

# Foreword

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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.”<sup>1</sup> 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 manipulate<sup>2</sup> 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*.”<sup>3</sup> As the American judicial department is totally under the control of lawyers,<sup>4</sup>

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<sup>1</sup> Hilaire Belloc, *The Servile State* (1912).

<sup>2</sup> “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.

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

<sup>4</sup> 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 Pittsburgh<sup>5</sup> and a successful law school entrepreneurship clinic,<sup>6</sup> but there are also honestly acknowledged failures, such as the past history of state-sponsored venture capital funds<sup>7</sup> and the attempt to create an intellectual property community from scratch through development of a

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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.

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

<sup>6</sup> 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)*.

<sup>7</sup> 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.<sup>8</sup> 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 lawyers<sup>9</sup> can inform our understanding of what their role should be (and how it can be encouraged) in “regional innovation ecosystems”<sup>10</sup> 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 entrepreneur<sup>11</sup> 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,<sup>12</sup> support the rule of law in economic affairs around the world,<sup>13</sup> and foster economic justice.<sup>14</sup> An economy, after all, is nothing more than the aggregate of all of the individual decisions made

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<sup>8</sup> 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.

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

<sup>10</sup> 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)*.

<sup>11</sup> 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.

<sup>12</sup> 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)*.

<sup>13</sup> 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)*.

<sup>14</sup> 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;<sup>15</sup> policies designed to encourage innovation may destroy jobs in existing industries;<sup>16</sup> policies whose goal is to preserve jobs may discourage both innovation and entrepreneurship.<sup>17</sup> 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

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

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

<sup>17</sup> 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.

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