18th Annual Conference (2022) of the *Italian Society of Law and Economics*
LUMSA University Palermo, December 14-16, 2022

# The interdependence between the definition of the economic good and actor's legal position

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*First draft*

*Abstract*

Ronald Coase, in his seminal 1960 contribution to the notion of social costs, introduced the idea of **individual legal position**, including a whole set of organizational and rule arrangements in which the allocation of resources takes place. This includes property rights in strict terms and general rules affecting the use of property, the access to goods as well as the way governance of exchanges is organized. This is an explicit acknowledgement that property rights were intended by Coase as a far more complex notion than a simple, typical real right. The idea of transaction cost, which is a very synthetic notion, further highlighted the complexity of factors affecting the pursuit of economic interests.

The problem of this perspective is that it considers the notion of "good" as non problematic. Most of economics, when dealing with goods, implicitly is referring to commodities, to industrial goods. Actually, the idea of **economic good** proposed by many economists is fundamental to define the boundary of economics. Say developed the idea of immaterial good, which was discussed for a long time. Carl Menger (1871), building on the research of Hermann, Roscher and Schäffle, adopted the widest interpretation of economic good as whatever is in causal relationship with the satisfaction of a human need and is scarce. He proposed the distinction between material goods and useful actions and omissions. Whatever can be important for the individual can be an economic good. Later, Robbins (1933) would propose a similarly wide view of what is a good. On the other hand, Menger and the majority of the other economists had no clear analysis of how to integrate need, moral or legal elements. The general tendency is to keep a pragmatic definition of the good and a separate definition of rules and rights. The latter have consequently been shaped as **property rights**, stretching this notion to limits that have little relation with law. That determined a difficulty to understand the individual legal position in cases in which the good is relevantly shaped by the legal system (including the ethical dimension) and is not defined as simple **property**.

Today, our economic system is increasingly dependent on the consumption of goods that are defined by the artificial construction of rules and rights. They include access rights or platform services. We may include in this category also carbon permits or any administered rationing of relevant inputs of production or limited access to commons. The aim of the paper is analysing the notion of *individual legal position* in relation with the definition of good. After a rapid historical account of different positions, a framework will be sketched to supply a reasonable characterisation of the problem of individual choice in a legal context.

**Key words:** individual legal position; economic good; access; regulation

**JEL:** B21; D02; D86; K11; P14

## 1. The role of law in economic processes

Ronald Coase, in his seminal 1960 contribution to the notion of social costs, introduced the idea of **individual legal position**, including a whole set of organizational and rule arrangements in which the allocation of resources takes place. This includes property rights in strict terms and general rules affecting the use of property, the access to goods as well as the way governance of exchanges is organized. This is an explicit acknowledgement that property rights were intended by Coase as a far more complex notion than a simple, typical real right. The idea of transaction cost, which is a very synthetic notion, further highlighted the complexity of factors affecting the pursuit of economic interests. Nonetheless, the legal framework of the "legal position" has never been explicitly fully developed.

The recent literature on the legal foundations of capitalism has underlined the role of the law of property for the definition of capital (Pistor, 2019; Levy, 2017). Contract, civil responsibility and bankruptcy law, beside property, are seen as the capitalistic legal foundations. However, what is that can be bought and sold? Is property rights the only object of transaction?

The literature on property rights has partially dealt with this issue. Nonetheless, the idea of property right used in economic reasoning has little to do with legal categories and it appears as unfit to analyse the new goods available on the net. Most of economists, from Demsetz to Barzel, emphasise the "control" element in property, while economic goods include a much broader array of legal situations, and the legal position includes a variety of rules that limits or magnify individual action.

We find a double view of goods in economics since its beginnings. The Austrian stream, beginning with Carl Menger (1871), affecting also Robbins and coming more recently to Becker affirms that economic goods include whatever can fulfill a need, including actions or even omissions. Nonetheless, coming from the classical British tradition, goods are usually intended as commodities, normally material produced objects, distinguished from services. That leads to the common indication of "goods and services" that we can find also in official documents of important institutions. The latter tradition is perfectly fit with the idea of property right where the good is a non-legally defined category and the right is over impressed. That, however, leaves undefined the legal status of many goods object of the transactions actually performed in the market. Moreover, from this perspective it is difficult to see any other component of the legal position.

The former definition of economic good has been similarly theorised as preceding any legal element, but actually requires a juridical frame of individual action. It is open to characterise whatever could be bought and sold. It is even reinforced by the idea of individual legal position as a starting point in the definition of human action. In present day Law & Ecnomics textbooks there is a definition of the economic good which is in line with this tradition because economics is considered dealing with "human action" in general, whenever some opportunity costs exists and the end is scarce (Cole and Grossman, 2011).

In the following pages we first define how legal elements are presently conceived as property rights. Then the position of some prominent economists is studied to highlight the total confusion in which the legal status of economic goods are left by economics. Subsequently the institutional approach is introduce to widen the focus. Finally, some insight on how to define legal structures is proposed.

## 2. The economic theory of property rights

Looking at economic textbooks as well as to the relevant economic publications we often find the classical definition of "goods and services". If we consider the standard definition of goods, services are actually included in goods. Therefore, in most of writings it is intended "commodities and services", in the British tradition.

The problem of this perspective is that it considers the notion of "good" as non problematic referring to commodities, to produced material goods. Actually, the idea of **economic good** proposed by many economists is fundamental to define the boundary of economics. In the Continental tradition, Jean-Baptiste Say (1828: 42) developed the idea of immaterial goods, which was discussed for a long time. In this author there is a strict connection of immaterial goods with property, which opens to a legal reading of the situation.

In a contemporary text of Law and Economics property is correctly defined what "determines who controls … access and use of resources" and a "sociolegal *relationship* between people respecting things" (Cole and Grossman, 2011: 109). Property is seen as a bundle of rights (and duties) including the right to possess, the right to use, the right to alienate, and the right to exclude. What distinguishes property from other rights is that it deals with things or resources (Cole and Grossman, 2011: 110). Therefore, the broad notion of property is kept as the fundamental legal framework for the economic good.

