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A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates

Jedediah Purdy†

This should be a heady time for theorists and practitioners of property law. Some of the most important recent proposals to improve human wellbeing rest on the expansion or reform of property rights. From Peru, the political economist Hernando de Soto recently captured the world's attention by contending that a lack of property rights stands between the slum dwellers of the world's poor countries and new horizons of prosperity.¹ Nearer home, Yale economist Robert Shiller has proposed a new market in risk, essentially propertizing present expectations of good fortune, which would represent one of the most dramatic expansions in the domain of private property since labor power slipped the bonds of status-based obligation and became a freely alienable commodity.² Debates grow hot over whether copyright and patent protection should expand, retract, or take new forms altogether.³ In environmental law, the power of new types of property

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¹ See generally Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic 2000) (arguing that capitalism fails in poor countries because the poor lack property rights in their assets); Hernando de Soto, *The Other Path: The Economic Answer to Terrorism* (Basic 2d ed 2002) (arguing that Peru's poor represent a distinct entrepreneurial class).

² See generally Robert J. Shiller, *The New Financial Order: Risk in the 21st Century* (Princeton 2003) (proposing a new risk management infrastructure that utilizes financial inventions to insure the gains made by workers). On the freeing of Europe's serfs from feudal bonds, and the essential relationship of this development to property rights, see David D. Haddock and Lynne Kiesling, *The Black Death and Property Rights*, 31 J Legal Stud 545, 551 (2002).

³ See generally William W. Fisher, III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford 2004). See also James Boyle, *The New Enclosure Movement and the Construction of the Public Domain*, 66 L & Contemp Probs 33, 73 (2003) (analogizing the development of intellectual property rights to the movement to enclose common property in England, and arguing that today's public domain is unlikely to suffer from the tragedy of the commons); Jane Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 Colum J L & Arts 61, 65 (2002)

rights to foster efficient conservation represents the most significant advance since the passage of the major regulatory acts of the 1970s.⁴ In short, it is a time characterized not just by what Michael Heller has called the “dynamic analytics” of property,⁵ but also by a *dynamic practice*, in which basic reform of property regimes has become a major—and contested—instrument for pursuing all manner of goals.

I have in mind reform that does at least one of the following. First, it may change the *domain* of resources subject to property law: those things that colloquially are called “property.” This reform may involve redefining as property some resource that has not previously been in the “property” domain at all, such as environmental services—what I refer to as an *extension* of property rights. Alternatively, the change in domain may introduce refinements that multiply the set of possible distinct interests in what has previously been regarded as a unified resource—what I call an *intensification* of property rights.⁶ I use the term *expansion* to encompass both methods of reform.

Second, a dynamic reform may change the *criteria of ownership*, so that a new class of owners is created for a propertized resource—as in the shift from feudal obligation to labor markets, in which people became by default the owners of their own labor power.⁷ Third, such a reform may change the *incidents of ownership*: for instance, conferring the power of alienation and creating market structures (such as contract law) by which property may be enforceably alienated.⁸ These

(arguing that recent legislation and cases are reaching a “happier balance between the copyright owner’s, the intermediary’s, and the end-user’s interests . . . to the ultimate enrichment of the public”).

⁴ See James Salzman and J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 Stan L Rev 607, 614–16 (2000) (analyzing the role of currency selection in environmental trading markets); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 Minn L Rev 129, 163–64 (1998) (analyzing environmental rights as “hybrid property” rights).

⁵ Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 Theoretical Inquiries in L 79, 80–82 (2001). Heller proposes a view of property theory, which I adopt, in which conceptual innovations respond essentially to institutional innovations and political struggles “on the ground,” clarifying the stakes of these developments and sometimes contributing to them by indicating implicit or overlooked conceptual possibilities. *Id.* at 86–91.

⁶ The reforms discussed in Part III.B have this character: they bring into the regime of formal property a set of claims that are now local and possessory. The reforms described in Part III.C are an instance of refining existing distinctions to make possible a partial exchange of present expectations.

⁷ See Haddock and Kiesling, 31 J Legal Stud at 551 (cited in note 2). This is also the character of the reforms discussed in Part III.B: to create legally a class of owners who are presently only possessors.

⁸ This would be the effect of creating formal markets in personal income expectations, discussed in Part III.C. It is not clear, however, that in this specific instance legal reforms would be required to make such markets effective. Perhaps a conceptually clearer example would be the prohibition on selling oneself into slavery in a free-labor economy—that is, alienating one’s labor power in gross rather than in units of time or production.

methods are not mutually exclusive, of course, but they are reasonably analytically distinct.⁹

The elevation of property rights as a master term for diagnosing and solving all manner of problems has given fresh vitality to three persistent and important critiques of property regimes. The first is an *anticommodification* critique resting on the claim that commodification—introducing property regimes to areas previously governed by other principles—impoverishes our experience of the values at stake in those areas, tending to produce an instrumental relationship to others and to the natural world.¹⁰ The second is an *anti-expropriation* critique. The main contention of this line of argument is that the introduction of property rights presents an opportunity for powerful social groups to expropriate resources that were previously distributed in a

⁹ My designation of three dimensions of dynamic reform bears some similarity to the taxonomy developed by Emily Sherwin. See Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 Ariz St L J 1075, 1076–77 (1997) (defining a system of property rights where the object of property and the conditions of its ownership are determinate as “two-dimensional,” and a system where the incidents of ownership are also determinate as “three-dimensional”). I am also indebted to the somewhat different scheme developed by Laura Underkuffler. See Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* 16–33 (Oxford 2003) (distinguishing among (1) the “theory of rights,” or incidents of ownership; (2) the spatial dimension—that is, the definition of resources falling within the ambit of ownership; (3) stringency, or the level of protection given the property right relative to incursions or competing public policy considerations; and (4) time—that is, the question of at what point the previous three features attach as to any particular owner, and to what extent they are susceptible to revision in light of subsequent political (or other collective) judgments).

¹⁰ See, for example, Margaret Jane Radin, *Conceiving a Code for Creation: The Legal Debate Surrounding Human Cloning*, 53 Hastings L J 1123, 1126 (2002):

We want the legal system to make a commitment to an ideal of noncommodification of love, family, and other commitments close to ourselves. . . . Some people think that if we start talking about children as things we own, and about one as being fungible with the other, and we expect them to maximize our pleasure in life, we might start actually trading them one day.

Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L J 1135, 1146–47 (2000) (arguing that the use of apologies as bargaining chips in settlement negotiation drains a “moral process” of meaning by making it a “market trade”); Jennifer Fitzgerald, *Geneticizing Disability: The Human Genome Project and the Commodification of the Self*, 14 Issues L & Med 147, 151–52 (1998) (arguing that regarding the self as a bundle of alienable resources stunts the ability to discern noneconomic value in persons); David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 Ind J Global Legal Stud 621, 655 (1998) (considering the argument that a market in organs will reduce altruism); Norman W. Spaulding, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 Stan Envir L J 293, 311–13 (1997) (considering the psychological experiences of “commodity fetishism” and “alienation” as consequences of commodification). See also generally Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 Harv L Rev 689 (2003) (surveying arguments concerned with the devaluation of commodified goods and relationships, and proposing that this devaluation arises less from the designation of the goods as commodities than from the character of the consequent transactions, in which the fungibility of values is assumed).

more egalitarian manner under less formal arrangements.¹¹ The third line of argument involves the *structure of production*. The characteristic claim is that property rights lock a social order into a specific system of productive activity—usually portrayed as hierarchical and substantially involuntary—in which alternatives more friendly to creative or cooperative endeavor are implicitly suppressed.¹²

Theorists and reformers friendly to the expansion of property rights should be able to provide two kinds of responses to these critiques. First, they should be able to answer the attacks on their own terms, either by showing that property rights need not have the effects that critics claim, or by demonstrating that the critical arguments, even if accurate, lack the normative weight to carry the day. Second—assuming the critical arguments do not fail categorically—property's proponents should be able to identify the points at which a critique becomes powerful enough to brake the expansion of property rights; that is, arguments *for* property rights should also generate an account of the proper *limits* to property rights.

Neither such argument has been forthcoming. Conventional arguments in favor of property rights take two broad forms. The first rests on the economic efficiency of property rights—their power to internalize the costs and benefits of an owner's use of a resource and facilitate the market allocation of resources to their highest-value users (as measured by effective demand).¹³ Second, they have empha-

¹¹ See Joel M. Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 Mich J Intl L 467, 499–500 (2004) (arguing that Kenyan land-title reform was driven by opportunistic elites who used the government's reform to create a landed gentry at the expense of peasant farmers); Khiara M. Bridges, Note, *On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue*, 102 Colum L Rev 123, 158–61 (2002) (arguing that black women, because of economic necessity and internalized oppression, will be uniquely vulnerable to the dehumanization of a market for fetal tissue); Emily Marden, *The Neem Tree Patent: International Conflict over the Commodification of Life*, 22 BC Intl & Comp L Rev 279, 292–93 (1999) (discussing the benefits Western pharmaceutical companies derive from patents on plants discovered in India, where commodification of such living things runs counter to deeply rooted traditions).

¹² See Ngugi, 25 Mich J Intl L at 513–14 (cited in note 11) (arguing that the effect of Kenyan land-title reform was to mandate the participation of farmers in commodity markets); Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 Duke L J 1245, 1247–48, 1254 (2003) (describing how pursuing productivity and growth places a limit on commitments to “democracy, autonomy, and equality,” particularly because of two modes of making production decisions—the market and the corporate hierarchy); Fitzgerald, 14 Issues L & Med at 157–59 (cited in note 10) (arguing that giving parents the ability to genetically manage their unborn child will establish relationships where the child is made to serve the whims of the parents); Spaulding, 16 Stan Envir L J at 314 (cited in note 10) (“Commodification of the environment, much like commodification in other areas, subordinates individuals and groups lacking market power.”).

¹³ See, for example, Richard A. Posner, *Economic Analysis of Law* 32–34 (Aspen 6th ed 2003) (“Legal protection of property rights creates incentives to exploit resources efficiently.”);

sized the potential of property rights to secure negative liberty, that is, to protect their owners from interference by others in their affairs.¹⁴ More specifically, most such defenses have concentrated on the protection property rights may provide against the state, with scant attention to the issue of interference by other private persons.¹⁵

These are, of course, powerful arguments. The difficulty is that the descriptions they provide are entirely consistent with the three objections to property rights identified earlier. Economic efficiency and negative liberty may seem to anticommodificationist critics of property rights to be the *summa* of the instrumental, atomistic conception

Robert C. Ellickson, *Property in Land*, 102 Yale L J 1315, 1320–21 (1993) (defining the “efficiency thesis” as how “land rules within a close-knit group evolve so as to minimize its members’ costs”). Of course, the influence of economic analysis on legal scholarship has been so powerful in recent decades that an enormous amount of work on the dynamics of property regimes has supposed that economic efficiency, secured by the coordinated pursuit of respective self-interest, is in fact the purpose of private property regimes. See generally Stuart Banner, *Transitions Between Property Regimes*, 31 J Legal Stud 359 (2002); Haddock and Kiesling, 31 J Legal Stud at 561–62 (cited in note 2) (applying Harold Demsetz’s theory, which proposes that social cost-benefit analysis predicts when property regimes emerge, to medieval property rights after the Black Death); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J Legal Stud 421 (2002) (arguing that the competing stories of efficiency and interest group manipulation undermine normative theories of the extent to which property should be private); Thomas W. Merrill, *The Demsetz Thesis and the Evolution of Property Rights*, 31 J Legal Stud 331 (2002) (outlining Demsetz’s theory of property rights evolving toward efficient rules); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J Legal Stud 453 (2002).

A view of property regimes that stresses their power to create and undergird markets that, in turn, lead to efficient allocation of resources and effort, is not necessarily at odds with a view stressing the priority of freedom in normative evaluations of such regimes. Rather, the question is whether one takes efficiency to be a complete and final account of what is valuable in property regimes or, alternatively, understands markets as securing freedom by (1) coordinating activity voluntarily according to rules that exclude direct coercion, and (2) creating opportunities for capability-realizing activity that would not otherwise have existed. As will emerge in this Article, I am highly sympathetic to the second view. See generally Amartya Sen, *Markets and Freedoms*, in Amartya Sen, *Rationality and Freedom* 501 (Belknap 2002) (analyzing the function of market mechanisms to promote individual freedoms like decisional autonomy).

¹⁴ For writers in this tradition, property is the keystone of negative liberty, the “guardian of every other right” that gives substance and certainty to the immunity against interference. See James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* 26 (Oxford 1998) (describing how “the protection of property ownership was an integral part of the American effort to fashion constitutional limits on governmental authority”). See also generally Richard Pipes, *Property and Freedom* (Knopf 1999) (arguing that property is a necessary prerequisite for political liberty); Richard A. Epstein, *Takings: Private Property and the Eminent Domain* (Harvard 1985) (arguing in favor of an absolutist conception of property rights, where such rights include exclusive use, disposition, and full alienability).

