

# FRAGMENTED LAWS, CONTINGENT CHOICES: THE TRAGICOMEDY OF THE VILLAGE COMMONS IN CHINA\*

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*Defining the direct conflict between law and social norms as a tragedy and their reconciliation as a comedy, this paper serves as a case study of the mixture of tragedies and comedies of collective land governance in China. The term tragicomedy encapsulates such a mixture. This paper presents two contrasting cases of collective land governance: one village co-op is captured by a mafia and the consequent mafia-style land development business is maintained through violence and the bribing of government officials; the other village co-op from time to time takes actions “in the name of law” in their bargaining for legal property rights with the government and with a hold-out couple who refused to submit their “nailhouse” to the village co-op for redevelopment. This paper reveals that the different identities that village leaders simultaneously assume under different social control systems are key to understanding the co-evolution of property law and norms. It also highlights the essential roles of the laws and communities’ legal strategies in governing common-pool resources.*

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\* Note from the Editor: The stories discussed in this article were previously printed in the author’s book *CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS* (Cambridge University Press, 2017). This article analyzes these stories through a new conceptual framework. It is the author’s and this journal’s hope to present the lessons learned from these stories to a new audience.

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## INTRODUCTION

When a number of people have access to certain resources, the central question is why some result in a tragedy while others result in a comedy. In his original article published in *Science* in 1968, Garrett Hardin was dealing with what we would call open-access regime today,<sup>1</sup> in which access to resources is open to all, an unidentified and unlimited number of people. The tragedy of the commons develops in this way:

Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . . the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit--in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.<sup>2</sup>

In reality, however, the tragedy of commons does not always happen to the above herdsmen because they often belong to the same local community which develops social norms regulating the use of the pasture. According to Robert Ellickson, “a close-knit group tends to create, through custom and

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1. Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S335 (2002).

2. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

law, a cost-minimizing land regime that adaptively responds to changes in risk, technology, demand, and other economic conditions.”<sup>3</sup> The key is the existence of a close-knit community. What community governance would lead to efficient resource governance? Ellickson provides us with principles but leaves the details unelaborated.<sup>4</sup>

Nobel Prize Laureate Elinor Ostrom examined various cases to answer the question of why self-governance works in some situations but not in others, and built a framework identifying various factors contributing to the success or failure of governing the commons. Her major contribution was persuasively proving self-governance as an alternative solution besides privatization and state control in governing common pool resources.<sup>5</sup>

One danger in understanding self-governance, however, is to ignore the impact of state and law, which has been either absent or treated as an outside alternative in the commons literature. In Garrett Hardin’s thought experiment of herds on the pasture, the state and law entered the picture as a possible solution only at the last stage.<sup>6</sup> Carol Rose argues that custom is a means different from exclusive ownership by either individuals or governments, through which a commons may be managed.<sup>7</sup> As she wrote, the intriguing aspect of customary rights is that they vest property rights in groups capable of self-management.<sup>8</sup> Ostrom, although framing self-governance as an alternative to privatization and state control, actually listed macro political and legal environment as a factor in her framework of governing the commons.<sup>9</sup> Nevertheless, it is still unclear how law and local communities interact with each other and what would be the consequences of such interactions.

Using village governance in China as an example, this article investigates the interaction of state laws and local communities and such interactions’ impact on land management. To highlight the interactions between law and local communities, we focus on informal property

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3. Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1398 (1993).

4. “A close-knit group is a social entity within which power is broadly dispersed and members have continuing face-to-face interactions with one another. By providing members with both the information and opportunities they need to engage in informal social control, conditions in such groups are conducive to cooperation.” *Id.* at 1320–22.

5. JOHN F. PADGETT & WALTER W. POWELL, *THE EMERGENCE OF ORGANIZATIONS AND MARKETS* (2012). (I am grateful to Xiaohong Xu for recommending this literature.)

6. Hardin, *supra* note 2, at 1243 (1968).

7. Carol Rose, *The Comedy of the Commons: Commerce, Custom and Inherently Public Property*, 53 UNIV. OF CHICAGO L. REV. 711, 742 (1986).

8. *Id.*

9. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 211 (1990) (“It is essential to consider not only the variables that characterize a particular CPR situation but also the type of external political regime under which the CPR is operated”).

development and their interactions with formal laws in China. According to the Chinese Ministry of Land and Resources, by 2007, Chinese farmers had built over 6.6 billion square meters of houses in evasion of the legal prohibition on private rural land development and transfer, resulting in a huge market of illegal houses. By way of comparison, in 2007, the total floor space of housing sold on the legal housing market was 0.76 billion square meters.<sup>10</sup> People in China call these illegal buildings “small-property houses” (*xiaochanquan*) because their property rights are “smaller” (weaker) than those on the urban/formal housing market, which have “big” property rights protected by the government. The market has developed in step with China’s ongoing struggle for a formal property regime.

This research is based on my eleven-month fieldwork in Shenzhen, the first experimental site of China’s market reforms. In the city of Shenzhen, which experienced exponential population growth from 300,000 to over 10 million from 1978–2010, almost half of the buildings are small-property constructions.<sup>11</sup> These buildings, without legal titles and concentrated in 320 intra-city villages, host most of the 8 million migrant workers in Shenzhen and are the main livelihood of the more than 300,000 local villagers.<sup>12</sup> There has formed a huge impersonal small-property market that is supported by a network of institutional innovators, including local villagers and their co-ops, local government officials, real estate developers and brokers, lawyers, etc. Both the risks of contract breach and of government demolition are greatly reduced because of the implicit consensus on rural land development and transfer.<sup>13</sup>

The Chinese use color to distinguish the legality of organizations and their activities: “black” means totally illegal and often involving mafia<sup>14</sup>

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10. Xiao Chanquan Fang Cun Liang 66 Yi Pingmi Xiangdangyu Shinian Fangchan Chengjiao Liang (小产权房存量66亿平米相当于十年房产成交量) [Small-Property Houses total 6.6 Billion Square Meters, almost the same amount of Legal Housing Transactions within a Decade] [http://lianghui.china.com.cn/info/txt/2008-11/17/content\\_16779899.htm](http://lianghui.china.com.cn/info/txt/2008-11/17/content_16779899.htm) (last visited May 6, 2018).

11. Shenzhen is the city with the highest ratio of small-property houses, which make up 47.57% of the city’s total floor space, compared to 30% in Xi’an and 20% in Beijing. Song Linfei (Quanguo Zhengxie Weiyuanhui, Jiangsusheng Zhengfu Canshi Zhuren): Xiaochanquanfang Meiyou Zhuanzheng “Tequ” (宋林飞 (全国政协委员、江苏省政府参事室主任): 《小产权房没有转正“特区”》, 《人民论坛》2012年7月4日) [Song, Linfei (National CPPCC Member, Director of Jiangsu Province’s Government Counsellor’s Office), *No Special Economic Zone for Legalization of Small-Property Houses*, PEOPLE’S FORUM, July 4, 2012].

12. Shitong Qiao, *Planting Houses in Shenzhen: A Real Estate Market without Legal Titles*, 29 CAN. J.L & SOC’Y 253, 255, 266 (2014).

13. Shitong Qiao, *Small Property, Big Market: A Focal Point Explanation*, 63 AM. J. COMP. L 197 (2015).

14. Mafia is a vague term with no consensus definition. But generally speaking, their primary activities involve the use of violent intimidation to manipulate local economic activity, in particular illegal transactions. As Milhaupt and West argue, mafia, or organized crime, is “an entrepreneurial response to

activities marked by violence and crime; “white” means totally legal and official recognized. On most occasions, small property is “grey,” between black and white. However, as land available for development decreases, the Shenzhen city government has adopted various policies on small property, ranging from prohibition to legalization.<sup>15</sup> These varying and changing policies, together with the tensions and conflicts within the Chinese legal system, have led to different interpretations and applications of law across time and in different villages. That’s to say, law is not a uniform and integrated concept but fragmented and layering.

“Layering” refers to variety, competition, and conflicts of laws in the vertical dimension, i.e., between laws made by different levels of authorities, such as those between the Chinese central government, provincial, and city governments.<sup>16</sup> “Fragmentation” refers to the fact that even laws along the horizontal dimension, i.e., laws and policies made by the same government could conflict with each other and that reconstitution of the same law in different local settings or at different times might lead to different outcomes.<sup>17</sup> The application of laws is far from unified. It is thus a question of which laws would be applied to a situation. The greyness of small property is caused by the fragmentation and layering of Chinese laws regarding rural land development and transfer.

Some villages successfully gain government recognition of their real estate business by making use of various government policies rewarding law-abiding villages with legal rights to develop their land. There are also villages that have gone the opposite route, i.e., giving up any legal dialogue with the official system and the hope for legal development, most often resorting to bribes and, occasionally, to violence. Both the ‘whitening’ and ‘blackening’ of small property exist in Shenzhen. Whitening results in the reconciliation of state law and local community practices and enables villages to profit from the legal real estate market. Blackening results in the direct conflict between state law and local practices symbolized by legal enforcement and deprives villages from even their “grey” real estate business. Defining the direct conflict between law and social norms as a

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inefficiencies in the property rights and enforcement framework supplied by the state.” Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43 (2000).

15. Shitong Qiao, *Small Property, Adverse Possession and Optional Law*, in *LAW AND ECONOMICS OF POSSESSION* 290, 303–10 (Yunchien Chang ed., 1st ed. 2015).

16. Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 *WORLD POL.* 116, 121 (2006).

17. See Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 *LAW & SOC’Y REV.* 893 (2005).

tragedy and their reconciliation as a comedy, this paper also serves as a case study of the mixture of tragedies and comedies of collective land governance in China. The term tragicomedy encapsulates such a mixture.<sup>18</sup>

This paper presents two contrasting cases of small property: one village co-op<sup>19</sup> is captured by a mafia and the consequent mafia-style small-property business is maintained through violence and the bribing of government officials; the other village co-op from time to time takes actions “in the name of law” in their bargaining for legal property rights with the government and with a hold-out couple who refused to submit their “nailhouse”<sup>20</sup> to the village co-op for redevelopment.

Why do state law and local norms reconcile in some villages while they conflict in others? Robert Ellickson notes that individuals and entities choose among different social control systems based on the comparative efficiencies of social forces and the state in generating and enforcing rules.<sup>21</sup> The question for Ellickson would be how to compare efficiencies of changing social control systems. Ostrom argued that “individuals who have self-organizing capabilities switch back and forth between operational-, collective-, and constitutional-choice arenas, just as managers of production firms switch back and forth between producing products within a set of technology, introducing new technology, and investing resources in technology development.”<sup>22</sup> The question for Ostrom would be how individuals decide which “products” to introduce. If these products (Ellickson’s social control systems or Ostrom’s arenas) are mutually

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18. Donald Elliott used this term to reflect that human beings sometimes solve their environmental problems and live in harmony with nature, but in other instances, they fail to solve them and destroy the natural world upon which their own survival depends. E. Donald Elliot, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 VA. ENVTL. L.J. 17, 19–20 (2001). Ostrom and her collaborators used “the drama of the commons” because “the results [of governing the commons] are somewhere in between [tragedy and comedy], filled with ambiguity. But drama is always there.” See *THE DRAMA OF THE COMMONS 4* (Elinor Ostrom, Thomas Dietz, Nives Dolšák, Paul C. Stern, Susan Stonich & Elke U. Weber eds., 2002).

19. Villages in Shenzhen are governed by village co-ops. It is a form of collective economic organization under which village members own shares in the co-op and elect the co-op board. The co-op board is in charge of the management of land owned by the collective and responsible for issuing dividends to villagers each year.

