A Forensic Analysis of "The Dark Side of Private Ordering" (Repository version)

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Have you seen that vigilante man?
  Have you seen that vigilante man?
Have you seen that vigilante man?
  I been hearin' his name all over the land.
-- Woody Guthrie[1]

In an article published recently in the University of Chicago Law Review,[2] Professors Curtis Milhaupt and Mark West set forth a tantalizing proposition: Organized crime is an entrepreneurial response to inefficiencies in the structuring and enforcement of property rights that the state has undertaken to offer.[3] In comparative legal scholarship, conclusions that are both well defined and general are a rarity. The possibilities of comparative law are so often touted and so seldom realized that when the promise matures into production, it is hard to do much else than celebrate. However, the more clear and consequential a proposition is, the more important it is to test its limitations. Therefore, and with no particular pleasure, I would like to raise here a few reservations concerning "The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime".[4]

削除: an earlier volume of this journal

The potential power of the authors' hypothesis arises from its logical simplicity. The proposition that state and non-state enforcement institutions are competing suppliers of a well-defined service for hire can be tested empirically, which the authors set out to do.[5] More important, if the hypothesis stands up, it carries with it a set of clear policy prescriptions. If it is shown that organized crime firms arise as alternative enforcers of property rights, then the best response to organized crime is rationalization of the property system, and the recruitment of these firms to the service of the legal order.[6] Conversely, the suppression of organized crime through criminal sanctions comes to be seen as a futile Sisyphean effort to discourage activity for which there is a strong and deeply rooted economic demand.[7] These are certainly consequential recommendations, and if they are

correct, they ought to have a significant impact on legislative policy worldwide.

As the authors indicate, both enforcement weakness and organized crime have figured prominently in discussions of Japan and its legal system. The authors also point out that there is a wealth of anecdotal evidence suggesting that criminal firms in Japan do, in fact, provide enforcement services.[8] Their hypothesis therefore seems a good fit for the Japanese environment. In their study, they explore statistical evidence for competition between state enforcement institutions and criminal firms in a data set covering the years 1972 through 1995.[9] Finding a strong inverse correlation between the size of criminal firms and the performance indicators of state enforcement institutions, the authors conclude that criminal firms respond to weaknesses in the property system by providing substitute enforcement services to "fill in the gaps" left by under-performing state institutions.[10] They are at pains to stress that their point is not limited to Japan,[11] and that their findings are of general utility in explaining the relationship between state institutions and the underworld, particularly in today's economies in transition.[12]

The statistical treatment is carefully executed; but the study's more general claims rest on two intermediate premises embedded in the model on which it is based. The first of these is that enforcement failure has been a consistent feature of Japanese legal life since the deployment of the nationwide system of property rights at the end of the 19th century. The second is that the clear substitution effects that the authors observe are a *spontaneous* underworld response to enforcement failure. These points are crucial, if the landscape of a very young property system, like that of contemporary Russia, is to be successfully read from the contours of modern-day Japanese experience.[13] Milhaupt and West meet this need with the proposition that countries that undergo an "'overnight' property rights transformation" often fail to provide adequate matching enforcement services.[14] They tell us that Japan, which ran the rapids from decentralized feudalism to a national legal order in the late 19th century, is a typical case of this kind.[15]

Unfortunately, the argument is built on sand. The history and development of Japanese law defies simplistic cultural explanations – but it has not been very conveniently arranged for sweeping economic models, either. Japan is most emphatically *not* a case of this kind.

The authors organize their discussion of enforcement weakness around a diverse set of areas in which substitution behavior is found:[16] bankruptcy; debt collection; landlord-tenant relations; shareholders' rights; dispute intermediaries; and the regulation

of financial services. The authors match these categories with specific types of underworld racketeer,[17] emphasizing the significance of the fact that special terms exist in Japanese popular speech for each type of racketeer that they include in their analysis.[18] a brief review of the weaknesses exploited by each follows.

With respect to bankruptcy, the underworld figure raised is the *seiriya*, a specialist in workouts. These are said to have close links with organized crime, but apart from bringing pragmatic expertise to the table, they engage in two practices that are specifically illegal: obstruction of foreclosure proceedings; and debt collection on behalf of the failing firm combined with the expeditious liquidation of assets.[19] In the former instance, they exploit both Japan's tenant protection legislation, and the country's acute shortage of court bailiffs (who are necessary to the execution of eviction orders). In the latter instance -- debt collection -- *seiriya* provide a substitute for lawyers (who had a legal monopoly on debt collection business until very recently), or for court bailiffs (who are necessary to the execution of attachment orders).