¹⁵ Isaiah Berlin’s portrait of negative liberty concerned the kind of dignity and personality one might hope to attain when one enjoys protection from interference by the state, private institutions, and other persons. See Isaiah Berlin, *Two Concepts of Liberty*, in Henry Hardy, ed., *The Proper Study of Mankind: An Anthology of Essays* 191, 193 (Farrar, Straus, and Giroux 1997). The conventional identification of negative liberty merely with “negative rights,” or “the right to be let alone,” impoverishes Berlin’s view, which involved a distinctly affirmative view of the value of “negative” protections.

of personhood that they charge property regimes with promoting. Critics concerned with the expropriative potential of expanding property rights will also not be placated. Theft is theft, they will say, and the issue is whether in some cases "property is theft"¹⁶—not whether it increases the social pie in the long run or leaves the thief secure against state interference.

Critics concerned with the structure of production will also contend that the conventional defenses of property are simply not on point. If the concern is whether people are able to enter into free and collaborative productive relationships, rather than hierarchical and partly involuntary ones, pointing to economic efficiency and negative liberty will seem substantially beside the point. I do not mean to say that critics of expanding property regimes should, or do, deny altogether the force of the conventional pro-property arguments. Rather, my point is that the two classes of arguments operate as if they were incommensurable. The proponents and critics talk past each other.

The central argument of this Article is that proponents of expanding property regimes suffer from their neglect of a powerful tradition in Anglo-American jurisprudence and political thought: a *freedom-promoting* conception of property. This conception originated in the liberal, reformist Enlightenment period of the mid-to-late eighteenth century, when it was exemplified in the thought of the Scottish jurist, moral philosopher, and proto-economist Adam Smith. It was important in the United States in the early decades of the nineteenth century, when the influence of the Scottish Enlightenment was strong, but declined later in that century and in the twentieth century.¹⁷ Today its theoretical underpinnings are experiencing a revival, most prominently in the thought of Nobel laureate economist Amartya Sen.

However, the freedom-promoting tradition has not yet been revived in the realm of property rights, where it had its origin and its most important early expositions. Instead, advocates of property-based reform tend to the narrower lines of argument already described,¹⁸ while thinkers who pursue a freedom-promoting reform pro-

¹⁶ Pierre Proudhon, *What is Property? An Inquiry Into the Principle of Right and of Government* 14 (Cambridge 1994) (Donald R. Kelley and Bonnie G. Smith, trans.).

¹⁷ See Paul A. Samuelson, *The Overdue Recovery of Adam Smith's Reputation as an Economic Theorist*, in Michael Fry, ed., *Adam Smith's Legacy: His Place in the Development of Modern Economics* 1–2 (Rutledge 1992) (arguing that Smith's theories were largely lost and ridiculed for much of the twentieth century).

¹⁸ See, for example, de Soto, *The Mystery of Capital* at 63 (cited in note 1):

A well-integrated legal property system in essence does two things: First, it tremendously reduces the costs of knowing the economic qualities of assets by representing them in a way that our senses can pick up quickly; and second, it facilitates the capacity to agree on how to use assets to create further production and increase the division of labor.

gram are apt to miss the connection to property rights, even when their proposals essentially implicate the definition of property.¹⁹ A narrow conception of property thus denies conceptual resources both to those who think of themselves as property theorists and to those who do not, but might if they recognized the centrality of property rights to the freedom-promoting tradition. The purpose of this Article is to reforge the broken circle.

The freedom-promoting conception of property is distinguished by several features, in which its ideas of property and of freedom intertwine. I begin with the attitude toward property.

In contrast to the libertarian property thinking of the late nineteenth century and that of certain revivalists today, the freedom-promoting standpoint does not conceive of property as a fixed and immutable category.²⁰ Rather, from Smith to Sen, participants in this tradition understand property as a dynamic institution, a set of rules evolving in response to technological and social innovation, which applies a variety of types of claims to a variety of resources.

Members of this tradition understand property as a *social* institution in this sense: property regimes set the terms on which people are able to recruit each other for social cooperation. They make up the grammar of collaboration for any project that is neither solitary nor motivated by love or force. Property rights thus deeply and necessarily structure interpersonal relations.

In addition to these attitudes towards property, the tradition I am describing is marked by a distinctive conception of freedom. Perhaps most important is that it conceives of freedom *functionally*: to inquire how free people are, it asks what they are able *to do*, which forms of human potential they have turned into actual capabilities that they can in fact exercise. This is in contrast to procedural conceptions of freedom, which ask whether people's personal rights have been violated without their consent²¹ or whether the decisions affecting them have been subject to a credible form of hypothetical or indirect consent.²² It is likewise in contrast to substantive, or "positive," conceptions of freedom, in which the question is whether people have achieved *specific* forms of personality, activity, or self-mastery, which are identified

¹⁹ See Shiller, *The New Financial Order* at 1 (cited in note 2).

²⁰ For a discussion of this fixed and immutable conception of property, see Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* 243–302 (Chicago 1997).

²¹ See generally Robert Nozick, *Anarchy, State, and Utopia* (Basic 1974).

²² See John Rawls, *A Theory of Justice* 11 (Belknap 1971) ("Thus we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits.").

with being free.²³ The conception of freedom that this Article revives does not claim to identify the purposes of human life, but insists on knowing what people in fact are able to do—that is, what choices are genuinely open to them.

This conception of freedom directs attention to two specific considerations, in addition to actual or hypothetical consent, in assessing degrees of freedom. One of these is the *set of viable options* an individual faces: she is regarded as more free to the extent that she confronts more rather than fewer viable alternatives. This consideration thus directs attention to the structure of social rules that open or close practical alternatives, particularly the rules of the property regime.

The other consideration points inward, toward the individual psyche. This consideration concerns *self-conception*: whether a person thinks of herself as the kind of agent whose interests and commitments are self-authorizing reasons for her to act and give others reason to respect her person and projects; or whether, alternatively, she either fails to formulate interests and commitments of her own or is psychologically inhibited from acting on them. In diagnosing property regimes, therefore, it becomes important to consider whether they promote relationships of domination and subordination, which tend to inhibit self-assertion by the subordinated, or whether, alternatively, they promote reciprocity and cultivate the habit of recognizing and

²³ This family of views understands property as a precondition of people's becoming, in a relevant sense of Berlin's phrase, masters of themselves: realizing some individual or collective good that makes their lives appropriate, worthy, excellent, or otherwise commendable. Berlin, *Two Concepts of Liberty* at 203 (cited in note 15) ("The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master.").

There are several distinct species of this genus of argument. One has to do with the development of personality. It proposes that ownership of property is necessary to the development of free will and intentionality; to the capacity to form a plan of life and act consistently with it over time; and to habits of prudence and responsibility. See Jeremy Waldron, *The Right to Private Property* 301–02 (Oxford 1988) ("It is necessary for the free man not only to *be* independent of others, but actively to assert himself as a free and independent will and to be recognized as such by others."); Alan Ryan, *Property* 71–76 (Minnesota 1987) (arguing that the system of property rights must reflect individuals' need for "a space for free movement and secure social attachments").

Another strand of argument contends that private property enables individuals to participate in *collective* goods, usually the political life of the community. See, for example, Waldron, *The Right to Private Property* at 313–18; Ryan, *Property* at 23–34. Private property enables the individual to stand as an equal among others in a community of citizens. For a productive discussion of this theme, see Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* 48–104, 68 (North Carolina 1980):

The personal independence that resulted from the ownership of land permitted a citizen to participate responsibly in the political process, for it allowed him to pursue spontaneously the common or public good, rather than the narrow interest of the men—or the government—on whom he depended for his support.

pursuing one's own interests and commitments in the course of negotiating cooperation with others.

In Part I of this Article, I survey the main lines of argument against expanded property regimes: the anticommodification critique, the anti-expropriation critique, and the critique of productive organization. In Part II, I present the freedom-promoting tradition, showing its historical origins in the jurisprudence and proto-economic thought of Adam Smith. I briefly sketch the tradition's decline in the later nineteenth century, from a dynamic account of the purposes of property to a static natural-law account of property. I also show the revival of this tradition in the work of Amartya Sen.

I conclude Part II with a schematic account of the orientation to freedom. I identify the primary dimensions of the *description* of any property regime from this perspective: in short, the description centers on what a property regime enables people to do, and what rules of recruitment and collaboration it implies for the things they do collectively. I also identify the *pragmatic* cornerstones of the orientation in identifying opportunities for reform: thresholds of technological possibility, constituencies for reform, conceptual opportunities for extension of existing property relations, and opportunities for cultural or ideological intervention regarding the definition of the interests and values at stake in any reform.

In Part III, I turn my attention to three specific contemporary reform programs in property regimes. My aim here is not to derive these programs, or any others, from the theoretical terms of the freedom-promoting tradition. Rather, in the manner appropriate to a dynamic analytics of property, I intend to show how theory and practice are mutually clarifying. It was reflection on these programs that first led me to the formulation of the freedom-promoting tradition. In turn, however, I believe a full appreciation of that tradition helps to identify aspects of incompleteness in the programs.

At the conclusion of Part III, I return to the three critiques of property with which I opened the Article, now fleshed out by discussion of the three areas of reform in which they might be seen as having particular bite. I conclude that each one is better addressed by the freedom-oriented approach to property than by the competing justifications.

In Part IV, I draw special attention to the freedom-promoting approach's ability to clarify the problem of the proper limits of expansions of property rights. I argue that the freedom-promoting approach partly dissolves this issue by making clear that the question is often not "for or against property?" but "what kind of property, and in whom?" The freedom-promoting standpoint provides criteria to answer the question so phrased. It also provides criteria to answer the

question as traditionally expressed: when property relations should be excluded from domains presently governed by other rules and values.

I. THE CRITIQUES OF PROPERTY

A. The Anticommodification Critique

The first kind of objection to expanded property regimes is what I have called the anticommodification critique. The spirit of this objection, if not its full logic, is captured in *Remembrances*, by John Clare, the nineteenth-century English peasant and laborer renowned as an authentically primitive folk-poet.²⁴

Enclosure like a Bonaparte let not a thing remain,
It levelled every bush and tree and levelled every hill
And hung the moles for traitors—though the brook is
 running still,
It runs a naked stream, cold and chill.²⁵

Like much traditional North Atlantic debate about expansions in property regimes, Clare's poem takes as its starting point the archetypal "Enclosure," the conversion of common fields and pastures into private land—much of it in the hands of nobility and other large landholders—that transformed the English countryside in the seventeenth and eighteenth centuries.²⁶ Unlike many critical accounts of Enclosure, however, Clare's concentrates not on the distributive consequences of turning peasants' common land into private holdings of the wealthy and powerful, but on the way privatization changes people's *experience* of the land. Enclosure of course did not literally "level[] every hill"—although it did result in the deaths of many bushes and trees as sheep farming replaced small-scale cropping, turning fields to pastures. The image of "leveling" rather refers to a flattening-out of experience as the local and particular texture of peasants' relationship to their land is replaced by the abstract, universal terms of monolithic property rights and its accompanying economic logic.²⁷ Although the landscape remains, some vital quality of liveliness, intimacy, or warmth has gone out of the human relationship to it. Thus, "though the brook is running still," it is as "naked . . . cold and chill" as the hills are "level."

²⁴ See James Fenton, *Getting Clare Clear*, NY Rev of Books 42 (Oct 7, 2004).

²⁵ John Clare, *I Am: The Selected Poetry of John Clare* 134 (Farrar, Straus, and Giroux 2003) (Jonathan Bate, ed).

²⁶ See J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* 259–93 (Cambridge 1993) (explaining the resistance to enclosure by farmers and freeholders).

²⁷ See Eric T. Freyfogle, *The Tragedy of Fragmentation*, 36 Valp U L Rev 307, 318–22 (2002).

It no longer provides a hospitable home for human sentiment. The choice of Napoleon Bonaparte as the simile for Enclosure is telling: Bonaparte swept across Europe as a conqueror, but also as the violent avatar of modernity, abolishing traditional social distinctions, elevating middle classes, and installing a uniform system of law: the Napoleonic Code.

Clare was a nostalgic and romantic poet, and from the point of view of many historians and historically minded economists, this account of Enclosure is nonsense draped 'round a Maypole.²⁸ Peasant life was crude, often brutish, vulnerable to all manner of violence and abuse, and seldom tinged by gentle poetic sentiment toward the unyielding land. Enclosure on this account was the necessary instrument of progress, leading to increased agricultural yields while freeing labor once used inefficiently on the land to power England's industrial revolution instead. Nor need one have a Panglossian view of Enclosure in all dimensions to believe that Clare's plaint was, to paraphrase Karl Marx (a trenchant critic of both Enclosure and pastoral romanticism), idiocy about rural life.²⁹

Be that as it may, the contention persists that "commodification" impoverishes the experience of value by subjecting qualitative and complex relations to market logic; it is hardly restricted to quarrels over the poetic capacity of the English peasantry. Nowadays the same argument is sometimes made about relations to the natural world, in answer to proposals to create property rights in "ecosystem services," which, to critics, makes the natural world as much an instrument of human ends as a household appliance, and thus tends to undercut the cultural practice of valuing nature "for its own sake."³⁰

The anticommodification argument frequently arises in debates over markets in human relationships, whether prostitution or the sale of children, and in parts of human bodies, such as organs.³¹ In these

²⁸ The image is of course intended to suggest a pastoral counterpart to Jeremy Bentham's characterization of rights as nonsense and natural rights as "nonsense upon stilts." Jeremy Bentham, *Anarchical Fallacies*, in John Bowring, ed, 2 *The Works of Jeremy Bentham* 489 (Russell & Russell 1962).