20. A “nailhouse” is the Chinese term for the buildings of hold-outs because they stick out and are difficult to remove, like a stubborn nail. *Stubborn as a Nail: China Residents Who Refuse to Move*, ABC NEWS, <http://abcnews.go.com/International/photos/stubborn-nail-china-residents-refuse-move-19827908/image-19828396>. For a scholarly discussion of such a case, see Shitong Qiao, *The Evolution of Chinese Property Law: Stick by Stick?*, in *PRIVATE LAW IN CHINA AND TAIWAN: ECONOMIC AND LEGAL ANALYSIS* 182-211 (Chang et al eds., 2017).

21. ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 123–37 (1991).

22. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 50 (1990).

influencing each other, a cost-benefit analysis focusing on one single system does not give us the answer.

How is institutional change to be understood from such a co-evolving and dynamic perspective? Social scientists have provided us with some clues. John Padgett and Walter Powell provide a theory of the co-evolution of social networks through their infrastructural work of synthesizing social science with biochemistry.<sup>23</sup> They focus on the multiple roles of actors in different arenas, which, according to them, are the channels through which mutual interactions and co-evolution is achieved. Following a path focused on the multiple roles of actors in different arenas, I discovered that different identities of village leaders are the key to understanding the co-evolution of property law and norms in Shenzhen. For example, a village leader in Shenzhen has three identities: (1) operator of the village co-op corporation and thus responsible for maximizing its economic performance, (2) elected representative that should take care of villagers' interests, and (3) implementer of governmental laws and policies. How a village leader plays these three roles both influences and is influenced by the three co-evolving systems (market, community, and law and policy).

This paper is structured as following: Part I presents the tragicomedy of small property in detail. Part II introduces the concept of layering and fragmentation of law and discusses its challenge to law and social norms, exploring how choice of rules needs to consider the co-evolving and mutually-influencing nature of different social control systems. Part III applies the multiple-network evolution model to explain the tragicomedy and investigates how the three identities of village leaders influence each other and the systems in which they are embedded. Part IV concludes.

## I. TWO LEGAL DESTINIES OF THE COMMONS

The emergence of a small-property market accompanied three decades of rapid urbanization in Shenzhen. Even when facing the same market demand and the same formal institutional structure, however, villages are subject to different destinies. Some villages successfully gained government-recognized rights to develop and sell their land through village redevelopment, making their members millionaires and even billionaires.<sup>24</sup> Some villages chose to make money from developing small property, disregarding state laws and policies. Sometimes, even between villages sitting on opposite sides of a small river, completely different outcomes have

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23. JOHN F. PADGETT & WALTER W. POWELL, *THE EMERGENCE OF ORGANIZATIONS AND MARKETS* (2012). I am grateful to Xiaohong Xu for recommending this literature.

24. See Shitong Qiao, *Small Property, Adverse Possession, and Optional Law*, in *LAW AND ECONOMICS OF POSSESSION* 293–94 (Yun-Chien Chang ed., 2015).

occurred. On one side is a village full of small-property constructions where villagers have shown no respect for the legal prohibition on rural land development and transfer and have “planted” as many houses as possible in each vacant plot.<sup>25</sup> On the other side is a village in which construction has been restricted by the village co-ops, which in turn have devoted time and resources to applying for legal rights to develop and sell their land. Such disparities are possible due to the fragmentation and layering of laws.

From a long-term perspective, with government-recognized rights to develop and transfer land, villages can gain access to capital, strategic investors, business ideas and technology available to the legal real estate business, and can make significantly more money from their land. This bright but uncertain future involves substantial costs. Many people in such villages pursuing legal development complain that, “We’re losing money every day by not developing our land—the cost of complying with law is too high!”<sup>26</sup> Violation of the legal prohibition on rural land development and sales usually does not lead to serious penalties, although villagers pay government officials regular bribes to reduce the risk of enforcement. Alternatively, the “gray” small-property business could also go “black” and totally flout the law. This involves “flagrant forms of criminal activity”,<sup>27</sup> such as kidnapping, murdering and organized crime. In such cases, the government often cracks down with the use of law enforcement.

To investigate what leads grey small property to whitening in some villages while blackening in others, I will discuss two case studies in detail in the following section.

In one case, W village and its leader were prosecuted for bribing government officials to cover up their small-property business; the leader was also convicted for participating in a mafia,<sup>28</sup> of which the main business was small property in recent years. In the second case, Z village co-op acquired legal rights to redevelop the village land, and even resolved the hold-out problem by suing a nailhouse holder in court.<sup>29</sup>

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25. See Qiao, *supra* note 13, at 258.

26. Beijing Daxue Guojia Fazhan Yanjiu Yuan: *Shenzhen Shi Tudi Chanquan Zhidu Gaige Yu Erci Kaifa Liyong Jizhi Chuangxin Yanjiu Baogao* (北京大学国家发展研究院：《深圳市土地产权制度改革与二次开发利用机制创新研究报告》) [NAT’L SCHOOL OF DEV., INVESTIGATION REPORT OF LAND REFORM IN SHENZHEN 18 (2013)].

27. See Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 WORLD POL. 116, 126–27 (2006).

28. The mafia is “a specific economic enterprise, an industry which produces, promotes, and sells private protection.” DIEGO GAMBETTA, *THE SICILIAN MAFIA: THE BUSINESS OF PRIVATE PROTECTION I* (1996). For discussions on mafia in the Chinese context, see PENG WANG, *THE CHINESE MAFIA: ORGANIZED CRIME, CORRUPTION, AND EXTRA-LEGAL PROTECTION* (2017).

29. See *infra* Part I.B.

### A. W Village: The Mafia-Style Small-Property Business

W village is located in SJ sub-district of Bao'An district. It comprises an area of 6.8 square kilometers with a total population of 60,000, only 2,067 of whom are official residents of the village. Most share the family name Pan. In the 1990s, W village was called one of the top four “super-villages” in China because of its wealth, which was accumulated mainly through the building of factories for rent to outside investors.<sup>30</sup> It was also the first village in Shenzhen to experiment with village co-ops, a form of collective economic organization that has since been adopted by all other villages in Shenzhen. Under this structure, the co-op board is in charge of the management of land owned by the collective and responsible for issuing dividends to villagers each year.<sup>31</sup> W village was also one of the earliest villages to conduct large-scale commercial residential housing developments under the pretext of building residential housing for their own villagers—most of which were actually placed for sale on the small-property market.

With the additional rise and growth of a mafia of local villagers, the small-property market in W Village—and in the Shajing sub-district in general—developed into a partnership between corrupt government officials, the mafia, and village co-op leaders, resulting in criminal prosecutions and a crisis of the market.

#### i. Brother Dragon and His Xinyian

The “the biggest mafia in the history of Shenzhen,” was founded by a local villager of HS village, located in the SJ sub-district and close to W Village.<sup>32</sup> Its leader, Brother Dragon (“BD”) became a member of a local mafia in the 1980s, during which time various mafias fought for territory and resources. BD gradually made himself the ultimate leader and mediator of all mafias in the SJ sub-district. He united them under a single name, “XYA”, after a famous Hong Kong mafia, of which BD’s uncle was a leader. BD’s mafia controlled most of the garbage collection stations, gas stations,

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30. A super village means super successful village as evaluated by the degree of economic development. See Zhe Xiaoye: *Cunzhuang de Zaizao: Yige “Chaoji Cunzhuang” de Shehui Bianqian* (折晓叶:《村庄的再造:一个“超级村庄”的社会变迁》) [ZHE XIAOYE, THE VILLAGE REMAKING: SOCIAL TRANSFORMATION OF A SUPER VILLAGE] 79–94 (1997) (a classic book on Chinese super villages based on the case of W Village).

31. See *infra* Part III.

32. See Shenzhen Zuida Hei Shehui “Sha Jing Xin Yi An” An Long Ge Bei Pan Wuqi Fa Yi Dian Er Qi Yi (深圳最大黑社会‘沙井新安’案 龙哥被判无期徒刑1.27亿) [Judicial Decision of The Biggest Mafia in Shenzhen: Brother Dragon Sentenced to Life Imprisonment and Fined 127 Million] 1 (Jan. 31, 2013). <http://legal.people.com.cn/n/2013/0131/c42510-20387623.html>.

strip clubs, and real estate businesses in SJ. It is said that he was “the emperor of SJ.”<sup>33</sup>

To be a “little brother” (*mazai*), i.e., member of the mafia, there are rules to follow, the most important three of which include:

(1) No fighting within the mafia; territories are divided according to the boundaries of villages and crossing the boundaries to “develop business” is forbidden;

(2) Mutual support should be offered whenever it is needed; outsiders must be informed that the little brothers are “Brother Dragon’s man”; and

(3) BD’s orders must be followed absolutely.<sup>34</sup>

Little brothers who violated any of the above rules were beaten. In the case of infighting, penalties for the initiator were clearly set: 3000 RMB<sup>35</sup> for one punch; 30,000 RMB for one cut.<sup>36</sup> However, the real threat is the loss of BD’s support, in which case the offending little brother’s business would be subject to others’ encroachment without remedy.<sup>37</sup>

BD enjoyed vast influence in village elections and grassroots government operations. He chose the most influential men (as determined by wealth or connections) in each village to be little brothers.<sup>38</sup> It is said that almost every elected village official had some degree of support from BD and that BD was capable of controlling at least one-half of the votes in each village.<sup>39</sup> In some cases, BD’s men would be present during village elections to deter any dissidents.<sup>40</sup>

A party secretary of a villagers’ group disclosed a case to government officials during the investigation of BD’s mafia:

Two or three years ago in our village election, one person was not obedient; the next morning when he got up, his car was smashed. It is the big brothers of XYA that decided our elections, even party-secretary Liu of the SJ sub-district government did not matter. I feel that is not the country of the Communist Party, but the mafia’s.<sup>41</sup>

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33. Guangdong Sheng Shenzhen Shi Zhongji Renmin Fayuan Xingshi Fudai Minshi Panjue Shu (2012) Shen Zhong Xing Yi Chu Zi Di Erbai Ershi Qi Hao (广东省深圳市中级人民法院刑事附带民事判决书(2012)深中法刑一初字第227号) [Shenzhen Intermediate Court Criminal Case First Trial No. 227] 193 (2012) [hereinafter Shenzhen Court Decision].

34. *Id.*

35. Renminbi (RMB) is the official currency of the People’s Republic of China.

36. Shenzhen Court Decision, *supra* note 33, at 198–99.

37. *Id.* at 219.

38. *Id.* at 145.

39. *Id.* at 328.

40. *Id.*

41. *Id.* at 307–08.

BD also had strong connections within the SJ sub-district government. Party Secretary Liu, No. 1 of the sub-district government was eventually prosecuted as a “protection umbrella” (*baohusan*) for BD’s mafia. In total, Liu received over 12 million RMB from BD for various conveniences he provided for BD’s businesses. For example, in 2008, BD bought about 20,000 square meters of land from BG village. In 2009, the subdistrict government planned to requisition the same plot of land. BD invited Liu to dinner and afterward gave him a bag of HKD 2 million in cash. The plot has still not been requisitioned.<sup>42</sup>

Interestingly, Liu confessed that he had to rely on BD to govern SJ. After taking office as No. 1 of SJ sub-district but without much local connections, Liu’s subordinate who was local and a friend of BD’s—introduced the two in 2003. Liu’s subordinate actually told him that “he can displease anybody in SJ but not BD.” Liu sought help from BD for the management of legitimate government affairs. For example, in 2008, when a little brother of BD organized over 30 villagers to disturb the party branch election in his village, Liu had to ask BD to call the man off.<sup>43</sup>

Overall, BD’s mafia functioned like a government and provided protections, solicited or unsolicited, to both legal and illegal businesses. Small-property business, as in-between legal and illegal, relies on connections with local officials in reducing risk of legal enforcement, and private mechanism in resolving disputes. BD’s mafia had advantages in both aspects and entered into the industry in early 2000s.<sup>44</sup> He managed to buy a lot of land from villages at discounted prices. BD had little brothers in each village of SJ, some of whom were village co-op board members, village party branch members, or villagers’ committee members. Even in villages where BD’s men did not have official positions, they still had influence in the village governance due to their wealth, connections, and use of violence. Moreover, these deals were often opaque. Usually BD orchestrated to deal with one or two village leaders, although legally, transactions involving village assets had to be approved by the village co-op board or at the shareholders’ meeting of the village co-op.<sup>45</sup> For example, in 2003, BD bought an industrial plot of 30,000 square meters from SL village at 6 million RMB. The price was 200 RMB for 50-year use rights per square meters. BD sold this plot to HY village for 55.2 million RMB in 2007. The 2003 transaction was made after BD’s private conversation with the village’s party

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42. Shenzhen Court Decision, *supra* note 33, at 31.

