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### Cover Page Footnote

Professor of Law and Director of International and Comparative Law Programs, Florida International University. I would like to thank Aya Gruber, Daniel Suman, and Catalina Villegas for their helpful comments on this paper and Marisol Floren-Romero for her expert research assistance. I would also like to thank Colin Crawford and Daniel Suman for coordinating our research trip to Panama in December 2007. My gratitude to the Georgia State University Center for the Comparative Study of Metropolitan Growth for its financial support and to the Watson Institute for International Studies at Brown University for an enriching research stay.

ESSAY

**TITLING AND UNTITLED HOUSING IN PANAMA CITY**

*Jorge L. Esquirol\**

**I. Introduction**

Panama City is experiencing a luxury condominium building explosion. A wall of high-rises now dominates the city's coastal skyline, and more are underway despite mounting supplies of unsold units. This type of development seriously impacts its surroundings. Public utilities struggle to meet the demand for new installation and high load services. Single family neighborhoods are choked by towers rising all around them. And, an already deteriorating environment and creaky infra-structure strain against the competing goals of increased development, quality of life, urban transportation, and environmental protection.

At the same time, migration to the city from the Panamanian countryside continues unabated, and population growth continues to press on the stock of affordable housing. The over-sized construction is targeted to the luxury and international markets. As a result, most local housing needs are satisfied by privately-developed tract housing

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in the city's outskirts for those who can afford it; substandard housing in the older parts of the city; and squatting on public or private land. Strikingly, at the very moment that a fleet of residential skyscrapers appears on the waterfront, many Panamanians continue to build makeshift homes and neighborhoods on squatted land.

This Essay examines the role of law in promoting different housing patterns, especially low-income options. A common form of the latter is squatting on public land, known as a type of "informal" housing. Over the past two decades, development professionals have urged the legal formalization of these arrangements, arguing their great economic potential. On public land, property is to be privatized and titled. On "invaded" private land, the state is to negotiate and pay for the transfer of ownership from the original titleholder. This titling agenda has received the overwhelming support of international development institutions such as the World Bank and the Inter-American Development Bank. The government of Panama, along these same lines, has instituted a robust titling program. One of its express objectives is reducing the incidence of informality.

"Informality," as described in law, sociology, and economics, can have a number of different meanings, ranging from the underground economy to outright illegality. Informality, in legal theory, can also mean different things. It can refer to legal standards as interpreted by courts, areas of discretion exercised by government officials, legal deference to customary business practices, social norms different from official law, governmentally tolerated areas of legal non-enforcement, and the like. Legal informality in housing has its own particular forms. It can refer to legal yet unregistered ownership, illegal occupation of land, unauthorized subdivision of property, legally documented sale of squatted land, "squatters rights," illegal sale of collective land, on-going violations of building and housing regulation. It also encompasses less commonly considered

examples such as official discretion in zoning codes and processes, standards in laws and legal judgments, indeterminacy in the interpretation of legal rules, and other possibilities.

This essay examines the concept of “legal informality” in the context of several Panama City neighborhoods. The discussion leads to five basic points. First, it maintains that the notion of informality has been instrumentalized as an argument for development-sponsored legal reform. It has been used, with different jurisprudential meanings, to advance one or another conception of private property, either subordinate to public regulation or paramount and inviolable. In either case, the existence of informality has been marshaled to demonstrate the need for legal change.

Second, the currently-prevailing, rhetorical use of informality supports government titling programs for squatters on public land. These internationally-supported efforts reinforce a classical and uniform conception of private property. The latter is promoted as informality-reducing and thereby in the best interests of low-income residents: i.e., squatters’ informal assets are to be converted into formal legal and economic value. When analyzed more closely however, the switch is not so clearly advantageous. Additionally, titling this particular conception of private property legitimates its societal singularity and significantly forecloses alternative property conceptions.

Third, the specific situation of untitled housing on public land is more usefully understood as an alternative within law and not separate from it. Untitled homeownership is a product of the combination of existing private property law, administrative regulations, and *de facto* government policy. Its existence can be seen as purposeful as a political matter. My claim that this type of “informality” is part of the legal system is neither an endorsement nor a denunciation of any existing practice labeled informal. For example, it does not suggest that any grab of public land should be unconditionally condoned or that other practices

labeled informal should be automatically proscribed. Rather, it is limited to providing a more realistic assessment of property regimes in which one of its elements is untitled housing on public land. I leave for another day the discussion of illegal occupation of private land.

Fourth, “informality,” in a different sense, is no less a dimension of titled property regimes. Classical private law, for example, assigns significant legal interests to titled owners. It provides a range of privileges, affording considerable amounts of discretionary private power. This allows title-holders to externalize a number of social costs and capture public benefits more effectively than under untitled conditions. In this way, a single model of classical property may primarily benefit large financial interests able to accumulate significant holdings.

Fifth, the relative indeterminacy of legal rules provides less predictability than ordinarily assumed of the official legal system. A significant amount of variability in the application of zoning codes and indeterminacy in the interpretation of property rules are inherent and common aspects of liberal legal regimes. As a result, focusing on housing informality as foremost a question of titling squatters is misleading.

All of these ideas, however, are more fruitfully considered in disaggregated fashion as demonstrated in the examples of Panama City neighborhoods discussed in more detail below.

## II. Background

Panama gained its national independence not from Spain but rather from Colombia.<sup>1</sup> At the beginning of the twentieth century, negotiations between the United States

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<sup>1</sup> See Robert Freeman Smith, *Latin America, The United States and the European Powers, 1830-1930* in THE CAMBRIDGE HISTORY OF LATIN AMERICA, VOL. IV C. 1870-1930, 101,101.

and Colombia to build a trans-oceanic canal in Central America through Panama came to a head.<sup>2</sup> After the Colombians proved difficult negotiators, the U.S. extended support to local Panamanian leaders eager for greater autonomy.<sup>3</sup> With U.S. warships anchored off the coast, Panama declared its independence in 1903, immediately recognized by the United States.<sup>4</sup> Shortly thereafter, the new Republic of Panama granted the U.S. a concession to build the Panama Canal and, along with it, a ten-by-fifty mile swath of land across the middle of the national territory.<sup>5</sup> The Canal was completed in 1914.<sup>6</sup> It was, throughout the twentieth century, considered vital to U.S. national security interests, and during this period the Canal and the Canal Zone were effectively under U.S. sovereignty.<sup>7</sup> Even off-base residential housing remained the property of the U.S. government and was centrally assigned and leased to its occupants.<sup>8</sup>

After World War II, Panamanians became increasingly resentful of the U.S. presence, punctuated by bloody riots in 1964.<sup>9</sup> Responding to the rising demands of Pana-

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<sup>2</sup> *Id.*

<sup>3</sup> See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 152-54 (1993) (noting that the Colombian Senate voted unanimously against ratification of the previously negotiated Hay-Herrán Treaty, presumably on the grounds the permanent grant of control to the U.S. over the canal zone offended Colombian sovereignty).

<sup>4</sup> See Freeman Smith, *supra* note 1.

<sup>5</sup> *Id.*; Convention between the United States and the Republic of Panama for the construction of a ship canal to connect the waters of the Atlantic and Pacific oceans, 33 Stat. 2234 (Nov. 18, 1903).

<sup>6</sup> PETER M. SÁNCHEZ, *PANAMA LOST? U.S. HEGEMONY, DEMOCRACY AND THE CANAL* 79 (2007).

<sup>7</sup> See David G. Hanrahan, *Legal Aspects of the Panama Canal Zone – In Perspective*, 45 B.U. L. REV. 64, 80-81 (1965).

<sup>8</sup> See Sánchez, *supra* note 6, at 67.

<sup>9</sup> See WALTER LAFEBER, *THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE* 108-09 (1989); see also OMAR JAÉN SUÁREZ, *LAS*

manian officials, in 1977 Jimmy Carter began the return of the Canal Zone and the Canal to the Republic of Panama, to extend over a twenty year period.<sup>10</sup> Before the hand-over was complete, in December 1989 George H.W. Bush ordered a military invasion under the pretext of self-defense, arguing Panamanian aggression and protection of the Canal.<sup>11</sup> Thereafter, with past Panamanian president and army general Manuel Noriega imprisoned in the U.S., the final transfer was made in 1999 to local civilian authorities. The Panamanian Defense Forces, the country's highly politicized military, was turned into a police force after the U.S. invasion.<sup>12</sup> A few years later it was officially disbanded by a constitutional amendment.<sup>13</sup>

The Canal Zone was under effective U.S. government control for nearly a century.<sup>14</sup> By the time it was completely returned to Panama, it was home to two remaining U.S. military bases, as well as a number of residential areas, neighborhoods, schools and stores. Branches of U.S. universities such as Florida State University and Texas A & M have satellite campuses there, formerly serving military personnel, their children, accompanying civilians, and affluent Panamanians. Shortly after reverting to Panama, most residential properties in the Zone were sold or auc-

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NEGOCIACIONES SOBRE EL CANAL DE PANAMÁ: 1964-1970 125-53 (2002).

<sup>10</sup> See Sánchez, *supra* note 6, at 151-58.

<sup>11</sup> See John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J.INT'L L. 276 (1990) (discussing the illegality of the invasion under international law).

<sup>12</sup> ROBERT C. HARDING, *THE HISTORY OF PANAMA* 120-22 (2006).

<sup>13</sup> *Id.*; see MAX HILAIRE, *INTERNATIONAL LAW AND U.S. MILITARY INTERVENTION IN THE WESTERN HEMISPHERE* 115-23 (1997); JOHN LINDSAY-POLAND, *EMPERORS IN THE JUNGLE: THE HIDDEN HISTORY OF THE U.S. IN PANAMA*, 188 (Duke University Press 2003).

<sup>14</sup> The Panama Canal Treaty, Sept. 7 1977, 16 I.L.M. 1021 (setting up the terms for reversion to Panama).



tioned off to individuals, corporations, and organizations.<sup>15</sup> Government sales of these properties transferred full formal title to successful bidders. The properties themselves range from typical middle class ranch houses found in any U.S. suburb to the more Mediterranean style of Coral Gables, Florida.<sup>16</sup> Although there is no longer a barbed wire fence or check point to get through, the change from one side to the other is still dramatic. The aesthetics and zoning preferences of U.S. occupation contrast with the denser Panama City and more crowded building patterns right beyond the former fence.<sup>17</sup> In fact, the funnel-like configuration of Panama City is directly related to the U.S. presence, cutting off lands to the north and the west and forcing the city to grow east and northeast.<sup>18</sup>

This Essay makes reference to several neighborhoods in and around Panama City subject to different regulatory regimes, both *de jure* and *de facto*.<sup>19</sup> The discussion of different housing patterns is meant to highlight differences among operative conceptions of property in Panama

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<sup>15</sup> See LINDSAY-POLAND, *supra* note 13, at 177-82. ("The commercial or neoliberal vision has generally dominated Panamanian policy and actions for the reverted areas."), Sarah N. Whitney, *Will the Goals be Met? An Examination of ARI's General and Regional Plans with respect to Protected Areas within the Inter-oceanic Region, Panama*, in PROTECTING WATERSHED AREAS: CASE OF THE PANAMA CANAL 93-105 (March S. Ashton, Jennifer L. O'Hara, & Robert D. Hauff, eds. 1999) (referring to the Panamanian Inter-oceanic Region Authority ("ARI") which is now defunct: "ARI's leadership feels that the key to its success is international investment in the inter-oceanic region.")

<sup>16</sup> See Stephen Frenkel, *Geographical representations of the 'Other': the landscape of the Panama Canal Zone*. 28 J. HIST. GEOGRAPHY 85, 91-96 (2002).

<sup>17</sup> *Id.* at 94-95.

<sup>18</sup> See Sánchez, *supra* note 6, at 64-65.

<sup>19</sup> These descriptions are based, for the most part, on personal observation during a group research trip to Panama City in December 2007, organized by Daniel Suman and Colin Crawford, and sponsored by the Georgia State University Center for the Comparative Study of Metropolitan Growth.

