**Property Transactions and Entrepreneurship**

**By**

**Robin Paul Malloy, JD, LLM**

**E.I. White Chair and Distinguished Professor of Law**

**College of Law, Syracuse University**

1. **Introduction**

This paper expands on work begun in two of my earlier books: *Law and Market Economy: Reinterpreting the Values of Law and Economics*;[[1]](#footnote-2) and *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning*.[[2]](#footnote-3) In each of these books I elaborate on market exchange theory, or what I have elsewhere identified as law and market economy. Market exchange theory focuses on the networks and patterns of exchange in and between people and their communities. It involves examining the way in which exchange is initiated, the terms of trade, the objects of exchange, and a variety of socio-legal factors that govern human interaction in a market society. In market exchange theory it is assumed that a number of motivations and values drive people to act in cost effective ways to pursue particular normative and aesthetic goals. It is further assumed that people form beliefs as predicates to action. Therefore, fixation of belief comes before market choice, and there is, thus, a need to understand the process by which we fix belief. Moreover, fixation of belief arises from a communicative process, and is not dependent on methodological individualism or an endogenous economic calculus.

In this paper I address the relationship between property transactions and entrepreneurship. While the ideas discussed in this paper are applicable to a variety of property transactions, my primary point of reference is to real estate transactions. In this regard I identify and explore four categories or patterns of entrepreneurial behavior that come into play with property transactions. Each pattern of behavior reflects different motivations for participation by people in particular types of transactions. The suggestion is that different people seek different types of returns and value rewards from engaging in property transactions and that multiple behavior patterns can nonetheless all be identified as forms of entrepreneurship.

With this in mind, the goals of this paper are two-fold; first, to define entrepreneurship, and second, to articulate the general contours of four categories of entrepreneurial behavior. In accomplishing these goals I proceed in several steps. First, I discuss the general idea of entrepreneurship and provide a definition for use in this paper. Second, I outline my ideas on four different patterns of behavior that seem to operate in property transactions. And third, I conclude with some suggestions on how these observations might open new doors of inquiry in thinking about the ways in which law can facilitate entrepreneurship in the area of property transactions.

**II. General Ideas Concerning Entrepreneurship**

Entrepreneurship is a relatively new and growing area of interest and study. Currently one can find discussion aimed at private entrepreneurship, public entrepreneurship, and social entrepreneurship. In the current context private entrepreneurship generally involves action taken by private parties to maximize profit and wealth. This involves the setting of a private mission executed for private gain. Public entrepreneurship relates to the idea of a public entity as an elected or appointed body taking action to promote a public mission as set by actors accountable to the public. And, social entrepreneurism is related to the actions taken by nonprofit entities seeking to accomplish a private mission undertaken for the promotion of a public good. In this paper I take the view that these categories are not altogether helpful. They have us focus on the differences in the structure of the actors rather than on possible behavioral patterns related to entrepreneurship that might be shared across these three categories.

In my view, all entrepreneurship involves social entrepreneurship because it necessarily occurs in a social context. Entrepreneurship arises from exchange and human interaction. It does not occur in isolation. Invention may take place in some respects as an isolated activity but entrepreneurship is a process and not an event. Furthermore, this process is facilitated, incentivized, and protected within a given socio-legal environment and in such a setting it is often difficult to separate the public from private aspects of a given set of activities. This becomes increasingly difficult as government credit and financing, as well as tax policy and regulation, work to inform private action and shape reward values related to particular goals and missions.

In seeking an alternative framework for exploring entrepreneurship I offer my own definition which can include any type of so called private, public or social entrepreneurship. In doing so I discuss entrepreneurship in terms of four patterns of behavior related to what I identify as the transactional entrepreneur, speculator entrepreneur, innovator entrepreneur, and network entrepreneur. Each type of entrepreneur brings different expectations to the exchange. In general, however, I define an entrepreneur as:

1. a person with a special alertness to the opportunity to capture and create value from changes in the existing networks and patterns of exchange (including gaps in information),
2. who forms a belief concerning the potential future value to be gained from exploiting the observed opportunity, and
3. acts on that belief in a cost effective way with the hope of transforming the hypothesized (potential) value into actual value.

Cost effective action is not the same as acting to maximize wealth, efficiency, or profit in as much as it is impossible to determine the optimal course of action to take in any complex system of exchange and human interaction. Instead the goal is to be conscious of the fact that we are embedded in markets and that actions involve costs and benefits. The goal is one of using market structures as a means of incentivizing particular networks and patterns of exchange in order to achieve particular public policy goals, and to do so in a way that is cost effective.