With respect to debt collection, the underworld figures are the *toritateya* and the *yonigeya*, whose functions, respectively, are to pressure debtors into paying up, and to help them escape from their creditors.[20] The former racketeers substitute for lawyers (where cash collection is concerned) or court bailiffs (where evictions or the attachment of moveable property is concerned). The latter figures, *yonigeya*, do not substitute for any aspect of a well-functioning property system.

With respect to landlord-tenant relations, the underworld figures are the *jiageya*.[21] These earn their keep by frightening tenants out of leased property, by frightening mortgagees off of their land, and by obstructing the efforts of court bailiffs to do either.[22] They substitute for or exploit the limited numbers of court bailiffs, as the case may be.

With respect to dispute resolution services, the underworld figures are the *jidanya*. These essentially provide off-the-record arbitration services that substitute for what a lawyer might do.[23] The evidence of their fees presented by Milhaupt and West suggests that their services are valued about as highly as a lawyer's would be.[24] If they habitually engage in criminal activities other than the unauthorized practice of law,[25] these are not mentioned by the authors.

With respect to shareholders' rights, the underworld figures are the *sokaiya*. Their

business, extortion, is driven by the inadequacy of disclosure rules in Japanese corporate law.[26]

With respect to financial services, the underworld figures indicated are the *sarakin*, or loan sharks.[27] The illegal collection work of loan sharks substitutes for lawyers and court bailiffs. The remainder of loan sharking business in Japan is much like its counterparts in any other society.

Thus, the institutional weaknesses that lie behind the lion's share of observed underworld responses boil down to four:

A monopoly on debt collection business enjoyed by the tiny Japanese Bar;
Excessively strong tenant protection legislation;
A serious shortage of court bailiffs; and
Inadequate corporate disclosure rules.

Of these categories of enforcement weakness, only the last has been a feature of Japanese law from the start. The first dates back to 1936, when the predecessor to the modern Attorneys Act came into effect.[28] The second arose in 1941 with a wartime revision to the Building Lease Act.[29] The third can be dated to the passage of the Court Bailiffs Act of 1966.[30] These three laws are at the root of most of the evils described by the authors, outside of the context of corporate governance. There is no prior evidence of the sort of crippling enforcement failure that has reached crisis proportions in Japan in recent years. This is quietly reflected in the fact that Milhaupt and West offer none.[31]

Lawyers were first given the exclusive privilege to carry out debt collection work for hire by the Act Concerning the Oversight of the Handling of Legal Matters of 1933.[32] This was a companion to the Attorneys Act of the same year,[33] and granted attorneys a monopoly in collections business that they have continued to enjoy under subsequent legislation[34] (until the passing of the "Servicer Act" of 1998[35]). Prior to 1936, debt collection firms would have been able to operate legally. They may have been rough in their methods – since people tend to react badly when money and other things are taken away from them, I imagine that they probably were[36] – but they would not have been criminals by virtue of their profession alone. It is possible that legitimate debt collection agencies went underground in 1933; but until someone takes a closer look at the historical record, we will not know for sure.

With respect to tenants' rights, the authors cite a book by Mark Ramseyer and Minoru Nakazato for the proposition that "[b]y judicial interpretation, almost all leases in Japan – no matter how many recitals to the contrary – give the tenant an interest close to a life estate."[37] This reads like a ballpark description, and that is what it is. In Japanese law, there are two types of lease that affect urban real estate: leases of land for the purpose of owning a building ("land leases"); and leases of space within a building ("building leases"). Ramseyer and Nakazato ignore this distinction because it is too complicated for their intended readership.[38] But these two forms of lease do exist,[39] and in modern Japanese cities it is protection of building leases that gives rise to the greater social cost, for the simple reason that they are more numerous.[40] The statutory rule under which such leases are automatically renewed[41] was introduced into law in 1941.[42] At the time, Japan was engaged in a major military conflict involving the United States and several other nations. The accompanying industrial buildup was placing strain on the urban housing supply, and this, combined with existing rent control legislation,[43] gave landlords a strong incentive to terminate leases in great numbers.[44] No doubt with a view, in part, to mollifying the conscripts and munitions workers among the nation's renters, the government proposed that leases be automatically renewed, unless the landlord needed the property for his own use, or could show "other just cause" for termination.[45] It is clear from the legislative record that a general desire to increase the rent is not what lawmakers had in mind when they referred to "other just cause".[46] Although the original purpose of this legislation vanished when the war ended, robust tenant protection has proved to be politically difficult to repeal. Japan's experience in this regard closely resembles that of, among other countries, England[47] – not generally thought to be a jurisdiction that has experienced an "`overnight' property rights transformation" anytime recently.[48]