Harold Demsetz had supplied a first picture of the complex set of elements that constitute property rights as the "set of social arrangements that define ownership" (Demsetz, 1966: 61). A private property system implies that "individuals have control over the use to which scarse resources (including ideas) can be put, and that this right of control is saleable or transfearable" (Demsetz, 1966: 62). Armen Alchian (1965) reductively defined property rights as the ability to choose the use of goods. This definition is partial as it choses one of the rights included in the bundle, but it is good for most of economic goods. However, it has difficulty in understanding the role of managers in regard to the control of companies as well as of any fiduciary. More recently, Barzel (1997, 3) has still defined property as the **ability to control** or use assets. This is still the functional-dynamic element in property rights, but it is unable to distinguish different rights as well as different elements of the bundle of rights. Douglas Allen has proposed an even more abstract view of property rights defining them as "the ability to freely exercise a choice" (Allen 2015, 2). This definition, invades other legal elements compared to property. It apparently is able to frame services and immaterial goods but represents an analytical simplification, which does not allow to analyse the actual specificities of goods and rights structuring the legal positions of actors.

These definitions are in line with a pragmatic definition of the economic good. The latter remains prioritarian compared to the legal framework in which the good is defined. Therefore it is not from the economic theory of property rights that we can receive a help in defining both the economic good and the legal position of the transacting parties.

## 3. Goods and the law in the history of economics

In the history of political economy we can perceive a difference in the definition of goods between British and Continental liberalism up to the end of the Nineteenth century. While the British usually focus on commodities, the Continental adopted a broader view of economic action and on the means that represent the ends of choices. Jean-Baptiste Say

(1828: 42) developed the idea of *immaterial good*, which was discussed for a long time. He included clientship in this category (Say, 1828: 42). His view extends the economic principle to any valuable action.

> "celte utilité peut être créée, peut avoir de la valeur, et devenir le sujet d'un échange, sans avoir été incorporée à aucun objet matériel … mais un médecin nous vend l'utilité de son art sans qu'elle ait été incorporée dans aucune matière. Cette utilité est bien le fruit de ses études, de ses travaux, de ses avances; …un produit réel, mais immatériel (**Say,** 1828: 42).

Adam Smith (1776) refused to consider services as products because they are not producing any accumulation. Say enlarges the economic perspective to any action, opening the way to modern microeconomics. However, the definition of economic good remains a primitive notion even if he considers the "influence des institutions sur l'économie des sociétés" (**Say,** 1828: 233) and the fundamental role of the property right. "Le droit de propriété est la faculté exclusive garantie à un homme, à une association d'hommes, de disposer à leur fantaisie de ce qui leur appartient" (**Say,** 1828: 252). He also includes the "propriété littéraire et du droit d'auteur" (**Say,** 1828: 238) in the property rights with the justification of protecting immaterial investments. Therefore, considering the legal framework of transaction he is a forerunner of stretching the notion of property to immaterial goods. Nonetheless, there is no actual distinction and characterisation of different services.

Nonetheless, the role of the law in Say is not limited to the property right. He admits the role of the "différents systèmes de législation économique" (**Say,** 1828: 253). But he sees no positive interference between rules and value:

> "Une loi, un règlement d'administration peuvent ôter des biens à un homme pour les donner à un autre; mais ils ne sauraient créer des biens, de la richesse, dont les sources ne sont nulle autre part que dans l'action industrielle aidée de ses instruments: les capitaux et les terres…D'où nous conclurons, en these générale, que la législation la plus favorable à l'industrie est celle qui procure à tout le monde au plus haut degré de liberté et la sûreté des personnes et des propriétés" (**Say,** 1828: 253).

A fundamental step in the direction of contemporary Law & Economics is Carl Menger's *Grundsätze* (1871). Here this scholar, refining the studies of Hermann and Schäffle, adopted the most open interpretation of economic good. An economic good is whatever can satisfy a human need and is scarce. Menger proposed the distinction between material goods and *useful actions and omissions* (1871, end of 1.1). In particular, the inclusion of *useful omissions* reveals that economics has to include any human action and even the choices of not to do expected actions. Therefore, any change in the expected state of the world due to a decision can be analysed from the economic point of view. In the same text, Manger discusses the opportunity to include personal relationships as clientship, monopolies, copyrights, patents, concessions as well as family relationships, love etc. (1871, chap.1.1). He (Menger, 1871, note 5) considered interesting the idea of Steuart including in goods services and rights including tradable privileges. Hermann had conceived "external goods"

including a number of personal relationships.[1] On the other hand, Schäffle (1867) limited the notion of goods to transferable rents and monopoly rights. Important is the known utility of the thing and the relationship with need that states the interdependence of goods and human ends (Solari, 2022).

In Menger's view, the individual subjective ordering of goods is the result of a prudent forward-looking (providence) including ethical or moral elements. From his empirical-realist perspective, economic laws incorporate individual ethical influences (Menger 1883, appendix 9). Menger's (1883 [2011], book 1, chapter 7) considers private interest as a very broad set, including a variety of action motives pointing to human well-being: common sense, altruism, costumes, the sense of law, and so on. Organic institutions as well as the legal order are defining an order that is in a certain sense endogenisd in action. The idea of *individual interest* is reproducing the organic order, motivations are hardly separable (1883, book III, chap.2, §4). The appendix VIII (1883) is dedicated to the organic origin of the juridical system and to its exact understanding. In his perspective, morals guides action and is included in individual interest (appendix VIII).

On the other hand, in his second edition of *Grundsätze* (1923, chap.2) he affirmed that *subjective rights* are not goods. A thing, Menger states, is not a good only because is *object of a right* but should be something a man can reach. In his view, the rlationship that makes a thing a good is not derived from the rights we have on it, but from the same thing. It is not the *rights in themselves* to produce the good, but they may help defining the property of such good. In chap. 2.3 (1871) Menger affirms that at the ground of our juridical order lies the *protection of possession*, which is the foundation of property. This is not arbitrary, but the only practical solution to the problem of scarcity. Therefore, it is not possible to eliminate property if we have scarcity. Property cannot be separated from human economy. Unfortunately, he did not extend this reflection to other goods than those framed by property rights. This would remain a problem for economics.

That testifies a difference with the British "common sense-based" approaches to this matter and a clear reference to cognitive processes. In fact, Menger delayed his second edition of *Grundsätze* to improve his understanding of psychology in a way to better frame how humans make their choices – failing this attempt (Becchio, 2010; Campagnolo, 2008). Therefore, the ambition of Menger was to depict a general interpretation of any human purposeful action, which would be later more completely theorised by Mises or Robbins.