City. It is also meant to describe the relationship of the different classes of property holders. Panamanian law provides flexible zoning regulations and tax incentives for titled construction. At the same time, the city continues to experience growth of squatter settlements. It would seem that shiny skyscrapers are a sign of progress and development while self-built homes on public land recall an enduring third-worldness. Pointedly, however, some of the titled construction is greatly exacerbating the city's urban problems, while some of the squatter settlements actually reflect certain positive, public policy objectives.

Indeed, the regime of squatter settlements is nothing other than a different state regulatory scheme. It has well-known drawbacks, but it also has some potential benefits less commonly considered. Conversely, titled ownership of classical property rights has a number of known benefits, but it can also have significant disadvantages that are not so commonly acknowledged. Moreover, the different alternatives balance competing rights and regulatory claims in different ways. Formally titled classical property merely represents one line of demarcation of the relationship with the state and with other right holders. Specifically, the neighborhoods considered in this Essay consist of: (1) the former U.S. Air Force officers' residences in Albrook auctioned to private purchasers after the return of the Panama Canal Zone; (2) high rise condominiums in the city center; (3) tracts of titled "popular" (low income) housing by private developers; and, (4) several untitled settlements within the metropolitan area.

### **A. Ciudad Jardín Albrook**

The Ciudad Jardín Albrook consists mostly of former U.S. Air Force officers' quarters, now privately

owned.<sup>20</sup> The area consists of approximately 400 homes built primarily in the 1950's.<sup>21</sup> These are typically large two-story, single family residences, many of them abutting pristine shared tropical gardens and parks. They exemplify the "garden city" model of residential living. The area is nicely manicured with quiet neighborhood streets—at least until recently—connecting the several blocks of two-story homes. This is not the scenario of most development models. The typical model contemplates the titling of land occupied by squatters, so as to provide occupants with full ownership rights to finance and sell their holdings. The Albroom case consists of public land previously used as military housing now converted to private property. In this case, government property was sold to the highest bidder. The example raises some interesting questions about titling programs, but its role here is rather by way of illustration of the frustrated expectations of Albroom's titleholders, discussed in detail further below.

## **B. High-Rise Condominiums in the City Center**

Another example of title-holding is the Panama City condominium buildings mentioned above. Several waterfront areas, such as Punta Pacífica and Punta Paitilla, have been prime zones for developers.<sup>22</sup> These projects are internationally marketed and are particularly targeted to U.S. retirees, Colombians, and Venezuelans. As of the end of 2007, approximately 40,000 new units were being con-

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<sup>20</sup> Lina Vega Abad, *De base militar a "collage"*, LA PRENSA, Mar. 13, 2005 (noting the "Panamization" of Albroom).

<sup>21</sup> See About Aprojal, [http://albroom.org/html/sobre\\_aprojal.html](http://albroom.org/html/sobre_aprojal.html).

<sup>22</sup> See generally Mario Lungo, *Land Management and Urban Planning in San Salvador and Panama City*, LINCOLN INSTITUTE OF LAND POLICY, 26 (2004) (two thirds of housing investment occurs in two zones, the financial center and downtown).

structed.<sup>23</sup> One of the major appeals of investing in Panama real estate is the generous 20-year, transferable property tax exemption. Owners of property with values over \$75,000 would otherwise pay 2.1% in annual taxes.<sup>24</sup> Not all of these areas were previously residential. They include waterfront zones earlier inhabited by the urban poor and local fishermen. Still other developments are built on filled in land along the water's edge. In any case, most of these high rises hug the crescent of Panama Bay, between the Bella Vista neighborhood and the ancient remains of the first settlement of Panama City. High-rises are increasingly being erected in middle class and upper middle class low-rise family neighborhoods. The main districts threatened in this way are the Bella Vista, La Exposición and San Francisco neighborhoods, the former with its 1920's art deco houses particularly cherished by local architects and citizen

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<sup>23</sup> *Is the party in Panama over? Panama's developers hoped to lure U.S. retirees with cheap prices. Then came speculators, 380 tower projects representing more than 40,000 condos, rising prices and the possibility of a bust*, MIAMI HERALD, Aug. 21, 2007.

<sup>24</sup> Tax liability can actually be as low as one percent if eligible for the alternative tax which requires having submitted a property value "self-appraisal" by December 31, 2007. Combined with the exemption provisions exempting the owner from annual property taxes for twenty years, an over-valued self-appraisal also lowers tax liability upon resale. See Artículo 81 de la ley No. 6 de Feb. de 2005 (granting a twenty year exemption on property taxes for new construction with permits obtained prior to August 31, 2005), amended by Ley No. 34 de 9 de Nov. de 2005, Gaceta Oficial número 25,424 (extending the exemption to new construction with permits obtained prior to September 1, 2006) (On March 10, 2008, the Panamanian National Assembly once again passed – after a Presidential veto the first time—an additional extension, not yet signed by the President as of this writing, to the 20 year exemption for building permits obtained prior to July 1, 2009 and occupation permits secured by December 31, 2011. Properties valued over \$250,000 and not meeting the deadlines only enjoy the default 5 year tax exemption).

preservation groups.<sup>25</sup> Large homes on proportionally-suited lots have been bought and then razed in order to erect large skyscrapers in their place.

### C. Working-Class Tract Housing

A third example of titled property is the working class tract housing developed by private capital. These are constructed by private developers. They are typically built on a several acre plot of land with several long, grid-like streets. Astride each street are rows of identical, small square townhouses. They are tight one-story structures with very little, if any, greenery. These developments usually have one access road into and out of the neighborhood feeding onto the main highway. Many of these projects are built several miles out, along main arteries to Panama City. Homes are offered at prevailing market prices with full title, and thus—if purchasers qualify—are eligible for mortgage financing.

### D. Three untitled neighborhoods

Three examples of squatter settlements are the neighborhoods of Felipillo, Loma Cobá, and Boca La Caja.<sup>26</sup> The discussion here is limited to title-less occupation of state land—the case emphasized by development professionals.<sup>27</sup> The first two examples were both mass unauthor-

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<sup>25</sup> See Lina Vega Abad, *Crean foro ciudadano para defender la ciudad*, LA PRENSA, Oct.27, 2006; see also Alianza ProCiudad, [www.alianzaprociudad.org](http://www.alianzaprociudad.org).

<sup>26</sup> See RAUL LEIS, LA CIUDAD Y LOS POBRES 121-37, (1980) (discussing the history of squatter settlements in Panama); See, e.g., Álvaro Uribe, *La integración del área del canal y la expansión de la Ciudad de Panamá* (Lincoln Institute Research Report No. LP00z20, 2000).

<sup>27</sup> See THOMAS MCKINLEY LUTZ, SOME ASPECTS OF COMMUNITY ORGANIZATION AND ACTIVITY IN THE SQUATTER SETTLEMENTS OF PANAMA CITY (Land Tenure Center Library, University of Wisconsin,

ized occupations of state land.<sup>28</sup> On the eastern end of Panama City, Felipillo was a state-owned sugar mill subsequently controlled by the Panamanian military in the 1970's. After the U.S. invasion in 1989 and the abolition of Panama's national army, squatters settled on the unmaintained land and over a period of fifteen months built a neighborhood of over 1000 houses on 120 hectares.

Loma Cobá is located in the Canal Zone. It is considered an example, by some, of the poor's integration in the reverted areas. The area is a complex of neighborhoods located on the west side of the Canal, next to the communities of Arraiján and Veracruz that, although not officially part of Panama City, are functionally part of it. It was initiated in 1986 on lands that had reverted to Panama since 1979 but remained vacant. The process of settlement was slow but unceasing and produced a self-constructed housing complex with a population of nearly 25,000 inhabitants.<sup>29</sup> The land was leveled and individual plots were traced for individual home construction. Notably, regular plots were laid out with room for streets and sufficient yard space for the installation of utilities. In particular, space was sufficiently allocated to allow for septic tank installation. Furthermore, residents organized committees dedicated to education, health, garbage disposal, streets, water, women, work and elections.<sup>30</sup> As such, some of the practi-

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Madison 1972) (discussing squatter settlements in Panama City circa 1966).

<sup>28</sup> *Would be squatters routed*, THE PANAMA NEWS, Mar. 16-29, 2003 ("Panama tends to be tolerant when squatters invade public lands, often at the urging of construction material vendors. When private lands are taken and the owners show title and complain, as COFINA did, the police usually move in.")

<sup>29</sup> While "pirate" developers of informal settlements are not common in Panama, incidents of politician incited land grabs on private and indigenous lands have however been widely reported. See, e.g., *Legislator incites Darien land grab*, and *Representante organizes Chorrera land grab*, THE PANAMA NEWS, Aug. 3 (2003).

<sup>30</sup> See generally LINDSAY-POLAND, *supra* note 13, at 181.

cal realities of living in this area and in this way were integrated into the building configuration. These settlements are comprised of low income residents generally lacking the possibility of accessing the private housing market.

Boca La Caja is one of the oldest squatter settlements in Panama City dating from the 1930's. Approximately 600 families currently live there.<sup>31</sup> Many of them depend on fishing for their livelihood. The neighborhood was first settled approximately seventy years ago on the waterfront just east of the city Center, when the San Francisco area surrounding it was hardly developed. It is adjacent to Punta Pacífica, one of the main areas of high-end condominium development. It is a low lying zone prone to flooding. In some cases building has taken place on mud flats and within the tidal basin. Parts of this neighborhood have been titled, with estimates ranging from 25% to 60% of lots titled.<sup>32</sup> As noted, the City's building boom has grown all around them, and developers are now interested in this land.

### III. "Informality" in Law and Development

As noted above, the meaning of informality can take different forms.<sup>33</sup> In relation to economic develop-

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<sup>31</sup> Yaritza G. Mojica, *No quieren salir de Boca La Caja*, EL PANAMÁ AMÉRICA, May 12, 2007.

<sup>32</sup> *Id.* See also Mario A. Muñoz, *Boom inmobiliario llega a San Sebastián y Boca La Caja*, LA PRENSA, May 12, 2007.

<sup>33</sup> See Rogelio Pérez Perdomo & Teolinda Bolívar, *Legal Pluralism in Caracas, Venezuela*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, (Edésio Fernandes & Ann Varley, eds., 1998); see also Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2291 (1994) (arguing that the informal sector is not limited to third world immigrants coming to the United States but is due to a shift in the political economy), Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157 (1994), Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137,

ment, specifically, the concept of informality was reportedly popularized in the 1970's in relation to rapid urban growth and the accompanying rise of an excess labor supply.<sup>34</sup> The term has loomed large in development assistance circles since then. One observer notes:

The concept of formalization policy stems from the introduction 30 years ago of the term *informal sector* into development discourse by the International Labor Organization (ILO), giving rise to a new type of assistance to developing countries: the formalization of the informal sector.<sup>35</sup>

In the housing context, the notion of informality was first employed to describe and rebut then common views about squatter settlements as sites of social backwardness, isolated indigenous communities, outlaws, and communists.<sup>36</sup>

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141 (2002) ("within our [U.S.-Mexico] borderlands, more than 400,000 people now live in informal housing settlements known as colonias"), Edésio Fernandes and Raquel Rolnik, *Law and Urban Change in Brazil*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, 140-56 (Edésio Fernandes & Ann Varley, eds., 1998). See generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (describing the vast informality attendant contractual relations in a sampling of Wisconsin, manufacturing industry insiders, despite the formalization of terms and presumptive predictability expected of doctrinal contract law), Alejandro Portes & Richard Schauffler, *Perspectives on the Latin American Informal Sector*, 19 POPULATION & DEV. REV. 33, 33-48 (1993) (describing the "structural approach").

<sup>34</sup> Alejandro Portes & Richard Schauffler, *Competing Perspectives on the Latin American Informal Sector*, 19 Population and Dev. Rev. 33, 38 (1993).