With respect to civil execution procedures and institutions, modern Japan's most glaring weakness has been its small number of court bailiffs, the officers with sole authority to conduct evictions and to attach moveable property.[49] But these officers have not always been scarce. The first judicial enforcement officers were licensed in 1886.[50] In 1890, Japan introduced a system of official bailiffs, charged with duties roughly similar to those of the court bailiffs of today.[51] Official bailiffs had offices separate from the court, were paid on a commission basis, and were permitted to retain deputies.[52] Driven by performance-related incentives, with freedom from direct supervision and blessed with a flexible labor supply, this early enforcement service was calculated to get the job done.

Following the Second World War, however, the government became concerned over the "quality" of the service. A report published in 1955 suggests that there were two problems.[53] First, in the harsh conditions brought on by the war, the commission income of bailiffs had been depressed to a point that made it difficult for them to make ends meet. Second, the service had come to draw on strongman intermediaries retained as bailiffs' deputies or as execution assistants. The first of these factors would heal with the recovery of economic activity. The second, which cut not to *performance*, but to the perceived *legitimacy* of the civil justice system, was ultimately addressed ten years later, with the introduction of the Court Bailiffs Act of 1966.[54]

The Act, together with the supporting regulations issued by the Supreme Court Secretariat, made three significant changes. First, new applicants were required to be members of Japan's professional civil service bureaucracy at the time of their application.[55] In practice, new entrants were limited to court clerks, a status second only to that of judge within the offices of a Japanese court. Second, the offices of "court bailiffs", as they were now called, were moved inside the premises of the courts which they served.[56] Third, bailiffs lost the power to appoint deputies.[57] Thus, the bailiff service was compelled to sever relations with the contract labor force that it had fostered – a prohibition that was backed up by a change in the architecture of the workplace itself. The subcontractors thus jettisoned were left at loose ends. Most people, when presented with a choice between developing new skills and exploiting skills they already have, will choose the latter. The data examined by Milhaupt and West suggest that this is exactly what the court bailiffs' newly orphaned contract work force did.

These observations raise some rather serious problems for the authors' effort to generalize from the data that they have collected. Japan started up its national legal system with a robust enforcement system. This was not undermined seriously until 1936, and the last weakening legislation was passed in 1966, six years before the start of the authors' data set. On top of this, some of the most prominent "dark side" enforcement institutions were actually apprenticed to the mainstream legal system before the start of the game. With the best will in the world, it is not clear that the Japanese case is representative *either* of markets conspicuously afflicted with organized crime, *or* of legal systems characterized by weak enforcement. Careworn claims of Japanese "uniqueness" aside, it does appear that Japan is, in this instance, at least special.

Milhaupt and West posit an "entrepreneurial response" to weak enforcement. Insofar as

this suggests that criminal firms will attempt to exploit weaknesses in the legal system for selfish gain, the point is non-controversial. We generally assume that law-abiding citizens will strive for private advantage, and criminals can hardly be expected to behave any differently. Beyond this, the phrase suggests that criminal firms serve a useful social purpose as "transaction cost engineers" or "enforcement intermediaries" for property rights, a point that the authors emphasize throughout their analysis. Criminal firms are cast as agents of potential service to efficient property rights, whose efficacy is dissipated by the poor coordination that results from failings of the legal system.[58]

It is true that this view makes a certain amount of sense in the context of modern-day Japan. If bailiffs' agents sold out to the *yakuza* in significant numbers, their new bosses could be expected to have them sometimes enforce property rights (since they already knew how to do that), and sometimes obstruct property rights (since they knew how that worked as well). But to extend the point to other jurisdictions, or even to other periods in Japan's own history, we need a model for how these organizations develop when they evolve from scratch. Perhaps because the evidence from their empirical study seemed so very clear, Milhaupt and West forego an explanation of why an organization composed of criminals would choose to work in the service of property rights and efficient rules. It is a stiff demand – after all, we are not entirely sure why even judges act that way.[59] That said, evidence that efficiency is at least one of the things that judges tend to promote, whatever the reason may be, is plentiful. But Milhaupt and West's study has provided neither a theory nor a useful base of evidence to back up their view that criminal organizations tend spontaneously to respond to holes in the legal fabric by filling them with enforcement, rather than with force alone.