Some years later, an Italian scholar following Menger (and Ferrara),[2] Maffeo Pantaleoni (1894) focussed mainly on the way of conceiving action's motivation, proposing an all-including hedonism. He pointed out that "quattro condizioni di fatto, affinché una cosa sia un bene, cioè, la esistenza di un bisogno, la esistenza di una cosa con proprietà tali da poter essere causa della estinzione del bisogno di cui si tratta, la conoscenza di queste proprietà e, finalmente, la accessibilità della cosa" (Pantaleoni, 1894: 72). What is interestingly, he made his radical subjectivism explicit affirming that "in ogni dato momento,

[1] After some discussion with Kauder (who dad no so larger view, reported in Magliulo, 2009) in the second edition (1923 chap.2) Menger excluded goodwill and the relationships necessary to achieve certain goods when they cannot be traded separately.

[2] In Pantaleoni's framework need causes action "un bisogno è il desiderio di disporre di un mezzo reputato atto a far cessare una sensazione doloosa, o a prevenirla, o a conservare una sensazione piacevole, o a provocarla" (1894, 52). He used Menger's scales. "I mezzi di soddisfacimento dei nostri bisogni, qualunque essi siano, si chiamano beni" (1894, 72).

non v'è distinzione fra beni immaginari e reali, prevale l'idea che abbiamo di essi" (Pantaleoni, 1894: 76). He affirmed that the problem of what a good is has been resolved thirty years before by Francesco Ferrara: "Discutevasi, se, oltre un complesso di oggetti chiamati arbitrariamente *materiali,* o *cose,* fossero anche beni i *servizi* che un individuo può rendere all'altro" (Pantaleoni, 1894: 77). In fact, Ferrara discussed services: "Tutto ciò che tange i nostri sensi, sia desso una parte del mondo esteriore in cui vivono gli uomini, o sia desso una azione positiva o negativa, di un uomo o di più uomini verso di un altro, può essere un bene, cioè appagare un bisogno, estinguere una sensazione dolorosa o farne sorgere una piacevole" (Pantaleoni, 1894: 78-79). As a matter of example of immaterial good he proposes "l'orazione dell' avvocato, il credito incorporato in una cambiale, o in un contratto, il canto della prima donna, l'affluire degli avventori in una bottega, la astensione dal concorrere dei produttori vincolati dalla patente di un altro, la astensione dal concorrere di capitalisti ad una asta vincolati da un qualsiasi interesse loro, ancorché altruistico, il libro dello scienziato, ecc." (Pantaleoni, 1894: 79).[3]

The contemporary conception of good used in Law & Economics has been proposed by Lionel **Robbins** (1932). He wrote that "Economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses" (Robbins, 1932: 15). He emphasised scarcity and *opportunity costs* as a necessary element*:* "The ends are various. The time and the means for achieving these ends are at once limited and capable of alternative application" (Robbins, 1932: 12-13). The limitation of means is not by itself sufficient to give rise to economic phenomena[4] because the "alternative use" is fundamental. Moreover, he stressed the importance of dividing means from ends in case of actions, separating in this way economics from ethics: "A satisfaction is to be conceived as an end-product of activity. It is not itself part of the activity which we study… Ends may be 'material' or 'immaterial'" (Robbins, 1932: 24-25). An interesting aspect of Robbins' view is that "The conception of an economic good is necessarily formal" (Robbins, 1932: 46): he is not privileging the pragmatic position of the classical literature. We may interpret this view as the need of having a formal language to define or distinguish goods, but this could also open to a kind of expressive function of law.

As regards the relationship between good and the legal position, Robbins is aware of the "relations between the scales of relative valuations and the historical framework of institutions" (Robbins, 1932: 92). He affirms that in all discussions "we must start by assuming a given distribution of property…if distribution changes, relative valuations must be expected to change also" (Robbins, 1932: 93). Moreover, "It is clearly necessary to assume a *social order* within which the valuations based upon it may show themselves in tendencies to action" (Robbins, 1932: 93). The legal framework, however, is seen as a superimposed structure:

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[3] Pantaleoni resume the insights of Ferrara: "*a)* sono cose materiali quelle che tangono direttamente, o in- direttamente (mediante illazioni) i nostri sensi ; *b)* non esistono per l'uomo che cose materiali ; c) qualunque cosa può essere un bene ; basta che soddisfi un bisogno ; *d) V* effetto di ogni bene è sempre d'indole psicologica ; *e)* il bene e il suo effetto sono fenomeni affatto distinti ; *f )* le cause di beni sono anch'esse dei beni, in quanto sono d'indole materiale e perciò a noi note, se sono d'indole immateriale, sono pure a noi ignote" (Pantaleoni, 1894: 829).

[4] Scarcity "means limitation in relation to demand" (Robbins, 1932: 45). Wealth is wealth because it is scarce (Robbins, 1932: 46).

> "We assume a legal framework of economic activity. This framework, as it were, limits by exclusion the area within which the valuations of the economic subjects may influence their action. It prescribes a region in which one is *not* free to adopt all possible expedients; and these prescriptions are assumed in the discussion of what happens in the residual area of free action. Labour legislation, laws of property and inheritance, tax systems, obstacles to trade and movement - all these are taken for granted when we assume the scales of relative valuation" (Robbins, 1932: 93-94).

Laws are therefore limiting the field of choice and often limiting economic opportunities, obstacles to need fulfillment. No further insight is proposed on the legal position.

More recently, Gary Becker has represented a reference for those conceiving economics as the study of any human activity. In fact, Becker (1976: 4) criticises the definition of economics as dealing with material goods or physical needs and wants or material needs and desires. He prefers the definition of Robbins that points at scarce means that have alternative uses or competing ends.

> "The preferences that are assumed to be stable do not refer to market goods and services, like oranges, automobiles, or medical care, but to underlying objects of choice that are produced by each household using market goods and services, their own time, and other inputs. These underlying preferences are defined over fundamental aspects of life, such as health, prestige, sensual pleasure, benevolence, or envy, that do not always bear a stable relation to market goods and services" (Becker, 1976: 5).