²⁹ See Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in *The Marx-Engels Reader* 594, 608 (Norton 2d ed 1978) (Robert C. Tucker, ed) (referring to the politically and socially divided peasants as having all the class consciousness of "a sackful of potatoes").

³⁰ Spaulding, 16 Stan Envir L J at 312 (cited in note 10) ("[T]he 'organic,' holistic qualities of the resource are lost to commodified consciousness. This loss is particularly troubling and complex with respect to the conversion of environmental quality into a propertized 'resource.'").

³¹ See Radin, 53 Hastings L J at 1126 (cited in note 10) ("We want the legal system to make a commitment to an ideal of noncommodification of love, family, and other commitments close to ourselves."); Fitzgerald, 14 Issues L & Med at 158 (cited in note 10) (describing problems that can arise when genetic technology introduces notions of control and conditionality into parenthood, which run counter to the reality of the parenting experience that is filled with the unforeseeable and uncontrollable); Jefferies, 5 Ind J Global Legal Stud at 622 (cited in note 10) (exploring the effects of the commodification of organ donation).

domains, the claim is that in regarding others as fungible sources of our satisfactions, we accustom ourselves to treating them (in Kantian terms) as means rather than ends, obscuring the individuality and personhood that should command our respect.³² The argument also arises in connection with creative activity (where it dovetails with the objection concerned with the organization of production) in relation to intellectual property. The view that all creative output must be someone's property to create sufficient incentive for further creation seems to its critics to imply a mean and narrow view of human motives—and, indeed, promotes the habit of writing, painting, and singing only when there is a dollar in it.³³

The conventional defenses of property have little to say in answer to this line of attack. They are founded on individual negative liberty and on economic analysis that takes as its axiom the preference-satisfaction-maximizing individual, for whom all the world is, strictly speaking, an opportunity for the fulfillment of his desires.³⁴ Their defenses of property in these terms are extremely powerful; but to the phenomenological critic, they only make matters worse, for they seem to underscore indifference to other, qualitative considerations. To the explanation that a rational agent in a private-property regime is enabled to reap the full economic benefits of exploitation of his land, and thus has maximum incentive to exploit it optimally, the critic is apt to blurt in exasperation, *He would!*

B. The Critique of Expropriation

This critique is captured in another poem treating Enclosure, this one an anonymous piece of incendiary doggerel:

The law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose.
The law demands that we atone

³² See generally Leon R. Kass, *Life, Liberty, and the Defense of Dignity: The Challenge for Bioethics* (Encounter 2002) (arguing in non-Kantian terms that commodifying others demeans their personhood). For a contemporary account of the Kantian ethical view, see Christine M. Korsgaard, *Creating the Kingdom of Ends* 109 (Cambridge 1996).

³³ A different view comes from the singer-songwriter Gillian Welch, who comments on Napster, "They figured it out/That we're gonna do it anyway/Even if it doesn't pay." Gillian Welch, *Everything is Free on Time (The Revelator)* (Acony Records 2001), lyrics available online at <http://www.cowboylyrics.com/lyrics/welch-gillian/everything-is-free-1293.html> (visited Sept 18, 2005).

³⁴ Of course I do not mean to say that neoclassical economists are committed to an empirical characterization of human nature as egoistic. The description of people as self-interested satisfaction maximizers is a methodological axiom, whose strength is intended to lie in its power to generate precise and complex predictions of behavior on the basis of parsimonious assumptions.

When we take things we do not own
 But leaves the lords and ladies fine
 Who take things that are yours or mine.
 The poor and wretched don't escape
 If they conspire the law to break;
 This must be so but they endure
 Those who conspire to make the law.
 The law locks up the man or woman
 Who steals the goose from off the common
 And geese will still a common lack
 Till they go and steal it back.³⁵

This is conceptually the most straightforward of the critiques. Methodologically, it involves none of the heterodox elements of the anticommodification critique. It can be rendered either in Marxist terms,³⁶ or as a rather pessimistic application of public choice theory.³⁷ The spirit of this critique is its insistence on the cynic's question: *Cui bono?* Who benefits?

The critique begins with the definitional observation that programs to expand the domain or intensity of property rights must vest the novel rights in somebody. This point is then joined to a proposal that such reforms in legal regimes tend to come about when they have a constituency—most frequently one that stands to benefit from the change. From these two claims alone, one would expect the expansion of property in many cases to vest new claims in politically powerful constituencies.³⁸

In specific cases, the claim is typically that resources previously held either in informal, often semicommunal arrangements, or else as open-access commons (such as air, water, cultural productions, or information) are “enclosed” to the benefit of some group. In reforms of land tenure, the beneficiary group is often a relatively sophisticated class in a country with a precolonial or colonial land regime of semi-communal property: this narrative of opportunistic reform most closely resembles the skeptical picture of Enclosure.³⁹ As to culture,

³⁵ See Boyle, 66 *Law & Contemp Probs* at 33 (cited in note 3).

³⁶ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* 130–34 (Farrar & Rinehart 1944).

³⁷ See generally Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 *U Chi L Rev* 181 (2003); Banner, 31 *J Legal Stud* 359 (cited in note 13).

³⁸ See Levmore, 70 *U Chi L Rev* at 190–94 (cited in note 37).

³⁹ See Ngugi, 25 *Mich J Intl L* at 500 (cited in note 11) (describing the opportunistic behavior of the Kenyan government in devising a plan that created a “landed African gentry”); Marden, 22 *BC Intl & Comp L Rev* at 280 (cited in note 11) (“The uncompensated ‘harvesting’ of biological resources from developing states can be seen as an insidious new form of colonial-

information, or open-access natural resources previously thought to be inherently public, the beneficiary is generally an industry already sophisticated in the business of exploiting the resource.⁴⁰

C. The Critique of Productive Organization

It's not a water-mill really, labor. It's like the nocturnal
paper-mill pulverizing, crushing each fiber of rag into atoms,
or the workhouse tread-mill, smooth-lipped, that wore down a
London of doxies and sharps,
or the flour mill, faërique, that raised the cathedrals and wore our
hosts of dust-demons,
but it's mostly the miller's curse-gift, forgotten of God yet still
grinding, the salt-
mill, that makes the sea, salt.⁴¹

The point of origin for this critique, as for the poetry of Anne Winters, is Marxist thought, which posited a logic inherent in each stage of technological and social history: to any level of technology there corresponded a way of organizing production.⁴² To that organization, in turn, there corresponded rights in the means of production: slavery and mastery for the irrigation-based empires of East Asia, small-scale ownership for guild-based craft production in Medieval Europe, and in nineteenth-century industrial Britain, the ownership by capitalists of factories, raw materials, and machines, and the ownership by workers of nothing but their hands, their backs, and their waking hours, which they sold to avert starvation.⁴³ A property system was therefore a concomitant—an epiphenomenon, in Marxist language—of the productive, and ultimately of the technological, mode of the era.

ism, since multinational companies reap huge benefits while none of the profits flow back to the states providing the resources.”); James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* 47–52 (Yale 1998) (noting how representatives of colonial powers benefited from surveying and land-partitioning in colonized areas, while natives did not). See also Bridges, Note, 102 Colum L Rev at 124 (cited in note 11) (describing the commodification of fetal tissue and how it ultimately will come at the expense of the poor black female).

⁴⁰ See Boyle, 66 L & Contemp Probs at 36 (cited in note 3) (“In stories about stem cell and gene sequence patents, critics have mused darkly about the way in which the state is handing over monopoly power to a few individuals and corporations, potentially introducing bottlenecks and coordination costs that slow down innovation.”).

⁴¹ Anne Winters, *The Mill-Race*, in Anne Winters, *The Displaced of Capital* 3, 5 (Chicago 2004).

⁴² See Karl Marx, *Manifesto of the Communist Party*, in *The Marx-Engels Reader* 469, 477–78 (cited in note 29) (describing the ever-changing means of production and exchange, particularly that which led by the bourgeois class from feudalism to capitalism).

⁴³ Id at 482 (“All the preceding classes that got the upper hand, sought to fortify their already acquired status by subjecting society at large to their conditions of appropriation.”).

From this perspective, the expansion of property rights into new domains brings the activity of those domains under the direction of the productive imperatives of “the market.” Making traditional farmers into freeholders in an agricultural economy transforms them into small-scale capitalists. Whatever else they have been, they will now be dancers to the market’s tune, producing what consumers (and distributors) demand, enjoying flush years when they gamble correctly at planting time on the slopes of supply and demand at the harvest, tightening their belts when their guesses are wrong.

The equation at the heart of this critique, then, is between property rights and hierarchically organized production. Ultimately, the hierarchy is that of the market itself: those who do what sells thrive, and those who follow their whims—unless they are lucky enough to have whims that coincide with market demand—go broke and eventually go hungry. By adopting this regime, as Yochai Benkler has pointed out, today’s societies have won massive productivity at the cost of most people’s autonomy in choosing the form of productive activity in which they spend their time and energy.⁴⁴ The choice is a creditable one, for the wealth born of productivity increases people’s freedom in innumerable ways; but it is also a tragic one, a purchase of freedom in the coin of freedom forgone.

II. THE FREEDOM-PROMOTING APPROACH TO PROPERTY

A. Adam Smith and His Successors: The Origins and Eclipse of the Freedom-Promoting Tradition

From the long history of thought about property and freedom, I mean to draw a single tradition, which runs from the eighteenth century through today. Its first avatar was Adam Smith, the prophet, advocate, and theorist of one of history’s great expansions of property: the rise of the principle that each person’s labor is an intrinsic quantum of personal property, which she may freely alienate by agreement, provided such agreements are bounded by the right of exit. Smith’s account of an economy governed by these simple principles of “natural liberty,” which channel the axiomatic self-interest of each individual into socially beneficial courses, is famously the foundation of neo-classical economics. Smith is, in consequence, sometimes anachronistically mistaken for a simple free-market libertarian committed to a historically invariant scheme of natural individual rights.⁴⁵ To accept

⁴⁴ See Benkler, 52 *Duke L J* at 1247 (cited in note 12) (describing how the pursuit of productivity and growth limits democracy, autonomy, and equality).

⁴⁵ As Alan Ryan puts it in a passage that exemplifies the received view of Smith:

only this received view of Smith is to overlook the revolutionary advance in freedom that he believed the rise of free labor would bring.⁴⁶ It is in this aspect of his thought, which complements his contribution to the foundations of neoclassical economics, that Smith is the founder of the freedom-promoting tradition in political economy and property thought.

Smith's account of the system of commercial relationships—those founded on private property, mediated by contract, and bounded by exit, without obligations derived from status or inheritance—involved close attention to the dynamics of freedom and domination. For Smith, the significance of market relations for freedom lay precisely in the social consequences of the bargains they facilitated: by diminishing the prerogative attached to tradition and status, and requiring persons to bargain over the terms of their cooperative enterprises, commerce brought the mighty low and elevated the poor, closing the cruel gap in sympathy and self-understanding that feudal and courtly hierarchy produced.⁴⁷

To appreciate this less widely recognized dimension of Smith's commitments, it is necessary first to grasp two aspects of his thought. First, he regarded economies and societies not just quantitatively in terms of their efficiency or productivity, but also *qualitatively*. Any social and economic regime depends on the existence of, and produces, people of a certain kind. Any social and economic regime is thus also a regime of character. The rise of free labor, with its new market negotiations around labor, was also necessarily the rise of a newly dominant form of character, which would both express and undergird the workings of market society.⁴⁸

This view connects liberty and property by arguing that so long as individuals use only what is theirs, they cannot limit the liberty of others. Liberty is maximized, indeed, "natural liberty" [Smith's famous phrase] is unscathed, if everyone employs only what is theirs to employ and refrains from employing what is not theirs. The only way liberty is invaded is by incursions on what is not ours. We have here the classical defense of the "simple system of natural liberty" beloved by Adam Smith.

Ryan, *Property* at 82–83 (cited in note 23). While this does indeed describe a dimension of Smith's thought, it might be more accurate to say that it is a one-sided received view of Smith.

⁴⁶ Valuable recent scholarship on Smith's thought and milieu is well captured in Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (Harvard 2001) (arguing that sentiments, uncertainty, and concern for equality were as much of an issue for Smith as order and reason). Much of the important early work on the rediscovery of Smith's complexity is gathered in Istvan Hont and Michael Ignatieff, eds, *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge 1983). See also generally Alexander Broadie, ed, *The Cambridge Companion to the Scottish Enlightenment* (Cambridge 2003).

⁴⁷ See Adam Smith, *The Theory of Moral Sentiments* 61–66 (Oxford 1976) (D.B. Raphael and A.L. Macfie, eds) (describing how the rich and powerful are the subject of admiration while the poor are neglected, causing the "corruption of our moral sentiments").

⁴⁸ *Id.*

Second, Smith believed that the foundational motive underlying all social relations, including economies, was not a desire for wealth as such, but rather a desire for the *esteem* of one's contemporaries. He put the matter bluntly, demoting wealth-seeking to a derivative position: "It is chiefly from the regard to the sentiments of others that we pursue riches and avoid poverty."⁴⁹ Admiration and emulation pervade social relations, as do their near-opposites—indifference and aversion to the poor and powerless.⁵⁰ To understand the qualitative, or characterological, dimensions of an economy, therefore, one must understand the way esteem works in that economy.