Finally, in light of the observations above, the descriptions of underworld profiteering that Milhaupt and West present actually cut pretty firmly *against* their conclusion. The one area of enforcement weakness that has been a feature of modern Japanese law from its inception is the inadequacy of corporate disclosure requirements. The resulting uncertainty is exploited by the *sokaiya*, and it has been so for better than a century.[60] But, as the authors admit, and in contrast to the underworld figures working the debt collection game, it is not at all clear that these corporate racketeers promote efficiency in any way.[61] The *sokaiya*, who got in on the ground floor, undermine the authors' entrepreneurial enforcement model by behaving as pure parasites.

It is important to be precise about the impact of these corrective observations on Milhaupt

and West's claims. The suggestion that poorly designed legal systems – including poorly implemented property regimes – lay themselves open for criminal exploitation is naturally unaffected. Furthermore, the authors' statistical analysis continues to provide some support for the enforcement substitution hypothesis, in the context of established systems of property law that are later weakened and begin to fail. What this comment challenges is the Panglossian optimism that leads the authors to suggest that enforcement failure need not "prove to be wholly problematic",[62] and to encourage governments to welcome the services of organizations that set their own rules. If enforcement failure is, in fact, *very much* wholly problematic, the enforcement substitution hypothesis could prove very costly indeed for someone responsible for setting policy on the bleeding edge of law reform.

In their introduction, Milhaupt and West set out "to show that the structure and activities of organized criminal groups are significantly shaped by the state."[63] In that, they have surely succeeded, although probably not in the sense they originally intended. Legal systems may be even more important to the promotion of efficient choices than Milhaupt and West give them credit for. It is possible, although not proven, that the state must create property rights by main force before private agents will find it profitable to offer after-market enforcement services. It may also be that legal architects who fail to attend to enforcement early on will summon up a random, aggressive and persistent cocktail of criminal responses. And it may be that the task of cleaning up afterward will always and unavoidably be difficult and expensive. Perhaps behind any market with a future, we should expect to find a set of state-enforced rules with a past.

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[1] Woody Guthrie, "Vigilante Man", performed by Ry Cooder for his album "Into the Purple Valley" (Warner Bros. 1990).

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[2] Curtis Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000).

[3] *Id.* at 43 ("Organized crime, we argue, is the dark side of private ordering – an entrepreneurial response to inefficiencies in the property rights and enforcement framework supplied by the state."); *id.* at 44 ("Illicit entrepreneurs, then, substitute for state-supplied or state-sanctioned public services, especially as alternative enforcers of property rights.").

[4] *Id.*

[5] The authors signal a note of caution in their introduction. *Id.* at 44 ("To explore the linkage between state-sponsored institutions and illicit organizations, we provide an in-depth theoretical and empirical analysis of organized crime in Japan. Although caution is warranted when drawing general conclusions from the experience of a single country, Japan provides unusually fertile ground for such a study."). Their conclusion shows little reserve, however. *Id.* at 96 ("In this Article, we have established theoretically and empirically a linkage between state institutions and organized crime. Inefficiencies in state property rights structures and a shortage of state-sanctioned rights-enforcement agents are a recipe for illicit entrepreneurialism. As the data from Japan strongly indicate, private ordering in defective formal environments can have a dark side.").

[6] *Id.* at 97 ("To combat organized crime, governments might be well advised to direct their resources not at crime control per se, but at creating, or facilitating, proper property-rights-enforcement institutions.").

[7] *Id.* at 98 ("Such a strategy may not completely eliminate organized crime. In the absence of such an approach, however, organized crime will continue to flourish.").

[8] *Id.* at 66-72.

[9] *Id.* at 73-91.

[10] *Id.* at 45 ("The universal point emerging from our study is that where the state fails to get the institutions 'right,' it invites dark-side private ordering to fill in the gaps.").

[11] *Id.* ("Although we rely on the Japanese experience for data, our discussion has more universal import.").

[12] *Id.* at 46 ("Part IV examines the implications of the Japanese experience and applies those lessons to economies in transition.")

