and information.² As economies evolve from traditional industrial resources, such as mining and manufacturing, to “new” resources, such as information and content, innovation and entrepreneurship become key.

Cities such as Detroit are exemplars of this kind of transition, where the automotive manufacturing industry suffered a substantial collapse, and more auto industry-related jobs were lost than were left in the region as a whole.³ While there ultimately may be some resurgence in these sectors, thus far it has not reversed the overall trend.⁴ Rather, cities like Detroit are seeking necessarily to diversify their economies, looking for ways to embrace new sectors of the economy. This is an issue that communities of all sizes face across the country and around the world as one of the key issues of modern entrepreneurship. In part, these economic transitions involve a move away from the old and into the new. But also in part, the new must at some level utilize traditional resources in new economy ways.

While the seeds of this project germinated in my childhood, they began to sprout when I returned home to teach law as a Visiting Associate Professor. I organized a conference in 2006 called “From Coal to Content: The Role of Intellectual Property and Technology in a New Economy.” This project sought to begin a dialogue about the role that intellectual property can play as communities evolve from primary and secondary sector industrial resources to new economy resources, such as intellectual property and high technology. The conference speakers included policy-

² See, e.g., Alan Greenspan, *Intellectual Property Rights*, Remarks at the Stanford Institute for Economic Policy Research Economic Summit, available at <http://www.federalreserve.gov/boarddocs/speeches/2004/200402272/default.htm> (Feb. 27, 2004) (accessed Oct. 2, 2011).

³ John Austin, *The New Republic: Pinning the Problem in Detroit*, available at <http://www.npr.org/templates/story/story.php?storyId=113959508> (Oct. 20, 2009) (accessed Oct. 2, 2011).

⁴ One such resurgence is discussed, in part, in Chapter 8.