<sup>35</sup> Julio Calderón Cockburn, *Property and Credit: Property Formalization in Peru*, LINCOLN INSTITUTE OF LAND POLICY 1 (June 2007).

<sup>36</sup> See William Mangin, *Latin American Squatter Settlements: A Problem and a Solution*, 2 LATIN AM. RES. REV. 65, 85 (1967) (arguing against their radical politicization: "At present they seem capable of mobilization only as a group to defend their homes."); Thomas



Developmentalists, instead, attributed economic growth potential to squatter settlements and their informal norms. It was part of a larger diagnosis of state law's formalistic, backward, and socially unresponsive condition in Latin America. Informal law was perceived as an intelligible popular reaction to official legal under-development. In that era, the "informal" represented an adaptation of formal state law that was more contextual, responsive and pragmatic. It showed how squatters, for example, turned official legal categories into a system of land holding, conveying, and ultimately community organizing that responded to their actual circumstances.

Pursuing similar methodologies, commentators relied on personal interviews and surveys to describe the inner workings of social groups purportedly governed by a separate, informal law.<sup>37</sup> A classic in this genre is Kenneth Karst's study on the non-state law of Caracas barrios.<sup>38</sup> In it, he discovered that, with the exception of legal title, residents operated essentially under the national legal system. Karst principally followed the stages of squatter settlements

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McKinley Lutz, *Self-Help Neighborhood Organizations, Political Socialization, and the Developing Political Orientations of Urban Squatters in Latin America: Contrasting Patterns from Case Studies in Panama City, Guayaquil, and Lima*, 297-98 (1970) (unpublished Ph.D. dissertation, Georgetown University).

<sup>37</sup> See Kenneth Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971); Lutz, *supra* note 27; Lutz, *supra* note 36; Boaventura de Sousa Santos, *The Law of the Oppressed: the Construction and Reproduction of Legality in Pasagrada*, 12 LAW AND SOC'Y REV. 5 (1977).

<sup>38</sup> Compare Karst, *supra* note 37 (throughout the article, Karst argues polemically against the prototypical formalist Venezuelan lawyer—and middle class stereotypes – who would maintain that there is no law in the barrio), with Rogelio Pérez-Perdomo and Pedro Nikken, *The law and home ownership in the barrios of Caracas*, in URBANIZATION IN CONTEMPORARY LATIN AMERICA (Gilbert, Hardoy, & Ramirez, eds., 1982).

and survey responses from its residents.<sup>39</sup> He defended the thesis that the sense of security felt by residents in their tenure reflected an informal legal system of property – not dependent on formal land titles: “Ownership of the land seems not to be significant in this process.”<sup>40</sup> Still, these communities he observed operated in strict relation with the state law of contracts, inheritance, etc. The lesson to be learned, he maintained, was a model for more pragmatic state law better suited to promote development in contextually appropriate and participatory ways. The “informal” thus provided a working example for development planners of legal flexibility and demonstrated a source of legal creativity—or “development mentality”—driven by poverty-driven necessity.

In the 1990’s round of development reform, the informal occupied a different position. Informal regimes were also conceptualized as compensating for the failings of formal law.<sup>41</sup> This time, however, the image was not the socially or culturally discordant nature of law and society in Latin America: the social demanding of more flexibility in conceptions of property. In the 90’s, the existence of an informal sector and informal land holding were an argument to turn the informal into the formal in the case of property, and in other cases to de-regulate the sphere of government regulation.<sup>42</sup> This more current use of the turn to the informal, all the while, is premised on a rejection of

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<sup>39</sup> See, e.g., *id.* at 563 (“Thus the central fact about a squatter-owner’s rights is that nothing happens to disturb his occupancy.”).

<sup>40</sup> See *id.* at 569. But see Mangin, *supra* note 36, at 75 (“Land titles play a major role in investment in housing, and in places where a title or some assurance of permanence is thought to exist constructions are more elaborate than in those without titles.”).

<sup>41</sup> See generally HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (2002).

<sup>42</sup> See Rashmi Dyal-Chand, *Reflection in a Distant Mirror: Why the West has Misperceived the Grameen Bank’s Vision of Microcredit*, 41 STAN. J. INT’L L. 217, 278 (2005).

official state law. It is advanced as an alternative source of legal rules. Indeed, for neo-liberals, the transactional modes and operations presumably outside the ambit of government regulation are deemed a more suitable model for state law itself.<sup>43</sup>

Considering both periods of law-and-development work on squatter settlements in Latin America, “informality” generally has been invoked as a phenomenon outside the legal system. It has meant, principally, social norms separate from state law and, alternatively, self-help deregulation by the poor prompted by the high costs of legal compliance. In the first period of law and development in the 1960-70’s, the concept was primarily employed to loosen claims to vested private rights to property. In the second 1990’s moment the opposite was true. Informality became an argument to reinforce an expansive and inviolable conception of private rights. In this more recent era, untitled housing is considered the epitome of informality, and titling is the primary goal of most formalization programs.

The law-and-development usage of informality is not so different from the productive tension in the distinction between law and society, historically used to facilitate legal reform.<sup>44</sup> The latter was mobilized by legal realists, sociological jurisprudes, and law and society practitioners for a number of changes in the U.S. legal system. The turn to social reality, in U.S. legal history for example, was prevalent as a reaction to Lochnerism.<sup>45</sup> This mode of arguing for legal change also has a long pedigree in continental

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<sup>43</sup>Epstein, *supra* note 33 (arguing that the reduction of government and regulation reduces informality by reducing the possibility of running afoul of law or government.).

<sup>44</sup>Jane E. Larsen, *Informality, Illegality, and Inequality*, 20 YALE L. & POL’Y REV. 137, 142-43 (2002).

<sup>45</sup>See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33-34 (1992).

Europe and Latin America.<sup>46</sup> The general idea is that focusing on social realities would reveal the need for laws to protect society from the abuses of unchecked industrial capitalism. The plight of the masses would thus support social legislation and more government action against vested property rights anchored in the constitution. By comparison, in the development versions, the “informal” has represented, by turns, a model of legal pragmatism and a substitute set of norms.

Describing a practice as “informal” has thus provided a space for re-considering its legal status. Labeling that which is legally suspect, or outright prohibited, as informal signals the possibility that it may be “formalized.”<sup>47</sup> One way to conceptualize this is as an argument about the constitutive elements of a legal norm. So, for example, where municipal ordinances permit licensed retailers to operate and, correspondingly, repress unpermitted street vendors, characterizing the latter as “informals” – rather than law-breakers full stop—opens the possibility of re-drawing the lines. The street vendors may be afforded greater legal rights through formalization, but

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<sup>46</sup> See DIEGO LÓPEZ-MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA* 235-340 (2004); ANDRÉ-JEAN ARNAUD, *LES JURISTES FACE À LA SOCIÉTÉ DU 19ÈME SIÈCLE À NOS JOURS* 154-90 (1975); see also Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis*, in FRANÇOIS GÉNY, *MYTHE ET RÉALITÉS 1899-1999 CENTENAIRE DE MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*, ESSAI CRITIQUE 295-320 (Claude Thomasset, Jacques Vanderlinden & Philippe Jestaz, eds., Éditions Yvon Blais, 2000); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 92-96 (1997); Marie-Claire Belleau, *The “Juristes Inquiets:” Legal Classicism and Criticism in Early Twentieth Century France*, 1997 UTAH L. REV. 379 (1997).

<sup>47</sup> See, e.g., Rogelio Pérez Perdomo & Teolinda Bolívar, *Legal Pluralism in Caracas, Venezuela*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 123-39 (Edésio Fernandes & Ann Varley eds. 1998).

just as logically plausible more onerous conditions could be imposed through greater formality.

Additionally, the *notion* of informality—separate from the reality of illegal land occupation or any other practice—has been repeatedly pressed in the context of development reform in Latin America as an argument for one or another reform proposal. The continual discursive reproduction of the “informal” by scholars and commentators and its reputed extraordinariness in Latin America reinforces this trope.<sup>48</sup> Its exceptional extensiveness in the region is rather automatically accepted. To such extent, it appears as if state law was limited to the elites and then only as cover for backroom politics.<sup>49</sup>

In similar fashion, the purportedly extraordinary gap between law on the books and law in action in the region is another incarnation of this same idea.<sup>50</sup> Informality and the gap—within development literature—have been firmly established as defining deficiencies of law in Latin America.<sup>51</sup> If law in the region were better functioning, this perspective suggests, there would be no eruption of informality and informal norms—springing from local communities—to fill the void. The continuing existence of informality is offered as proof of official law’s failure. Quixotically, the guiding star for reform is eliminating informality—either by absorbing it within state law or making it itself the formal law.<sup>52</sup> However, as common to liberal legal systems, examples of informality and of different types of informality are always abundantly observ-

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<sup>48</sup> See Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003).

<sup>49</sup> *Id.*

<sup>50</sup> See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., Julio Calderón Cockburn, *Considerations on Illegal and Informal Urban Land Markets in Latin America*, LINCOLN INSTITUTE OF LAND POLICY 2 (July 2006).

able.<sup>53</sup> As such, they are perennially available as grounds for new rounds of reform. Described below are the ways in which this concept has been marshaled to promote titling programs for untitled housing on state land.

#### IV. Titling as a means of reducing informality

The reduction of informality is a principal argument for titling squatters on state lands. The case has been forcefully made by neo-liberal reformers using this rhetoric. In the context of Latin America, specifically, this argument promotes privatization and strong property rights.<sup>54</sup> Internationally-supported, development reform has targeted land registry offices and land plotting technologies.<sup>55</sup> Monies have been lent to improve the efficiency of these offices and to make clear the rightful property owners at any time.<sup>56</sup> According to the World Bank loan documents supporting Panama's titling program:

Informality is one of the main issues of both, the urban and rural sector. To address some of these

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<sup>53</sup> *Id.* (considering urban land specifically independent of housing policy). See generally Karst, *supra* note 37; DE SOTO, *supra* note 41; Sassen, *supra* note 33, see Dyal-Chand, *supra* note 42; David Kennedy, *Laws and Developments*, in CONTEMPLATING COMPLEXITY: LAW AND DEVELOPMENT IN THE 21<sup>ST</sup> CENTURY (Amanda Perry-Kessaris & John Hatchard eds., 2003).

<sup>54</sup> See Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L. J. 69 (2006) (arguing the significant elimination of social conceptions of property as a result of neo-liberal reforms).

<sup>55</sup> See, e.g., The World Bank, *Poverty and Social Development in Peru, 1994-1997* (1999).

<sup>56</sup> World Bank, Panama Land Administration Project [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/01/12/000094946\\_00122905320369/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/01/12/000094946_00122905320369/Rendered/PDF/multi_page.pdf) (last visited Sept 5, 2008) (granting a \$58.7 million loan to be administered by Panama's Programa Nacional de Administración de Tierras).

problems, the Government has developed a Poverty Reduction Strategy in which land tenure security is a fundamental issue. The proposed Project will help the Government to implement this strategy.<sup>57</sup>

In short, in its latest law-and-development iteration, the “informality” argument purports to turn the existing legal interests of squatters into classical property rights. This position, it bears noting, supports the neo-liberal agenda of de-regulation, privatization, and free markets. At the same time, the argument strikes a populist tone by asserting that “informals” will be better off. This is essentially the position advanced by Hernando de Soto and his followers.<sup>58</sup> The formula has become a generalized if unproven mantra. Again, the structure of the argument is not unlike early twentieth century legal theories advocating the “social” or social relations as a determinate source of legal norms.<sup>59</sup> The “informal” comes to occupy a similar role within the prescriptions of neo-liberal reformers. Indeed, turning to this domain has much the same flavor of socio-legal projects. It appears to offer a determinate, non-political source of legal rules and a populist one at that.