[13] Russia is the primary example of a transition economy raised in the article.

[14] *Id.* at 45 n. 15 ("Organized crime is more limited in the U.S. because the U.S. never went through the type of 'overnight' property rights transformations that occurred in Japan and Russia. These rapid property rights developments created greater opportunities to exploit inefficiencies in state structures." The authority cited at the end of the footnote 15 does not cover this proposition.).

[15] *Id.* at 53 ("The expansion of property rights accompanying these two phases of wholesale institutional transformation, however, was not matched by the development of complementary enforcement mechanisms.").

[16] *Id.* at 53-61. These categories figure in an interesting bit of rhetorical sleight-of-hand. They are introduced in Part II.A. simply as convenient descriptive headings. *Id.* at 53 ("In this Part, we analyze several areas of rights enforcement in Japan that provide fertile ground for activity by organized criminal firms. We defer until Part II.B. discussion of the ways in which organized criminal firms actually exploit these opportunities."). In Part II.B., they suddenly take on a larger significance, and become the foundation for an empirical conclusion. *Id.* at 66 ("Crucially, many of the activities of Japanese organized criminal firms track the institutional problems we identified in Part II.A. The influence of organized crime is readily apparent in bankruptcy and debt collection, property development, dispute settlement, shareholders' rights, and finance.") This is a false enthymeme, and the conclusion is entirely specious. In terms of argumentation, these categories are basically decorative. On the use of false enthymemes in argumentation, see Artistotle, RHETORIC, Book II, Chapter 24.

[17] Milhaupt & West, *supra* note 2 at 71.

[18] *Id.* at 67 ("As discussed below, so pervasive is the influence of organized crime in these gray areas that special terms have been coined in Japanese to describe the underworld entrepreneurs who exploit each of these opportunities.").

[19] *Id.* at 67.

[20] *Id.* at 68.

[21] The authors also mention *apaatoya*. *Id.* at 71. As the name may suggest, these earn their keep by frightening tenants out of apartment buildings.

[22] *Id.* at 68-69.

[23] *Id.* at 69-70.

[24] *Id.*

[25] Which is, of course, a very serious and anti-social crime that should be severely punished.

[26] *Id.* at 70.

[27] *Id.* at 71.

[28] *Bengoshi hô* [Attorneys Act], Law No. 53, June 28, 1933 (effective from April 1, 1936); and *Hôritsu jimu toriatsukai no torishimari ni kansuru hôritsu* [Act Concerning the Oversight of the Handling of Legal Matters], Law No. 54, April 28, 1933 (effective from April 1, 1936); both superceded by *Bengoshi hô* [Attorneys Act], Law No. 205, June 10, 1949.

[29] *Shakuya hô* [Building Lease Act], Law No. 50, April 8, 1922, amended by Law No. 56, 1941.

[30] *Shikkôkan hô* [Court Bailiffs Act], Law no. 111, July 1, 1966.

[31] In another context, one of the authors has stated that a common practice of hiring "gangs of ruffians to beat up non-paying debtors" dates from the Tokugawa period. Mark D. West, *Private Ordering and the World's First Futures Exchange*, 98 MICH. L. REV. 2574, 2607, n. 124 (2000) (quoting CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868, at 121 (1991)). Steenstrup may have had a source in mind when he wrote the quoted phrase, but if so he does not cite it. A bit more background on consumer finance in the feudal era would certainly be helpful on this one. The most common source of lending in the Tokugawa period was probably the pawnbroker. Pawnbrokers take possession of collateral before any money changes hands, and often benefit from repeat business. As a result, they do not ordinarily have an incentive to beat up their customers in the way suggested. The law and practice of pawnbroking in the United States is not radically different from the situation in 19th century Japan or, for that matter, in England or in Imperial China. See Oeltjen, *Pawnbroking on Parade*, 37 BUFF. L. REV. 751 (1989); Oeltjen, *Pawnbroking: An Historical, Comparative Perspective*, 8 ARIZ. J. INT'L & COMP. L. 53 (1991).

[32] *Hôritsu jimu toriatsukai no torishimari ni kansuru hôritsu* [Act Concerning the Oversight of the Handling of Legal Matters], Law No. 54, April 28, 1933, sec. 2 (the Act went into effect from April 1, 1936).

[33] *Bengoshi hô* [Attorneys Act], Law No. 53, April 28, 1933.