Smith's argumentative strategy was to contrast a social order founded on free labor with two other contemporary orders to show how commodification of personal labor made people at once more free and more fit to be free. Smith's first contrast was between market relations, founded on commodified labor, and a courtly society, in which both sustenance and social relations depended on *status*: substantially inherited positions, each of which carried with it inherent duties, privileges, and rank.⁵¹ In a courtly society, hereditary nobles and high gentry dominated the distribution of esteem. In consequence, those who admired and emulated them became courtiers—sycophants dependent on the whim and favor of their superiors, or in Smith's language, "the fanciful and foolish favour of ignorant, presumptuous, and proud superiors."⁵² In such settings, "flattery and falsehood too often prevail over merit and abilities."⁵³ The search for esteem in a courtly

⁴⁹ Id at 70. The desire for esteem is a consequence of sympathy, or the desire that one's sentiments should be in harmony with those of others, a more complex motivation that Smith treats at length in *The Theory of Moral Sentiments*. He writes:

Nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren. She taught him to feel pleasure in their favourable, and pain in their unfavourable regard. She rendered their approbation most flattering and most agreeable to him for its own sake; and their disapprobation most mortifying and most offensive.

Id at 116.

⁵⁰ Smith writes, "The man of rank and distinction is observed by all the world. Everybody is eager to look at him, and to conceive, at least by sympathy, that joy and exultation with which his circumstances naturally inspire him." Id at 51. The source of this charisma is, somewhat tautologically (or axiomatically, as Smith would have it), distinction itself, the implicit social designation of the high-ranking individual as fit to be seen, "[t]o be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation." Id. Of the poor, Smith writes by contrast: "The poor man goes out and comes in unheeded, and when in the midst of a crowd, is in the same obscurity as if shut up in his own hovel." Id.

⁵¹ See Henry Sumner Maine, *The Ancient Law* 164–65 (Beacon 1963) (Frederick Pollack, ed) ("All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family.").

⁵² Smith, *The Theory of Moral Sentiments* at 87 (cited in note 47).

⁵³ Id.

society is thus a path to degradation: it creates a form of domination in which the subordinate, subject to the arbitrary whim of the superior, adopts tastes, manners, and attitudes to suit his perception of the superior's desires. Smith writes that courtiers "are proud to imitate and resemble [their superiors] in the very qualities which dishonour and degrade them. . . . They desire to be praised for what they themselves do not think praiseworthy, and are ashamed of unfashionable virtues."⁵⁴

Such courtiers cannot even formulate and pursue their own interests and commitments independent of the relations of material and psychic dependence that they inhabit.⁵⁵ This is the classic psychological harm done by dominant-subordinate relationships to the subordinate parties' capacity to exercise freedom.

Smith contrasted free labor regimes with slave societies as well as with status-based economies. This selection of contrasts is striking for what it reveals about Smith's conception of the threats to freedom that confronted his period. The contrast between a society of free labor and a courtly society is one between early modernity and premodernity. However, Smith seems to have regarded the image of a slave society not as a vestige of premodernity, but as a premonition of modernity gone wrong. In his view, slavery, like free labor, could not be understood exclusively along the lines of economic efficiency. Although he regarded slavery as less efficient than free labor because slaves lack the incentive created by a right to the fruits of one's work,⁵⁶ Smith believed that slavery must be interpreted as a social relationship, and so as a system of status and emulation. Slavery appeals to "the love of domination and authority and the pleasure men take in having every thing done by their express orders."⁵⁷ This is the ultimate satisfaction of domination. It is possible only when coupled with the total subjection of a class of persons.

In what sense is slavery emblematic of a possible modernity which Smith wishes to avert? It is central to his characterization of slavery that, despite its inferior economic performance, it is not likely to disappear of its own accord. Rather, the persistence, even the exac-

⁵⁴ Id at 88.

⁵⁵ See Amartya Sen, *Development as Freedom* 74–76 (Knopf 1999) (describing the importance of a person's capability as a form of "freedom to achieve alternative functioning combinations" that can be limited by many life circumstances such as famine or social status).

⁵⁶ See John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 Colum L Rev 1, 5–6 (2003) ("From Adam Smith to Benjamin Franklin to William Lloyd Garrison, leading thinkers in Anglo American tradition viewed the incentives provided by free labor as vastly more efficient than the compulsions and coercions of unfree labor alternatives."). Note that this "was slavery efficient?" argument is all some people get from Smith.

⁵⁷ Adam Smith, *Lectures on Jurisprudence* 186 (Liberty Classics 1982) (R.L. Meek, D.D. Raphael, and P.G. Stein, eds).

erbation, of slavery seemed to Smith to be perfectly compatible with the growth of the defining political and economic characteristics of modernity: republican government and prosperity. Republican governments made up of slaveholders, he argued, were much less likely than monarchies to abolish slavery, because the social standing of the slaveholding class depended on its continued enjoyment of “domination and authority” over its human property.⁵⁸ By contrast, the monarch’s status was independent of any claim on slaves, as he stood categorically apart from even his free countrymen. Indeed, the monarch might even wish to weaken wealthy and independent citizens by liberating their slaves. The slave’s prospects for freedom would thus grow worse as republican liberty advanced in a slaveholding society: “[L]ove of domination and tyrannizing, I say, will make it impossible for the slaves in a free country ever to recover their liberty.”⁵⁹

On Smith’s account, so long as slavery persisted, prosperity would worsen the condition of slaves. The simple reason was that a rich society would have more slaves than a poor society, and thus, to avert the prospect of slave revolts, become a police state, with slaves on the receiving end of the proverbial boot-heel. The more complex reason was that the wealth of the master increased the social, and hence the psychological, distance between him and his slaves. Smith imputed to the relatively poor slaveholder, who worked alongside his chattel, a sympathetic attitude to these bonded creatures who so resembled him.⁶⁰ The wealthy master, however, would lead a life so removed from the experience of the slaves that “he will hardly look on him as being of the same kind; he thinks he has little title even to the ordinary enjoyments of life, and feels but little for his misfortunes.”⁶¹

This analysis led Smith to one of the most arresting passages in his work:

Opulence and freedom, the two greatest blessings men can possess, tend greatly to the misery of this body of men [slaves], which in most countries where slavery is allowed makes by far the greatest part. A humane man would wish therefore if slavery has

⁵⁸ *Id* at 181:

The persons who make the laws in that country are persons who have slaves themselves. These will never make any laws mitigating their usage; whatever laws are made with regard to slaves are intended to strengthen the authority of the masters and reduce the slaves to a more absolute subjection.

⁵⁹ *Id* at 186.

⁶⁰ *Id* at 184 (arguing that slaves and masters in poor countries “eat at the same table, work together, and [are] clothed in the same manner” so that there is “no great difference betwixt the master and slave”).

⁶¹ *Id* at 184.

to be generally established that these greatest blessings, being incompatible with the happiness of the greatest part of mankind, were never to take place.⁶²

The most important word in the passages just quoted is *if*: “if slavery has to be generally established.” The burden of Smith’s argument is that the redefinition of property in human labor, from a world in which some people *are* property to one in which all have it to alienate freely, is foundational. From that choice flows, in some measure or another, nearly everything else.

A key to the stakes of the choice lies, again, in Smith’s characterization of the psychology of slaveholding. Masters love to dominate absolutely, he writes, “rather than to condescend to bargain and treat with those whom they look on as their inferiors.”⁶³ “Bargain and treat” is a striking choice of phrase, echoing as it does Smith’s famous observation of “a certain propensity in human nature . . . to *truck, barter, and exchange*.”⁶⁴ To “bargain and treat” is to “truck [and] barter,” that is, to enter into dealings with others *that they might exit*, to make offers *that they might refuse*. It is a relationship that may contain all sorts of inequality; however, it does not contain prerogative, that essential vehicle of whim and domination.

This difference is the key to the social and economic order that Smith famously endorses: a society of free bargaining and free labor. In the absence of prerogative, and with the consequent right of exit, two people who come together to bargain stand foursquare with each other. The claim each can make on the other is limited by the resources (including the strength and talent) of the one, and by the interest and need (which may of course be abject) of the other. However imperfect this reciprocity, it *is* reciprocity, in contrast to the basic interactions of the other social orders Smith describes. It requires that each address the other as she understands herself, or persuade her to understand herself differently.⁶⁵ It makes much more vulnerable the noble’s or master’s assumption that the social world answers auto-

⁶² Id at 185.

⁶³ Id at 186.

⁶⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 25 (Oxford 1976) (R.H. Campbell, A.S. Skinner, and W.B. Todd, eds) (emphasis added) (noting that this propensity in human nature is the explanation for the principle of division of labor).

⁶⁵ As Smith told his students:

[T]he principle in the human mind on which this disposition of trucking is founded . . . is clearly the naturall [sic] inclination every one has to persuade. The offering of a shilling . . . is in reality offering an argument to persuade one to do so and so as it is for his interest. . . . And in this manner every one is practicing oratory on others thro [sic] the whole of his life.

Smith, *Lectures on Jurisprudence* at 352 (cited in note 57).

matically to his whim. It therefore short circuits the most stark forms of domination, and creates at least the preconditions for what one might call the free development of personality.

I have placed such stress on Smith's discussion of contrasting social orders and their consequences for freedom not to discount the received and straightforward dimensions of his thought, but to augment it. The redefinition of individual talents and labor as personal property famously contributed to the efficient allocation of productive resources, and so increased the aggregate of social wealth with which individuals could develop and exercise their capabilities. It also, in the most straightforward way, liberated those who had been the property of others; the liberation was not comprehensive, of course, but it was categorical. Finally, the rise of free labor set in motion a new social dynamic, in which the psychic satisfactions of domination became harder to pursue, more utilitarian satisfactions came to substitute for them, and a measure of reciprocity (relative to absolute domination) became part of the grammar of social life.

It is my impression that Smith's dynamic view of property and political economy, in which the goals of freedom and efficiency come first, and particular legal instruments are evaluated contextually in light of their ability to promote those goals, gradually ossified into a form of institutional essentialism, in which the legal tools were misidentified as immutable, necessary, even natural, rights.⁶⁶ James May has demonstrated that in the antitrust jurisprudence of the late nineteenth century, judges displayed the profound influence of an account of free-market economies as reflecting "natural" relations of liberty and economic value, which in turn provided a baseline for identifying and correcting deviations into "unnatural" relations.⁶⁷ Gregory Alexander has shown how late nineteenth-century constitutional jurisprudence reflected the same valorization of economic principles derived originally from the aims of the free-labor movement as *in themselves* the primary instruments of securing freedom, rather than potentially dynamic tools of a freestanding (and, of course, potentially evolving)

⁶⁶ For an equally speculative account in line with this proposal, see Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 Am U L Rev 939, 940–67 (1985) (noting that nineteenth-century American economists "emphasize that . . . 'natural, free, and just' outcomes make everyone better off than they could be under an 'unnatural' (or artificial or distorted) system that might be created by interfering with freedom of production and exchange").

⁶⁷ See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U Pa L Rev 495, 561–84 (1987) (noting that prior to World War I, American economic writers "displayed a common belief that economic life ultimately could and had to be understood as arising from the operation of basic, *natural* economic laws") (emphasis added).

conception of freedom.⁶⁸ By the time the second generation of Progressives and the first generation of welfare economists began challenging this body of thought, the target had become so ossified and so identified with its “natural” principles that positing general wellbeing rather than axiomatic rules as the goal of economic and legal policy seemed a radical innovation, rather than a return to origins. It was really only with Sen’s careful rereading of Smith as the precursor to his own form of heterodox, freedom-oriented welfare economics that the continuity became clear, and the later decades of the nineteenth century emerged as a detour into institutional essentialism, and not at all the exemplar of traditional economic thought their critics had imagined them to be.

B. The Conception of Freedom: Amartya Sen

The account of freedom in this Article derives in part from the historical tradition of liberal, reformist political economy discussed in Part II.A, particularly the thought of Adam Smith. It has its most powerful contemporary expositor in the Nobel laureate economist and philosopher Amartya Sen. Sen’s account is notable for its freedom from the usual tics of the genre, such as painstaking examination of the boundary between negative “freedom from” interference and positive “freedom to” do or be one thing or another.⁶⁹ Sen proposes that both negative protections and positive entitlements should be understood in terms of *what they enable persons to do*, that is, the “capabilities” or “functionings” they make possible in a person’s life.⁷⁰ The right against being arbitrarily imprisoned, the right to a subsistence, and the right to participate in one’s political community enable people

⁶⁸ See Alexander, *Commodity and Propriety* at 248–76 (cited in note 20) (noting that, by the end of the nineteenth century, “the Supreme Court’s constitutional property jurisprudence had . . . substantially shifted toward the private commodified understanding”).

⁶⁹ I agree with Sen’s remark:

The question of foundation is a very difficult one to resolve, and it is not very clear what would count as providing an adequate foundation of a substantive moral theory. There is, in fact, some evidence of arbitrary distinction when it comes to evaluation of particular moral theories. Some who find no difficulty at all in intrinsically evaluating “utility,” or “interest” of individuals, or some idea of “equal treatment,” find it intolerably arbitrary to begin with an assertion of rights. But any moral theory would have to begin with some primitive diagnosis of value (even if it is a procedural one in terms of some mythical primordial state), and the real question is whether the acknowledgement of rights cannot play that primitive role. The question is not meant as a rhetorical one. I accept fully that one has to dig for foundations, but there is a substantial issue involved in deciding where to stop digging.