The promise of titling is providing greater access to home values. The premise is that these settlements are, for all intents and purposes, permanent. As such, settlers are at a minimum in possession of the land and most likely are so

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<sup>57</sup> World Bank, Panama Land Administration Project, [http://wbIn0018.worldbank.org/LAC/PA\\_LandAdmin/Doclib.nsf/4145387661f08830852565a3005f4a64/411b2ffa283aafcd85256a02005b3aab/\\$FILE/P050595.pdf](http://wbIn0018.worldbank.org/LAC/PA_LandAdmin/Doclib.nsf/4145387661f08830852565a3005f4a64/411b2ffa283aafcd85256a02005b3aab/$FILE/P050595.pdf) (last visited May 9, 2008) (projecting 45,000 titles to be granted within Panama’s urban centers).

<sup>58</sup> See generally DE SOTO, *THE OTHER PATH*, *supra* note 41; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Basic Books 2000).

<sup>59</sup> See Kennedy, *A CRITIQUE OF ADJUDICATION* *supra* note 46; see also Belleau, *The “Juristes Inquiets,”* *supra* note 46.

indefinitely. Yet, this form of land tenancy and the economic value that it represents are not available for circulation in the economy. So, if vested with a more cognizable property interest, *de facto* right-holders would be able to draw on the equity of their interests. This could take the form of borrowing against home equity or more freely alienating, leasing or otherwise disposing of the value in the full bundle of property rights. Promoted as being primarily beneficial to the poor, the preferred bundle of rights and privileges—urged by Developmentalists—are the classical and neo-liberal elements of full legal title. In fact, the argument is that this recognition merely cashes out the economic transfer of stable tenure already granted by the state.

In Panama City, several factors are salient: an overcrowded city, low incomes, high unemployment, low-skilled workers, short supply of affordable housing, and relative lack of government money for low income housing. Reporting on illegal occupations in 2002, the Panamanian press noted that the state at that point offered no housing programs for these low income groups.<sup>60</sup> The Panamanian Ministry of Housing currently reports four different government housing programs: public housing for 500 families in the interior of the country, a total of 1,000 awards of a \$2,000 subsidy for families obtaining commercial mortgages for properties under \$16,000; neighborhood infrastructure improvement projects and job training; and the sale of three large public lots to private developers for the building of mixed low income (under \$300/month) and lower income (over \$300/month) housing.<sup>61</sup>

The Ministry also claims that the national government between 2004 and 2006 issued a total of 30,095 titles

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<sup>60</sup> José Arica, *Camino al precarismo*, LA PRENSA, May 8, 2002.

<sup>61</sup> See República de Panamá, Ministerio de Vivienda, Programas, <http://www.mivi.gob.pa/paginasprincipales/programas07.html> (last visited Apr. 11, 2008).



to property nation-wide.<sup>62</sup> Funded by the World Bank and the Inter-American Development Bank, the Panamanian agency charged with land titling is the Programa Nacional de Administración de Tierras (PRONAT).<sup>63</sup> The World Bank fund targets 25,000 new titles issued in urban areas and 12,000 more nationally, between 2006 and 2009.<sup>64</sup> Over the same period, the Inter-American Bank fund aims at 150,000 new titles.<sup>65</sup> Clearly, with the scant public investment in the sector, the Panamanian government is primarily counting on the titling of squatted land as the centerpiece of its housing policy. Whether or not titling self-built housing on public land is the best alternative for the poor, however, is a question best answered by analyzing the positives and negatives of the different legal options.

### A. Questionable benefits

The position in favor of strong private rights has in the not so distant past been firmly championed by the propertied classes.<sup>66</sup> Indeed, one of the generally accepted reasons and diagnoses of the deficiency of Latin American democracies has been attributed to the unequal concentration of private land holding, represented by the striking image of the vast *latifundios* in the hands of an elite few.<sup>67</sup> The principal remedy for this concentration of power and wealth proposed throughout most of the twentieth century—although not very widely achieved except possibly in

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<sup>62</sup> *Id.*

<sup>63</sup> Decreto Ejecutivo No. 125, República de Panamá, Sept. 12, 2001.

<sup>64</sup> PRONAT, Objetivos y Metas, [http://www.pronatpanama.org.pa/web/index.php?option=com\\_content&task=view&id=14&Itemid=44](http://www.pronatpanama.org.pa/web/index.php?option=com_content&task=view&id=14&Itemid=44) (last visited May 8, 2008).

<sup>65</sup> *Id.*

<sup>66</sup> Joseph Thome, *The Process of Land Reform in Latin America*, 1968 WIS. L. REV. 9, 20-22 (1968).

<sup>67</sup> *Id.* at 10-14.

Cuba (and there by abolishing private property)—has been agrarian reform. In effect, the process requires expropriating land from large landholders, not making productive use of their property, and transferring it to landless agricultural workers. There have also been movements, notably in Brazil, to extend this same procedure for the benefit of urban dwellers. In any case, the principal legal obstacle to land reform has been the figure of vested rights. If anything, the plight of the property-less and squatters has been understood as worsened by the restrictions on government policy imposed by an unyielding conception of private rights. Such formal rigidity has had the effect of impeding either imaginatively or constitutionally (or both) the ability of governments to more equitably redistribute legal entitlements.

Curiously, this more recent re-alignment of strong property rights as a benefit to the poor raises some questions about this one-time government transfer.<sup>68</sup> It is not clear that these programs fulfill their own stated objectives of increasing mortgage credit, improved lending conditions, greater investment in home improvement, and a deeper secondary home sales market.<sup>69</sup> Some scholars have noted the wide support for these efforts even though its benefits remain unproven:

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<sup>68</sup> See Copello, Mercedes & Smolka, *infra* note 91 (stating that preliminary estimates in various places indicate that property values increase post titling by approximately 30%).

<sup>69</sup> Compare Cockburn, *supra* note 35, at 43-44 (In Peru these projects have been most far-reaching. There is some evidence of increased investment in housing and increases in prices of titled housing. However, note that formalization is only one among explanatory factors in a list including "various public and social policies, formalization and its diffusion, the subsidized credits of the Materials Bank, the initiatives of public services providers, and the assistance of multilateral institutions."), with Karst *supra* note 37, at 569 ("the key motivation to investment in barrio housing appears to be the occupant's ownership of the house [not the land]").

Analysts associated with the World Bank argue for legalization on the grounds that it increases land and housing values and provides access to credit for housing improvements. They do so in spite of growing evidence that tenure legalization is not required for investment in housing improvements. Squatters may even consolidate their houses faster than those with formal tenure. Both the advocates of legalization and the more skeptical, however have concentrated their attention on “technical” questions, and overlooked the political uses of illegality.<sup>70</sup>

In Peru, where mass titling programs since 1996 have been widespread, “[a]ccess to mortgage loans by virtue of owning registered property has been negligible” and “there is no evidence that formalization is leading to the development of formal land markets among the low income population.”<sup>71</sup> At the end of the day, these programs may not advance their own much vaunted goals. Instead, their only effect may be to consolidate a more rigid conception of private property rights. Furthermore, it is not clear that a monolithic slate of property rights is preferable in all cases to different modes of asset allocation. At a minimum, the overwhelming push for titled property rights limits possibilities for other alternatives.

### **B. The mystifying effect of arguments based on informality**

As noted above, there are many different sorts of legal informality. They are common to modern legal sys-

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<sup>70</sup> Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, 172 (citations omitted).

<sup>71</sup> Cockburn, *supra* note 35, at 44-45.

tems.<sup>72</sup> For example, socio-legal scholars have amply demonstrated the variation, adaptation, and only partial relevance of legal rules to social relations generally.<sup>73</sup> As such, legal informality is the common experience of life in law and society. In addition, the legal realists showed us that legal rules, by themselves, provide no static guarantee of individual expectations on the meaning of property.<sup>74</sup> The latter are subject to regular changes in the law, the competing forces of economic exchange, and plain legal non-recognition.<sup>75</sup> Thus, there is no autonomous separate private (or informal) domain independent of legal regulation and non-regulation combined. Moreover, classical private law property contains a variety of different legally protected interests—not solely grants of actual rights.<sup>76</sup> These different legal relations can vary in terms of formalization. Either way, these alternatives to the single logic of formal rights are equally options within law. As a result, the representation of informality and other legal interests as non-official law is misleading. The formal-informal distinction primarily demarcates alternative legal devices. As such, the concept of legal informality needs to be disaggregated if it is to mean anything at all.<sup>77</sup>

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<sup>72</sup> See Macaulay, *supra* note 33.

<sup>73</sup> *Id.*

<sup>74</sup> See Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *Political Science Quarterly* 470 (1923), reprinted in *THE CANON OF AMERICAN LEGAL THOUGHT* 106-07 (David Kennedy & William W. Fisher III, eds., 2006) (discussing the inescapable exposure to vicissitudes of “legitimate expectations” framed as legal rights).

<sup>75</sup> *Id.*

<sup>76</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

<sup>77</sup> See generally Alejandro Portes & Manuel Castells, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 12 (Alejandro Portes, Manuel Castells & Lauren A. Benton eds. 1989).

Defining informality symptomatically as either separate social norms or self-help deregulation obscures the pre-reform legal relations among squatters, the state, and third parties. Conversely, it unjustifiably equates formalization with classical property rights.<sup>78</sup> This convoluted reasoning advances the cause of broad rights and privileges to title-holders.<sup>79</sup> The sleight of hand is that the claimed source of the new proposed rights derives from areas where the state applies a different *de facto* property regime or where the state tolerates regulatory non-compliance.<sup>80</sup> Therefore, the change propounded is, in effect, either a change to a different form of property and/or the expansion of regulatory exemptions.

The classical rule of adverse possession provides a useful example here. This conventional legal doctrine regularly turns illegal trespassers into legal owners and thus routinely validates past periods of irregular—or informal—possession. In Peru, the period for adverse possession was shortened to one year, on the strength of this same argument characterizing squatters as “informals.”<sup>81</sup> There may indeed be good policy reasons to shorten the period of adverse possession. For example, it may lead to greater

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<sup>78</sup> See Horwitz, *supra* note 45, at 163-67 (describing Hohfeld's and Hale's understanding of the bundle of legal relations constituting property).

<sup>79</sup> See generally Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1 (2006); Hohfeld, *supra* note 76 (describing more precisely some of the “rights,” “privileges,” “immunities,” and “powers” bestowed by law to property title-holders).

<sup>80</sup> See, e.g., George L. Priest, *The Informal Economy: The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259 (1994) (highlighting the high levels of informal activity in the U.S., distinguishing among types of informal activity, and defending the preference for aggregating moral justification and value of informal markets).

<sup>81</sup> Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARV. INT'L L.J. 433 (2003).

tenure security, regulatory compliance, social justice, personal savings, and the like. Alternatively, there may be good reasons against quickly increasing the stock of titled property rights. The latter permit a number of excesses, if not outright abuses, by titleholders often externalizing social costs, such as the harms associated with over-building, reduced quality of life to neighbors, and pollution. Commoditization of titles encourages practices of financial speculation on assets serving multiple needs, like sufficient housing.<sup>82</sup> An expansive allocation of property rights may frustrate other public policy goals. However, the force of arguments based on “reducing informality” has the effect of pre-empting more transparent consideration of the various pros and cons.

Accordingly, in relation to the housing context in particular, it may be more useful to speak in terms of different legal relations and distributional rules rather than formal and informal law.<sup>83</sup> For neo-liberals, the preferred rules are expansive interests for private property holders.<sup>84</sup> It is not clear whether or not this reduces or raises the actual aggregate amount of legal non-compliance across society.<sup>85</sup> Irrespectively, by claiming to end informality through titling, the law is changed and government regulation, planning, and more significant redistribution are made more difficult. Marshalling the argument of informality either to reinforce property rights—as in the 1990’s neo-development—or to loosen vested property rights – as in the 1960’s law and development, however, obscures the

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<sup>82</sup> See generally Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006).

<sup>83</sup> See Hale, *supra* note 74.

<sup>84</sup> See Ankersen & Ruppert, *supra* note 54.