43. *Id.* at 733–34, 741–45.

44. *Id.* at 282.

45. *Id.* at 546.

secretary.<sup>46</sup> As for the 2007 transaction, according to the director of the HY villagers' committee, "We were willing to sign the contract because it was BD's company."<sup>47</sup>

BD made quick profits from such resales. A more significant case occurred in 2007. On September 11, 2007, BD and his real estate developer Chen bought 70-year use rights of 41,549 square meters of land at a price of 30 million RMB from the SX village co-op. After a little over one month, they sold it to the HS village co-op at 158 million RMB on October 26, 2007.<sup>48</sup>

At the end of 2008, Li, a non-local investor, bought three floors of YFY, a small-property building from Chen. The total amount agreed to was 140 million RMB. Li paid five million RMB as front money and agreed to pay the remaining amount from future sales income. Li developed a shopping mall with these three floors. The income from selling the first 25% of the units alone amounted to 70 million RMB, making the total amount approximately 280 million RMB. Chen had not expected the floors to be so profitable and asked Li to withdraw from the project. BD brought Li to Chen's office and told him: "Boss Li, YFY is not a big deal; Chen told you not to do it—you should not continue; if you withdraw, I can give you several million RMB and another project to do."<sup>49</sup> BD sat for a while and then left. Chen ordered Li to stay for a whole night and forced him to sign a contract and submit relevant documents, including the project license. However, Li kept the original contract, preventing Chen from finishing the official transfer procedures. Consequently, in October 2009, BD's men kidnapped Li, holding him for a whole week and forcing him to sign other contracts. He was also forced to submit the original contract and remaining documents needed to complete the official transfer.<sup>50</sup>

It was not rare for violence to be used as a last resort to maintain BD's business. As said by a witness in court, most of the fighting in SJ in past years was related to BD's mafia members, including quite a few murders.<sup>51</sup> Villagers in SJ can be horrified at the mention of BD's name.<sup>52</sup> No one dared to resist BD plans. In one instance, BD seized villagers' land to build a club to treat his men and clients, but the villagers dared not complain until after

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46. *Id.* at 545.

47. *Id.*

48. Shenzhen Court Decision, *supra* note 33, at 34.

49. *Id.* at 384.

50. *See id.* at 383–84 (Here it means the change of the owner of the company at the business administration bureau).

51. *Id.* at 307.

52. *Id.* at 310.

he was arrested.<sup>53</sup> A village cadre told another story to the police after BD's arrest, saying "Don't like the 24-hour operation of the laundromat near your home? It was BD's business – keep an eye on your home window during the night (if you complained)!"<sup>54</sup>

ii. Criminal Prosecution, W Village's Fall, and A Crisis of the Market

W Village has been heavily influenced by the XYA Mafia. Pan, the head of W Village, was BD's little brother and prosecuted for participating in a mafia and bribing government officials. Pan's defense disputed this charge by arguing that Pan had no motivation to participate in BD's XYA mafia, since he was the party secretary and village co-op board chairman. In other words, his defense claimed that Pan could not profit economically, socially, or politically from joining a mafia.<sup>55</sup>

Though seemingly plausible, this argument was contradicted by Pan's own testimony and the facts.<sup>56</sup> Pan confessed, "I devoted myself to BD with all my heart. Upon BD's call, I would drop anything at hand and run to his office and call him boss. Their real intention in controlling me was to force me to sell land cheaply to them at the expense of our villagers' interests, but I cannot control my own fate and have to follow their control."<sup>57</sup>

Pan kept close ties with BD and sold him a lot of village land at low prices. Pan even cooperated with BD in small-property development in the name of building concentrated residential apartments for villagers—a plan that was not approved by the village co-op board and was unknown even to many ordinary villagers. Much of the land was transferred directly to BD.

W Village is located at the central area of the SJ subdistrict. With the rapid industrialization and urbanization, real estate development in the area became profitable. Villagers saw village land developed into small-property buildings one plot after another, but the allocation of profits was unknown. The village co-op had not paid dividends to villagers since 2002 due to bank debt amounting to over 1 billion RMB.<sup>58</sup> The reason was that most of the buildings were controlled by BD's companies, though some under the guise of partnership with the village co-op.

53. *Id.* at 294.

54. *Id.* at 307–08.

55. *Id.* at 69.

56. For further discussion on Pan's motivations, *see infra* Part III.

57. Shenzhen Court Decision, *supra* note 33, at 244–45.

58. Tian Jiagang & Jing Jianfeng *Shenzhen "Wanfeng Shenhua" 17 Nian Hou Zouru Jiongjing*, MINZHU YU FAZHI SHIBAO, 2006 Nian 2 Yue 12 Ri (田加钢、景剑峰, 《深圳"万丰神话"17年后走入窘境》《民主与法制时报》2006年2月12日)[Tian Jiagang & Jing Jianfeng, *The Mystery of Wanfeng Fell into Quandary after 17 Years*, DEM. & RULE OF L. NEWS, Feb. 12, 2006], <http://news.sina.com.cn/c/2006-02-12/10499078862.shtml>.

As powerful as BD and his mafia were, they eventually became targets of criminal prosecution. In February 2012, the Guangdong provincial government launched a campaign called “three strikes and two build-ups.”<sup>59</sup> The three strikes referred to targeted actions against the “monopolization of the market through violence,” the “making and selling of counterfeit products,” and “commercial bribes”.<sup>60</sup> The build-ups referred to building up “a social reputation system” and “a market supervision system.”<sup>61</sup> BD’s monopoly over the small-property market in Shajing and his bribery of government officials became prime targets under this campaign. In early 2012, the police rooted out the XYA mafia through a raid, in which 102 mafia members were arrested, leading to over one hundred criminal prosecutions.<sup>62</sup>

BD was prosecuted for organized crime, murder, kidnapping, bribery, and more. Most interestingly, he was also prosecuted for “illegal transfer of land use rights” despite the fact that village leaders who sold the land to his company were not prosecuted for the same crime.

The crime of “illegal transfer of land use rights” is set forth in Article 228 of the Chinese Criminal Code, which defines it as “with the purpose of making profits and in violation of land administration laws, transferring land use rights illegally, in a serious situation.” Such “serious situations,” as defined by the Chinese Supreme Court, include “making more than 500,000 RMB profits,” “transferring more than five *mu* of basic agricultural land,” etc. Judged by the amount of profits BD made from “illegal transfer of land use rights,” the Shenzhen Intermediate Court considered BD’s crime as “particularly serious” and increased penalties accordingly.<sup>63</sup>

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59. CCTV News: *Wangyang Bushu Guangdong “Sanda Liangjian”* (央视网: 汪洋部署广东“三打两建”) [*Wang Yang Implements “Three Strikes” and “Two Build-Ups”*, CCTV NEWS], <http://news.cntv.cn/china/20120210/104962.shtml>. This campaign was initiated by Wang Yang, then governor of Guangdong province and currently Vice Premier of the State Council of China. As stated, the main purpose was to improve the market environment. Before that Bo Xilai, former Mayor of Chongqing and member of the Political Bureau, also had a campaign under his jurisdiction against organized crime. Both politicians were viewed as strong competitors for the new standing committee of the Political Bureau.

60. *Id.*

61. *Id.*

62. Yang Tao, *Xiao Changquan Fang Wanjiu Jiti Jingji Zhong Yinfa Tudi Chanquan Zhengduozhan*, NANFANG DUSHIBAO, 2013 Nian 11 Yue 26 Ri (杨涛, 《小产权房挽救集体经济 终引发土地产权争夺战》, 南方都市报2013年11月26日) [Yang Tao, *Small Property Saved Collective Economy, but Led to Fighting over Land Rights at the End*, SOUTHERN METROPOLITAN DAILY, Nov. 26, 2013], <http://gz.house.qq.com/a/20131126/004483.htm>.

63. See also Quanguo Renda Changweihui Guanyu Xingfa Di 228 Tiao Di 342 Tiao Di 410 Tiao de Jieshi (2001 Nian 8 Yue 31 Ri Dijiujie Quanguo Renmin Daibiao Dahui Changwu Weiyuan Hui Di Ershisan Ci Huiyi Tongguo) (全国人大常委会关于刑法第228条第342条第410条的解释 (2001年8月31日第九届全国人民代表大会常务委员会第二十三次会议通过)) [Interpretation of the National People’s

At trial, BD's lawyer argued that BD's transfer of land use rights was not among the four situations prohibited by the Decree on Transfer of Collective-Owned Land Use Rights (No. 100 Decree) promulgated by Guangdong province. The No. 100 Decree is a product of Guangdong province's efforts to accommodate widespread rural land development and transfer within its jurisdiction, which play a crucial role in its economic development. BD's lawyer argued that Guangdong province has allowed the lease of rural land with multiyear terms. BD's transfer of rural land use rights actually took the form of a long-term lease and thus was consistent with No. 100 Decree. BD's lawyer further argued that the Guangdong Higher Court also promulgated Guiding Opinions on the Transfer and Lease of Collective-Owned Non-Agricultural Land Use Rights, which further recognize the legality of the transfer of rural land use rights.<sup>64</sup> According to BD's defense, Guangdong is at the frontier of reform and has experimented beyond the national practice, which is why the above decree and guiding opinions have been issued. In practice, small-property transactions have been prevalent and there are cases in which the local courts have recognized the effectiveness of such transactions.<sup>65</sup>

The court's decision on this particular crime of "illegal transfer of land use rights" was indeed an exception rather than an ordinary practice. Firstly, in BD's case, no sellers were punished. Secondly, numerous other transactions occurred without incurring criminal punishment. For example, before BD's "illegal transfer of land use rights" of one plot of land, its owner, SX village, had sold the same plot to a public university and bought it back to sell to BD.<sup>66</sup> If the criminal law on the "illegal transfer of land use rights" had been uniformly enforced, all other parties involved in the transactions, including sellers from whom BD bought land use rights illegally, the SX village head, and the public university involved should also be penalized. But such things did not happen.

The Shenzhen Intermediate Court failed to provide coherent and consistent standards in deciding on the legality of transfer of land use rights. Take another example. Among the 22,845 square meters of land BD bought from the SL village, the Shenzhen Commission of Urban Planning, Land, and Resources had granted the SL village co-op legal rights to transfer a plot of land of 2286.92 square meters.<sup>67</sup> But the court did not bother to distinguish

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Congress Standing Committee on Articles 228, 342 and 410 of the Criminal Code, (promulgated by the Standing Comm. Nat'l People's Cong., Aug 31, 2001)].

64. Shenzhen Court Decision, *supra* note 33, at 551–52.

65. *Id.*

66. *Id.*

67. *Id.* at 543.

this patently legal part of the transaction from the overall illegal transaction. If the court enforced the original law consistently, it should have separated the legal part from the illegal transactions.

Altogether, it was not a case of enforcing the current legal prohibition on the transfer of collective-owned/rural land use rights. Instead, it was a case against organized crime, which was the government's real target. There is a Chinese saying that "a fire on a city wall brings disaster to the fish in the moat." In this case, BD and his mafia are the city wall on fire, while small-property business are the suffering fish, i.e., collateral damage.