Amartya Sen, *Rights and Capabilities*, in Amartya Sen, *Resources, Values, and Development* 307, 310 (Harvard 1984) (internal citation omitted).

⁷⁰ See id. at 316–17 (“[T]he category of capabilities does come close to being able to reflect freedom in the positive sense.”).

to *do* certain things: make and pursue life plans, form intimate and civic attachments, cultivate their talents, and so forth. They are parts of a form of life, an arrangement of institutions, rules, and practices that together produce or facilitate the capabilities of their members. To be more rather than less free is to enjoy greater capabilities relative to one's potential.⁷¹

Sen introduces a two-part distinction within his conception of freedom, which captures some of the appeal of the "freedom from" and "freedom to" distinction without succumbing to the same intractability. He terms the two, complementary aspects of freedom the *process* and *opportunity* dimensions.⁷² The process aspect guarantees (1) noninterference by others in the making of one's decisions, and (2) noninterference by others in the reasonable pursuit of the projects one has chosen.⁷³ For instance, the ground rules of a market society, in which joint activity is coordinated by voluntary contracts, which are negotiated on the basis of private claims to property and bounded by each party's freedom of exit, provide formal protection of each person's right to do only as she chooses, without unreasonable interference. As Sen points out, the process aspect of freedom is not simply a formal precondition for certain kinds of functioning; rather, it is essentially linked to one of the most important capabilities, the deliberation and self-scrutiny that make our choices *choices*, rather than mere fruits of impulse. As he puts it:

A person is not only an entity that can enjoy one's own consumption, experience and appreciate one's welfare, and have one's goals, but also an entity that can examine one's values and objectives and choose in the light of those values and objectives. . . . We can ask what we want to do and how, and in that context also examine what we should want and how.⁷⁴

⁷¹ Sen has developed this position in many essays. In addition to those just cited, see Sen, *Markets and Freedoms* at 501 (cited in note 13) (analyzing the mechanism of competitive markets from the perspective of individual freedom); Amartya Sen, *Opportunities and Freedoms*, in Sen, *Rationality and Freedom* 583 (cited in note 13) (applying the discipline of social choice to the idea of freedom); Amartya Sen, *Freedom and the Evaluation of Opportunity*, in Sen, *Rationality and Freedom* 659, 659, 664–66, 694 (cited in note 13) (discussing the "opportunity aspect" of freedom, "choice-act valuation," and "option appreciation"); Amartya Sen, *Goods and People*, in Sen, *Resources, Values, and Development* 509 (cited in note 69) (examining the world hunger problem). See generally Sen, *Development as Freedom* (cited in note 55).

⁷² See Sen, *Markets and Freedoms* at 506 (cited in note 13) ("[F]reedom gives us the *opportunity* to achieve our objectives [I]mportance is also attached to the *process* of autonomous choice.") (emphasis added).

⁷³ See *id.* at 507–08.

⁷⁴ Amartya Sen, *Rationality and Freedom*, in Sen, *Rationality and Freedom* 1, 36 (cited in note 13).

The point is not that a highly deliberative or cognitive view of practical reasoning is clearly the “right description” of human activity, but that the *capacity* to reason in this way, and the ineluctable tendency to understand our decisions in terms of better and worse alternatives rather than brute instincts, constitute one of our most significant capabilities, which the process aspect of freedom secures and promotes in a direct manner.⁷⁵

The second dimension of freedom is the *opportunity* aspect. Freedom from interference means little to a person faced with “a choice over three alternative achievements that are seen as ‘bad,’ ‘terrible,’ and ‘disastrous,’” even though from the perspective solely of process freedom, this person will enjoy “exactly as much freedom as [if she had] a choice over . . . three alternative achievements which are seen as ‘good,’ ‘terrific,’ and ‘wonderful.’”⁷⁶ The opportunity aspect of freedom states formally the emphasis on those considerations intuitively linked to functions and capabilities: acting physically, operating socially, and pursuing those projects that one in fact values. Any person’s opportunity freedom encompasses both the *number and variety* of activities and projects actually available to her and the *value* of the alternatives to her in light of her interests and commitments.⁷⁷

Sen’s distinctions cast light on an important conceptual point. Analytically, there are three ways that freedom, understood as capabilities, can be limited. Although they are interconnected in practice, they are conceptually distinct. The first is interpersonal domination: one person’s power to override arbitrarily the wishes and actions, and even to dominate the personality, of another.⁷⁸ The second is a structural constraint: the legal, economic, or political order may limit the *set* of choices available to a person, even though she is unconstrained in her selection among those choices.⁷⁹ This restriction of freedom has as its extreme form a Hobson’s choice, that is, a choice that is no choice at all because it is made—without interpersonal interference—from a set of choices encompassing only one viable option. The extreme but

⁷⁵ On these themes, see generally Christine Korsgaard, *Reflective Endorsement*, in Christine M. Korsgaard, ed., *The Sources of Normativity* 49 (Cambridge 1996) (discussing how humans constantly review their moral choices to see if they “survive reflection”); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard 1989).

⁷⁶ Sen, *Markets and Freedoms* at 515 (cited in note 13).

⁷⁷ See *id.* at 512–23.

⁷⁸ This was of particular concern to Adam Smith, see Smith, *Lectures on Jurisprudence* at 8–9 (cited in note 57) (discussing the importance of reputation as a property right), as will emerge in Parts III.A and IV.B.

⁷⁹ A very productive account of the analytics of this class of constraint appears in David Singh Grewal, *Network Power and Globalization*, 17(2) *Ethics & Intl Aff* 89, 92–93 (2003) (“The network power of a dominant standard converts the freedom to choose freely into the freedom to choose by eliminating the viability of alternative[s].”).

exemplary case is that of a landless worker—in a remote region or a company town—who lacks the resources to leave and must choose between employment on whatever terms the sole local employer offers, on the one hand, or starvation on the other. The choice to accept employment will be voluntary in the sense that it is undertaken without overt interference by another. It will not, however, be a free choice in the sense of one made from a set of more than one viable option.

This second limitation corresponds to an important dimension of context-sensitivity in Sen's account. The level of resources necessary to achieve a given capability may vary enormously from society to society. Thus the "same" structural conditions may result in very different choice-sets.⁸⁰ For instance, appearing in public without shame may in one setting require only a single bolt of cloth, appropriately wrapped and tucked; in another setting (say, a contemporary workplace or school), it requires a wardrobe sufficient for daily variation of one's ensemble over at least a week. Participation in the buying and selling of goods in one setting requires sandals to walk to the marketplace; in an exurban American setting, it requires a car. The list is indefinitely extendable. Thus, to understand the set of viable choices from which a person may in fact choose, it is necessary to know not just the bundle of resources that the person commands, but also what capabilities those resources enable her to exercise in the setting where she finds herself.

The third limitation on freedom is internal: it consists of forms of delusion, inhibition, neurosis, or other impediments to perceiving, acknowledging, or acting on one's preferences or commitments.⁸¹ Self-regard and aspiration, an idea of oneself as an agent with purposes, plans, and interests, is necessary before people can *recognize* the gap between their present level of freedom and their possible level. Domination inhibits the development of such a self-conception, and so produces internal barriers to freedom that complement external barriers. This constraint on freedom is distinct from the objective fact

⁸⁰ See Amartya Sen, *Poor, Relatively Speaking*, in Sen, *Resources, Values, and Development* 325, 336 (cited in note 69) (explaining, for example, that the level of resources necessary to avoid shame and to participate in the activities of a community differs among societies).

⁸¹ The idea in its contemporary form owes something to Sigmund Freud's account of the relationship between consciousness and the unconscious. See, for example, Sigmund Freud, *New Introductory Lectures on Psycho-Analysis* 35–77 (Penguin 2d ed 1991) (James Strachey and Angela Richards, eds) (James Strachey, trans). It also reflects Karl Marx's contention that, under capitalism (as under all previous economic systems) people systematically misapprehend both their genuine interests and their genuine nature. In typically Germanic fashion, "[A]lienated labor makes the species-life of a man a means to his physical existence. The consciousness which man has from his species is altered through alienation, so that species-life becomes a means for him." Karl Marx, *Writings of the Young Marx on Philosophy and Society* 295 (Hackett 1997) (Lloyd D. Easton and Kurt H. Guddat, eds and trans).

of domination or structural constraint: the view of oneself as a person incapable of formulating and acting on interests and commitments needs no objective corollary to inhibit free action.

As Sen puts it:

The most blatant forms of inequalities and exploitations survive in the world through making allies out of the deprived and the exploited. The underdog learns to bear the burden so well that he or she overlooks the burden itself. Discontent is replaced by acceptance, hopeless rebellion by conformist quiet, and . . . suffering and anger by cheerful endurance.⁸²

The freedom-promoting approach seeks to reverse the process Sen describes here. It aims to unsettle the expectation and experience of domination and deprivation so that people can gain insight into the present bounds, and the ultimate potential, of their freedom.

Addressing this last limitation is likely to be the most controversial aim of the program, as it involves distinguishing between people's expressed preferences and their "true" preferences, a move that is epistemically dubious in principle and associated with totalitarian apologetics in practice.⁸³ I take it, however, that Sen's account of how the dominated may fail to recognize such straightforward aspects of self-interest as their own health provides a relatively uncontroversial version of this idea, which one can build on with due caution.⁸⁴

⁸² Sen, *Rights and Capabilities* at 308–09 (cited in note 69).

⁸³ See Berlin, *Two Concepts of Liberty* at 216–26 (cited in note 15) (quoting, for example, Fichte's chilling pronouncement that "[n]o one has . . . rights against reason"). See also generally Jean-Jacques Rousseau, *On the Social Contract* (St. Martin's 1978) (Roger D. Masters, ed) (Judith R. Masters, trans).

⁸⁴ One helpful effort in this direction is in Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in Martha Nussbaum and Amartya Sen, eds, *The Quality of Life* 242 (Clarendon 1993). Nussbaum contends that the cumulative acquisition and exercise of capabilities will lead to a progressive appreciation of those capabilities and of the rights and opportunities that secure and promote them, tending to produce a mild convergence among traditions on the question of how to identify persons' "true interests." Id at 247.

As Jeremy Waldron has noted, positive conceptions of freedom as justifications for property rights (or much of anything else) fell out of fashion in much of the middle and later twentieth century for two reasons. See Waldron, *The Right to Private Property* at 318–22 (cited in note 23). The first was their association, not least through Berlin's famous essay, with totalitarian regimes. Id at 318–19. When those in power claim to have an idea of the true interests of their subjects, which is not falsifiable by the subjects' demurral, they authorize themselves to follow Rousseau's notorious dictum that those who will not embrace their freedom must "be forced to be free." Rousseau, *On the Social Contract* at 55 (cited in note 83) ("Therefore, in order for the social compact not to be an ineffectual formula, it tacitly includes the following engagement . . . that whoever refuses to obey the general will shall be forced to be free."). Any designation of a positive conception of liberty, toward which people ought to strive or be guided, fell under this shadow.

The second was the overwhelming power of utilitarian and then economic accounts of the benefits of private property. The now-familiar account of property's power to allocate resources

These three constraints on freedom, and the corresponding approaches to promoting each dimension of freedom, do not map neatly onto “negative” and “positive” conceptions of freedom. That famous distinction, indelibly associated with Isaiah Berlin, envisages “negative liberty” as “the degree to which no man or body of men interferes with my activity,”⁸⁵ in contrast to the more varied “positive freedom,” which “consists in being one’s own master.”⁸⁶ Promoting a capabilities-oriented conception of freedom involves both securing persons against interference and helping them toward the resources, institutional context, and psychologically significant experiences that undergird “positive” self-direction. Unlike many conceptions of positive liberty, however, the capabilities conception of freedom is not committed to any specific vision of the *content* of positive liberty, that is, an account of how one must live in order to be free. Nor does each aspect of freedom imply a distinct class of remedies, such as “positive” rights to opportunity-enhancing goods or purely “negative” rights against interpersonal interference. Rather, the two aspects of freedom—process and opportunity—and the three domains in which it may be inhibited or promoted—interpersonal domination, structural constraints, and internal constraints—are properly regarded as interwoven parameters that can help one to identify barriers to the realization of potential capacity, and thereby to help identify opportunities for reform that can press back or erase those barriers.

C. Descriptive and Pragmatic Dimensions of the Freedom-Promoting Approach

This Article so far has had more to say about the conception of freedom it promotes than with how that promotion should proceed. In this Part, I move to address this second aspect of the question: what does a freedom-promoting approach to property law *do*? As Michael Heller has written in a related discussion:

Property theory scholarship aimed at reform works cyclically—reasoning from real-world contests over scarce resources, to analytic tools that translate these struggles into useful conceptual terms, to jurisprudential debates regarding the rightness of result-

efficiently and correct incentives by internalizing externalities seemed to do so much, it was unclear what contribution remained to be made by so diffuse and contested a concept as freedom; but if freedom deserved a place, it should be the analytically tractable conception of negative freedom, which is consistent with economists’ chaste attitude to interpersonal utility comparisons and the evaluation of human ends—an attitude somewhat at odds with the more influential theories of positive freedom.

⁸⁵ Berlin, *Two Concepts of Liberty* at 194 (cited in note 15).