> "Indeed, I have come to the position that the economic approach is a comprehensive one that is applicable to all human behavior, be it behavior involving money prices or imputed shadow prices…" (Becker, 1976: 8). "…the economic approach provides a valuable unified framework for understanding *all* human behavior" (Becker, 1976: 14).

He importantly adds that information is costly. However, his vision of the law and rights is quite poor. The only way these elements come into the economic discourse is that "Obedience to law is not taken for granted…" (Becker, 1976: 39). The probability of being punished is seen as an expected cost. In this way, the law exited economic reasoning.

The general tendency is to keep a pragmatic definition of the good and a separate definition of rules and rights. The latter have consequently been shaped as **property rights**, stretching this notion to limits that have little relation with law. That determined a difficulty to understand the individual legal position in cases in which the good is relevantly shaped by the legal system (including the ethical dimension) and is not defined as simple **property**.

## 4. Transactions and rights

John Commons (1924) is the fundamental scholar who paid attention to the legal framework of capitalism. He brought forth many legal elements structuring capitalistic production processes, so that economic outcomes depend on the institutional set-up. Commons reformulated Wesley N. Hohfeld concept of the adversarial nature of legal positions (Vatiero, 2021; Hohfeld, 1919). In this perspective, individuals act in a space defined by a set of symmetric entitlements and working rules. Hohfeld (1919) singled out a set of symmetrical juridical variables framing transactions: the *Right* of A, corresponding to *duty* of B; *Privilege* of A, corresponding to *no-right* of B; *Power* of A, corresponding to

*liability* of B; *Immunity* of A, corresponding to *no-power* of B. Therefore, he did not refer to actual laws or rights, nor to the simple concept of property right, but to a general set of entitlements deriving from the actual arrangement of the legal position, always defined in a relationship. This set of entitlements shape the process of acquiring the legal control of commodities, or the legal control of labor by management"(Commons 1931). Therefore it can fit services as well as obligations of performance. Nonetheless, there is not much interaction with the legal definition of economic good or with actual legal schemes in which economic choices are embedded.

Massimilano Vatiero has underlined how the legal structure defined by Hohfeld and Commons is a positional good: increasing a right of a party menas increasing obligations of the other, as well as assigning privileges to somebody means reducing rights to others, etc. Vatiero specifies that these juridical elements are not only positional, but are subjective (Vatiero, 2021: 36). In this way, there is more than a simple property right framing transactions.

Moreover, in the real world, the definition of rights (rule-making process) and their enforcement (rule-enforcing process) represent two distinctive issues (Vatiero, 2021: 33). Vatiero in this way distinguishes two kinds of legal elements with different logical times of definition. "One key point of his argument is that the definition of rights is a necessary pre-condition in order to ensure Pareto-efficiency in a market transaction (cf. Hypothesis 2 of the Coase theorem). Otherwise, without such a clear definition of rights over resources, externalities (…) will persist" (Vatiero, 2021: 34). As regards the latter dimension, the adversarial nature of legal positions makes the definition of rights by a public official a non neutral and costless act. This aspect assumes a particular relevance when the definition of the good is part of the legal elements.

Commons (1965) considered goods and rights as **inputs** of production among capabilities and capital. He mentions monopolistic privileges and legal rights as personal rights (life, liberty, employment and marriage). However, he has not ordered them to design a coherent framework to study the legal position of transacting actors.

Ronal Coase (1960) mentions the legal position of actors taking part to transactions. His interest is limited to civil responsibility.

> "It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the **legal position** if the pricing system is assumed to work without cost" (Coase, 1960: 843).

Later in that paper he is clearer on what this notion means affirming that "peculiarities of the **legal position** and the light it throws on the part which economics can play in what is apparently the purely legal question **of the delimitation of rights**" (Coase, 1960: 869). Consequently Coase is not interested much on the content of rights as to the boundary separating different property rights.[5] Transactions exactly concern the reciprocal modification of rights, although "Even when it is possible to change the **legal delimitation**

[5] This is confirmed also in this observation: "The legal position in the United States would seem to be essentially the same as in England, except that the power of the legislatures to authorize what would otherwise be nuisances under the common law, at least without giving compensation to the person harmed, is somewhat more limited, as it is subject to constitutional restrictions" (Coase, 1960: 859).

**of rights** through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out" (Coase, 1960: 854). It is clear that Coase, red in the light of Commons, implies that subjective rights are involved in such negotiations to re-arrange entitlements.

Actually, it would be difficult to distinguish in Coase (1960) the set of organizational and rule arrangements in which transactions take place. Property rights are dififcult to be distinguished from rules affecting the use of property or the governance framework of exchanges. In fact Coase later argued that "Law came into the article because, in a regime of positive transaction costs, the character of the law becomes one of the main factors determining the performance of the economy" (Coase, 1993: 251), not only as an obstacle.

The literature that followed this intuition of Coase, did not develop the whole elements of the legal position but focussed on individual property (Hutter, 1978). In particular, much attention has been paid on the inefficiency of common property or public property. **Alchian** (1965) reassessed the broad all-inclusive notion of property to reaffirm the virtues of individual private property:

> "Often the idea or scope or private property rights is expressed as an assignment of exclusive authority to some individual to choose any use of the goods deemed to be his private property. In other words the « owners », who are assigned the right to make the choice, have an unrestricted right to the choice of use of specified goods" (Alchian, 1965: 818).

Alchian and Demsetz (1973, p. 18) also studied two forms of attenuation of property rights: *decision sharing* and the *domain partitioning* of rights uses by several people, without considering what is shared or the legal context. Demsetz (1967) emphasised the rationality of exclusive property rights as well the economic impossibility of a perfect delineation of rights. That would lead to domains in which property rights are public.[6] Nonetheless, in this paper Demsetz (1967) acknowledges that property right is complex and composed of different specific rights. His strategy is to keep the notion of property right as a unitary and composite bundle of more specific rights.

> "When a transaction is concluded in the marketplace, two bundles of property rights are exchanged. A bundle of rights often attaches to a physical commodity or service, but it is the value of the rights that determines the value of what is exchanged. Questions addressed to the emergence and mix of the components of the bundle of rights are prior to those commonly asked by economists… An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways" (Demsetz, 1967: 347).