[34] *Bengoshi hô* [Attorneys Act], Law No. 205, June 10, 1949, sec. 73.

[35] *Saiken kaishugyô ni kansuru tokubetsu sochi hô* [Special Measures Act Concerning Debt Collection Business], Law No. 126, October 16, 1998.

[36] Repossession work, for example, can attract violence even in the United States. *See, e.g.*, the "Prologue" to CHRIS CANTRELL, PROFESSIONAL'S GUIDE TO AUTO REPOSSESSION (1997).

[37] J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW 38 (1999).

[38] *Id.* at xi. ("If you want to use the index in this book to find the answer to your problem, do not bother. You will not find it. If you insist on trying, you commit malpractice. … Find a comfortable chair. Put on a CD. Get something to drink. And read. Worry about your legal problem later."). It is always prudent to read warning labels. This warning label, directed at readers with individual legal problems, presumably also applies to researchers formulating policy advice for the design of entire legal systems.

[39] The best historical treatment in English of the lease laws is John Owen Haley, *Japan's New Land and House Lease Law*, *in* LAND ISSUES IN JAPAN: A POLICY FAILURE? 149 (John Owen Haley & Kôzô Yamamura eds., 1992). For a historical review specifically of leases for the purpose of owning a building, see Bennett, *Building Ownership in Japanese Law: Origins of the Immobile Home*, 26 LAW IN JAPAN 75 (2000).

[40] *Id.* at 149-150.

[41] *Shakuya hô* sec. 1/2 as revised by Law No. 56 of 1941, *superceded by Shakuchi shakuya hô*, Law No. 90, October 4, 1991, sec. 28. See also Haley, *supra* note 39 at 158-161, *cited in* RAMSEYER & NAKAZATO, *supra* note 37 at 253 n. 34. Ramseyer and Nakazato explain automatic renewal as a rule of judicial interpretation, and state that leases are renewed "by the court", but things do not work that way. Under section 1/2 of the 1941 revision, and in section 28 of the new Act, renewal is presumed unless the landlord intervenes. This procedural structure is necessary to the original legislative intent, which the courts have dutifully carried out. Possibly Ramseyer and Nakazato assumed that the statute simply gave convenient expression to a preexisting ideological bias within the judiciary, on the basis of the following statement by Haley:

> "[B]y 1920 Japan's judiciary had effectively transformed the basic legal rules of both contract and code governing leaseholds. By "reinterpretation" they had imposed a legal regime in which neither the parties' stated intentions in their lease contracts nor the provisions of the Civil Code prevailed. To enter a lease, particularly a ground rent agreement, thus placed the landlord in the unenviable position of almost total loss of control over its duration without the tenant's consent and voluntary surrender of the leased premises."

Haley, *supra* note 39 at 158. The evidence for this position is drawn from a study of *land lease* agreements. These are a highly idiosyncratic feature of Japanese property law, made necessary by the recognition of an ownership interest in buildings, with the consequence that a bilateral monopoly arises between the owner of a building and the owner of the land on which it stands (if they are separate persons). What the study cited by Haley illustrates is that a judge charged with enforcing the imperative terms of a contract and two conflicting property claims often found it necessary to jettison the contract and ride roughshod over one or both of the property interests in order to arrive at something like a sensible resolution of the case. Although Haley's prose here wants to imply that courts took similar liberties with *building leases*, this is little more than wishful thinking; they had no incentive to act in that way, and he offers no evidence that they did. The study referred to is Tadao Hozumi, *Hôritsu kôi no 'kaishaku' no kôzô to kinô* (Pt. II-End) [Structure and function of the interpretation of juristic acts], 78 HÔGAKU KYÔKAI ZASSHI 27-91 (1961), *translated in* 5 LAW IN JAPAN 132-164 (1972). Concerning the origin of building ownership, see Bennett, *supra* note 39. For an annotated laundry list of bilateral monopoly problems that can arise with respect to real property, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 63-66 (3rd ed. 1986).

42 Law no. 56 of 1941.

43 Japan's first rent review legislation affecting the lease of space within buildings dates from 1925. *Shakuchi shakuya rinji shori hô* [Provisional Act on the Disposition of Land Leases and Building Leases], Law No. 16, July 22, 1925. A one-year rent control order issued in 1939 attempted to roll rents back to August 4, 1938 levels. *Chidai yachin tôsei rei* [Land Rent and Building Rent Control Order], Imperial Order No. 704, October 16, 1939 (incorporating a sunset provision in sec. 12, under which the Order was to be effective until October 19, 1940.).