<sup>85</sup> See Alejandro Portes & Richard Schauffler, *Perspectives on the Latin American Informal Sector*, 19 Population and Dev. Rev. 33 (1993) (discussing measures of informality).

multiple policy decisions and regulatory options represented by these categories.

Indeed, marshalling informality *as a stand-alone argument* in favor of titling classical property rights eclipses the range of other policy questions implicated by squatter settlements. The latter involve not merely asset transferability, liquidity, mortgage-ability and the type of security provided by registered titles. They also include questions about access to housing, building requirements, safety, habitability, disclosure, transportation, public health, environment, and the like. These other objectives need to be better addressed, possibly even with international development assistance. Moreover, the possibilities for reform advanced by the concept of informality—advocating a change in the law—are never fully extinguished by title formalization. As the examples below will show, legitimate expectations and democratic will can be frustrated despite rights to legal title. New legislation, ministry regulations, and judicial pronouncements can reinterpret rules, apply standards, under-enforce regulations, or simply presume entitlements in favor of one right-holder versus another. These points are more fully addressed further below.

## V. An alternative conception of property

A common way of conceptualizing untitled property, as argued above, is as a failing of the formal law. This form of “informality,” it is argued, is a malfunctioning of state legal systems. Its very existence is advanced as the rationale for law reform. Recent reforms, furthermore, seek to formalize a *particular* conception of property. Within the neo-liberal program, this conception is a neo-classical version of property rights.<sup>86</sup>

By contrast, a more precise understanding of untitled property holding unveils the operation of a different

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<sup>86</sup> See Ankersen & Ruppert, *supra* note 54.

type of legal relationship. Shorn of the negative connotations of “informality,” untitled housing on state land simply constitutes a different set of legal relations. It reveals the exercise of a privilege to build and reside on state land, informally yet still officially recognized by the government.<sup>87</sup> This form of tenancy is both subordinate to certain superior rights of the state, and the subject of a number of legal privileges.<sup>88</sup> It responds to demands for affordable housing at the expense of other public uses and proper regulatory compliance. Describing the Mexican context, for example:

Land tenure regularization in Mexico may be understood primarily as a means for routine, low-cost, state intervention in the production of urban land and housing for the low-income population...regularization programmes give clear expression to the predominant laissez-faire approach to housing the poor: official tolerance of illegal subdivision ensuring an abundant supply of inexpensive housing plots, and the post hoc legitimization of this process in tenure regularization programmes.<sup>89</sup>

Indeed, the *de facto* government policies that enable this form of tenancy reflect implicit policy decisions. This is not to say that in a context of more or different resources, policy makers would not affirmatively make different choices and regulations in the area of housing. Of course, it

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<sup>87</sup> See generally Pérez-Perdomo and Nikken, *supra* note 38.

<sup>88</sup> See generally Hohfeld, *supra* note 76 (for example, the privilege to exclude other non-right holders from possession and *de facto* immunity from building code enforcement action).

<sup>89</sup> Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 157, 168 (Edésio Fernandes & Ann Varley, eds., 1998).



is not in reality simply a matter of limited resources. The latter could be diverted from other uses were this a foremost priority. Under different political conditions and combinations of forces, different choices about housing and the economy could be made. Likewise, it is also not simply a matter of competing political priorities as against some unchangeable background of rules of private property and government regulation. At base, the workings of property law—more difficult to perceive and to modify—directly contributes to the housing stock actually made available.

Accepting that untitled property on public land fulfills certain objectives does not mean that either government regulation or private property law should remain unchanged. In fact, a more transparent appraisal of the political and legal nature of this arrangement may make it possible to better tailor housing law and policies.<sup>90</sup> Some aspects of the relaxed regulatory environment may continue to be part of the mix; others may be recalibrated better to meet other public policy needs. The perspective advanced here, it should be noted, neither supports the “invasion” of public lands by would-be squatters nor does it advocate the automatic eviction of existing squatters in all cases. More importantly still, it does not hold out the promise of a titled piece of land *post hoc*—as the current titling policies in fact do. Rather, it recognizes the legal and economic dimensions that give rise to self-help housing settlements and proposes to tailor a more effective government response. It suggests, as part of the mix, the reform of private law for the purpose of public welfare, the environment, and government provided infra-structure.

Surely, there are comprehensible reasons why existing property owners may want expanded and reinforced

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<sup>90</sup> See generally Ugo Mattei & Fernanda Nicola, *A “Social Dimension” in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1 (2006) (describing the stakes involved with the harmonization of European private law).

rights. Additionally, titling currently-untitled property holders appears to extend these same benefits to them. However, those with large titled holdings are especially in a position to reap the sum of the rewards. The broad array of rights and privileges under a broad definition of private property disproportionately benefits large owners. By contrast, shantytown dwellers will not effectively enjoy much more under their newly titled holdings than what they had before. The most notable exception would be possibly the privilege to apply for a home equity loan.

Yet, other property configurations are not impossible. In Colombia, for example, the Municipality of Bogota is experimenting with dividing the right to build from a monolithic conception of ownership rights, particularly for land planned for low-income housing.<sup>91</sup> Since 1997, Colombia has had a national law allowing municipalities to recover 30-50% for increases in land value resulting from public investment.<sup>92</sup> The primary means for recapturing this “socially-created” value is through a capital-gains-type tax.<sup>93</sup> Additionally, both property owners and “pirate” subdividers acting ahead of government action on low-income developments are in a position to extract the expected value of public investment and regulatory change. Separating out the right to build and transferring it to qualifying beneficiaries, it is suggested, would reduce the speculative value of land. However, “the policy faces enormous resistance because of the civil law tradition that unitary and

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<sup>91</sup> See Maldonado Copello, María Mercedes & Martim Smolka, *Las plusvalías en beneficio de los pobres, el proyecto Usme en Colombia*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY, July 2003; see also Mario Lungo, *Land Management and Urban Planning in San Salvador and Panama City*, LINCOLN INSTITUTE OF LAND POLICY, 44 June 2006.

<sup>92</sup> Law 388, Law of Land Development, July 18, 1997, Republic of Colombia.

<sup>93</sup> See, e.g., Liliana Bonilla Otoy & Juber Galeano Loaiza, Application of New Land Value Capture Instruments in Colombia: Desepaz Case Study, LINCOLN INSTITUTE OF LAND POLICY, June 2006.

absolute rights are associated with private land ownership.”<sup>94</sup>

This is one form of tinkering with the background rules. Granted, it is not suited for every issue, and may not be particularly transferable to Panama where “pirate developers” do not appear to be a big concern.<sup>95</sup> However, it demonstrates the role of background rules of private law on the economics of squatter settlements. By limiting our conceptions of the latter to simply the limitations of law enforcement, a separate social system of laws, the capitalist exploitation of labor, and other constructions of the sort, it renders invisible the current system of distribution of rights and privileges within property law producing the current state of affairs. Furthermore, maintaining imprecise ideas about the informal and its instrumental use as a vehicle for reform confounds the possibility for alternatives within the law. Retaining the myth of informality’s exceptional and transitory nature simply leads to an unclear approach. At the same time, the fixation on titled property as investment, accumulation, and development makes it that much harder to perceive its negatives in responding to the need for low-income housing.

#### **A. Non-Formalized Alternative Legal Interests**

In the context of Panama City, specifically, the untitled residents of Felipillo, Loma Cobá, and Boca La Caja could simply be described as mere trespassers. And, the

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<sup>94</sup> Maldonado Copello, María Mercedes & Martim Smolka, *Using Value Capture to Benefit the Poor: The Usme Project in Colombia*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY July 2003.

<sup>95</sup> See Álvaro Uribe, *Ciudad y Sostenibilidad*, Remarks at Encuentro Interamericano de Desarrollo Sostenible, Fundación Conama, Nov. 19-21, 2007, <http://www.conama.org/eima/documentos/8.pdf> (last visited Oct. 15, 2008).

construction of houses on that land can be seen as illegal possession. There is no separate category under the Civil Code of Panama for “informal tenure.”<sup>96</sup> At the same time, forms of land tenancy short of full titled rights are legally recognized, such as simple possession and adverse possession.<sup>97</sup> Squatters may possibly qualify for one of these designations under the law. Notably however, in the context of public land, adverse possession does not run against the state.<sup>98</sup>

And yet, the residents in these areas enjoy relative tenure security from government eviction. Indeed, the government itself can be seen as promoting this mode of housing.<sup>99</sup> First, by not prioritizing sufficient affordable and social housing it implicitly acts to maintain the status quo. Second, by over-relying on the market and over-estimating job growth, it knowingly accepts the predictable low-income housing shortages that will be thereby produced. Additionally, the government leads the way by example by allowing the externalization of social costs at the high-finance end, such as when it authorizes exceptions for private construction and public works projects through national parks and areas that were previously zoned more stringently.<sup>100</sup> Finally, commentators have noted that a post hoc titling program further encourages the invasion of private and public land as a route to property holding.

Other commentators confirm Panama’s *de facto* policies on squatters. For example, rural settlers may obtain title to a “patrimonio familiar,” a form of tenure that is limited to land of a certain size and value and includes immunity from judgment creditors, rights to inheritance by

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<sup>96</sup> Código Civil de la República de Panamá, Aug. 22, 1916, Art. 324-627.

<sup>97</sup> *Id.*, Art. 1696 (requiring uninterrupted possession for 15 years).

<sup>98</sup> *Id.*, Art. 1670 (amended by Cabinet Decree 75, Art. 1, Mar. 21, 1969).

<sup>99</sup> See Pérez-Perdomo & Nikken, *supra* note 38 at, 224-25.

<sup>100</sup> Arica, *supra* note 60.

heirs, an absolute prohibition on mortgages, and restrictions on alienation except in cases of absolute necessity.<sup>101</sup> As another indication of recognition, squatter neighborhood organizations are eligible to obtain legal personage. This has been noted to be particularly commonplace in Panama City, especially in certain cases where the government has organized the delivery of electricity and water to squatter settlements and charging users a fee.<sup>102</sup> These associations have also been active as a form of local government, especially beginning in 1967 when the national housing authority promoted self-help housing projects in Panama City and invested resources in them.<sup>103</sup>

Furthermore, Panama's Metropolitan Area Plan of 1997 estimated an increase in informal housing over the 1997-2005 decade, expecting a decline thereafter and ultimately a 5.6% rate of informality by the year 2020.<sup>104</sup> These estimates by the consulting firm hired to produce the report are based exclusively on the income earning potential based on very optimistic assumptions of job growth in Panama City. Their conclusion is that on the basis of more

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<sup>101</sup> Ley Número 22 de 20 de marzo 1941 sobre Patrimonio Familiar, Asamblea Nacional de Panamá, República de Panamá (Gaceta Oficial No. 8476), Ley Número 108 de 29 de diciembre de 1960, Díctanse disposiciones relativas al Régimen Provincial, Asamblea Nacional de Panamá (Gaceta Oficial No. 14,300). Compare Lutz, *supra* note 27, at 8-12, with Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, 164-65 (Edésio Fernandes & Ann Varley, eds., 1998) (arguing that the Mexican experience with "patrimonio familiar" simply led to illegal transactions as a way of circumventing restrictions on alienation).

<sup>102</sup> Lutz, *supra* note 27, at 9-23. ("The results of some recent survey research studies, including my own, suggest that in Panama City the level of participation in *barriada* improvement organizations is higher than in Santiago, Chile, Lima, Peru, and Guayaquil, Ecuador").

<sup>103</sup> Lutz, *supra* note 36, at 306.