The most interesting statement is that "it is the value of the rights that **determines the value of what is exchanged**", and that this comes before value. Such view contradicts the whole history of economics. It also implies the role of laws, customs, and mores of a society in determining the legal position of an individual relatively to a good. Recently Müller, and Tietzel (2005) reaffirmed that "Property rights can be defined as socially recognized entitlements of individuals to use a good" (Müller and Tietzel, 2005: 40).

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6 "A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities." But "property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization" (Demsetz, 1967: 350).

The idea of **bundle** was further developed by Furubotn and Pejovich. They finally paid attention to the economic good involved in transactions. They argued that transactions concern not only material resources, but also immaterial goods and "human rights such as the right to vote and that of free speech" (Furubotn and Pejovich, 1974: 3). They distinguished the bundle of rights involved in property as the right to use a resource, to appropriate returns, to change the form and substance of assets, and to sell or lease some of these rights to another user. Such bundle is simply formed by the various real rights, but it is also shaped by the particular set of legal restrictions determining the socially recognized use of goods (Müller, and Tietzel, 2005).

More recently, Francesco Parisi (2005) admits that "The law creates many subjective juridical positions that are also susceptible to exchange and transfer… The voluntary transfer of individual rights in the marketplace, thus, will cure a non-optimal allocation of legal entitlements" (Parisi, 2005: 13). This final acknowledgement by Parisi of the variety of rights object of transactions arrives with a certain delay relative to the evolution of economic thought. It is important that transactions modify the rights that can be object of a voluntary agreement. It also opens at the detection of abuses in practice and of the same law, in a perfect Virginia school perspective (Parisi, 2004).

## 5. The socially shaped good: insights derived from capital

In the theory of capitalism we can perceive a more thorough study of the legal dimension of capital. Even here we can find a difference between Materialist vs. Fundist definition of capital, which has an impact on the history of capitalism. Changing what is included in the material factors of production, or enlarging the view of capital to immaterial factors, changes relevantly the story. The "fundist" view of capital is adopted by Jonathan Levy (2017) who argues that "Capital is legal property assigned a pecuniary value in expectation of a likely future pecuniary income. Capital valuation is prospective, always occurring under conditions of uncertainty. A capitalized form of property, including but not limited to a material factor of production, is a capital asset" (Levy, 2017: 487). In this definition the legal definition of the good comes before the evaluation. Then, evaluation comes from a future expectation of pecuniary income. Differently from economic goods, not all wealth can be capitalized. But the process of capitalisation is fundamental to define what is or can be capital.[7] The act of capitalization brings capital to life (Veblen, 1898). The challenging theoretical aspect of the theory of capital is to understand "how capitalization became a plausible way of relating the future to the present" (Levy, 2017: 504). Moreover, what is usually forgotten by economists is that the legal definition of capital is complementary to the technology available to grant the excludability: from fences to internet accountancy.

Katarina Pistor (2019) in The *Code of Capital* has defined in detail what is needed for capitalisation: priority (of competing claims), durability (in time), universality (in space), and convertibility. The law or political institutions, in her view, are fundamental for capital definition. Law of property has been shaped by the need to code real estate, particularly land, according to the feudal calculus (Pistor, 2019: 9). What is relevant also for the definition of economic goods, is that ordinary objects must undergo some transformation

[7] Levy adds that "Under capitalism, the process of capitalization has become so economically prevalent that it has become conceivable as a general form of strategic action and valuation" (Levy, 2017: 501). John Commons had a radical view of this process saying that capital is the present value of expected beneficial behaviour of other people.

before they can be treated in exchange for money: the process of commodification. From this perspective, everything can become a commodity, not only things produced for the market. Bernard Rudden (1994) also argued that a thing is transformed in wealth thanks to the law. Things may be singular, while wealth has to be standardised to be exchanged and become "means of handling abstract value", "member of a class, perfectly replaceable and subject to an implacable regime of real subrogation" (Rudden, 1994: 83). In this regard, these scholars are apparently underlining the cognitive social dimension of rules. By referring to some code, things become socially recognizable and the set of rights-duties connected to some resource or piece of wealth become socially shared.

Pistor, Rudden and Levy stress the role of law, but technology has to be added to understand what is feasible. It is not only necessary for producing goods, but also for defining their boundaries and their standardisation as wealth. To this we should add that dimension of technology that is complimentary to law to make exclusion or selective access possible. There is no motorway fare without the toll, the administrative rule is not sufficient. Wealth as bonds and other financial instruments are simply certified promises by some conventional writing. The accountancy technology and the stock exchange platform are complimentary to financial legislation and specific standard contracts to assure the existence of present day certificates that can be traded at high speed.

In conclusion codification as described by Pistor (2019) is not only necessary to define capital, but it represents a meaningful concept also in the definition of economic goods. In fact, when we do not deal with material commodities easily detectable and controllable, institutions and the law have a fundamental cognitive role shaping the barriers of access to the good as well as the social dimension of the reciprocal recognition of people in regard to the goods. This fact is magnified in the case of positional goods (Claassen, 2008). Therefore, technology and the law define the legal infrastructure in which goods are defined.

In the economic tradition the economic good is defined with the individual evaluation of its potential use for the fulfillment of a need/desire. This primitive evaluation is nonetheless socially framed by habits, conventions, institutions apprehended in the process of education and socialisation. The law and its expressive function play an important role in this social conditioning.

In the Catholic tradition, morals plays a fundamental role. Goods are defined as anything that can be the object of our desires. Freedom of choice is a property of the will, which is «enlightened by the knowledge possessed by the intellect» (Leo XIII, 1888: §5). Reason is conceived as far from being perfect and therefore human liberty is in «need of light and strength to direct its actions to good and to restrain them from evil» (Leo XIII, 1888: §7). This *ordering of reason* is the the *moral law* that gives a social shape to individual free will (*Libertas* by Leo XIII, June 20, 1888). Therefore when we perceive a need and a good that can fulfill such desire, this is a socially mediated process. More generally, we can consider institutions and the law as a further socially shaping the good as well as the whole set of rights and obligations deriving from such good and the actions required to get it.