Pan and his village are other fish that are suffering. After BD and Pan were arrested, W villagers finally felt secure enough to claim their land rights. Some W villagers then blocked the entrance of a small-property building that buyers had not yet moved into and cut off the supply of electricity and water. Villagers claimed that Pan and his colleagues sold the land too cheaply and demanded a renegotiation of the contract with the real estate developer for a higher price. They argued that the conventional division of profits in SJ between village co-ops and their partners in small-property development was 3:7, but in the original contract, W Village got much less than that ratio.<sup>68</sup> W villagers even blocked a main avenue in SJ to protest and claimed that they would defend their land interests to the death. On the other side, buyers of small-property apartments developed on the land, most of whom were from outside Shenzhen, also hung out a banner reading, "Who stole my house? I want to go home! Give back my home!"<sup>69</sup> Thus the fallout from BD's case became a so-called "mass incident."<sup>70</sup>

Although the court sentenced BD to life imprisonment for "illegal transfer of land use rights," the SJ sub-district government dared to invalidate neither the land transfer contract between BD's development company and the W village co-op nor the contract between hundreds of small-property apartment buyers and BD's development company, removing the buyers from their apartments and returning the land to W village. Rather, it ordered the development company to renegotiate its land transfer contract with the W village co-op, paying extra money to the village co-op to pacify those angry villagers. It is worth noting that even after the villagers' protest, the village co-op assured buyers several times that the apartments belonged to the buyers because they paid for them; they should not worry that they would be taken away.<sup>71</sup>

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68. Yang, *supra* note 62.

69. *Id.*

70. *Id.*

71. 陈小琼:《深圳小产权房冲突引起集体土地贱卖 危局待解》,《华夏时报》2013年4月20日 [Chen Xiaoying, *A Crisis to Be Resolved: Conflicts of Shenzhen Small-Property Houses Were Caused by Cheap*

Nevertheless, the crackdown on the XYA mafia created a crisis for W village and its small-property business. It also signified that the gray small-property market could be captured by organized crime, a problem that ranks much higher on the agenda of legal enforcement. It is worth wondering why W village went from gray to black, i.e. why Pan participated in BD's mafia and why he sold land so cheaply to the mafia. As Pan's lawyer would argue, neither seemed a rational decision. I will explore explanations for his decisions in Part III.

#### B. Z Village: In the Name of Law

Z Village is located in the NW sub-district of Longgang District. It comprises an area of 0.85 square kilometers, with a total population of 11,270, only 424 of whom were official residents of the village in 2004.<sup>72</sup> All the villagers share the same family name, Deng.

Since the emergence of the small-property market, formal institutions have adapted, producing narrow openings for villages to obtain legal rights to develop and transfer their real estate.<sup>73</sup> Despite the uncertain and costly nature of such an endeavor, quite a few villages have succeeded. The most successful example is the Caiwuwei case, in which the highest skyscraper in Shenzhen was developed from village land, with villagers receiving a substantial portion of the profits.<sup>74</sup> Z is a more ordinary example of villages that have gone white. Crucial steps in this decade-long process were undertaken in the name of the law. The village made intentional use of law, sometimes even advancing interpretations of the law opposite to those of the Shenzhen government in order to achieve its goals. The two key issues in obtaining legal rights for real estate development are the government's recognition and support, and managing the collective action problem of villagers. The corresponding questions are: (1) given that villagers are basically free to build small-property constructions with only sporadic interference from law enforcement, what incentives existed for the Z village co-op to bother to spend several years getting authorization, while incurring costs and lost profits in the process; and (2) why did it bother to sue a "nailhouse", when the opposite situation is more common, i.e., the nail household is seeking legal redress?

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*Sales of Collective Land*, HUAXIA DAILY, Apr. 20, 2013], <http://finance.sina.com.cn/china/dfjj/20130420/001615212277.shtml>.

72. 深圳市Z股份合作公司章程（2014年10月5日股东大会通过）[Shenzhen Z Village Co-op Charter (passed by Shareholders' Assembly on October 5, 2014.)]; 龙岗区民政局：《关于村改居的通知》（龙民【2004】43号，2004年9月3日）[Longgang Dist. Bureau of Civil Affs., Doc. [2004] 43, Approval of Replacing Villagers' Committees with Residents' (Sept. 3, 2004)].

73. See Qiao, *supra* note 15, at 293.

74. *Id.* at 311-13.

As early as 1982, Z Village—among many villages, including W village—began to build factories to rent to Hong Kong investors. Most such factories did not undergo any legal procedure before construction and are therefore illegal small-property constructions. For example, the first investor from outside of the village, a private printing house, rented its factory from four village cadres, who rented land from the village collective and built factory space. One of the cadres said that they did this in response to the Shenzhen government's call for industrial development and the need to create jobs for villagers, but they did not apply for any certificate for the building from the government. The factory was built in 1993, and now it has more than 100 employees, quite a few of whom are local villagers.<sup>75</sup>

Z is unique among villages due to its close proximity to the Shenzhen Reservoir, a main water source for the city. In 1986 the Shenzhen city government designated part of the village as a protected area, planned to move all factories within this area elsewhere and prohibited any further building within the area. After the designation but before the government was able to demolish these factories, the Z villagers built more to create a situation in which, as the Chinese saying goes, “the rice is cooked” (i.e., what is done cannot be undone).<sup>76</sup>

Economic development in Z Village is full of tales of making money from land. In addition to the industrial land development described above, housing land development also played a significant role. For example, in 1992, Z Village divided one portion of the village land into small plots and then sold them to non-villagers to build residential houses.<sup>77</sup>

Gradually, land became the main income source for village members. In particular, since the late 1990s, villagers found that they could live a good life just by renting their houses to migrant workers. To accommodate this demand, it became a trend for individual villagers to rebuild and expand houses.<sup>78</sup>

But villagers' business of “planting houses” did not go much further. In 1999, DYJ, then 32-years old, returned to Z Village from his job as a vice president of a large real estate company in Shenzhen and successfully ran for the chairmanship of the village co-op board. He decided to stop the chaotic housing construction by his fellow villagers, which did not realize the full

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75. 程瑜、刘思霆、严韶：《一个客家村落的都市化——深圳樟树布村改革开放30年的发展  
与变迁》，广东人民出版社2010年版。[CHENG YU, LIU SITING & YAN SHAO, URBANIZATION OF A  
HAKKA VILLAGE: THREE DECADES OF DEVELOPMENT AND CHANGE IN ZHANGSHUBU VILLAGE OF  
SHENZHEN 115 (2010)].

76. *Id.* at 79.

77. *Id.* at 81.

78. *Id.* at 82–83.

potential of the village land. Instead, under his leadership, Z Village began to apply for legal rights to redevelop Z Village from the Shenzhen government in 2000, a plan that would make huge profits for the village if successful.<sup>79</sup>

In 2003, the Longgang District government approved the redevelopment plan of Z Village; the Shenzhen City Bureau of Environmental Protection also finished an environmental impact evaluation in 2004.<sup>80</sup> WK, a leading real estate company in China, also set up a project company to work on the Z village redevelopment; a contract between the project company and Z village co-op was signed in 2004.<sup>81</sup>

According to the village redevelopment plan, 191,648 square meters of land would be redeveloped, among which 104,870 would be used for housing development, 32,000 would be used for public green space, and 54,778 would be used for roads. The neighborhood would have more green space and better roads than before. The redevelopment would demolish 173,241 square meters of housing but would eventually add 471,915, including 15,500 square meters of public housing to be operated by the Shenzhen government, 3,200 square meters of housing for a kindergarten, and 2,500 square meters of complementary facilities.<sup>82</sup> Overall, the redevelopment would increase both the quantity and quality of housing in the village. As compensation, villagers would be given one or one-and-a-half times of the total floor area actually demolished.<sup>83</sup> Most important, the new houses would have certificates of legally alienable rights.<sup>84</sup>

No villagers opposed the redevelopment plan in principle, but negotiations with a few did not succeed. As in any other real estate projects, hold-out was a problem. The following is an excerpt from a negotiation transcript between DYJ, chairman of the village co-op board and Ms. DXH and Mr. LRL, a couple who owned a small-property building of about 1,000

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79. *Shenzhenshi Shida Jiechu Qingnian Houxuanren: DYJ* (腾讯新闻: 深圳市十大杰出青年候选人: 邓奕军) [DYJ, Candidate for Top Ten Outstanding Youth, TENGXUN NEWS], <https://news.qq.com/zt/2007/sz10/>.

80. Longgang Quwei Bangongshi (龙岗区委办公室), Disici Jiucun Gaizao Gongzuo Huiyi Jiyao, Aug. 26, 2003 (第四次旧村改造工作会议纪要, 2003年8月26日) [OFF. OF THE PARTY COMM. OF LONGGANG DIST., SUMMARY OF THE FOURTH MEETING ON OLD VILLAGE REDEVELOPMENT, Aug. 26, 2003] [hereinafter Summary of the Fourth Meeting].

81. Z村旧村改造合作合同 (2004年12月6日) [Z Old Village Redevelopment Cooperation Contract (Dec. 6, 2004)] [hereinafter Redevelopment Contract].

82. *Id.*

83. Most villagers have at least two separate houses: one is left by their ancestors and is usually only one floor; the other is more modern and is several floors high. The ancestor's house would be compensated at 1.5 times the total floor area; the other kind of housing would be compensated as if it were new housing after redevelopment. *Id.*

84. Redevelopment Contract, *supra* note 81.

square meters:

DXH: Overall 55,000 per square meters, Sister wants this price, you help your sister get this [from the real estate developer].

DYJ: Impossible! What's the market price? I can only do that.

DXH: This is my offer. You do your best!

DYJ: The market price is a bit over 10,000 and up to 20,000; how can you ask for 55,000 from them? Too far from the market price!

DXH: It's impossible to do it according to the market price.

DYJ: Bargaining has limitations. Give you an example: assuming the market price is 20,000 and you ask for 25,000, that's okay!—I wouldn't say you're over and would only say it's a bit high. Beyond that, it's absurd . . . .

LRL: You tell me whether our house is worth 50 million!

DYJ: You're joking!

LRL: Not a joke! You tell me yes or no.

DYJ: Impossible.

DXH: It's hard to say impossible. You help me [to negotiate with the developer]!

. . .

LRL: We're not threatening. We have our needs. We're talking to you because we support [your redevelopment plan]. Otherwise we wouldn't negotiate with you. We support you, but we have our needs. It's another thing whether such a need is right or not.

DYJ: It's absurd for you to ask for such a price. . . . 25,000 would be rational. But the price you asked (55,000) is irrational.

LRL: It's not very absurd. We should have mutual [understandings].

DYJ: That's beyond what I can do.

DXH: I don't even have a job. You help me [get this deal done]!<sup>85</sup>

In such a situation, what can the village co-op and the real estate developer do to push this redevelopment plan forward? I would like to point out first that violence and threats were involved in this case; one of the nailhouses not discussed above was demolished in the early morning when the owners were not there. A manager of the developer claimed it was a mixup by the workers.<sup>86</sup> A coffin had been put in front of the house before the demolition by unidentified people.<sup>87</sup> If violence and threats are the

85. 与邓、梁的谈话记录（2011年9月21日）[Transcript of Negotiation with DXH and LRL (Sept. 21, 2011)].

86. 冯易：《房子“被拆错” 业主还被打》，《深圳晚报》2011年9月2日[Feng Yi, *House Demolished Wrongly and Owner Beaten*, SHENZHEN EVENING NEWS, Sept. 2, 2011], [http://wb.sznews.com/html/2011-09/02/content\\_1731660.htm](http://wb.sznews.com/html/2011-09/02/content_1731660.htm).

87. *Id.*

common and effective way to get things done, why did the village co-op, the developer's partner, bother to sue the owners of the nailhouse in court, as discussed below?