⁸⁶ *Id.* at 203.

ing allocations, to practical politics that implement one property regime or another, and then back to the on-the-ground struggles which refuse to hold still.⁸⁷

Similarly, a freedom-promoting approach to property moves from practice to theory and back again, and among the domains within practice and theory: courts, politics, and technology on the one hand; economic, jurisprudential, and philosophical thought on the other.

The freedom-oriented approach tries both to identify and to seize real-world opportunities to promote freedom through reform. To begin with, it looks for *thresholds of technological possibility*. A new technology makes possible new kinds of activity, whether in production, or monitoring, storing and analyzing information, or otherwise. The way in which people and institutions seize on these possibilities may reveal new potential for property regimes, which law can appropriate and advance. Shiller's proposal to draw on finance theory and information technology to create new risk-sharing devices is such an appropriation.⁸⁸ Another is Yochai Benkler's suggestion that open-source software innovations reveal new and untested potential for decentralized production schemes for goods with low capital requirements and high human-capital requirements.⁸⁹

The freedom-promoting approach also looks for *constituencies* whose existing activity and aspirations would support a proposed reform. These may be present users of a new technology or production arrangement. Alternatively, they may be populations presently deprived of capabilities by the lack of an appropriate property scheme. The slum dwellers, whose participation in informal market activity de Soto and his collaborators documented in Peru, are an example of this second sort of constituency.⁹⁰ In either case, such a constituency can play two roles. First, it can provide political support for proposed reforms. Second, it can serve an evidentiary function, as either its present activity—as among technologists—or its present deprivation—as among slum dwellers—will demonstrate the potential significance of the reform at issue.

In addition to technological and political opportunities, the freedom-promoting approach looks for neglected *conceptual* opportunities where the benefits of property regimes have not been extended to domains where they have potential application. De Soto's reform proposal is a textbook example of this sort of conceptual extension. In

⁸⁷ Heller, 2 Theoretical Inquiries in L at 79 (cited in note 5).

⁸⁸ Shiller, *The New Financial Order* at 69–82 (cited in note 2).

⁸⁹ See Benkler, 52 Duke L J at 1245–47 (cited in note 12).

⁹⁰ See Part III.A.

identifying circumstances where conceptual opportunities for expansion are also desirable, it is important to bear in mind the purposes of a property regime. A freedom-promoting approach will seek opportunities to extend property rights in ways that secure and promote capabilities. This lodestone will lead to somewhat different results from an approach that conceives of the benefits of property regimes chiefly or exclusively in terms of, say, either Pareto efficiency or civic virtue.⁹¹

A final dimension of the pragmatic aspect is attention to *cultural* or *ideological* opportunities to reform property rights and corresponding social relations. In any reform project, people's understanding of their existing interests and commitments, and the relative weights they assign these, will be highly important. In the eighteenth and nineteenth centuries, one of the essential projects of the free-labor movement was to present a picture of human dignity that centered on the excellence of free, productive activity and unconstrained exchange.⁹² This was in contrast to earlier aristocratic and quasi-feudal conceptions that identified physical labor and wage employment with dependence and dishonor, and implied a strong hierarchy unfavorable to those who sold their own labor power.⁹³ Today, value reorientation continues. The Creative Commons project sponsors video-collage projects for schoolchildren, seeking to disseminate the idea that freedom to "rip, mix, and burn" the existing artifacts of culture is an essential dimension of creative expression in a digital age.⁹⁴ Both the free-labor movement and the Creative Commons project must be understood partly as efforts to reorient the values people understand to be at issue in property reform, and so to re-infect political and cultural debates over reform.

⁹¹ See generally Amartya Sen, *The Possibility of Social Choice*, in Sen, *Rationality and Freedom* 65 (cited in note 13).

⁹² On the free-labor movement generally, see Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (Oxford 1970).

⁹³ See Gordon S. Wood, *The Radicalism of the American Revolution* 77–92 (Knopf 1992) (providing as an example that Benjamin Franklin turned down a position as a colonel because colonels were supposed to be gentlemen and Franklin could not be one since he was, at that time, still engaged in business); see generally Charles Loyseau, *A Treatise of Orders and Plain Dignities* (Cambridge 1994) (first published 1610) (Howell A. Lloyd, ed and trans) (specifying which individuals have the particular aptitude and capacity to attain either office or lordship).

⁹⁴ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 282–86 (Penguin 2004). The example of the video-collage workshops comes from a presentation by Lessig at the Berkman Center for Internet and Society, Harvard Law School, May 2004.

III. THE FREEDOM-PROMOTING APPROACH AT WORK IN PROPERTY REFORM

A. From Possession to Right: Property as Social Inclusion

In this Part, I present recent proposals that converting customary possession of land and chattels into legally cognizable ownership can provide a keystone of economic and social development. I explain that these proposals, exemplified in the thought of Hernando de Soto, are a prime example of freedom-promoting reform. They are, nonetheless, subject to attack from the perspectives of the anti-expropriation critique and the critique of productive relations. The freedom-promoting approach to property reform helps to answer the critiques by illuminating the power of the proposed reforms to affect a wider range of human capabilities than the conventional defense envisages.

1. De Soto's titling program.

The 2000 publication of Hernando de Soto's *The Mystery of Capital*⁹⁵ created a firestorm of attention, much of it enthusiastic.⁹⁶ The book was speculative, overly ambitious, and eccentric.⁹⁷ Nonetheless, it arose from decades of empirical work on the challenges to economic development in the slum-cities of Peru,⁹⁸ Haiti, and the Philippines, and it contained an exciting promise: the reform of property regimes could spur a near-revolution in economic dynamism and social mobility.⁹⁹

The central empirical claim in de Soto's work is that the world's urban poor are not profoundly materially deprived in the way that is often imagined. While there are, indeed, trash pickers in Buenos Aires and sidewalk dwellers in Mumbai, most dwellers in the slums of the developing world possess small plots of land on which they have erected modest homes. However, they lack legal title to these possessions. De Soto and his fellow researchers have estimated that poor

⁹⁵ De Soto, *The Mystery of Capital* (cited in note 1).

⁹⁶ See Robert J. Samuelson, *The Spirit of Capitalism*, Foreign Aff 205-08 (Jan/Feb 2001) (noting de Soto's influence among economists but criticizing that he "strains too much").

⁹⁷ For instance, de Soto begins a chapter on the wealth-creating power of capitalism with a quotation from Ludwig Wittgenstein's *Tractatus Logico-Philosophicus*, which appears to bear at best an adventitious, semantic relation to his theme. De Soto, *The Mystery of Capital* at 39 (cited in note 1). He compares his focus on the "dead capital" of the urban poor to Michel Foucault's famous decision to diagnose modern forms of sanity through a study of insanity. *Id.* at 49. A vague but persistent note of autodidactic prophecy recurs throughout the book.

⁹⁸ These findings are much more robustly documented as to Peru in de Soto, *The Other Path* (cited in note 1).

⁹⁹ See de Soto, *The Mystery of Capital* at 226 (cited in note 1) (arguing that "when people have access to an orderly mechanism to settle land that reflects the social contract, they will take the legal route" and thus gain upward social mobility).

people in developing and postcommunist countries possess, but do not legally own, real estate worth at least \$9.3 trillion, or twice the 2000 level of the total money supply in circulation in the United States.¹⁰⁰

The consequence of holding property without legal title is incapacity to take advantage of the usual economic and social benefits of property. Informal possessors enjoy the use-value of their real estate, but without legal title they can exchange it or use it as collateral only within the local and informal networks of neighbors in which their possession is recognized. The real estate possessed by the urban poor is, in de Soto's evocative term, "dead capital": there are serious, if not fatal, barriers to its circulation through mutually advantageous exchanges, and thus to its production of wealth for present and future owners.¹⁰¹

De Soto contends that the legal systems of developing countries place such high hurdles before those who would convert their informal possessions to legal title that the possessors can hardly do so. For instance, in the Philippines, an informal dweller on state-owned or private urban land can purchase it legally only by forming an association with his neighbors and applying for a state housing finance program.¹⁰² De Soto and his colleagues estimate that the process would require 168 legal steps, involve fifty-three public and private agencies, and take between thirteen and twenty-five years.¹⁰³ In such situations, it is perfectly rational for slum dwellers to apply a standard discount rate to their prospective income from ownership and conclude that they are better off earning less money now in local and informal activity.

In light of these considerations, the imperative for reformers would seem to be to create efficient means to convert possessory real estate to legal property. The challenge, however, is more complex than simply reducing the number of administrative steps toward the creation of formal property rights. As de Soto acknowledges, governments in the developing world have intermittently and nominally embraced

¹⁰⁰ Id at 35.

¹⁰¹ Id at 32 ("Nobody really knows who owns what or where, who is accountable for the performance of obligations, . . . or what mechanisms are available to enforce payment for services and goods delivered. [As a result], there is little accessible capital, and the exchange economy is constrained and sluggish.").

¹⁰² Id at 20.

¹⁰³ Id. In Egypt, the same process would involve seventy-seven administrative procedures at thirty-one public and private agencies and take five to fourteen years—sufficient explanation in terms of economic rationality for the decisions of 4.7 million Egyptians to build their homes illegally. Id at 20–21. In Haiti, a dweller on public land who wants to purchase it from the government must first spend over two years completing sixty-five administrative steps gaining permission to lease the land for five years; continuing to purchase the land requires another 111 administrative procedures over some twelve years. Id at 21.

that goal for more than a century.¹⁰⁴ Certain of these policies, of course, are the ones whose seemingly interminable procedures de Soto has used to make his point that ownership is nearly inaccessible to the poor. Others, however, have been less burlesque in their bureaucratic tangles, yet have still failed.¹⁰⁵

De Soto contends that the fatal error in the unsuccessful programs is failure to align new property titles with existing patterns of possession, that is, a false assumption that new titles can be written on a *tabula rasa*. On the contrary, he insists, existing customs of possession are elaborate and quite specific, and those who live by them will resist attempts to create new legal rights that conflict with customary ones. On this account, then, to succeed reformers must enshrine rather than revise customary rights, thus drawing customary possession into the formal asset markets from which participants in local, customary regimes are excluded.

2. Titling: the critiques and the freedom-promoting response.

The aim of de Soto's scheme is integration into a system of rights, where membership means a set of capacities otherwise lacking. The scheme is subject to two of the critiques of property: the critique of productive organization and the anti-expropriation critique. Joel Ngugi has recently made both points against de Soto and allied reformers, taking as his example a property-titling program in Kenya.¹⁰⁶ Ngugi contends that land registration schemes necessarily impose an authoritative

¹⁰⁴ See *id.* at 153–206 (arguing that these attempts have failed because the developing countries' governments operate under faulty assumptions such as that people take part in extralegal markets to avoid taxes and that existing extralegal contracts can be ignored). As he does not note, the same goal was a keystone of British economic reform in the colony of Bengal in the very first years of the nineteenth century. That reform, like many that followed, is generally regarded as a complete failure. The first major contemporary treatment of this scheme and its intellectual backdrop remains the most important one. See Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Orient Longman 1981). A fascinating critique of the program from the perspective of a nineteenth-century utilitarian radical comes in James Mill, *The History of British India* 515–20 (Chicago abridged ed 1975) (William Thomas, ed) (noting, succinctly, that the British land reform project “has completely failed”).

¹⁰⁵ See de Soto, *The Mystery of Capital* at 165–75 (cited in note 1) (noting that constitutionally and legislatively backed mandatory property systems have failed in Peru as well as many formerly communist states).

¹⁰⁶ See Ngugi, 25 *Mich J Intl L* at 471 (cited in note 11). Ngugi's criticism, with its picture of a liberal rights regime imposed from without on a communitarian society, put him in the tradition of Karl Polanyi, the great critical student of the rise of laissez-faire capitalism and its attendant claim of merely perfecting natural human relations. See generally Karl Polanyi, *The Great Transformation* (cited in note 36). For a creditable update of Polanyi's thought in relation to neoliberalism—with which de Soto is justly associated—see John Gray, *False Dawn: The Delusions of Global Capitalism* 12–14 (Granta 1998) (discussing the relevance of Polanyi's work in the modern world).

legal interpretation on customary practices. This interpretation in turn reflects the specific vision of development that the reformers hold. Such reform is therefore an inherently ideological project, and not simply a matter of giving the law's imprimatur to extant and unproblematic custom. Ngugi contends specifically that in Kenya, the Blackstonian fee-simple tenure that was assigned the new owners in that country's registration scheme significantly distorted traditional customs. For instance, the reform program assigned title to the male head of each household, a rule that Ngugi asserts lacked a basis in Kenyan custom.¹⁰⁷

This argument forms the backdrop of Ngugi's application to Kenyan reform of the anti-expropriation critique and the critique of productive organization. On Ngugi's account, Kenyan reform redistributed considerable property rights to the influential and sophisticated social groups that initiated and administered the reforms. In this respect, Kenyan reform was an instance of the opportunism envisioned in the anti-expropriation critique. The reform also drew the new fee-simple landowners into the economy of commodity production for regional and global markets. Assignment of legal title took assets out of the semicooperative social schemes of small communities in favor of the abstract, self-interested relations of the market. Kenyan reform thus also imposed a specific order of productive activity, as the critique of productive relations claims.

De Soto provides part of the answer to both critiques himself. The response to the anti-expropriation critique is straightforward. As already noted, he makes it a cardinal point of his program, in contrast to what he characterizes as failed efforts in the same vein, that reformers must ensure that their titling programs closely track existing possessory rights. The extent to which this aim succeeds in any specific setting will be an empirical one; despite Ngugi's claim that such tracking is impossible in principle, the critique will have any real bite only as to particular applications, not as to de Soto's program in general.