## 6. Transactions and technology

The theory of property rights has is based on two fundamental dimensions: *rivalry* that transforms the scarcity of the good scarcity in a social problem of allocation; *exclusion* that

is usually seen as a problem of enforcement of rights. These dimensions are relevant because, seen from the other way round, help defining the good. Usually distinguishing a public good from a private one, etc. The whole discussion is based on political-legal decisions, but the actual problem is technology. Most of the research done in Law and Economics has been directed to produce clear and strong arguments advising to avoid the *common resources* problem and stimulate investments in innovation. But this is not simply a political problem. Technology mostly depend what can be done and what cannot. Laws are useless if they do not rely on feasible and cheap technologies. Naturally, the advantage of social conventions is that they develop in time based on available technologies, avoiding rationalistic unfeasible solutions.

Massimiliano Vatiero (2021) noticed how Holmes and Commons and Hale considered that each legal relationship is based on a degree of duress and even coercion. He underlines how transactions consists of the three main dimensions: the *legal*, *competitive* and *political* dimensions (Vatiero, 2001). However, technology is fundamental and strictly related to the first two dimensions: no meaningful law without a suitable technology, at least for enforcement; no efficient competition without an appropriate communication and codification technology ("A transaction occurs when a good or service is transferred across a technologically separable interface" Williamson, 1981: 552).

Technology enters transaction costs economics, as Vatiero remembers, through asset specificity. That produces rigidities in competition assuring a disequilibrium of opportunities between parts that increases transaction costs. However, technology enters transactions at least in three forms:

1. The definition of the good; it is the final part of the technology of production, that assuring how to reach and become under the control of the consumer. What is offered has to be clearly defined and transferred. In part it is tied to the codification of the good (description according to standards), in part with quantification (measurement and comparability) and conservation. Technology helping commodification is important, but also that registering knowledge and intangibles. In case of immaterial goods this function is crucial.
2. Exclusion, how it is possible to protect the good from others, favoring the reduction of transaction costs. This aspect is not relevant for many commodities, but many goods tend to become *free-access* if not technologically protected, from the motorway to the film available on streaming. For most of the new goods, from e-books to media on the net, technology is defining exclusion even without the legal definition of it. The cost of enforcement is therefore falling on internet (other problems are rising, however).
3. Connecting with competing actors, assuring generalised rivalry. This public space has evolved from the market square to the stock-exchange and further to platforms. Tenders on-line can reach the whole world, much beyond payment means that still suffer a certain delay. The laws in favour of competition are obviously well-analysed in Law and Economics, but their connection to technology a bit less.

On each point we find a precise legislation helping reducing transaction costs. As concerns the definition of the good, many rules define the safety and other subjective rights of customers. Other try to avoid frauds or externalities. When we enter the field of the reciprocal modification of subjective rights, obligations of doing or not-doing certain actions, which specifies Menger's "omissions", the law defining individual rights (as

labourer or simply as a person) enters the definition of the good. We can talk of a legal-technological complex that is helping the definition of the good.

When technology changes, old rules become irrelevant and new rules are required to keep transaction costs low.

## 7. A synthetic perspective on the legal definition of goods

The problem that has been discussed is the tripartite relation between need, technology and the law. Both technology and the law shape economic goods and frame the legal position of contracting parties. Even if textbooks and the common use of goods points at industrial goods, Law & Economics is interested in the broader definition of good, including immaterial and every kind of action and omission.

As regards goods and the dimension of coding, standard goods do not need specific coding, nor property rights, as they depend much by cultural conventions and by the available technology. Therefore, the fact that the good is a primitive notion is true in the short run, when the economic structure is given and economic choices consider the suitable existing means to satisfy needs. For most of standard commodities the formal law is simply a super-imposed structure limiting the range of feasible choices.

All that is not true in a series of cases:

1. in the long run, produced goods and the same desires that define them are the result of a social construction. The law contributes to such a process as part of a variety of social institutions that coordinate dynamic socio-economic processes.

2. Goods of relevant value need coding by specific property law as well as registers determined by a suitable technology.

3. Artificial and immaterial goods need coding, a conditional property law and suitable registers or at least a system of accountancy (as in the financial market). This is particularly evident in the case of New property (Reich, 1964; 1990). In the case of artificial and immaterial goods, resulting from specific contractual agreements or from administrative arrangements derived from the law, the legal position depends from a specific law and is co-substantial to needs. We may consider the case of the subscription rights of existing shareholders. They are short-lived goods quoted in the market, but they do not exist without a given legal arrangement of the financial market. ETF are another case, crucially depending from coding and from legislation. Electricity-producing company have no need of buying a right to emit carbon, except in the given European administered market and because of controls. Therefore, scarcity is artificial. A market is created and a good is exchanged that is immaterial and that has value only in an administrative artifact.

4a. In the case of labour, the situation is mixed. Labour is a natural good but a fictitious commodity (Polanyi). Its commodification, lamented by Polanyi, is a matter of conventions. Nonetheless, all nations have found it convenient to regulate it in a way that some human right is created and defended, improving the legal position of labourers vs. employers. The actual labour negotiated in the market is therefore a specific form of labour, which in part is an artifact. The fact that at least some natural rights of the person are negotiated in this market makes this good at least framed by natural law, or a moral law (which is not superimposed but co-substantial to the negotiation). The existence of formal laws complicates the situation and makes some rule surely an artifact. Nonetheless, many legal

conventions equally enter the definition of what can be exchanged. Think of maternity or child labour.

4b. Services are surely natural goods in principle. They are strictly connected to the idea of action (omission) oriented to achieve specified results. Nonetheless, we often pay for actions that do not achieve the desired results (any professional) and this is due to the legal position of the contracting parties and to the uncertain nature of the expected results. It is often difficult to define what we are paying for when we engage a tax consultant or a solicitor: his competences or a result? Nonetheless, many services are administratively made compulsory, e.g. the car insurance. In this way, it is the law which shapes the need as well as the legal position of the insured. The number of these services, which are not totally voluntarily chosen or at leas indirectly pushed by some administrative rule is increasing.

5. A final category of goods are supplied as access goods via Platforms. In this case the legal position of contracting parties is strictly determined by the technology, which in part conforms to the law, in part it overcomes every specific legal framework. A peculiarity of technological centralisation characterising this world is that the good is totally in control of suppliers. When you buy an e-book for a given time lapse, how you use it is controlled by the supplier. In this sense, the good is different from a concrete paper book, the way it fulfills the need is not comparable. If we consider social networks, it is difficult to say what we buy and how we pay it, even if the need is defined. Remarkably, the cost is a form of control on the preferences of the client. A significant part of the original legal position and the modifications to it are not clear or even knowable. On the other hand, platforms make third party enforcement, by information spreading or via punishment, clearer, costless and efficient. We may consider Chrono24 platform for exchanging watches, which is an intermediary in payments and acting as a hostage keeper in transactions.