On August 27, 2011, seven years after the official approval of the village redevelopment plan, the village co-op held an unusual shareholders' meeting that passed a resolution by 83.39% of the total shares to *regain the use rights to the collective-owned land within the redevelopment area and to sue the owners of nailhouses who refused to sign a contract with the village co-op*.<sup>88</sup> The Longgang district court accepted the case on September 23, 2011.<sup>89</sup> According to the Z village co-op, by September 19, 2011, 91.32% of the households had signed contracts with it on 92.20% of total floor area to be demolished.<sup>90</sup> Only 19 households, i.e., 8.68% of the total, owning 7.80% of total floor area to be demolished, had not signed contracts.<sup>91</sup>

This was an unprecedented case in Shenzhen, raising two legal questions: (1) is the village land still collective-owned after the Shenzhen government's land nationalization in 2004, and (2) even if the village land is collective-owned, could the village collective by a majority vote reclaim use rights to a residential plot that has been allocated to individual households?

In 2004, the Shenzhen government initiated a so-called "land nationalization after urbanization" (*chengshihua zhuandi*) campaign. The government claimed that Shenzhen had finished urbanization and was the first city in China without agriculture. Accordingly, all land within its jurisdiction should be state-owned pursuant to Article 10 of the Chinese Constitution, which states that "urban land is state-owned," and Section V, Article 2 of the Implementing Decrees of Land Administration Law, which states that "[t]he following land is state owned: in the case that members of all village collectives are all converted to urban residents, the land originally owned by [the] village collectives."<sup>92</sup>

Interpreting that the conversion of the status of villagers from rural to urban would convert the collective-owned land to state-owned land, the Shenzhen city government initiated a year-long campaign to replace 300,000 villagers' rural *hukou* with urban *hukou*, integrating them into the urban welfare system. As the actual controller and manager of state-owned land

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88. 樟树布股份合作公司股东大会决议（2011年8月27日）[Res. of the Shenzhen Z Village Co-op Shareholders' Representative Assemb. (Aug. 27, 2011)].

89. 广东省深圳市龙岗区人民法院民事判决书（2011）深龙法民三初字第4886号[Longgang Dist. Court Decision Civil Case First Trial No. 4886 (2011)] [hereinafter Longgang Court Decision].

90. *Id.*

91. *Id.*

92. Tudi Guanlifa Shishi Tiaoli (中华人民共和国土地管理法实施条例)[Implementing Decrees of Land Admin. Law, art. 2, § V] (State Council No. 256, Dec. 27, 1998).

within its jurisdiction, the Shenzhen city government intended to the collective-owned rural land through this land nationalization.<sup>93</sup> Eventually the Shenzhen city government did “nationalize” a lot of rural land, but not all of it as the government had planned—in reality farmers still exercised *de facto* control over 300 square kilometers of the original rural land.<sup>94</sup>

This land nationalization was a serious encroachment on villagers’ land rights. It was also an intentional misinterpretation of the Chinese Constitution and Land Administration Law and was designed to get around the increasingly strict approval procedure of the central government in controlling local governments’ land requisitions. Although the Shenzhen government managed to get authorization from the central government leadership and finish the land nationalization before the Ministry of Land and Resource (MLR) could stop it, the Chinese MLR still declared publicly that, “[t]his practice in Shenzhen cannot serve as a precedent” (“*shenzhen zuo fa, xia bu wei li.*”). To minimize the challenge of such a practice to the Chinese land administration system, the MLR promulgated a special opinion interpreting Section V, Article 2 of the Implementing Decrees of Land Administration Law, stating that when the land of village collectives is requisitioned *according to law* and all its members have become urban residents, the little amount of remaining land can be requisitioned to become state-owned land *according to law*.<sup>95</sup> This means, for example, that when all land allocated to rural households within a village have been requisitioned according to law (in particular the central government’s land use quota system), the remaining land that has not been allocated could also be requisitioned because all the rural residents have become urban residents. Thus a local government cannot nationalize rural land within a village by declaring its members to be urban residents. A certain sequence must be followed to requisition rural land: rural residents can lose their rural status only after their land is taken; it cannot be done in reverse order.<sup>96</sup>

93. Though urban land is state-owned, in reality it is the city/county governments which control and manage the land.

94. See PEKING U. NAT’L SCH. OF DEV., INTERVIEW TRANSCRIPT OF THE SECOND SHENZHEN LAND REFORM SURV. 132–157 (2012).

95. Guowuyuan Fazhibangongshi, Guotuziyuanbu Guanyü Dui <Zhonghua Renmin Gongheguo Tudi Guanlifa Shishi Tiaoli> Di’er Tiao Diwu Xiang De Jieshi Yijian (国务院法制办公室、国土资源部关于对《中华人民共和国土地管理法实施条例》第二条第(五)项的解释意见) [Opinions of the Legislative Affairs Office of the State Council and the Ministry of Land and Resources on the Interpretation of Item (5) of Article 2 of the Regulation on the Implementation of the Land Administration Law of the People’s Republic of China] (promulgated by the Legislative Affairs Office of the State Council (incl. Legislative Bureau of the State Council) & Ministry of Land & Resources, Mar. 4, 2005, effective Mar. 4, 2005), [http://f.mlr.gov.cn/201702/t20170206\\_1437295.html](http://f.mlr.gov.cn/201702/t20170206_1437295.html).

96. Wangyi Zhuanti: <Xiaochanquanfang “Hefahua”, Shenzhen Zhineng shi Teli > (网易专题: 《小产权房“合法化”, 深圳只能是特例》 [Wangyi, *Symposium: Legalization of Small Property?*]

Notwithstanding the above, the central government has essentially acquiesced in the official position of the Shenzhen city government: officially, all land within Shenzhen has been nationalized and no collective-owned rural land remains. The Z village co-op's resolution explicitly contradicted the Shenzhen city government's official stance that all land was state-owned. The resolution determined that land in the village was still collective-owned and thus the village co-op had rights to regain the individual use of the collective-owned land. The relationship between the village co-op and individual village households is one of "land administration," as in the relationship between a land owner and land users. As the owner's rights are superior to that of users, the village co-op has the right to regain the use rights.

The second basis of the Z village co-op's argument was that this redevelopment plan had been passed by the majority vote of the village shareholders, and owners of the nailhouses, as shareholders of the village co-op, were bound by the resolution of the shareholders' meeting. This is quite an innovative argument. The nailhouse owners challenged this argument on the ground that the shareholders' meeting did not have the authority to decide this issue because their residential plots and houses were not part of the village co-op's property. They even checked the asset sheet of the village co-op and found that their property was not listed there.

Nevertheless, the local court decided that the village co-op had the authority to regain the land underneath the nailhouse and pay compensation to the owners at its objective value, which, according to an appraisal company hired by the village co-op, was only a bit over one million RMB.

The court's decision consists of two parts. In the findings of fact, the court highlighted that the redevelopment plan would serve the public interest at large, and had been passed by the majority votes of the village co-op shareholders; before the suit, over 90% of the villagers had signed a contract with the village co-op.<sup>97</sup> In this part of the opinion, the court also reviewed the history of the nailhouse plot, which had been allocated to the owners for free due to their village membership.<sup>98</sup> In the part of the opinion on the interpretation of laws, the court decided that the relationship between the village co-op and individual households should be governed by the laws applicable to rural residential plots, and thus their relationship was that between owners and users.<sup>99</sup> The court avoided explicitly stating that the land

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*Shenzhen is a Special Case* (June 2, 2009), <http://news.163.com/special/00012Q9L/xiaochanquanfang090602.html>.

97. Longgang Court Decision, *supra* note 89.

98. *Id.*

99. *Id.*

was still rural land; rather it said that the relationship between the village co-op and its members should still be governed by laws applicable to rural residential plots.<sup>100</sup> This intentional ambiguity left room for the court to pursue what it saw as a decision made in the public interest and the interests of the local government without directly conflicting with the city government's official interpretation of the national constitution. If pressed, the court would be able to claim that even if the land is nationalized, the relationship between village co-op and its members should still be governed by laws applicable to rural residential plots as the Shenzhen government did not make special provisions about this relationship. In fact, village co-ops are officially recognized by the Shenzhen government as the dominant form of collective economic organizations.<sup>101</sup>

The court did not clarify the specific laws that grant the village co-op the right to regain use rights from its members. There are no such laws.<sup>102</sup> Even during the Cultural Revolution, People's Commune's members had relatively secure rights to their houses and the land underneath, as residential houses were part of "living materials" (*shenghuo ziliao*).<sup>103</sup> The communist ideology is that "productive materials," such as water buffalo and agricultural land and facilities, should be owned and used collectively; but land underneath commune members' houses—although part of the collective ownership of rural land—were "living materials" subject to members' rights of use that deserved respect.<sup>104</sup> Thus collective land ownership does not grant the village co-op the right to take residential plots from its members.

Nor did the court's recognition of the majority vote for the redevelopment plan have any valid legal basis. Z village co-op's practice is similar to the Heller and Hills proposal, known as "Land Assembly Districts" ("LADs"). Here, the problem facing the Z village co-op and the land developer is the same problem that LADs are designed to resolve:

After the land assembler has purchased a part of the planned larger parcel, the assembler becomes locked into purchasing the rest of it to avoid duplicating the site-specific investment at another site. Thus, existing

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100. Zhonghua Renmin Gongheguo Wuquan Fa (中华人民共和国物权法) [PRC Property Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), ch. 13, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 291, 301-02.

101. Shenzhen Jingji Tequ Gufen Hezuo Gongsì Tiaoli (深圳经济特区股份合作公司条例) [Regulations of Shenzhen Special Economic Zone on the Cooperative Stock Companies] (promulgated by the Standing Comm. People's Cong. Shenzhen Municipality, September 4, 1994, effective Sep. 4, 1994; rev'd by the Standing Comm. People's Cong. Shenzhen Municipality, Sep. 4, 1997 & Dec. 24, 2010), [http://www.fzb.sz.gov.cn/fggzsjk/201505/t20150520\\_2880508.htm](http://www.fzb.sz.gov.cn/fggzsjk/201505/t20150520_2880508.htm) (China).

102. Zhongguo Nongcun Tudi Wenti Diaocha, 中国农村土地问题调查 [SURVEY ON CHINA'S RURAL LAND ISSUES] 89 (Han Jun, ed., 2009).

103. *Id.*

104. *Id.*

owners become monopoly suppliers of the assembled land. Knowing that the assembler requires each of their parcels, every owner may seek to be the last to sell, and then to hold out for all of the extra value created by the assembly. With several such holdouts, negotiations collapse because the assembler, of course, cannot pay the entire surplus to each owner.<sup>105</sup>

The only difference is that village co-ops have been created *ex ante*, rather than *ex post* as the LADs had, and this might cause intra-group exploitation.<sup>106</sup> Nevertheless, overall, this latter solution would be appealing to Chinese local governments as it would “defuse hostility toward eminent domain and avoid drastic limits on local governments’ capacity to assemble land.”<sup>107</sup> Indeed, in Shenzhen and several other Chinese cities, the local government has encouraged intra-city villages to engage in “redevelopment by themselves” (“*zixing gaizao*”). Village community organizations are often better than local governments at persuading their members to sell their residential plots and houses and thus reduce the probability of hold-outs, as members value their connections with other members of the community.<sup>108</sup> This innovation, created by Z Village, would further smooth redevelopment of intra-city villages by providing a legal solution to the collective action problem and would increase the village communities’ bargaining power in dealing with nailhouses. In this case, the owners of the nailhouse accepted compensation of about 25 million RMB, a figure close to the offer the village co-op board chairman gave in the negotiation described above.<sup>109</sup>

What Z village co-op has achieved in this case is astounding. It not only challenged the official definition of land ownership in Shenzhen, but it also provided a new solution to the collective action problem in village redevelopment projects. What is more astounding is that it won the suit in a local court. Both Z village co-op and the local court made use of the layering and fragmentation of law and made use of laws in its favor. The question remains as to why and how Z Village achieved this.