For example, we can consider a typical environmental problem, of the type often used to illustrate the Coase Theorem problem. Let us assume we have a factory polluting a stream by discharging chemical s from its production process into the nearby river. The discharge has a negative impact on downstream homeowners. Efforts are undertaken to assess the negative impacts (costs) of the discharge and these are to be weighed against the benefits of production and of the employment act the factory. As one will know from the standard Coase analysis, a number of factors and variables come into play. The traditional law and economics approach would look for the most efficient or wealth maximizing outcome which might well include the continuation of the chemical discharge if that can be shown to generate more benefits than the costs that it imposes. This presumes a lot of trust and belief in numbers and measurements, numbers and measurements which are in fact subject to a lot of ambiguity and driven by assumptions that can be changed and altered based on the way in which an inquiry is framed. This type of analysis presumes that markets can generate social values and that markets are an end in themselves. To the contrary, however, markets are the product of volitional action. Markets reflect policy choices about the way in which particular networks and patterns of exchange are incentivized and privileged. From a cost effectiveness approach one understands that people set value goals and market are merely a means of achieving those goals. Thus, policy must first be set as to the desire to preserve clean water and then turn to the question of exploring alternative ways in which to achieve this goal in a cost effective way. And, cost effectiveness involves a fair balancing of feasibility in terms of available and employable technology, market factors, and socio-legal infrastructure.

**III Four Patterns of Entrepreneurship**

Having provided a general idea of what I mean by entrepreneurship, I now offer four patterns of behavior that can help in the consideration of the relationship between entrepreneurship and property transactions. I identify these patterns as transactional, speculative, innovative, and network entrepreneurship. In this section of the paper I outline the meaning of each category.

**Transactional Entrepreneur**

A transactional entrepreneur is one who takes action to participate in a property transaction of a rather routine nature that involves a major step for the person even though it may perhaps be rather insignificant from a macro perspective. As an example consider a person who decides to buy a home. For most people this is a big personal step even though it is routine and mundane in the context of millions of such transactions done as relatively standard exchanges. A key motivation in such a transaction is the desire to own a home, and from an economic perspective the concern is generally to cover accounting costs. Transactional entrepreneurs are motivated by a mix of factors and generally making a large profit is not a primary motivator. Home buyers often simply ask; can I afford this home. Home ownership is driven by a set of beliefs constrained by a concern for affordability in its simplest terms.

**Speculator Entrepreneur**

A speculator entrepreneur is motivated by the prospect of a potential for big profits and generally enters a transaction based on the pursuit of economic profits rather than mere accounting profits. (define and explain accounting vs. economic profits). The speculator entrepreneur takes risk for the potential upside returns, and is likely motivated by the desire to maximize wealth and attain high economic rents. The speculator may not have any original ideas but is willing to take on risk for certain types of transactions or to finance the risk in support of the ideas of others, assuming that an appropriate potential for return is attached to the willingness to finance the risk of a new venture. A franchise operator might be another example of this type of entrepreneur.

**Innovator Entrepreneur**

An innovator entrepreneur is driven by curiosity and has a special alertness to opportunities to capture and create value. Sometimes the activity is purposeful toward a given innovation, sometimes action is directed to a particular end but results in innovation of an unanticipated sort, and sometime innovation is simply fortuitous. Generally, innovation is facilitated within certain environments of openness, diversity, and interaction. While needing to cover accounting costs the sustaining economic motivation is driven by Riccardian rents. (Explain and give example)

**Network Entrepreneur**

A network entrepreneur seeks advantage by building and offering access to important networks of exchange. For example, this includes investing in and building close links to government officials in order to win government contracts and subsidies or tax breaks. Cultivation of the network is a key element of the actual work, product, or service to be delivered. Value creation is based on the network while covering costs on the products and services delivered.

In looking at property transactions, and in particular those that take place involving real estate, almost all actions can fit into one of the above four patterns of entrepreneurial behavior. Yes, it is true that different types of transactions involve different concerns and different structures but the basic behavioral patterns typically fall into one of the four types outlined above. Not every transaction has its own patterns even if there are unique risks or concerns. It is also important to remember that these are patterns not silos. A given transaction or actor may move in and out of several patterns or have characteristics of more than one pattern. Likewise, there may be other helpful ways to understand given transactions in addition to this typology.

**IV Implications and Conclusions**

Law and legal policy can be shaped with reference to the type of entrepreneurship likely to be involved with certain types of transactions. To the extent that law offers an important infrastructure for creativity and innovation, it must take into account the four basic patterns of entrepreneurship discussed in this paper. Each pattern may require a slightly different legal approach or call into question the relationship between current legal rules and incentives relative to the type of action one hopes to motivate.

Specific illustrations to be added in a later draft.

1. Cambridge University Press (2000) (published in English and translated into Chinese and Spanish). [↑](#footnote-ref-2)
2. Cambridge University Press (2004). [↑](#footnote-ref-3)