<sup>104</sup> "Plan de Desarrollo Urbano de las Áreas Metropolitanas del Pacífico y del Atlántico", *Informe Final del Plan Metropolitano*, Vol. 1, Parr. 9.2, Dec. 22, 1997, Ministerio de Vivienda, República de Panamá.

and better jobs a decade hence, the City's reliance solely on the private sector to respond to low-income groups housing needs is justified—despite the continuing and optimistically-low, 2002 estimate of private sector housing insufficiency.<sup>105</sup> Thus, untitled housing settlements can be seen as de facto policy.<sup>106</sup>

### **B. Problems with uncontrolled and unplanned settlements**

The characteristic conditions of squatter settlements resulting in overcrowding, poor sanitation, and substandard constructions are universally deplored. There is more disagreement, however, at the level of policy solutions. A recent report warns:

Any attempt to tackle the problem of existing settlements must take into account the deep-rooted causes of this phenomenon in order to design measures that will prevent it from continuing at the present speed and scope. Thus, while addressing the lack of basic infrastructure, accessibility, and public services, as well as unclear tenure rights, governments must look at policies to either stop or decrease the speed at which urban informality grows in its various dimensions. If nothing is done to reverse the current trend, the slum population may reach 1.5 to 2 billion people in 2020.<sup>107</sup>

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<sup>105</sup> *Id.*, at Vol. 2, Part 2, Parr. 13, Dec. 22, 1997.

<sup>106</sup> See generally Larsen, *supra* note 44, at 167 (“the current trend toward great wealth inequality and limited government responsibility for the basic social provision is enduring and fundamental”).

<sup>107</sup> Claudio Acioly Jr., *The Challenge of Slum Formation in the Developing World*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY, 3 (Apr. 2007).

One commentator identifies three strategies of “regularization” most recently employed by developing states as (1) short periods of adverse possession leading to full ownership for private land; (2) executive branch direct action to title squatters on public land and expropriate private land with compensation for benefit of squatters; (3) government purchase or designation of public land so that it develops and sells as low-income housing.<sup>108</sup> Analysts have also begun to highlight the ill effects of many titling programs. They note the perverse incentives that programmed regularization has on encouraging more illegal settlements.<sup>109</sup> And, it is argued that the costs of regularization programs are higher than providing publicly financed serviced land for low-income housing.<sup>110</sup>

#### i. Tenure Security

Not all untitled neighborhoods enjoy uninterrupted stability. They typically go through a process of consolidation. Newer areas of “invasion” are more likely to be recuperated by state forces. Observers have noted that occupations of public land are met with much less resistance than those on private property where the titled owner seeks to evict. In some cases, however, private owners are overpowered and must either agree to sell, settle on a low price, or simply stand by. The Panamanian Ministry of Housing has been active in negotiating sales agreement with private owners of squatter settlements. Compromises include the sale of part of the land to squatters and a relocation of some others elsewhere.<sup>111</sup> However, in longer standing settlements there is little likelihood of mass evictions.

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<sup>108</sup> King, *supra* note 81.

<sup>109</sup> Martim Smolka, *Informality, Urban Poverty and Land Market Prices*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY Jan. 2003.

<sup>110</sup> *Id.*

<sup>111</sup> “Noticias: Avanza medición de lotes en el Progreso”, Ministerio de Vivienda, República de Panamá, Dirección de Relaciones Públicas,

A change in government direction at some point could potentially overcome the implicit policy, political resistance, and practical inertia against massive squatter evictions. More likely, certain communities in areas of economic interest will simply be pressured to re-locate. This eventuality is not so different for those holding title to land. If the “persuasive” powers of the market do not work, powers of eminent domain are constitutionally available to be applied in such cases.<sup>112</sup> By way of precedent, the public use limitation may potentially be extended to include economic development cases, as we have seen in the U.S.<sup>113</sup> However, legally mandated compensation in the case of title holders may be calculated in a different and maybe more beneficial way. The political costs of uprooting a whole community would likely produce pressure as well. Those residents would likely be offered some amelioration or alternative housing by the state. Thus, in many cases, the difference between titled and untitled land holding in terms of permanence is not so great as it would seem at first blush.

Additionally, as noted above, untitled tenancy clearly does not fit within the categories of land tenure under the civil code. To the contrary, there is always in theory the potential of being charged with trespass. In practice however, the *de facto* government policies have created this alternative land structure. Certain areas of public land are routinely ceded and electoral politics are soon integrated within these neighborhoods. Moreover, residents generally conduct their affairs through regular legal forms, exchanging contractual documents to purchase and sell their hold-

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Feb. 27, 2008,  
<http://www.mivi.gob.pa/noticias/Febrero%2008/febrero08-22.html> (last visited Apr. 11, 2008).

<sup>112</sup> See generally Hale, *supra* note 74, at 93-110.

<sup>113</sup> See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 64-68 (2006).



ings. Private contracts may be used and chains of "title" maintained by keeping records of past conveyances. Notably however, questions of zoning and services are dictated by practical exigencies rather than by the strict application of city codes.

## ii. Regulatory Compliance

The argument against untitled housing is often based on the low levels of regulatory compliance with building and health codes in squatter settlements. In the Loma Cobá neighborhood, for example, the residents themselves cleared and set plot lines for their own homes. "Pirate" middle-men are not believed to have played any role nor are believed to operate in Panama in any significant way. Over the past fifteen years, much of the empty land has been reforested and rendered habitable. Indeed, it has been described as meeting better standards and a more appropriate equilibrium between urbanism and the environment than many formal development projects by private capital.<sup>114</sup> The plots are more spaciouly parsed out and road flows are better designed than in some of the middle-class tract homes, which are constructed for maximum space utilization and highest sales prices. In fact, Panama City architect Álvaro Uribe has noted that:

The [informal] neighborhoods that have been produced do not correspond to the "phantom neighborhoods" of yesteryear but rather resemble true neighborhoods with an environmental quality not found in the scarce public housing projects or in the "popular" neighborhoods of the private sector, which are generally high priced and/or low quality. By contrast, all the spontaneous low-income neighborhoods have open and enclosed spaces

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<sup>114</sup> Uribe, *supra* note 95.

dedicated to communal activities and are more generous in the size of streets and individual lots, with areas 4 or 5 times greater than the lots offered by private developers or the Ministry of Housing in equivalent locations. These efforts at informal housing developments have reached levels of spatial quality, habitability and savings that do not exist in the rationalized and miniaturized designs of conventional low-income neighborhoods.<sup>115</sup>

Lots traced by settlers at Loma Cobá are rather large in size. Part of the explanation, in this particular case, may result from the benefits of building in a relatively spacious area outside the city center. It may also result from lot requirements for septic tank functioning on each plot of land, under Ministry of Housing regulations.<sup>116</sup> Responding to government regulation—albeit not in full compliance—these settlements place less strain on governmental services, and design corresponds to constraints other than profit maximization. Clearly, it would be better if these residents had more ample resources and could construct even better homes up to code. However, as one possible policy alternative, untitled housing development on public land may not always be simply irresponsible or unplanned.

### **C. Positive potential of alternative forms of property**

There are no doubt numerous dangers associated with unplanned and unregulated human settlements, as noted above. Water, electricity, sanitation, safety, environmental and other regulatory concerns are surely more imperiled and are at a higher risk of experiencing

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<sup>115</sup> *Id.* at 12-13.

<sup>116</sup> Ministerio de Vivienda, Resolución No. 160-2002, July 22, 2002, Gaceta Oficial No. 24645. República de Panamá.

noncompliance. Nonetheless, state resources could be more broadly deployed in these areas, and this mode of land holding could potentially be made to work. In most cases, Latin American governments provide public services to shantytowns after the fact, once a residents association has become organized. However, this need not be the case. Government agencies can be, and in some places are, more proactive in ensuring some levels of services and regulation. Some of the adverse effects of non-compliance—particularly in relation to health and the environment—could be lessened by government action. These need not be conditioned exclusively on the three modes of regularization noted above. It could work with alternative forms of property holding as well.

As such, untitled holdings on state land need not signify, either imaginatively or in fact, free for alls. They may simply constitute areas of different modes of regulation. The existence of differential regulation and different modes of enforcement has already been discussed.<sup>117</sup> Additionally, this regime may produce some positive goods in their own right. This mode of land holding opposite to the neo-liberal prescription reduces the liquidity of this undeniable asset. This may not be a bad thing. Indeed, many communities across the globe have struggled with the proper modalities for ensuring affordable housing. Different legal formulas have been produced whereby affordable housing is transferred by the state and then its alienation is limited to other eligible purchasers at below market prices. Untitled tenure can be conceptualized as a vehicle for lower cost housing. It maintains this sector of the property market at different values than the titled market—which generate different negatives. As a result, residents may be more hesitant to transfer their property, or not be in a position to dispose of it so easily to creditors. It may also ensure that transfers are also directed to other purchasers desiring pri-

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<sup>117</sup> See Larsen, *supra* note 44, at 18.

marily to live in the house as a primary residence. In this way, untitled holdings create a different housing market with some of the same intended consequences that societies with no significant untitled sector in place must construct by contract or other restrictive covenants.

Finally, as already alluded to above, untitled holding lessens the financially speculative dimension of housing. By de-linking housing and investment, residents are insulated against a number of financial risks. Especially in the context of the real estate debacle seen in the United States in the past year, this risk is very real. Banks and financial organizations typically do not make mortgage loans against untitled property. Again, this is the direct opposite to the neo-liberal intention of making all housing a source of investment funds. However, this form of micro-lending with recourse to borrowers' homes places them at risk of outright destitution. This is already a vulnerable segment of the population with no access or diminished access to resources. A government policy that transfers to them "rights" to their existing interests may only put them at risk of having those assets more easily stripped away. Indeed, this government policy is precisely premised on the expectation that property holders will indeed draw on the equity of their newly titled assets. At the end of the day, what it provides is simpler asset-guarantees for the financial sector and a new credit market.

## **VI. Classical property regime**

The benefits of titling are generally characterized as providing for greater security in tenure, incentives for improvements, collateral for mortgage loans, and a secondary sales market. Less discussed are some of the drawbacks that titling, under the current constellation of ownership rights, may in practice entail. In the specific context of Panama City, the expansive rights of title and permissiveness of zoning has led to a miscalibrated housing supply.

Specifically, legal rights are often exploited to their utmost degree thereby imposing many negative externalities on society at large. A number of built-in and unseen subsidies are made available to developers by government-provided infrastructure. Better planning and control by government officials are compromised by the seemingly pre-determined logic of property rights. Working class displacement, environmental degradation, and historical preservation are all made worse as a result.

From a different angle, the legal system can also fall prey to certain powerful interests to the detriment of the expectations of others. More prosaically, though, even the run-of-the-mill expected permanence of unchanging property rights, tenure security, and guaranteed expectations—under the aegis of property law—is misplaced. Textual interpretation, application of legal standards, and discretion in rule enforcement are intrinsically dynamic aspects of the legal system. Therefore some of the assumed benefits of titling are premised on the expectation of political consensus rather than some inherent feature of rule formalization. The examples below demonstrate a number of negative effects in the Panamanian context.

### **A. Over-construction of high income housing**

The clearest illustration of over-construction is the number and size of luxury condos in the city Center. Structures are erected to the ultimate possible allowances under the zoning codes and then some. These vary across the city in terms of permissible density, setbacks, and use. In reality, however, they are quite permissive, especially in the Center. The tangible result has been tall skyscrapers and condominiums in previously low-rising residential districts. Minimal or no setback requirements at the lower floors has builders building to the widest extent of their land. Zoning laws limit density by floor. Its purpose presumably is to limit urban density and traffic by limiting the number of

residents per lot. The effect has been twofold. It encourages more luxury units—to which the full density limit is assigned—to in effect reap the highest profit margin as a function of density. But, it also drives the buildings higher up in order to add more units. It thus increases the inventory of high-priced housing and encourages overbuilding both horizontally and vertically. A March 2008 Miami Herald article reports 250 new skyscrapers under construction and applications for another 400 already filed.<sup>118</sup> It is reported that the Municipality of Panama received \$1,023,000 in new construction permitting revenues for January and February 2008 combined, a 72.3 % increase over the 2007 figures.<sup>119</sup> Álvaro Uribe notes that:

The formula of continuing to make use of the advantages of conglomeration in the Center, where the flexibility of norms allows for anything goes, continues to be more persuasive than the uncertainty that still weighs over the reverted lands [in the Canal Zone].<sup>120</sup>

This leads him to the observation of a zone of “laissez-faire” that is enacted through the law of registered titles and zoning codes.<sup>121</sup> Two things are interesting to note. First, state regulatory law is very flexible.<sup>122</sup> A recent Panama City op-ed notes:

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<sup>118</sup> See *Panama's economic boom breeds pride, concern*, MIAMI HERALD, Mar. 30, 2008; see also Muñoz, *supra* note 32.