## II. LAYERING AND FRAGMENTATION OF LAW

“Layering” refers to variety, competition, and conflicts of laws in the vertical dimension, i.e., between laws made by different levels of authorities,

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105. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1473 (2008).

106. *See id.* at 1519-20.

107. *Id.* at 1490.

108. For theoretical discussions on the role of communities in law and economics, see Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75 (2004); Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43 (2011).

109. Of course, the extra amount was paid under the table to avoid other villagers’ protests.

such as those between the Chinese central government, provincial, and city governments.<sup>110</sup> “Fragmentation” refers to the fact that even laws along the horizontal dimension, i.e., laws and policies made by the same government could conflict with each other and that reconstitution of the same law in different local settings or at different times might lead to different outcomes.<sup>111</sup> Many laws are involved in the above two cases, including:

(1) Clauses in the Chinese Land Administration Laws that prohibits rural land transfer and development.<sup>112</sup>

(2) Clauses in the Chinese Constitution and Land Administration Law on land ownership: “urban land is state-owned; rural land is collective-owned.”<sup>113</sup>

(3) Clauses in the Chinese Criminal Law that criminalize the “illegal transfer of land use rights.”<sup>114</sup>

(4) The Guangdong Provincial Decree (No. 100 Decree) that allows transfer of rural land use rights.<sup>115</sup>

(5) The Shenzhen City Decree that nationalized collective-owned land in Shenzhen.<sup>116</sup>

110. See Tsai, *supra* note 16, at 121.

111. See Grattet & Jenness, *supra* note 17.

112. Zhonghua Renmin Gongheguo Tudi Guanli Fa (中华人民共和国土地管理法) [PRC Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, effective Jan. 1, 1987; rev'd by the Standing Comm. Nat'l People's Cong. Dec. 29, 1988 & Aug. 28, 2004) art. 43, 63, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 566, 571, 573.

113. *Id.*; XIANFA art. 10 (2018) (China).

114. Zhonghua Renmin Gongheguo Xing Fa (中华人民共和国刑法) [PRC Criminal Law] (promulgated by Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980; rev'd by the Nat'l People's Cong., Mar. 14, 1997; rev'd by the Standing Comm. Nat'l People's Cong., Dec. 25, 1997, Aug. 31, 2001, Dec. 29, 2001, Dec. 28, 2002, Feb. 28, 2005, June 29, 2006, Feb. 28, 2009, Feb. 25, 2011, Aug. 29, 2015, Nov. 4, 2017) art. 228, 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 138, 180; Guanyü Shenli Pohuai Tudi Ziyuan Xingshi Anjian Juti Yingyong Falü Ruogan Wenti deJieshi (关于审理破坏土地资源刑事案件具体应用法律若干问题的解释 [Supreme People's Court Interpretation on the Application of Laws in Criminal Cases of Damaging Land Resources] (passed by the by the 1119<sup>th</sup> Meeting of the Sup. People's Ct. Jud. Comm., June 16 2000, effective Jun. 22, 2000), 2000 SUP. PEOPLE'S CT. GAZ., 120, 120-21 .

115. Guangdongsheng Jiti Jiansheyongdi Shiyongquan Liuzhuan Guanli Banfa (广东省集体建设用地使用权流转管理办法) [Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes] (promulgated by the 66th Exec. Meeting of the 10th Session of the People's Government of Guangdong Province, May 17, 2005, effective Oct. 1, 2005), CLI.11.FSDNX4F(EN) (Lawinfochina).

116. Shenzhenshi Baoan Longgang Liangqu Chengshihua Tudi Guanli Banfa (深圳市宝安龙岗两区城市化土地管理办法) [Government Decree on Urbanization Land Administration in Longgang and Bao'An Districts in Shenzhen Municipality] (promulgated by the 123rd Exec. Meeting of the 3th Session of the People's Government of Shenzhen Municipality, June 26, 2004, effective June 26, 2004), [http://www.sz.gov.cn/zflyfwzt/zcfg/201009/t20100911\\_1566849.htm](http://www.sz.gov.cn/zflyfwzt/zcfg/201009/t20100911_1566849.htm).

(6) Interpretation of the LAL by the Chinese Ministry of Land and Resources that contradicts Shenzhen city's interpretation of the LAL, on which the above Shenzhen city decree is based;<sup>117</sup>

(7) Various, the Shenzhen City Decrees on old village redevelopment, historical illegal buildings, and enforcement of the national prohibition on rural land development and transfer, which are mutually contradictory to each other.

The application of laws is far from unified. It is thus a question of which laws would be applied to a situation. Unfortunately, there are often no clear rules defining jurisdiction, as many laws and policies are made in response to specific problems in specific context. Even laws that are supposed to be applied uniformly can be interpreted arbitrarily and applied to unforeseen situations. The use of laws in ways that deviate from their intended purpose can be called "legal conversion,"<sup>118</sup> which is an oft-adopted strategy by actors in a fragmented and layered institutional framework. As we have seen from the W and Z cases, it is hard to expect these fragmented and layered laws to be applied systematically to all villages. The essential question, therefore, is why Z Village successfully gained legal rights to develop its land despite its challenge to the local government's definition of land ownership, while W Village suffered from criminal prosecution. In other words, why didn't the Shenzhen government punish Z Village for challenging its definition of land ownership? Why did W Village not get legal rights to develop their land from the government? In sum, why did the two villages end up in different social control systems?

#### A. The Challenge to Law and Social Norms

The layering and fragmentation of law has not received much attention in the existing research on law and social norms, which focuses more on the evolution of social norms and how law can change them, but not how social norms can change law, nor the *co-evolution* of law and social norms. A systematic theory of the choice between law and social norms, and more broadly, between the five different "social controllers,"—though elaborated

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117. Guowuyuan Fazhi Bangongshi, Guotuziyuanbu guanyü Dui <Zhonghua Renmin Gongheguo Tudi Guanli Fa Shishi Tiaoli> Di'er Tiao Di(Wu) Xiang De Jieshi Yijian (国务院法制办公室、国土资源部关于对《中华人民共和国土地管理法实施条例》第二条第(五)项的解释意见) [Opinions of the Legislative Affairs Office of the State Council and the Ministry of Land and Resources on the Interpretation of Item (5) of Article 2 of the Regulation on the Implementation of the Land Administration Law of the People's Republic of China] (promulgated by the Legislative Affairs Office of the State Council, Ministry of Land & Resources, May 4, 2005, effective May 4, 2005), CLI.2.2XAB6VIC(EN) (Lawinfochina).

118. See Tsai, *supra* note 24, at 122; Kevin J. O'Brien, *Rightful Resistance*, 49 WORLD POL. 31 (1996).

by Robert Ellickson in his groundbreaking book published in 1991—has not been fully explored.<sup>119</sup>

According to Ellickson's system of social control, there are five controllers that form the sources of rules. An actor who imposes rules and sanctions on himself is exercising first-party control. A promise-enforced contract is a system of second-party control. Third-party control differs from second-party control in that the rules are ones to which the actor may not have agreed and are enforced by persons not involved in the primary interactions; these rules include social norms, organization rules, and law.<sup>120</sup> In the mafia-style small-property business, the controlling system seems to be the mafia's organization rules; in the "in the name of law" village case, the controlling system seems to be the law.

Professor Ellickson also discusses the choice of different controllers. According to his theory, there are controller-selecting norms, which are defined as "informal rules through which nonhierarchical groups seek to apportion tasks among these various sources of social control."<sup>121</sup> As Ellickson writes:

The crucial role of controller-selecting rules . . . has gone little noticed. In a society replete with governments, private organizations, social forces, contractual arrangements, and individuals potentially capable of self-control, there must be rules that decide, for each domain of human activity, the division of social-control labor among the various controllers. Controller-selecting rules perform this function. They coordinate the social-control domains of, among others, the visible sovereigns that make and enforce laws and the invisible social forces that make and enforce norms.<sup>122</sup>

Professor Ellickson argues that "[t]he content of controller-selecting norms will reflect general expectations about the comparative efficiencies of social forces and the state in generating and enforcing rules."<sup>123</sup> Any social control system gives rise to certain associated transaction costs and members of a social group must consider various factors in minimizing their total costs.<sup>124</sup> This theory explains why there is "order without law" in Ellickson's Shasta County—a change in animal trespass law fails to affect resource allocation because legal rules are costly to learn and enforce. The choice is made for the social norms controller.<sup>125</sup>

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119. ELLICKSON, *supra* note 21.

120. *Id.* at 126–27.

121. *Id.* at 240.

122. *Id.* at 134–35.

123. *Id.* at 249.

124. *Id.* at 242.

125. ELLICKSON, *supra* note 21, at 42–64, 134–36.

Professor Ellickson's system of social control, and in particular the controller-selecting norms, is consistent with the classical economic analysis of legal enforcement, according to which "the optimal amount of enforcement is shown to depend on, among other things, the cost of catching and convicting offenders, the nature of punishments—for example, whether they are fines or prison terms—and the responses of offenders to changes in enforcement."<sup>126</sup> Whether a person chooses to control his behavior through the legal system or other social-control systems thus depends on a comparison of the costs and benefits in different systems. The behavioral challenge to law and economics mostly targets the rationality hypothesis, but not the cost-benefit analysis.<sup>127</sup>

As the above two cases in Shenzhen have revealed, law is layered and fragmented in China. In such situations, what is the law and when is it enforced? Which controller is chosen by a village co-op—a main actor of the small-property market?

Applying the cost-benefit analysis of the law and economics school, we could determine that villagers would pursue the law that is most friendly to small property or would decide whether to comply with the legal prohibition on rural land development and transfer based on their respective calculations as to their costs and benefits of complying with or disobeying the law. The complicating factor is that with layering, fragmentation, and mutually-conflicting laws, it is hard to conduct this cost-benefit analysis, which is premised on a static view of the mutually-influencing and co-evolving social-control systems. What would happen if we add a third dimension,—time,—to Ellickson's two-dimension system of social control?<sup>128</sup>

When I note that the village co-op led by Pan was captured by the mafia system, it is not to say that there had been a mafia system of small property ready for Pan to adopt. It is the confluence between the small-property market and the mafia that conceived the mafia-style small-property business. Similarly, it is not to say that there had been a legal system for the transfer of rural land use rights ready for Z Village's leader DYJ to adopt. Although the Shenzhen city government has authored various policies that serve as

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126. Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 2* (Gary S. Becker & William M. Landes eds., 1974).

127. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998); Christine Jolls, *Behavioral Law and Economics* (Nat'l Bureau of Econ. Research, Working Paper No. 12879, 2007).; Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 *HARV. L. REV.* 1593 (2014).

128. Adding a third dimension to Professor Ellickson's two-dimension table of the system of social control would transform the table to a cuboid, as each system would evolve across the time, during which they interact and influence each other. For Ellickson's two-dimension system of social control, see *ELICKSON*, *supra* note 21, at 131.

official channels for villages to obtain legal rights—all of which are responses to the emergence of the small-property market—whether a village co-op can obtain legal rights through such channels is also subject to its interactions with the government.

Imagine that you are a village co-op leader in Shenzhen. What are the costs and benefits of developing small-property houses? You would ask whether the government would demolish your small-property constructions and whether you would be sent to prison for illegal transfer of land use rights. Or you would consider the question from the opposite angle—what are the costs and benefits of not developing small-property houses? What is the possibility of obtaining legal rights to develop the village land? There is no abstract answer to give. It all depends on the micro- and macro- economic situations, the internal governance of your village, the strategy you have taken in dealing with the local government, and other factors. In addition, all factors are changing and mutually influencing each other. Because a village co-op can, to some extent, influence what law is applied and when that law is applied, its cost-benefit analysis is influenced by its own choice.<sup>129</sup>

For the analysis of this fluid situation, we must understand that for any particular actor, behaviors are decided not only by the economic restraints, as Demsetz would argue,<sup>130</sup> nor only by pure communal settings, which Ostrom would emphasize,<sup>131</sup> nor solely by interest groups or other political factors, which Levmore and Wyman would argue,<sup>132</sup> but by all the above factors together. Simply speaking, there are not two or three stories about the evolution of property rights. It is one integrated and fluid story with all factors considered. Moreover, given particular economic, social, and political restraints, different actors still can choose different strategies. It is thus important to add actors into our discussion of institutions as well.