[44] *See* Haley, *supra* note 39 at 159. Among the evidence offered by the government in committee are numbers relating to leasehold litigation between July 1939 and June 1940 in the six major metropolitan areas of Japan. Suits for clearance of land resulting from refusal to renew land leases numbered 484, with 226 cases of conciliation, for a total of 710. Suits for the termination of building leases or the eviction of tenants at the end of the term numbered 3,988, with 2,818 cases of conciliation, for a total of 6,806. *Dai 76 kai teikoku gikai* [76th session of the Imperial Diet], *Kizokuin* [House of Peers], *Shakuchi hô chû kaisei hôritsuan hoka tokubetsu iinkai sokki roku* [Transcript of the Special Committee on the Draft Law on Revision of the Land Lease Act et cetera], *Dai 1 kai* [1st session] (February 1, 1941) – *Dai 7 kai* [7th session] (February 13, 1941), *reprinted in Teikoku gikai, 95 Kizokuin iinkai sokki roku shouwa hen* [Transcripts of Committees of the House of Peers of the Imperial Diet (Showa Era), vol. 95], pp. 187-188 (University of Tokyo Press, 1998) (hereinafter cited as "HOUSE OF PEERS COMMITTEE TRANSCRIPTS", followed by the page number from the reprint edition). *See also Kanpô gôgai* [Official gazette appendices], *Dai 76 teikoku gikai* [76th session of the Diet], *Shûgiin giji sokki roku* [Transcript of debates of the House of Representatives], no. 18, pp. 279-280 (February 26, 1941) (hereinafter cited as "HOUSE OF REPRESENTATIVES 76TH SESSION TRANSCRIPTS", followed by the issue number, the page number, and the date in parentheses).

[45] The initial text submitted to the Diet can be found at *Kanpô gôgai* [Official gazette appendices], *Dai 76 teikoku gikai* [76th session of the Imperial Diet], *Kizokuin giji sokki roku dai 7 gô* [Transcripts of debates of the House of Peers], no. 7, pp. 57-58 (February 1, 1941) (hereinafter referred to as "House of Peers 76th session transcripts", followed by the issue number, the page number, and the date in parentheses); the final legislation is published as Law No. 56, March 8, 1941.

[46] The reference for the complete legislative record on the revision is as follows: HOUSE OF PEERS SESSION TRANSCRIPTS, *supra* note 45, no. 7, pp. 57-58 (February 1, 1941), no. 8, p. 61 (February 4, 1941), no. 13, pp. 124-126 (February 15, 1941); HOUSE OF REPRESENTATIVES SESSION TRANSCRIPTS, *supra* note 44, no. 15, pp. 211-212 (February 19, 1941), no. 16, pp. 225-226 (February 21, 1941), no. 18, pp. 279-280 (February 26, 1941); *Dai 76 kai teikoku gikai* [76th session of the Imperial Diet], *Shûgiin* [House of Representatives], *Shakuchi hô chû kaisei hôritsuan hoka ikken iinkai giroku* [Record of the Ad Hoc Committee on the Draft Law on Revision of the Land Lease Act et cetera], *Dai 1 kai* [1st session] (February 19, 1941) – *Dai 7 kai* [7th session] (February 27, 1941), *reprinted in Teikoku gikai*, *132 Shûgiin iinkai giroku shôwa hen* [Record of Committees of the House of Representatives of the Imperial Diet (Showa Era), vol. 132], pp. 391-450 (University of Tokyo Press, 1998); HOUSE OF PEERS COMMITTEE TRANSCRIPTS, *supra* note 45 at pp. 187-234.

[47] KEVIN GRAY, ELEMENTS OF LAND LAW 961-970 (1987). This source describes how economic distortions and other features of wartime administration triggered massive worker protests, resulting in the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. This measure was not seriously debated in Parliament, because it was thought that it was an interim measure with a short horizon. Rent control in England was still alive and well 70 years later.