<sup>119</sup> *Panama City building permits up*, THE PANAMA NEWS, Mar. 23-Apr. 5, 2008.

<sup>120</sup> Uribe, *supra* note 26.

<sup>121</sup> *Id.*

<sup>122</sup> Law 6 of February 1, 2006, República de Panamá. See also Eric Jackson, *Panama's Emerging Urban Planning Regime*, THE PANAMA NEWS, July 8-21, 2007.

The extraordinary boom of runaway construction of large towers everywhere, although it has some situational benefits, rapidly begins to destroy the potential of the city. It occurs with the sudden changes in zoning laws without the consultation of neighbors, without streets and other infra-structure to rationally accommodate the increases in density, with no attention paid to public easements, sidewalks, green areas, open spaces, historically and architecturally valued buildings, public recreational spaces for the young and the elderly... The excessive traffic, without proper avenues or streets, the noise, the environmental pollution, the lack of parking, you can keep listing....<sup>123</sup>

Second, it prioritizes construction and private property over other public policy concerns, such as the environment, quality of life, and health.<sup>124</sup> As such, the legal system subsidizes agglomerations of title at the expense of the public rather than incorporating a greater portion of social costs within the background rules applying to housing en-

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<sup>123</sup> Nicolás Ardito Barletta, *Panamá: La ciudad (I)*, LA PRENSA, May 8, 2007.

<sup>124</sup> See, e.g., *Alcantarillado Sanitario: Obsoleto, insuficiente y contaminante*, EL PANAMÁ AMÉRICA, June 30, 2002 (“So that the million inhabitants of the capital have an idea of the problem and possible solution [of pollution in the bay, and river and streams that empty there], they should know that when they flush the toilet in their homes and businesses, the fecal matter that runs through the pipes arrives 100% raw at the bay, along the rivers and large pipes that dump directly onto the coast. The same occurs with sewage coming from sinks, bathrooms and wash tubs.”); Elizabeth A. Garrido & Wilfredo S. Jordan, *Al rescate de la bahía*, MARTES FINANCIERO, Mar. 16, 2004, Marianela Palacios Ramsbott, *Podremos bañarnos en la bahía en 2010*, LA PRENSA, Mar. 27, 2007 (announcing sewage treatment project in progress financed by \$50 million loan from Inter-American Development Bank and a second \$167 million loan from the Japanese Government).

trepreneurs.<sup>125</sup> Additionally, legal rules sanction this result and, by adopting this essentially laissez-faire baseline, render it more difficult to exercise needed re-allocation of resources to the low-income housing sector.

### **B. Misdirected public subsidies**

The attribute of title also entitles owners and builders to demand the subsidized basic services of the city. In some setting this may be justified and part of government incentives. In the context of Panama, though, city services are stretched to their limit. The city is already home to numerous residents living in precarious conditions and not connected to basic services. The city's infrastructure is decaying in parts because of disorganized spurts of growth.<sup>126</sup> The particular shape the housing boom has taken places great demands on the city's capacity for more and larger water and sewer connections. All of this is occurring simultaneously with a number of high-rise projects. Thus, in the case of complying building plans, city officials are required to scramble to provide services such as water and sewer to huge buildings. Indeed, city officials understand that they are compelled to provide the municipal services so long as all the listed requisites have been met. They are effectively powerless to impose further limits, greater sequencing, or additional fees. Certainly, public officials can propose legislation or other measures having this effect. Yet, the perception of encroachment on baseline property rights makes this difficult to achieve. Notably, no ameliorative measures have been put in place, undoubtedly because

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<sup>125</sup> See Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L. ENVTL. L. REV. 375 (2007). See generally, Hohfeld, *supra* note 76.

<sup>126</sup> Irma Elena Mordok, *Exigen desarrollo planificado*, PANAMÁ AMÉRICA, June 4, 2007.



any such proposal would be met by substantial resistance from builders and other property owners.

Finally, many of the condominium units in these skyscrapers actually remain vacant. Indeed, city officials estimate that 30 % are unoccupied (developers typically proceed when they have deposits on 70%), but in all likelihood this is a very conservative estimate if one considers all the purchases based upon speculation.<sup>127</sup> Many of the rest are also not occupied on a full-time basis. Moreover, considering the prices and maintenance costs of these units, it is not surprising that they are beyond the reach of most Panamanians. Thus, even the permissive building codes encouraging construction to the full extent of lot lines is doing little by way of resolving the demand for housing of local Panamanians since most of these units are being bought by high net worth individuals.

### C. Hiding assets and laundering money

Purchasing real estate in Panama may also provide a route to hide assets from the reach of other jurisdictions and to launder money in the form of legal real property. For instance, real estate developers are permitted to accept cash payments from buyers.<sup>128</sup> Additionally, private investors may own real estate anonymously by holding title through non-registered bearer share corporations.<sup>129</sup> Share transfers are not recorded and thus not available for inspection.<sup>130</sup> Rather, simple possession of the stock certificate controls

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<sup>127</sup> See Jim Landers, *Condo boom hits Panama – As towers rise, sellers seek to woo Americans*, THE CHICAGO TRIBUNE, Aug. 24, 2007 (estimating that 70 to 90 % of units are bought on speculation).

<sup>128</sup> *Panama*, *supra* note 118.

<sup>129</sup> See Ronald Edwards, *Panama Anonymous Bearer Share Corporations*, (November 13, 2006) available at [www.goinglegal.com/article\\_98649\\_86.html](http://www.goinglegal.com/article_98649_86.html) (last visited Oct. 15, 2008).

<sup>130</sup> *Id.*

disposition of the asset.<sup>131</sup> Thus, this freely and anonymously transferable asset (i.e. housing units), which from a public-policy perspective serves many purposes, can easily serve to evade legitimate creditors and to launder money.

The pressure this influx of illicit money places on the housing industry has a number of deleterious effects. The demand for stashing large amounts of cash distorts the housing market, putting pressure on more high-end units as well as building disproportionately in size and volume. Furthermore, the subsidies generally available to these users in the form of installation of services and increased capacity upgrades are misdirected away from more pressing housing needs. Indeed, they may be redirected to the luxury end of the housing sector or to illicit activities.

#### **D. Housing instability**

Another feature not typically highlighted of titling is the opposite of its purported claim to tenure security. A good example is Boca La Caja, near the high rise developments of Punta Pacífica, Paitilla, and San Francisco. Approximately 40% to 75 % of the families there live in houses without title.<sup>132</sup> Because of their proximity to the city Center, their waterfront location, and high-end neighbors, residents are under significant financial incentives to sell their homes and re-orient their livelihoods. Land titling appears to be a good solution to protect them. Indeed the legal guarantees of title would appear to permit those preferring to stay with greater security than their current status of "informal" dwellers.<sup>133</sup> This security however is somewhat illusory since it is the possibility of titling these lands by their current occupants that makes them attractive to

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<sup>131</sup> *Id.*

<sup>132</sup> Muñoz, *supra* note 32.

<sup>133</sup> Mojica, *supra*, note 31.

developers. Reflecting on government titling in the Panamanian interior, Raúl Leis observes that for micro-farmers:

The state undertakes the massive titling of lands, granting or titling individual lots, but without significantly augmenting raw materials, marketing, technology, by which the small landowner (indigenous or peasant) ends up selling his farm at low prices in the land market and migrating to the agricultural fringes or cities. Under these conditions the countryside is, more so all the time, a reservoir of extended poverty and growing.<sup>134</sup>

Indeed, in a different context, the practice of titling very small plots to Sicilian farmers has been shown to be counter-productive.<sup>135</sup> Its effects have been principally an ensuing concentration of land. Titling made it easier to consolidate the land by providing easier transferability.<sup>136</sup> And, restricting transferability defeats the professed objectives of development-oriented advocates of titling programs.<sup>137</sup> In the context of titling programs, the Minister of Housing and other officials are limited to simply exhorting residents not to sell their properties once formalized, explaining that they constitute subsidies from the state.<sup>138</sup>

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<sup>134</sup> Raúl Leis R., *Panamá: Centralismo y Metropolización*, in, COMISIÓN UNIVERSITARIA DEL CENTENARIO DE LA REPÚBLICA, PANAMÁ: CIEN AÑOS DE REPÚBLICA 247 (2004).

<sup>135</sup> Harold Lemel, *Land Titling: Conceptual, Empirical and Policy Issues*, LAND USE POL'Y, 283, 283-85 (July 1988).

<sup>136</sup> Tim Hanstad, *Developing Land Registration Systems for Developing Countries*, 13 AM. U. INT'L L. REV. 647, 666 (1998).

<sup>137</sup> See DE SOTO, *supra* note 41, at 42-43, King, *supra* note 81, at 447 ("these conditional grants of title, if intended to diminish the redistributive aspects of titling programs, have often failed to alleviate the housing shortage to which they are addressed, as they have merely provided incentives to settlers to subdivide, sell, or rent their plots illegally").

<sup>138</sup> "Noticias: 7,000 familias reciben asignaciones de lotes en Arraiján," Ministerio de Vivienda República de Panamá, *Dirección de Relaciones*

Potential title holders have been warned that if they sell their lots prior to the finalization of title they would become ineligible and the property would be awarded to someone else.<sup>139</sup> Selling newly acquired titles will likely lead to squatting on land elsewhere.

In Panama City, condominium developers are already offering significant sums of money for this *untitled* land, offering residents the funds to get them titled and then sell them for development.<sup>140</sup> Indeed, these financial incentives are spurring more precarious informal construction by new residents. More makeshift houses are being built in this area, in low lying zones, and on land part of the tidal basin, reputedly in an effort to stake out claims to valuable land, for which title will be obtained—with the help of condominium developers—and then sold to them. New squatters have been advised by the Panamanian authorities of the illegality and dangers of building on land reclaimed from the sea since they are prone to flooding. The area residents, however, point out that high rise developers are similarly reclaiming land from the sea to build their luxury buildings in contiguous areas.<sup>141</sup>

#### **E. Deepening sub-prime credit markets**

Titling is meant to provide access to collateral. Indeed, one of the main arguments for titling squatters is that

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*Públicas*, Apr. 4, 2008,  
<http://www.mivi.gob.pa/noticias/abril09/001araijan.html> (last visited Apr. 11, 2008).

<sup>139</sup> “Noticias: Culmina agrimensura y ordenamiento de lotes en Villa Vivian”, Ministerio de Vivienda, *Dirección de Relaciones Públicas*, República de Panamá, Apr. 1, 2008,  
<http://www.mivi.gob.pa/noticias/marzo08/marzo08-14.html> (last visited Apr. 11, 2008).

<sup>140</sup> Muñoz, *supra* note 32.

<sup>141</sup> L. Ivis & C. Franco, *Peligro ronda Boca La Caja*, EL PANAMÁ AMÉRICA, Oct. 1, 2006.

they will then be able to use the equity in their assets. Since squatter dwellings are principal places of residence, these individuals will presumably continue to live in them. Thus, the primary means of accessing such equity will not be through selling. Rather, access to capital will depend on borrowing against the value of their home equity. In this way, the untitled will then be able to, through loans, access cash and presumably put it to good use.