## B. Multiple-Network Evolution

How is institutional change to be understood from such a co-evolving and dynamic perspective? Social scientists have provided us with some clues. In their multi-level causal model of institutional change, Nee and Opper discuss how private entrepreneurs under economic incentives developed market practices de-coupled from the old communist regime, and

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129. See *infra* Part III.

130. Merrill, *supra* note 2.

131. Ostrom, *supra* note 9.

132. See, e.g., Saul Levmore, *Two Stories about The Evolution of Property Rights*, 31 J. LEGAL STUD. 421 (2002); Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125 (2013); see also Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515 (2002).

then how formal institutions made changes promoted by private entrepreneurs' collective action and their own legitimacy seeking.<sup>133</sup> The formal institutions also monitor the evolution of informal norms, and private entrepreneurs from time to time have to comply with a particular set of formal rules. Overall, a private entrepreneur behaves in response to market incentives, pressures from his fellow businessman and partners, and micro- and macro-level changes in formal institutions. Both the community of private entrepreneurs and the political institutions have kept evolving together with the market.

Padgett and Powell developed a more delicate theory of the emergence of organizations and markets by applying chemistry concepts into the social sciences. According to them, "learning at the human level is equivalent to co-evolution of rules and protocols at the 'chemical' level. Actors thereby become vehicles through which autocatalytic life self-organizes."<sup>134</sup> Their mantra in the book is that, "in the short run, actors create relations; in the long run, relations create actors."<sup>135</sup>

They argue that most social science proceeds according to the logic of methodological individualism—taking as given some constitutive features of the hypothesized individual or actor. In contrast, they argue for a multiple-network perspective:

Our social science disciplines usually segregate their intellectual activities by analyzing only one domain at a time, as if the other domains and disciplines did not exist. At best, external domains are conceptually black-boxed as reified 'environments' without examining their internal structures. In contrast, the whole point of a multiple-network perspective is to superimpose multiple domains, with their respective production and exchange networks, and to examine feedback dynamics.<sup>136</sup>

As they explain in their investigation of the multiple-network ensemble in Renaissance Florence, Italy:

In the economic domain, for example, the person may be a businessman; in the kinship domain, he may be a father; in the political domain, he may be a politician—all depending upon how he is attached to others in that domain. Properly speaking, individuals don't have goals; roles have goals. Consistency of motivations across roles should in no way be presumed for complicated persons.<sup>137</sup>

Both theories highlight the interaction of different social control systems and the multiple roles individuals assume in multiple social

133. See VICTOR NEE & SONJA OPPER, *CAPITALISM FROM BELOW: MARKETS AND INSTITUTIONAL CHANGE IN CHINA* (2012).

134. Padgett & Powell, *supra* note 5, at 3.

135. *Id.* at 2.

136. *Id.* at 5.

137. *Id.*

networks. In the following part, I apply the above multiple-network evolution theory to explain the tragicomedy of village governance in Shenzhen.

### III. VILLAGE LEADERS' THREE IDENTITIES AND AN INTEGRATED EXPLANATION

A village co-op leader in Shenzhen has three identities: operator of the village co-op company responsible for maximizing its economic performance; elected representative charged with taking care of villagers' interests<sup>138</sup>; and implementer of government policies. As a company operator, a village leader should respond to economic incentives, such as the demand for rural land development and transfer. But his leadership and capability is not the only factor that contributes to the economic performance of a village co-op; the specific macro- and micro-economic situations also matter, among other factors. A village co-op leader has a choice to develop the village land illegally against the legal prohibition or to apply for legal rights from the government, in particular considering the adaptive government policies adopted after the formation of the small-property market. As an elected village representative, a village co-op leader faces pressure for reelection and, thus, must satisfy villagers' demands for dividend payments and other economic benefits as much and as soon as possible. The source for dividend payments can range from a purely illegal small-property business to other more legal businesses of the village co-ops, such as renting factory space. As an implementer of government policies, a village leader is expected to implement the government prohibition on rural land development and transfer as effectively as possible. In reality, he has the discretion to implement the prohibition to different degrees.<sup>139</sup>

Choices in each role are influenced by decisions in others. For example, economic choices and their effectiveness influence the choices available or desirable in the other two roles. Successful economic choices can increase a village co-op leader's capacity to negotiate with both the government and ordinary villagers. An economic failure, on the other hand, would make it hard for a village co-op leader to satisfy the demands of either the government or ordinary villagers. As a result, he or she would tend to choose to make quick money from short-term small-property business. In the long run, this further decreases the leader's capacity to implement government

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138. Kinship is another factor that might influence village governance and property arrangements. However, as both are single-family-name villages, I assume that the kinship dynamics are not the reason for the difference between them.

139. See, e.g., Kevin J. O'Brien & Lianjiang Li, *Selective policy implementation in rural China*, 31 *COMPARATIVE POLITICS* 167 (1999).

policies or take care of ordinary villagers' interests, and increases the risk of being captured by organized violence.

The mutual influence between the political and community levels is also significant. Once a village co-op leadership is captured by organized violence, although a relationship with the government could still be maintained through bribery, the hope for that village to be incorporated into the new legal order, i.e., a system that would grant it legal rights to develop its land, diminishes. In contrast, village co-ops that are proactively implementing government policies, even though sometimes just rhetorically or under a radically different interpretation, might be rewarded by being given priority access to the legal system. In the following we explain the conflict of state laws and local practices in W village and their reconciliation in Z village using the above co-evolution framework.

#### A. Investment Failure, Village Crisis and Mafianization<sup>140</sup> of W Village

The village co-op form originated in W Village. In 1984, W Village began to experiment with village co-ops as a way to collect money for village development. Villagers could buy shares from the village co-op. In the early years, shareholders received good returns and W Village was depicted as a model of "socialist common ownership," which was said to combine the advantages of market and socialism.<sup>141</sup> W village even held a conference on the so-called "W Village Model" in the Grand People's Hall in Beijing, where important national activities are often held.<sup>142</sup> For a while, W Village seemed to exemplify a new future for rural China. National leaders, including Deng Xiaoping, toured W Village, which was an indication of its success.<sup>143</sup>

Village co-ops are responsible for the management of collective-owned land that is not allocated to individual households. They use such land to build factories to rent to outside investors. Although village co-ops could participate in many other kinds of economic activities, land rent is the main income for all of the village co-ops in Shenzhen. Village co-ops are responsible for issuing dividends to their shareholders/villagers each year.

140. In the existing literature, mafianization means "the pursuit of organized crime based on the privatization of physical security measures." STUART CORBRIDGE ET AL., *SEEING THE STATE: GOVERNANCE AND GOVERNMENTALITY IN INDIA* 39 (2005); *see also* ECONOMIC LIBERALIZATION AND POLITICAL VIOLENCE: UTOPIA OR DYSTOPIA? 331 (Francisco Gutierrez & Gerd Schonwalder eds., 2010).

141. Tian & Jing, *supra* note 58.

142. Yang, *supra* note 62.

143. Jia Yunyong, *Shenzhen Nanguo Diyicun Yu Ouxiang Weiji, Cunmin Dizhi Yiyantang Guanli* (搜狐新闻: 深圳南国第一村遇偶像危机村民抵制一言堂管理) [*Shenzhen's Top Village in Southern China Run into a Crisis of Its Charismatic Leadership*, SOHU NEWS (Apr. 6, 2016)], <http://news.sohu.com/20060406/n242664740.shtml>

Dividends become the main indicator for the village co-op's performance in "representing villagers' interests." Villagers often cannot tell and even do not care how well the collective asset is managed by the village co-ops; what they really care about is the amount of dividends they are paid each year. Their support for the village co-op is also mainly based on the amount of dividends they are paid. As the board of a village co-op is elected every three years, village co-op leaders care more about how many dividends they are able to pay to shareholders/voters than they care about the long-term performance of the village co-op. Additionally, shares are spread among all villagers in the co-op, rather than concentrated among just a few. Even members of the village co-op boards have no more shares than ordinary villagers. Thus, there are no controlling shareholders who might have enough incentives to monitor the long-term economic performance of the village co-op.

If a village co-op makes money, issuing dividends is not such a problem. But tensions often arise when a village co-op does not make enough money to issue dividends or even suffers a loss. Unsurprisingly, some village co-ops issue dividends to villagers even when they have suffered an economic loss in that year. They often borrow money from banks to do so. In particular, many village co-ops rely on small-property businesses to issue dividends. Although it might not be the best investment from a long-term perspective, selling a plot of land to an outside investor, or co-operating with a real estate developer to build a small-property compound and then using the sales money to issue dividends, makes perfect sense for village co-ops, as they are under great pressure to issue dividends to their shareholders.

Unfortunately, the success of W Village Co-op did not last long. At the height of its success, in 1992—the year Deng Xiaoping toured W Village—W village co-op began to buy land in Hainan, Jiangxi, Yunnan, and many other parts of China. All of these investments failed due to the meltdown of the real estate bubble in the early 1990s.<sup>144</sup>

The village leader at the time, who was Pan's father, tried in 1996 to decrease the amount of the annual dividend payment to co-op shareholders. This triggered a crisis of confidence. Pan's father managed to remedy the crisis by asking for forgiveness from his villagers and promising better

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144. See Tian Jiagang, Liu Liyi & Jing Jianfeng (田加刚、刘丽琦、景剑峰), *Shenji Baogao Jiekai Nanguo Diyicun Jizi Neimu* (审计报告揭开南国第一村集资内幕), *Minzhu yu Fazhi Shibao*, Apr. 9, 2006 (民主与法制时报2006年04月09日) [Tian Jiagang, Liu Liyi & Jing Jianfeng, *Audit Report Reveals the Inside Story of Fund Collection at the First Village of Southern China*, *DEMOCRACY & RULE OF LAW NEWS*, Apr. 9, 2006], <http://finance.sina.com.cn/g/20060409/15592485805.shtml> (discussing the financial struggles of W Village).

economic performance in the future.<sup>145</sup> Afterwards, he began to marginalize members of the village co-op board who had disagreed with him during the crisis; consolidated control over the village co-op, sharing power between himself and his close family members. Nevertheless, in 2002, the village co-op could no longer afford to pay dividends to its shareholders.<sup>146</sup> This ultimately led to a lasting village governance crisis. In 2005 Pan's father decided to retire, but he nonetheless supported Pan in his campaign to become party secretary and co-op board chairman of the village. Pan won the positions amidst complaints about the legitimacy of the election. Villagers were unhappy about this.

BD, as the leader of the biggest mafia in the area, was able to take advantage of the above governance crisis of W Village. In 2007, a W villager who was a little brother of BD stood out and demanded that Pan step down. He and his fellows in the village also mobilized others to go to the sub-district and district governments to report the problems in W Village, including the abuse of power and corruption of Pan's father, the alleged cheating in the election, and non-payment of dividends. The SJ subdistrict government sent a working team to W Village to investigate the problems. Pan panicked. Neither the villagers nor the sub-district government liked him. It seemed that he and his father would lose everything after the government's investigation.

In this situation, BD became a life-line. According to Pan:

BD is from a nearby village. I knew him before that. I knew that he was very powerful in both the white and black worlds. .... I knew that if I devoted myself to BD, villagers would not dare make trouble anymore and I would keep my position. So I went to BD and begged him to deal with the villagers. One month later, the sub-district government asked me and the dissenting villagers to go to its office, and we made a deal there. Obviously BD can handle problems that the government cannot handle. Since then, I'm his little brother.<sup>147</sup>

This village governance crisis not only explains why Pan was willing to become a little brother of BD and why the W village co-op sold land to BD's companies so cheaply. It also influenced the interactions between W village and the local government.