Consequently, in order to perform an economic-legal analysis of a variety of markets or individual choices we need framing what **rule produces rights-liabilities, assigns powers etc. which produce a structured space of economic action.** That determines a variety of feasible actions that modify the starting legal position of actors. This framework has to be seen as relational as in Common's teaching. For sure it includes personal rights and a variety of regulations that assure individual rights. Moreover, contracts have a structuring effect on the legal position of actors, producing specific rights or liabilities, at least for a while.

In conclusion, as concern the role lo law:

1. Laws and social institutions socially frame needs in the long run; they also set them in case of positional goods and artificial goods.

2. Rules/rights and technology define a boundary to feasible action. But also help defining immaterial goods and useful actions or create needs that demand specific goods. In case of positional goods, the framework of rules and administration (organisation) is fundamental.

3. System of rights-liabilities help defining the boundary of goods vs externalities. But technologies are more important, therefore the enforcement of property rights is a technical problem more than a legal.

## 8. Conclusion: interdependency of goods and legal systems of exchanges

The tripartite relation between need, technology and the law expresses both goods and the conditions of exchange. Economists had difficulty to extend economics to a variety of domains. They failed and still fail to recognise that many goods are immaterial, positional or simply involve obligations of performing some action. Moreover, economics has displayed a certain reluctance to admit that the law has a significant impact on the definition and the value of the good. Therefore, economic theory has stuck to the idea of property as the only relevant legal element. Only recently Parisi admitted that subjective rights enter the object of transaction. Law & Economics should be interested in studying the complex set of factors interacting to shape goods and legal positions of actors, which are interdependent.

## References


Alchian, Armen A. (1965) "Some Economics of Property Rights." *Il Politico* 30: 816–829.

Alchian, Armen A. (1977) "Some Implications of Recognition of Property Right Transaction Costs." In Karl Brunner (ed.), Economics and Social Institutions: Insights from the Conferences on Analysis and Ideology. Boston: Martinus Nijhoff, pp. 234–255.

Alchian, Armen A., and Harold Demsetz (1972) "Production, Information Costs, and Economic Organization." *American Economic Review* 62(4): 777–795.

Alchian, Armen A., and Harold Demsetz (1973) "The Property Right Paradigm", *Journal of Economic History, 33 (1): 16-27.*

Allen, Douglas W. (2015) "On Hodgson on Property Rights." *Journal of Institutional Economics,* 11(4): 711–718.

Arruñada, Benito (2017) "Property as sequential exchange: The forgotten limits of private contract," Journal of Institutional Economics, 13(4):753–783.

Backhaus, Jürgen (1979) "Lawyers' Economics vs. Economic Analysis of Law." Munich Social Science Review 1: 1–34.

Barzel,Yoram (1997) *The Economic Analysis of Property Rights*. Cambridge: Cambridge University Press.

Becker, Gary S. (1976) The Economic Approach to Human Behavior, University of Chicago Press.

Campagnolo, Gilles (2008) "Menger: From the Works Published in Vienna to His Nachlass." In Carl Menger. Neu er€ortert unter Einbeziehung nachgelassener Texte, edited by G. Campagnolo, 31–58. Frankfurt: Peter Lang.

Claassen, Rutger (2008) "The status struggle. A recognition-based interpretation of the positional economy", Philosophy & Social Criticism 34(9): 1021-1049.

Coase R.H. (1959), "The federal communications commission," *Journal of Law and Economics*, 2(1):1–40.

Coase, Ronald H. (1960) "The Problem of Social Cost." Journal of Law and Economics 3: 1–44.

Coase R.H. (1988), *The firm, the market and the law*, Chicago: University of Chicago Press.

Coase R.H. (1992), "The institutional structure of production," *American Economic Review*, 82(4):713–719.

Coase, R.H. (1993) "Law and economics at Chicago", *Journal of Law and Economics,* 36 (1): 239-254.

Commons J.R. (1924) *Legal Foundations of Capitalism*, Clifton: Augustus M. Kelley Publishers, [reprinted, 2007].

Commons J.R. (1931) "Institutional economics," *American Economic Review*, 21:648–657.

Commons J.R. (1951) *The Economics ofCollective Action*, New York: MacMillan.

Commons J.R. (1965) *The Distribution of Wealth*, New York: Augustus M. Kelley.

Cole, Daniel H: and Peter Z. Grossman (2011) *Principles of Law and Economics,* New York, Kluwer.

Del Vecchio G. (1908 [1956]), "Ricchezze immateriali e capitali immateriali", in Id., *Capitale e Interesse*, Edizioni Scientifiche Einaudi, Torino: 208-280.

Demsetz, Harold (1964) "The exchange and enforcement of property rights", *Journal of Law and* Economics, **3**, 11–26.