De Soto also responds to the critique of productive organization. He contends that most poor possessors of land and homes strive to engage in market activity even without legal title, but are relegated to

¹⁰⁷ See Ngugi, 25 Mich J Intl L at 487 (cited in note 11). Ngugi also contends that de Soto's forecasts of dramatic changes in actual economic activity following titling are not empirically supported—a claim that Ngugi's cursory discussion does nothing much to resolve. See id at 526 (stating that the experience of registering land in Kenya indicates that “processes [imagined] to be ‘merely technical’” in fact “usher in unanticipated economic and political responses” rather than “translate into economic consequences in a unilateral fashion”).

informal or “shadow” economies by their lack of legal title.¹⁰⁸ Therefore, the formalization of title does not induce a new form of life, but rather advances projects and aims that informal possessors already seek to pursue. Where people already aspire to participate in a particular order of productive relations, observing that a reform enables them to do so is hard to characterize as an incisive critique of the reform.

To the extent all this is true, it is a substantial response. Nonetheless, there is more to say. The freedom-promoting perspective helps to identify and articulate the terms of a fuller response than de Soto’s. By virtue of his narrowly economistic picture of the capabilities that ownership is meant to provide the new owners, de Soto invites the critique of productive relations. De Soto’s image of the integration of the urban poor into a national and global scheme of asset and capital exchange is a celebrator’s—or apologist’s—mirror image of the unfriendly picture sketched by critics of the implications of market-oriented property schemes for the organization of production. De Soto’s self-restriction to these terms is a symptom of his intellectual isolation from the freedom-promoting tradition in law and political economy.

A fuller defense of a program such as de Soto’s would not focus exclusively on the very real capabilities that arise from the legal power to enter into national and global market relations. Instead, a fuller defense would also attend to the full complement of capabilities, many of them subtler but no less valuable than market access, that ownership offers. The move from possession to ownership can mean a passage from profound vulnerability to at least partial autonomy and command of reciprocity. For instance, slum dwellers who possess what they do not own are vulnerable to expropriation or destruction of their holdings at the whim of government officials and the wealthy citizens whose bidding those officials typically do. They occupy relatively subordinate and vulnerable positions in relations with better-established members of society. In both respects, uncertainty and subordination tend either to perpetuate inherited hierarchies or to produce and reinforce new ones.¹⁰⁹

A properly designed and executed property scheme may indeed constrain new owners in their choice of productive activities. At the

¹⁰⁸ This contention is more impressively documented than most aspects of de Soto’s position; in his earlier book *The Other Path*, de Soto presents the results of extensive empirical studies of informal markets in Peru. See de Soto, *The Other Path* chs 2–4 (cited in note 1) (studying, inter alia, the Peruvian black markets for housing, trade, and transportation).

¹⁰⁹ See Kalpana Sharma, *Rediscovering Dharavi: Stories from Asia’s Largest Slum* xx–xxxviii (Penguin 2000) (outlining the development and growth of a group of ghettos in Dharavi). See also generally Rohinton Mistry, *A Fine Balance: A Novel* (Knopf 1996).

same time, however, it may contribute to their emancipation from a variety of subtle and overt constraints on their freedom, which go well beyond inhibitions on free exchange and investment—which are at bottom only powerful tools for the promotion of capabilities. One must have the full range of freedoms and constraints in view to make an appropriate criticism—or defense—of property-reform programs. From this broad perspective, de Soto's proposal presents alternatives akin to those that structured Adam Smith's argument: on the one hand, a society of relative vulnerability and incapacity; on the other hand, a society of relative security and capability. De Soto's isolation from the freedom-promoting tradition impoverishes his account of his program and allows his critics rather too simple a line of attack, when more subtle considerations should inform both sides of the debate.

This is not the place for a full evaluation of de Soto's work. The view that expansion of rights in real property can enhance freedom should not be hostage to the eccentricities or limitations of a single, highly visible figure. In presenting de Soto's position, I have intended as much as anything to sketch a *kind* of expansion of property, concerned with converting potential assets to legally cognizable assets, and thus enabling newly titled owners to operate legally and economically as they could not otherwise do. I have also intended to show how much the full scope of the freedom-promoting tradition can contribute to the proper formulation and evaluation of such a program.

Even at its best, however, such a scheme has two distinct limitations. First is Mark Twain's famous remark that land is no longer being manufactured. There are inherent limits on a program based on allocation of a finite resource. Second, freedom to enter into market relations produces vulnerability as well as capacity: it means being subject to the sometimes devastating vagaries of markets, whose power to wreck economies and lives seems to grow with their scale.¹¹⁰ It is with these two points in mind that I turn to a second model of freedom-promoting property reform, one intended to mitigate the vagaries of markets, and which is much less reliant on a limited stock of physical materials.

¹¹⁰ See Joseph Stiglitz, *Globalization and Its Discontents* 89–165 (Norton 2002) (discussing the economic hardships created by the forced inclusion of Asia and Russia in the global economy); *A Decline Without Parallel*, *Economist* 26–27 (Mar 2, 2002) (chronicling the political and economic distress in Argentina); Richard Borsuk, Jay Solomon, and Darren McDermott, *Shock Waves: Indonesia Falls Prey to Hoarding, Loss of Public Confidence*, *Wall St J A1* (Jan 9, 1998) (reporting on Indonesia's economic troubles, including the drastic fall in the rupiah).

B. Property, Risk, and Freedom

In this Part, I present Robert Shiller's proposal to distribute risk through complex contractual arrangements. This proposal would enhance capabilities by diminishing the inhibition that structural shifts in the economy impose on vocational choice through their exogenous effect on long-term income. I argue that Shiller's proposal also answers two critiques of property. It responds to the critique of productive relations by showing how intensified property rights can provide more, not less, choice among vocations, that is, among kinds of productive activity. It answers the anticommodification critique by showing how intensified commodification of personal attributes can strengthen, not diminish, the bases of social solidarity.

1. Shiller and the critique of productive relations.

In his 2003 book, *The New Financial Order*,¹¹¹ Shiller provides a *summa* of more than a decade of work on the analysis and management of risk. Shiller seeks to identify and promote new ways to remedy the most significant constraints on freedom in an era of free labor.¹¹² That is, he aims to complete Smith's project of promoting autonomy through self-ownership by addressing the points where that project fails on its own terms. Shiller's starting point—on an uncharacteristic note for a mainstream economist—is Karl Marx's central observation about the free-labor economy:

[P]eople's ability to earn income by selling their own labor in a free market is ultimately determined by what they can contribute to the production process. Changes in their ability to earn income from their efforts are thus fundamentally tied up with changes in the technology of production.

...

[T]he dilemma people face [is] that their labor is essentially worthless when not combined with other factors and thus that their incomes are at the mercy of others who have access to these factors.¹¹³

This is, of course, the heart of the critique of productive organization: private property and market relations restrict our choices of productive activity even as they make new choices possible. According to

¹¹¹ Shiller, *The New Financial Order* (cited in note 2).

¹¹² *Id.* at ix ("Application of these ideas will not only help reduce downside risks, but will also permit more positive risk-taking behavior, thereby engendering a more varied and ultimately more inspiring world.").

¹¹³ *Id.* at 32, 34.

Shiller, this dilemma becomes more severe in proportion to the dynamism of the economy: the rate at which new technologies eclipse old ones, industries cross borders to take advantage of inexpensive labor, and economic life otherwise rearranges itself to allocate resources to their highest-value uses.¹¹⁴ This acceleration affects individuals' ability to earn income—and to exercise their talents in productive or satisfying fashion—in two ways. Most simply, structural changes in the economy—those that make steelworkers or electronics engineers obsolete, for instance, or depress real wages for manufacturing jobs—represent exogenous shocks that reduce the employment prospects, wages, and mobility of whole sectors of the population. More subtly, recognition of uncertainty inspires risk-averse career decisions: to borrow an example of Shiller's, a college graduate considering whether to undertake graduate training in a highly specialized area of biotechnology confronts an enormous upside akin to the experience of top-flight computer programmers in the 1990s, contingent on the oft-predicted explosion of biotechnology industries; but she also faces the prospect of over-credentialed obsolescence imposed by some unpredictable wrinkle in technology development or industry structure.¹¹⁵ Facing a significant downside with no way to hedge against it, she is likely to forgo the risky course.

Such uncertainty diminishes freedom in at least two ways. First, by inducing risk-averse decisions like that of our hypothetical biotechnician, the risk of exogenous shocks narrows the domain of viable alternatives from which people choose their life paths. To be denied viable alternatives is to be restricted along an important dimension of freedom. Second, the risk-averse decision to avoid specialization, multiplied over a generation of decisionmakers, will affect the arc of technological and economic development. It may prevent advances that would otherwise have occurred. Such advances would increase the capabilities of everyone who benefits from a new technology; where the advance does not take place, neither does the enhancement of capabilities.¹¹⁶

Shiller's response to these problems is a refinement in the technologies of risk management. Pooling risk to limit the effect of misfor-

¹¹⁴ See generally *id.* For discussions of this phenomenon in a global economy, see Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Anchor 2000); William Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism* (Simon & Schuster 1997).

¹¹⁵ See Shiller, *The New Financial Order* at 107–13 (cited in note 2).

¹¹⁶ See Sen, *Markets and Freedoms* at 501 (cited in note 13). I discuss this issue more systematically in Jedediah Purdy, *Efficiency, Freedom, and Degradation: Normative Standpoints for Evaluating Technological Innovations* (unpublished manuscript on file with author) (arguing that Sen's capabilities approach is the best lens through which to evaluate technological developments).

tune on individuals, from the corporation to the insurance industry to public financing of health care, is an exemplary modern advance in security—and so also in freedom, in the capabilities sense.¹¹⁷ Risk pooling, however, is dogged by the problem of moral hazard—the tendency for insurance to affect the behavior of the insured in ways that increase the likelihood of the bad outcome the insurance protects against, by reducing the consequence of that outcome for the insured individual. Moral hazard has seemed particularly threatening in the area of income supports, the kind of insurance that would protect a steelworker or biotechnologist against adverse exogenous shifts in employment prospects. With a guaranteed income support, the insured has incentive to find a low-stress, low-paying job, collect her income-insurance check, and devote her energies to pursuits other than employment.

The mechanism Shiller proposes to solve this problem is a new form of index that would track increases and decreases in income not for the insured individual, but for the relevant employment sector: biology Ph.D.s, genetic specialists, patent attorneys, physical therapists, and so forth. An individual's claim on an insurance pool would depend not on a decrease in her individual income, but on a decrease in the income of her sector.¹¹⁸ The mechanism for applying such an index could take several forms. The prospective student might take out loans whose repayment rate would fall with a decline in the sector for which she was trained, but rise with the health of the sector, so that the lender would effectively be investing in the future earnings of that sector. More ambitiously, members of different sectors might hedge against exogenous shocks to their sectors by investing in other sectors, so that a pool of patent attorneys might contractually commit to contribute a share of income in excess of ex ante expectations to making up any deficit relative to ex ante expectations in the income of a pool of biotechnologists, and conversely.¹¹⁹ The level of ex ante expected income would be set by the market in such contracts. In effect, each investor in such an insurance pool would be using her own perceived earning potential as collateral to secure a claim on the earning potential of those in different areas of the economy, thus reducing the vulnerability of her income to structural changes beyond her control. The aggregate character of the income measure would avert the problem of

¹¹⁷ This is to be contrasted sharply with the “ownership society” policies recently promoted by the current Bush administration, which are marked by a commitment to reconcentrating risk in individuals and families. See, for example, Robert B. Reich, *What Ownership Society?*, American Prospect (online edition) (Sept 2, 2004), online at <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=8447> (visited Sept 18, 2005).

¹¹⁸ Shiller, *The New Financial Order* at 110–20 (cited in note 2).

¹¹⁹ *Id.*

moral hazard: no one person's deliberate reduction in income could meaningfully increase her claim on the insurance pool, as it would not perceptibly affect the governing index.¹²⁰

I have argued that Shiller's proposal would advance freedom understood as capabilities by addressing one of the signal limitations of a free-labor economy: the vulnerability of the individual with property in her own talents and energy to structural shifts in labor demand. Shiller's scheme is thus a significant attempt to remedy one of the critiques of property that I discussed in Part I.C: the critique of productive organization.

2. Shiller and the anticommodification critique.

Shiller's proposal also responds to the anticommodification critique of property. That critique identifies the expansion of property rights with the growth of atomistic and instrumental conceptions of personhood. Shiller's program shows how intensified commodification of persons could have just the opposite effect: the promotion of social solidarity.