First, it led to a relationship mainly based on corruption. Because small property is still technically "illegal," the W village co-op paid regular money to government officials not to enforce the legal prohibition.<sup>148</sup> In addition to being convicted of participating in a mafia, Pan was also convicted of

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145. Jia, *supra* note 143.

146. *Id.*

147. Shenzhen Court Decision, *supra* note 33, at 243–44.

148. *Id.* at 46–47.

bribery. Each year, in the spring and mid-autumn festivals, the W village co-op sent money to Party Secretary Liu of the SJ sub-district as gifts. From 2005 to 2012, the total amount was 1.25 million RMB. In 2009 and 2011, when the Bao'An district government decided to demolish several of W's small-property buildings and even to remove Pan from the position of village party secretary, Pan sent money to Liu in the total amount of RMB 1.2 million to resolve the issues.<sup>149</sup> Regarding individual villagers' building of small property, W village co-op did not have the capacity to stop it. As these villagers would complain: "You still owe me dividends—how could you further stop me from making a living by building a small house?"<sup>150</sup>

Second, the village governance crisis excluded W Village from the Shenzhen's government's village redevelopment plans. In the early 2000s, Pan and his father had been hoping to benefit from the Shenzhen government's village redevelopment policies. They made a plan for redeveloping the village and even showed their plan for a new village to reporters. As of 2014, Shenzhen government has approved over 300 village redevelopment projects, but W Village has never been on the list. There are no details available for W Village's application for redevelopment, but its village governance crisis might have caused reasonable concern from the local government about whether the village co-op could persuade villagers to accept the plan and thus to surrender their land for it.

Moreover, the presence of BD would also dissuade any village redevelopment. Because many plots of the village land had been sold to BD or in cooperation with BD, it would be costly to assemble the plots from BD's hands. The village redevelopment plan would grant legal rights to village land and thus required huge capital investment. BD, although rich enough to develop small-property buildings, did not have the billions of RMB required for a village redevelopment project. Such projects are mostly carried out by the top real estate developers in China, who are among the few that have the financial capacity to take on such a project. A local mafia leader involved in organized crime is usually not a favorite business partner of such big companies, which are more sensitive to legal requirements.

In the end, W village was excluded from the world of legal redevelopment and captured by the illegal world of violence and corruption. It was just a matter of time before it became the target of law enforcement.

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149. *Id.*

150. Interview with W villagers, Bao'An District of Shenzhen, PRC (Mar.7, 2012).

## B. Increasing Dividends, Governing Capacity and Legalization of Z Village

Z village co-op presents an opposite case. On the one hand, as the representative of villagers' interests, it managed to be one of the first villages that were incorporated into the Shenzhen government's village redevelopment plan, and thus one of the first to gain legal rights to develop village land.<sup>151</sup> On the other hand, as the implementer of government policies, it successfully controlled the small-property development within the village.<sup>152</sup> This was an important factor that helped its application for village redevelopment.

Since becoming the village head of Z in 1999, DYJ demonstrated his talent in developing the economy. His experience in a big real estate company also gave him a new idea for developing the economy—rather than building more buildings, as many other village co-ops in Shenzhen did, he focused on improving the village environment, which resulted in raised housing rents. During his leadership, dividends paid to villagers increased at an average annual rate of 10%.<sup>153</sup> As a result, Deng alleviated the pressure from village members to make quick money from small-property development.

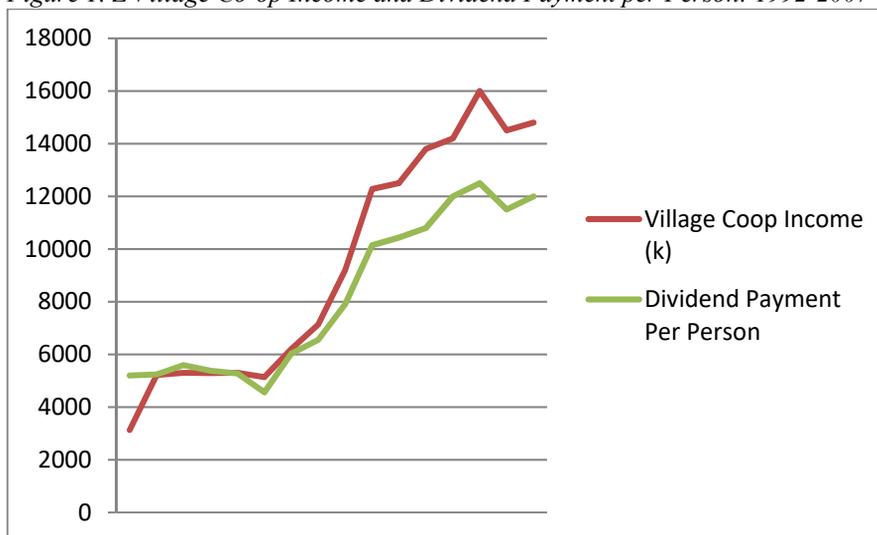
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151. SUMMARY OF THE FOURTH MEETING, *supra* note 80.

152. *See infra* footnotes 159–60. This does not mean there were no small-property constructions—in fact the village co-op developed a small-property building, but the local government officials acquiesced in this illegal construction as a reward for the village co-op's support for a government expressway project. Xu Wenge (徐文阁), Shenzhen Shuiyuan Baohuqu Weijian Shangqiantaofang Quan Maiguang (深圳水源保护区违建上千套房全卖光), Nanfang Dushi Bao, June 3, 2010 (南方都市报, 2010年6月3日) [Xu Wenge, *Up to One Thousand Small-Property Apartments Were Sold Out*, SOUTHERN METROPOLITAN DAILY, June 3, 2010], <http://focus.szonline.net/Channel/content/2010/201006/20100603/242134.html>.

153. Cheng, Liu & Yan, *supra* note 75, at 81–95.

Figure 1. Z Village Co-op Income and Dividend Payment per Person: 1992-2007



Source: Author's compilation, data from Cheng, Liu and Yan, *supra* note 44, at 96.

Increasing dividend payments enabled the village co-op to behave on the basis of long-term considerations. One example was DYJ managing to build a park to preserve 40,000 square meters of lychee forest. At that time, many village officials would have preferred to develop the land into buildings for sale or rent if there had been insufficient payment of dividends.<sup>154</sup>

Increasing dividend payments also won the village co-op leader support from the villagers to overcome the collective action problem. In 2000, a company that rented its factory space from the village co-op planned to move elsewhere because the original factory could no longer satisfy its manufacturing capacity. To expand the factory would involve moving dozens of individual households. DYJ successfully persuaded the households impacted by the expansion to move and thus, in this instance, avoided the hold-out complication. As a result, the company paid three million more RMB per year to the village co-op for rental of the expanded factory space.<sup>155</sup>

The Z village co-op leader also managed to successfully implement government policies on many occasions, even at the expense of short-term village interests. The first policy was that Deng persuaded villagers to hold

154. 南方都市报编著: “未来没有城中村” [No Intra-City Village in the Future 86 (Southern Metropolitan Daily ed., 2011)].

155. TENGXUN NEWS, *supra* note 79.

small-property development for long-term and sustainable development. It was such a success that Z Village became an oft-cited case by government officials who were worried about the continuous spread of small property in the city. Take another example. In 2012, the city planned to build an expressway crossing the village, as well as a transformer station. The two projects required over 40,000 square meters of land from the village. DYJ persuaded his villagers to support both projects.<sup>156</sup>

All of the above facilitated Z Village's application for village redevelopment. A leader of the Shenzhen city government said, "We should support villages like Z, which strictly control the construction of illegal buildings."<sup>157</sup> Another reason for this quick acceptance is that the restriction of small-property development also decreased the cost and difficulty of redevelopment. As DYJ said, "There will not be villagers who could become billionaires through village redevelopment. The top difficulty for village redevelopment is demolition. We don't have many illegal buildings and thus no complicated compensation problems."<sup>158</sup> This also made Z village redevelopment an attractive deal for real estate developers. WK, a leading real estate developer in China, became Z village co-op's partner.

Good relations with the government and a partnership with a top real estate company increased the village co-op's capacity to negotiate with nailhouse owners in resolving any hold-out problems. Winning the case against the nailhouse owners gave the latter no choice but to accept the village co-op's offer. In this instance, the village co-op has actually benefited from the layering and fragmentation of law through its creative interpretation and use of different laws, which was supported by the local court largely because the village co-op had successfully made itself a model of compliance with the law and supporting government policies and projects. In the future, this village co-op's use of majority voting in village redevelopment might also influence the evolution of related formal institutions in Shenzhen.<sup>159</sup>

In conclusion, Z presents an example in which a village co-op made proactive use of the layering and fragmentation of law. It successfully created an advantage for itself in one system, and used it as leverage in other systems, the success of which in turn increased its leverage in the original system. This process went on continuously and not only did the village co-op win legal rights to develop and sell its land, but the accumulation of successful cases could also promote change in the whole system.

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156. *Id.*

157. SUMMARY OF THE FOURTH MEETING, *supra* note 80.

158. SOUTHERN METROPOLITAN DAILY, *supra* note 154, at 87.

159. Using majority approval to take residential plot back from individual villagers was a creation of the Z village co-op and has no legal basis in Chinese law.

#### IV. CONCLUSION: LAW IN THE DRAMA OF THE COMMONS?

This paper emphasizes that law and social norms are actually endogenous, rather than exogenous to each other. This is particularly true in developing countries with layered and fragmented laws, between which social norms can grow, reinterpret, redefine, and even change subsequently the related laws. Local communities' legal strategies, on one hand is contingent on the specific social settings and the macro legal and political environment, and on the other hand, can play a crucial role in determining the fate of the commons.

Perhaps it is more apt to call the collective land management in the Shenzhen villages a drama of the commons.<sup>160</sup> Tragedy and comedy are just the two most extreme versions of the drama. There are many other villages somewhere on the spectrum between legalization and mafianization. Each village has its own distinct destiny that is determined by the co-evolution of the three systems and its own strategic choices, which are often made on an *ad hoc* basis.

I hesitate somewhat in using the words "legalization" or "mafianization," as it is easy to imagine a legal system or a mafia system that a village co-op tries to enter or is forced to enter, without recognizing the fact that both systems are changing and evolving together with the small-property norms. In addition, social norms always govern some spheres and will not be replaced by law, as evidenced by the prevalence of shadow economies in developed countries.<sup>161</sup>

In Part III, I highlighted the role of dividend payments in village governance and the chain effects in the other two systems, but this is not a story about how economic success or failure equates to success or failure in politics and community governance. Dividend payments themselves are subject not only to the market, but also to the latter two factors. The three systems, market, community, and law, are mutually influential.

The mutual-influence and co-evolution of different social-control systems seem mysterious and are difficult to observe and predict. To understand these phenomena, we need to focus on the different roles of the key actors that play simultaneously in all the social-control systems, none of which are external to or isolated from the others. The key actors connect different systems and make their co-evolution possible. Ultimately, the goal is not "rooting property law in social contracts," but is instead a new kind of

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160. OSTROM ET AL., *supra* note 18.

161. See Friedrich Schneider, *Size and Measurement of the Informal Economy in 110 Countries Around the World* 15–22 (Workshop of Australian National Tax Centre, JEL-class.: O17, O5, D78, H2, H26, 2002) (the ratio of shadow economy in GNP ranges from 8.8% in the U.S. to 28.6% in Greece in OECD countries; in developing countries, it can be as high as 67.3% in Georgia).

dynamic and symbiotic relationship between different social control systems, in particular between law and norms. Evolution of property rights is a systematic and integrated project.