Demsetz, Harold (1966) “Some Aspects of Property Rights.” Journal of Law and Economics 9: 61–70.
Demsetz, Harold (1967), “Toward a theory of property rights,” *American Economic Review*, 57(2):347–359.
Demsetz, Harold (1982), Economic, legal, and political dimensions of competition, Amsterdam: North-Holland.
Fiorito, Luca and Massimiliano Vatiero (2011), “Beyond legal relations: Wesley Newcomb Hohfeld’s influence on American institutionalism,” *Journal of Economic Issues*, 45(1):199–222.
Frank R.H. (1985), “The demand for unobservable and other nonpositional goods,” *American Economic Review*, 75(1):101–116.
Furubotn, E.G. and S. Pejovich (1974), ‘Introduction: the new property rights literature’, in E.G. Furubotn and S. Pejovich (eds), *The Economics of Property Rights*, Cambridge, MA: Ballinger, pp. 1–9.
Hale R.L. (1943), “Bargaining, duress, and economic liberty,” *Columbia Law Review*, 43(5):603–628.
Hale R.L. (1952), Freedom through law: Public control of private governing power, New York: Columbia University Press.
Hermann, F.B.W. (1832), *Staatswirthschaftliche Untersuchungen über Vermögen, Wirthschaft, Productivität der Arbeiten, Kapital, Preis, Gewinn, Einkommen und Verbrauch*, München.
Hodgson, Geoffrey M. (2006), “What are institutions?,” *Journal of Economic Issues*, 40(1):1–25.
Hodgson, Geoffrey M. (2015), “Much of the ‘economics of property rights’ devalues property and legal rights,” *Journal of Institutional Economics*, 11(4):725–730.
Hodgson, Geoffrey M. (2015) *Conceptualizing Capitalism: Institutions, Evolution, Future,* Chicago, Chicago University Press.
Hohfeld, Wesley Newcomb (1919) *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, ed. David Campbell and Phillip Thomas. Aldershot: Ashgate, 2001.
Hutter, Michael (1978/2017) “From Pigovian Analysis to Property Rights Theory” *Munich Social Science Review*, New Series 1: 1–10.
Levy, Jonathan (2017) “Capital as Process and the History of Capitalism”, *Busienss History Review,* 91: 483-510.
Magliulo, Antonio (2009) “Economia e felicita. La teoria austriaca dei Beni relazionali da Menger a Robbins.” History of Economic Thought and Policy 2 (2): 5–35.
Medema, Steven G. (1999) “Legal Fiction: The Place of the Coase Theorem in Law and Economics.” Economics and Philosophy 15: 209–33.
Medema, Steven G. (2015) “From Dismal to Dominance? Law and Economics and the Values of Imperial Science, Historically Contemplated.” In Law and Economics: Philosophical Issues and Fundamental Questions., edited by A. N. Hatzis and N. Mercuro, 79–98. New York: Routledge.
Menger C. (1871 [2001]) *Principi Fondamentali di Economia,* Rubbettino, Sovaria Mannelli (CT).
Menger C. (1915 [2002]), “Necrologio per Eugen Ritter von Böhm-Bawerk”, in Böhm-Bawerk (2002): 311-322.
Mossoff, Adam (2003) “What Is Property? Putting the Pieces Back Together.” Arizona Law Review 45: 371–443.
Müller, Christian and Manfred Tietzel (2005) “Property rights and their partitioning”, in J. Backhaus (ed.) *The Elgar Companion to Law and Economics,* Cheltenam, Elgar: 40-52.
Pagano, Ugo (2012a), “No institution is a free lunch: A reconstruction of Ronald Coase,” *International Review of Economics*, 59 (2):189–200.
Pagano, Ugo and Massimiliano Vatiero (2015) “Costly institutions as substitutes: Novelty and lim- its of the Coasian approach,” *Journal of Institutional Economics*, 11(2: Coase memorial issue):265–281.
Pagano, Ugo and Massimiliano Vatiero (2019) “Positional goods and legal orderings,” in Marciano A. and G.B. Ramello (eds.), *Encyclopaedia of Law and Economics*, Berlin: Springer.
Pantaleoni, Maffeo (1894) *Principi di Economia Pura,* (2nd ed.) Florence, Barbera.
Parisi, Francesco (2004) “Positive, normative and functional schools in Law and Economics”, *European Journal of Law and Economics,* 18: 259-272.
Parisi, Francesco (2005) “Coase theorem and transaction cost economics in the law”, in J. Backhaus (ed.) *The Elgar Companion to Law and Economics,* Cheltenam, Elgar: 7-39.
Penalver, Eduardo M. (2005) Property as entrance, *Virginia Law Review*, 91(8): 1889-1972.
Pistor, Katharina (2019) *The Code of Capital. How the Law Creates Wealth and Inequality,* Princeton and Oxford, Princeton University Press.

Reich, Charles (1964) “The New Property.” The Yale Law Journal 73(5): 733–787.
Reich, Charles (1990a) “The Liberty Impact of the New Property.” William & Mary Law Review 31(2): 295–306.
Reich, Charles (1990b) “The New Property After 25 Years.” University of San Francisco Law Review 24: 223–271.
Robbins, Lionel (1932) *An Essay on the Nature andSignificance of Economics Science*, London, Mccmillan.
Roscher, Wilhelm (1856) *System der Volkswirthschaft,* Stuttgart, VII ed. 1868.
Rudden, Bernard (1994) “Things as things and things as wealth”, *Oxford Journal of Legal Studies,* 14 (1): 81-97.
Say, Jean-Baptiste (1828-43) *Cours Complet d’Economie Politique*, Bruxelles, Société Typographique Belge.
Schäffle, Albert E.F. (1867) *Das gesellshaftliche System der menschilichen Wirtshaft,*
Schlatter, Richard (1951) *Private Property, the History of an Idea*. London: Allen & Unwin.
Solari, Stefano (2019) “The *recognition* of the other as a pre-requisite for fair market prices”, in *The Individual and the Other in Economic Thought. An Introduction,* Ragip Ege and Herrade Igersheim (eds), Abingdon, Oxon, Routledge: 180-192.
Solari, Stefano (2019) “Rights, entitlements and the law: The ambiguous status of legal elements in economic discourse”, in Péter Cserne and Magdalena Malecka (eds) *Law and Economics as Interdisciplinary Exchange,* Abingdon, Oxon, Routledge: pp.76-94.
Solari, Stefano (2022) "Menger and the continental epistemology of uncertainty", *The European Journal of the History of Economic Thought*, 29:5, 920-937.
Solnick S.J. and D. Hemenway (1998) “Is more always better? A survey on positional concerns,” Journal of Economic Behavior and Organization, 37(3):373–383.
Solnick S.J. and D. Hemenway (2005) “Are positional concerns stronger in some domains than in others?,” *American Economic Review*, 95(2):147–151.
Vatiero M. (2013) “Positional goods and Robert Lee Hale’s legal economics,” *Journal of Institutional Economics*, 9(3):351–362.
Vatiero M. (2015) “Dominant market position and ordoliberalism,” *International Review of Economics*, 62 (4): 291–306.
Vatiero M. (2021) *The Theory of Transaction in Institutional Economics. A History*, London and New York, Routledge.
Veblen, Thorstein B. (1898) “Why Is Economics Not an Evolutionary Science?” *Quarterly Journal of Economics* 12 (4): 389.
Williamson O.E. (1985a) *The Economic Institutions of Capitalism*, New York, Free Press.