The difficulties with this plan are evident. This area of home financing is practically by definition a sub-prime market. Accordingly, interest rates will likely be high. There is a strong danger of predatory lending. Moreover, a default because of a missed paycheck, unrealized profit from a new business, or an economic downturn will produce a major economic crisis, foreclosures, and a newly homeless people. Thus, plugging these lower-income sectors of society into the financial markets places both them and the economy at great risk. Indeed, it may be that housing priorities for the less advantaged in Latin America should be given precedence over financial sector policy. Increasing liquidity in the economy at the expense of putting shantytowns dwellers in jeopardy of losing their homes may not be the smartest course.

Not so dissimilar is the working-class tract housing on Panama City's outskirts. As noted above, lower income developments dot the east and north routes into the city. In an effort to create more of them, the Ministry of Housing has initiated a small program to stimulate this type of private development. It plans to sell three large tracts of public land to private developers for low-cost titled housing. In turn, at the level of home purchases, qualified buyers meeting certain restrictions are granted access to preferential mortgage terms for these homes. This situation again produces the same difficulties of risky and high-cost credit as with recently-titled squatter settlements—regardless of title to real property collateral. In the place of private credit markets, then, subsidized government loans are required to

ensure individuals access to homes. It is not clear that this form of government transfer is preferable to outright investment in public utilities and infrastructure for residents on urban public land.

## VII. Intrinsic uncertainties of legal rules

An inescapable dimension of titled property regimes, somewhat counter-intuitively, is the relative indeterminacy of legal rules. Conventionally, formalization in the form of titled rights appears to offer clarity of legal rights and certainty of tenure. Moreover, as described above, an expansive definition of private property allows titleholders to capture a disproportionate share of public goods and to externalize social costs. However, this beneficial distribution of economic power to titleholders is subject to all the regular “informality” of liberal legal systems, including legislated ambiguities, regulatory discretion, indeterminate legal rules, and conflicting judicial interpretation. These aspects of the legal system are less frequently addressed as areas of informality. As a result, the latter is mostly depicted as existing outside of law.

An example of the phenomenon addressed here is the experience of residents at Ciudad Jardín Albrook. The homes there were sold by auction by the Panamanian government between approximately 1998 and 2000. Many individuals including former and retired Panamanian Canal Zone employees as well as U.S. retirees obtained homes in this way. Ownership is held through formal registered title. This formal guarantee to home and neighborhood, however, has not come without its drawbacks. A large part of the appeal of the garden city is the low height and density restrictions, reduced traffic, and the aesthetics thereby produced.<sup>142</sup> The neighborhood reflects the mandates of larger

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<sup>142</sup> See Rafael Spalding, *Noticias objetivas o propaganda en Albrook*, LA PRENSA, June 20, 2002.

setbacks, harmonious styles, and single family home character maintained by the U.S. military. The designation of a “garden city” under the 1997 Panamanian law for the Canal Zone and subsequent August 8, 2000 Resolution No. 139 of the Ministry of Housing were meant to preserve this character.<sup>143</sup>

In 2001, after most initial owners had purchased their titles, two existing buildings in the area formerly housing for single soldiers, were bought by a developer with expansion plans for greater height, added floors, and greater density.<sup>144</sup> This development, called Albrook Park, was permitted under the zoning regulations for Panama City and not the specific legislation for the “garden cities” within the Canal Zone.<sup>145</sup> Although not a skyscraper, it brings multiple units, more height, increased density, and added traffic to two-lane residential streets. The unbar-gained-for expansion, contrary to the expectations of initial owners, has changed the character of the neighborhood and harmed their environment. Additionally, it has led many to question the legal guarantees available under Panamanian law.<sup>146</sup>

Despite contrary zoning regulations in effect at that time, the Ministry of Housing approved the expansion plans. Individual Albrook owners, organized in a residents association (“Aprojal”), took action and questioned the Ministry’s decision. The Ministry, however, did not reverse

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<sup>143</sup> Ley 21 de 1997, Plan Regional y el Plan General de Uso, Conservación y Desarrollo del Área del Canal, República de Panamá, Resolución N° 139-2000, Gaceta Oficial Sept. 1, 2000, No. 24,130, Normas especiales para mantener el carácter de ciudad jardín en la región interoceánica, Ministerio de Vivienda, República de Panamá, Aug. 8, 2000.

<sup>144</sup> Resolución N° 204-2003 de 30 de Sept. de 2003, Emitida por el Ministro de Vivienda, República de Panamá.

<sup>145</sup> See Rafael Spalding, *Justicia dilatada no es justa*, LA PRENSA, Sept. 16, 2002.

<sup>146</sup> Luis A. & Méndez F., *Las burlas de la “Ciudad Jardin,”* LA PRENSA, Oct. 6, 2001.

course. Instead, government officials and even media commentators have criticized the group as trouble-making U.S. retirees, unknowledgeable about Panamanian law, expecting to live in a military-style enclave, privileged, elitist, and seeking to embarrass the Panamanian government by calling upon the U.S. embassy for support.<sup>147</sup> The Aprojal president claims to have called upon U.S. officials, simply, to warn foreign purchasers of the risks of property ownership in Panama. In any case, in Aprojal's favor, the Panama Municipal Council, on October 31, 2001, temporarily halted construction at Albroom Park based on Aprojal's complaint pending a final decision by the competent authorities.<sup>148</sup> Specifically, Aprojal sued on the basis of Resolution 139-2000, paragraph b.12 of the Ministry of Housing which provides for these reverted properties:

There should be maintained inasmuch as possible the original designs of facades in terms of texture, color, materials, number of finished floors, heights, and other physical characteristics.<sup>149</sup>

According to past Association President Rafael Spalding, they hired a lawyer who also brought the case to the Panamanian Supreme Court in 2002. The Association succeeded in convincing the government's lawyers, the Procuraduría de la Administración, of the illegality of the Ministry's

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<sup>147</sup> Manuel Domínguez & Hermes Sucre, *ARI promete no derribar ni un árbol en Albroom*, LA PRENSA, Nov. 1, 2000.

<sup>148</sup> *Consejo Municipal suspende las obras de "Albroom Park,"* LA PRENSA, Oct. 31, 2001, Mario A Muñoz, *Proyecto de Albroom Park cumplió con las normas ambientales*, LA PRENSA, Nov. 1, 2001, Víctor D. Torres, *FV Constructor amenaza al Municipio de Panamá*, LA PRENSA, Nov. 1, 2001.

<sup>149</sup> Resolución N° 139-2000, Gaceta Oficial, Sept. 1, 2000 No. 24, 130, Normas especiales para mantener el carácter de ciudad jardín en la región interoceánica, Ministerio de Vivienda, Republica de Panamá, Aug. 8, 2000.



actions. The Supreme Court, however, refused a preliminary injunction and did not decide the case.<sup>150</sup> By 2003 with still no ruling handed down the Albrook Park project was completed and occupied.

Additionally, in February 2007, the National Assembly amended Law 21 of 1997 to allow the Ministry of Housing to modify provisions of that same law relating to urban development in the reverted areas by simple resolution, retro-active to July 1997.<sup>151</sup> This law was the basis, in a recent decision by the Administrative Chamber of the Supreme Court, for lifting a prior injunction against construction on land zoned as a “green urban area” under the 1997 law. By resolution dated 2000, the Ministry of Housing changed the “green” zoning to residential medium density. The Supreme Court in a prior decision issued January 31, 2006 had granted a preliminary injunction based on a clear likelihood of success on the merits, considering the clear inconsistency of the Ministry’s resolution with the law.<sup>152</sup> However, based on the February 12, 2007 legislative amendment of the law authorizing the Housing Ministry to unilaterally re-zone and ratifying its unilateral re-

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<sup>150</sup> Demanda Contencioso Administrativa de Nulidad interpuesta por la firma forense Rosas & Rosas, en representación de Asociación de Propietarios de Viviendas de Ciudad Jardín Albrook (APROJAL), para que se declare nula, por ilegal, la Resolución N° 204-2003 de 30 de Sept. de 2003, emitida por el Ministro de Vivienda, Ponente: Adán Arnulfo Arjona L, Panamá, Corte Suprema de Justicia de la República de Panamá, Expediente No. 58-06. Mar. 20, 2006.

<sup>151</sup> Ley 12 de 12 de Feb. de 2007, publicada en la Gaceta Oficial No. 25731 de 13 de Feb. de 2007, que modifica el Artículo 13 de la Ley 21 de junio de 1997, sobre el Plan general de uso de suelos de la región interoceánica.

<sup>152</sup> Demanda Contencioso Administrativa de Nulidad, Interpuesta por el Licenciado Carlos E. Varela Cardenal, en representación de la Alianza para la conservación y el desarrollo, para que se declare nulo, por ilegal, el artículo No. 8 de la Resolución 09-2000 del 31 de mayo de 2000, emitida por la Dirección General de Desarrollo Urbano del Ministerio de Vivienda, Ponente: Victor Benavides, Panamá, Jan. 31, 2006.

zoning retro-active to 1997 the Supreme Court terminated the preliminary injunction. Petitioners are now challenging the constitutionality of the legislative amendment. Previously, an opposition congressman had already challenged the constitutionality of this amendment before the Supreme Court in March 2007.<sup>153</sup> No decision has yet been rendered on this issue. Additionally, as of this writing, the legality of the first Ministry approval of Albrook Park, challenged by Aprojal, is still pending in the Panamanian Supreme Court—six years later. Aprojal's action will no doubt be dismissed if the constitutionality of the Ministry's newly granted and retroactive powers were to be upheld.<sup>154</sup> Comparing the situation of both squatters and Albrook residents, Álvaro Uribe has noted the unexpected similarities:

These actions [by Albrook residents], respecting the differences of social group distance involved, are equivalent to the efforts of the inhabitants of the self-built popular barrios: they are struggles for permanence in the barrio and for permanence of the barrio, faced with the threat of expulsion by new projects.<sup>155</sup>

Certainly, this example can be seen as a simple matter of a violation of existing laws and a potentially improper manipulation of the legislative process. However, it may be adjudged within the legislature's powers as part of the flexibility inherent in legal and constitutional interpretation. Thus, if the Court grants the legislature the authority to make this retro-active change, the latter becomes part of the corpus of property law. This example demonstrates that,

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<sup>153</sup> Juan Manuel Díaz, *Demanda contra ley de uso de suelos*, EL PANAMÁ AMÉRICA, Mar. 20, 2007.

<sup>154</sup> Rafael Spalding, *Una corte de injusticia suprema*, LA PRENSA, Feb. 26, 2008.

<sup>155</sup> Uribe, *supra* note 26, at 13.

even in the context of title and zoning, expectations may be frustrated. Indeed, any one of the various sticks in the bundle of these rights can be re-arranged, and alternative types of legal relations may be sanctioned. Thus, the questions involve not merely the distinction between formal or informal legal relations but also the advantages and disadvantages of different property-holding regimes.

### VIII. Conclusion

This essay is an attempt to move beyond the trope of “informality” as merely an argumentative device. That is, the notion that there is informality or an informal law has often been used in the past primarily as an argument for other ends. It has been instrumentalized to argue for a more pragmatic conception of law. Conversely, it has also been used to argue for a reinforcement of private property rights. In either case, the observation that a certain segment of the population is living on land not titled in their name has supported a strategy to re-calibrate the scope of legal regulation.

Quite differently, this Essay leads to several concluding points. Untitled housing on public land is not usefully understood as simply “self-help deregulation,” opting out of the high costs of legality. Rather, this arrangement is an alternative for low-income housing that has been *de facto* sanctioned by the state. Also, it need not be uniformly negative. Not unlike the titled regime, it has its positives and negatives. Because the state has superior ownership rights does not mean it need remain otherwise unregulated or unplanned. Simply awarding titles, however, may lead to more housing insecurity, foreclosures and financial crisis, than to sustainable capital infusions in the economy coming from the equity in squatter property. Finally, the options currently available are a reflection of existing laws. The rules leading to the current situation are political and economic positions regarding the distribution of entitlements,

principally those governed by private law rules. As such, a more frank assessment of those rights and privileges may lead to the consideration of different forms of property holding and alternative modes of collective regulation.