Japan did not idly wander into its own rent control legislation. Along with extended discussions of the transaction-level effects of the new rules, it was suggested in committee that the economic rigidities introduced by such a measure would make rapid urban redevelopment – and therefore a shift away from highly flammable wood and paper construction – more difficult. The nation's tragedy was already before its eyes; the government's response was that large-scale construction of fireproof buildings was in any case beyond the capacity of the economy, and that therefore "other measures" in support of air defense would need to be worked out. *See* HOUSE OF REPRESENTATIVES 76TH SESSION TRANSCRIPTS, *supra* note 44, no. 18, p. 280 (February 26, 1941).

During the Second World War, the Office of Price Administration ("OPA"), a U.S. federal agency and the workplace of future Nobel prizewinner George Stigler, imposed rent control in 28 areas of the United States. In the first of a string of decisions upholding the measure, the Supreme Court recites the OPA's findings:

> The declaration recited that the designated areas were the location of the armed forces of the United States or of war production industries, that the influx of people had caused an acute shortage of rental housing accomodations, that most of the areas were those in which builders could secure priority ratings on critical materials for residential construction, that new construction had not been sufficient to restore normal rental markets, that surveys showed low vacancy ratios for rental housing accomodations in the areas, that defense activities had resulted in substantial and widespread increases in rents affecting most of these accomodations in the areas, and that official surveys in the areas had shown a marked upward movement in the level of residential rents.

Bowles v. Willingham, 321 U.S. 503, 506 n. 1 (1944). All-out warfare is, it seems, an experience with common features that we all share.

[48] GRAY, *supra* note 47 at 55 ("The origin of the medieval theory of English land law was the Norman invasion of England in 1066.").

[49] See Bennett, *Civil Execution in Japan: the legal economics of perfect honesty*, 177 HÔSEI RONSHÛ 1 (1999), *cited in* Milhaupt & West, *supra* note 2 at 60 n. 82; Bennett, *The Descent of Civil Execution in Japan*, 13 ZEITSCHRIFT FÜR JAPANISCHES RECHT (2002). The discussion following summarizes the more detailed historical account given, in substantially identical form, in these two articles.

[50] *Saibansho kansei* [Court Administration] secs. 7 & 39 (Imperial Order No. 40, May 4, 1886).

[51] *Shittatsuri kisoku* [Official Bailiffs Act] (Law No. 51, July 24, 1890).

[52] Terada Jirou, *Shikkouri seido* [The System of Official Bailiffs], in MINJI SOSHÔ HÔ KÔZA 1087-1089 (1955).

[53] SHIKKÔRI SEIDO KAIZEN NI KANSURU IKENSHÛ 52 (1955).

[54] *Shikkôkan hô* [Court Bailiffs Act] (Law no. 111, July 1, 1966); *Shikkôkan kisoku* [Court Bailiffs Regulation] (Supreme Court Order no. 10, November 8, 1966).

[55] *Shikkôkan kisoku* [Court Bailiffs Regulation] sec. 1 (Supreme Court Order no. 10, November 8, 1966).

[56] This policy is reflected in *Shikkôkan hô* [Court Bailiffs Act] sec. 6 (Law no. 111, July 1, 1966) (requiring that all seized money and property be stored on the premises of the court), and *Shikkôkan kisoku* [Court Bailiffs Regulation] sec. 5 (Supreme Court Order No. 10, November 8, 1966) (providing for oversight by a judge of the court).

[57] The only remnant of this authority is a section in the transition provisions of the Act that permits those qualified as deputies under a 1953 provision to continue to serve on an exceptional basis. *Shikkôkan hô* [Court Bailiffs Act], *fusoku* [supplementary provisions], sec. 11 (Law no. 111, July 1, 1966). In principle, however, only court clerks were to be permitted to serve as deputies, and that only where a bailiff has suffered an accident or is otherwise incapacitated. *Shikkôkan hô* [Court Bailiffs Act] sec. 20 (Law no. 111, July 1, 1966).

[58] Milhaupt & West, *supra* note 2 at 50 ("[A]s a growing body of theoretical literature suggests, private and segmented enforcement of property rights can lead to the entrenchment of small-scale inefficient monopolies, high transaction costs, and a 'tragedy of coercion' in which savings from the provision of collective services are dissipated in contests both among firms and between firms and the state.").

[59] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 375-380 (1996).

[60] Milhaupt & West, *supra* note 2 at 70; Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767 (1999).

[61] Milhaupt & West, *supra* note 2 at 70 ("Whether the *sokaiya* actually monitor management on behalf of shareholders is, of course, open to question.").

[62] *Id.* at 53.

[63] *Id.* at 43.