Let us begin with the characterization of Shiller's program as one in property. It is an elementary premise of the economic theory of property that one of the independent variables affecting the density and refinement of property rights is the cost of delineating and monitoring a unit of property.¹²¹ The boundaries of a representative unit of property, on this account, will fix at the point where the benefits of propertization are equal to the costs of definition and monitoring. If definition and monitoring were costless, efficiency gains would dictate an intensified, or finer-grained, set of property rights.¹²²

¹²⁰ Id at 112–13. This form of privately contracted income insurance is one of a variety of mechanisms Shiller proposes. Among the most ambitious is an imagined contract between countries or pools of countries, in which the sovereigns would commit to future payments based on their levels of economic growth relative to ex ante expectations. Id at 175–85. The scheme would enable a wealthy but aging country, such as Germany, to plan some of its future pension payments around returns from the aggregate growth of, say, the countries of South and Southeast Asia, while insuring those countries against disappointing performance or, most pertinently, massive exogenous shock. Such an arrangement would, for instance, have cushioned the Southeast Asian countries against the devastating effects of the 1997–1998 financial crisis, which brought massive unemployment and, in the case of Indonesia, a corresponding political crisis whose consequences are still unfolding. I want to focus on the model of privately contracted, aggregate income insurance, however, both for reasons of economy and because it is potently related to the theme of property and freedom.

¹²¹ See Smith, 31 J Legal Stud at 462–67 (cited in note 13); Terry L. Anderson and P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J L & Econ 163, 164–68 (1975).

¹²² It is helpful to bear in mind the limitations of such purely demand-driven accounts of the creation and reform of property rights, which neglect the collective-action problems associated with creation and enforcement of new regimes. For a succinct expression of these concerns and discussion of ways of integrating governance models into the analysis, see Katrina M.

From this perspective, Shiller is describing a technological innovation that substantially reduces the monitoring costs for a unit of property in an individual's future earnings. The difficulty of such monitoring has historically pressed the propertization of productive labor in the direction of either units of present time—typically hours—or units of labor, whether dresses sewn or manuscripts produced. There was scant movement toward enabling one person to buy a share of another's future earnings at a price reflecting present expectations. When imagined, such schemes were typically set aside as morally distasteful, no doubt because of the difficulty of imagining that they could work without fine-grained monitoring of activity.¹²³ Shiller's innovation solves the monitoring problem by moving not *closer* to the individual through fine-grained monitoring, but *farther* from her by relying on aggregate measures of shifts in sectoral income.¹²⁴ The effect is a new potential to treat earnings expectations as presently fungible property at relatively modest monitoring cost. The "holder" of the expectations can exchange them for value and thus contractually take advantage of present potential by purchasing some protection against future misfortune. Without such propertization, potential remains only potential, an insubstantial point of contrast with actual outcomes, which makes intelligible that cruelest assessment, that one has "a great future behind him."

How does this scheme address the anticommodification critique? That critique, recall, holds that the commodifying of human talents and energies undermines social solidarity and other nonmarket bonds by "crowding out" intimate relationships or training people to regard others as investments and opportunity costs, blunting the moral and emotional apprehension of them as human beings like oneself. It is true that a certain kind of commodification of persons—exemplarily that of free-labor reform—can be regarded as having this effect. My attempt to show the moral depth and social complexity of what reformers such as Smith aimed to accomplish does not negate this point. The ambition of free labor was to break people out of oppressive status relationships. The theoretical corollary to this aim was a picture of the rights-and-interests-bearing person as distinct, integral, and in certain respects potentially self-sufficient.¹²⁵ Such emancipatory doc-

Wyman, *From Fish to Fur: Reconsidering the Evolution Toward Private Property* (unpublished manuscript on file with author).

¹²³ See Milton Friedman, *Capitalism and Freedom* 103 (Chicago 1962) (describing a similar scheme for education, in which the lender would "buy" a share in the student's future earning prospects, and stating that such schemes "are economically equivalent to . . . partial slavery").

¹²⁴ Shiller, *The New Financial Order* at 109–10 (cited in note 2).

¹²⁵ Richard Tuck has offered a fascinating argument that social contract theory derives from the theory of international relations, and that the model of the agent supposed in contractarian

trines tend to have hard edges: they are meant to break things, specifically, embedded and oppressive relationships.

Shiller's program is different in one critical respect. It promotes an image of the individual not as the sole mistress of her talents and her fate, but rather as vulnerable to a variety of social and economic forces that she cannot control. Taken together, an emphasis on the pervasive power of risk to redirect life-paths; a valorization of institutions that can mitigate such risk; and the literal intertwining by contract of the long-term fates of otherwise disconnected persons present a very different picture of personhood and society from that of the stereotyped, atomized individual of the liberal economy and polity. From the standpoint of freedom-enhancing risk reduction, each person is an initiative taker, but is also profoundly vulnerable. Her talents are her own, but she best realizes them by agreeing to share their fruits with others, and in turn to take a share of those others' weal or woe. Her freedom, in other words, is tied at every point to the freedom of others, and the tighter (in this respect) her bonds with them, the freer she is. Autonomy and solidarity are mutually reinforcing, because only solidarity enables people to resist the coercion, not of other individuals, but of enormous and anonymous shifts in the operation of economic life. Smith's definitional reform of property rights sought to promote a life immune to the arbitrary and vindictive will of others. The latest step in such a program would promote immunity to the economic tectonics that are the whimsical and cruel Fates of our time.

Let me be very clear about what I mean to argue here. My point is not that the fact of being joined in risk-sharing pools with others increases the sentiment of solidarity, so that we feel essentially aligned with other members of, for instance, our health maintenance organization. This would be a psychologically implausible claim, to say the least. I mean rather that the kinds of social arrangements we make to manage risk teach lessons about how we can reasonably expect our lives to go, and also about the kinds of beings we are. A society that ignores risk, assuming that everyone gets what she deserves, imparts a vision of the person as mistress of her fate, subject only to her own lack of will or merit. A society that makes elaborate provisions for risk, which in both their rationale and their operation acknowledge that we are deeply subject to forces we do not individually control, teaches a les-

theory is in fact an image of the state as an actor. See Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* 8–9 (Oxford 1999) (arguing that sovereign states interacting in the domain of international relations provide a “real and imaginatively vivid example” of the “liberal agent” or “wise man” of ancient and Renaissance moral philosophy, who “will eliminate from his personality many of the features which we regard as familiar—such things as passions, desires, and intellectual commitments”).

son of inevitable interdependence, in which only solidaristic measures can protect individuals from merciless buffeting. Such lessons cannot address the deepest concern of the anticommodification critique: they cannot induce us to govern our relations by love. They can, however, teach us to regard our prospects as essentially tied to those of others, and to regard solidaristic policies that spread risk as the best response to this obdurate feature of our circumstances. This is a substantial response to the claim that commodification robs relations to others of value by making us self-owners—selfish, self-seeking, and indifferent to the wellbeing and concerns of others.

C. The “Copy Left” and the Freedom-Promoting Approach

Legal scholarship’s most explicit and ambitious engagement with the political economy of freedom is in debates over the future of intellectual property. In this Part, I explain how the agenda of the “copy left” intellectual property reformists advances two dimensions of freedom: the capability to participate in the democratic debate of an increasingly visual culture and the capability to influence the technological and social structures that, in turn, frame individuals’ choices among forms of productive activity. I also argue that recognizing the common cause between “copy left” scholars and activists and the freedom-promoting tradition in property would help participants in this and other areas of reform to understand themselves not just as disparate tinkerers and malcontents, but as a movement.

The debate over intellectual property as a problem of freedom has recently gained new visibility with the appearance of Yochai Benkler’s important work on the political economy of peer production and the publication of Lawrence Lessig’s *Free Culture*.¹²⁶ The body of freedom-oriented intellectual property scholars has been branded the “Copy Left” by the *New York Times Magazine*, ever a reliable observer and creator of cultural currents.¹²⁷

Several distinct conceptions of “freedom” inform intellectual property debates.¹²⁸ Lawrence Lessig’s treatment of copyright law in

¹²⁶ See Lessig, *Free Culture* (cited in note 94) (criticizing the expansion of intellectual property rights at the expense of the public domain); Benkler, 52 Duke L J at 1254–60 (cited in note 12).

¹²⁷ See Robert S. Boynton, *The Tyranny of Copyright?*, NY Times Mag 40 (Jan 25, 2004).

¹²⁸ As James Boyle presents the question,

The assumption is that [upon appropriate reform] we will return to a norm of freedom, but of what kind? Free trade in expression and innovation, as opposed to monopoly? Free access to innovation and expression, as opposed to access for pay? Or free access to innovation and expression in the sense of not being subject to the right of another person to pick and choose who is given access, even if all have to pay some flat fee? Or is it common ownership and control that we seek, including the communal right to forbid certain kinds of uses of the shared resource?

Free Culture chiefly addresses the cultural and political stakes of “semiotic democracy,”¹²⁹ or, in the formulation I prefer, free speech for a visual age. The rise of sophisticated and inexpensive digital technology enables individuals to “rip, mix, and burn” visual elements of the common culture for satirical, editorial, or simply expressive purposes. The same technologies, however, also facilitate monitoring by copyright owners to block newly possible expressive uses. Conjoined with expanded copyright protection, these developments mean that people are prohibited from exercising substantial capabilities they would otherwise enjoy, that is, their expressive and political freedom may be significantly restricted.

The capability to join in the hurly-burly of visual culture is all the more important because of the continuing movement of American popular and political culture from verbal to visual expression. One has only to read Abraham Lincoln’s career-making address on slavery and the Constitution at New York City’s Cooper Union—a text that reads today like an uncommonly articulate law review article, but which elevated Lincoln to stardom in the young Republican party—to understand how much has changed.¹³⁰ Such a speech would today be impossible, while the manipulation of spectacle—witness President George W. Bush’s then-popular but ill-fated arrival on an aircraft carrier under the banner proclaiming “Mission Accomplished,”¹³¹ Michael Dukakis’s devastating ride in a tank,¹³² or Bush’s facial expressions during the first presidential debate of the 2004 general election¹³³—is the common currency of politics.

Boyle, 66 L & Contemp Probs at 58 (cited in note 3).

¹²⁹ The term is attributed to the cultural theorist John Fiske, and is now in wide currency in discussions of intellectual property and politics. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Digital Age*, 79 NYU L Rev 1, 3 (2004) (arguing that digital technologies alter the social conditions of speech and therefore the focus of free speech theory should shift from protecting the democratic process to a larger concern with protecting and promoting a democratic culture). For a critical view of such theories of the public domain from a postcolonial perspective, see Anupam Chander, *The Romance of the Public Domain*, 92 Cal L Rev 1331, 1334–35 (2004):

By presuming that leaving information and ideas in the public domain enhances “semiotic democracy”—a world in which all people, not just the powerful, have the ability to make cultural meanings, law turns a blind eye to the fact that for centuries the public domain has been a source for exploiting the labor and bodies of the disempowered—namely, people of color, the poor, women, and people from the global South.

¹³⁰ See Abraham Lincoln, *Address at Cooper Institute, New York City*, in *Abraham Lincoln: Speeches and Writings 1859–1865* 111 (Library of America 1989) (Don E. Fehrenbacher, ed.).

¹³¹ See Jim Rutenberg, *The Ad Campaign: Kerry Invokes Bush’s Carrier Landing to Emphasize Points*, NY Times A18 (Nov 11, 2003).

¹³² See Frank Rich, *How Kerry Became a Girlie-Man*, NY Times sec 2 at 1 (Sept 5, 2004).

¹³³ Patrick E. Tyler, *The 2004 Campaign: Global Reaction; As the World Watched the Debate, Some Saw a New Race*, NY Times sec 1 at 34 (Oct 3, 2004).

Although I have my worries about the desirability of this change, my point is not to tell a tale of decline, but to point out how the change affects the cultural stakes of intellectual property. In an age of visual politics, the ability to use clips of presidential television appearances, musical soundtracks, ad logos or advertising slogans, and other rip-and-mix materials for political and cultural commentary is as essential as free access to the dictionary was for pamphleteers in the eighteenth century. Review the widely watched satirical video of George W. Bush and Tony Blair as mutually enamored young lovers¹³⁴ or Jon Stewart's collage of President Bush's statements on foreign policy in 2000 and 2004 in an acrimonious debate between Bush the isolationist and Bush the Wilsonian expansionist,¹³⁵ and consider what it would mean for the satirists to lack access to these materials. What if King George had owned the words "tyranny" and "liberty," and the American colonists had been obliged to proceed in their pamphleteering without these and other essential terms? (Indeed, what is censorship but a crude and often brutishly enforced form of semiotic monopoly?)

Ripping and mixing changes the structure of cultural production from one in which a few companies produce spectacles that everyone else consumes, to one in which many decentralized creators vie with each other for the attention of many disparate audiences. The result is not a Habermasian Enlightenment salon, nor one of the idealized town meetings of deliberative democracy.¹³⁶ It is, however, less hierarchical and centralized than the present arrangement.

It is also, perhaps, less likely to train its audience in passivity, as each viewer is also a potential creator and commentator. That is a democratic advance in the tradition of free speech, even if it has less to

¹³⁴ The video clip, accompanied by the song "Endless Love," is available online at <http://www.snapsandbytes.co.uk/video38.html> (visited Sept 18, 2005).

¹³⁵ The clip from *The Daily Show*, included in a presentation by Larry Lessig at the Berkman Center for Internet and Society at Harvard Law School, is available online at <http://www.lisarein.com/videos/tvclips/dailyapril2003/4-28-03-bushvbush-sm.mov> (visited Sept 18, 2005). The use of "Wilsonian" is relatively standard in referring to the ambition of remaking the world's politics in a liberal, democratic, and capitalist image, but I am specifically indebted to Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (Knopf 2001) (arguing that American foreign policy over the past two centuries has succeeded astonishingly well, and identifying four schools of thought—the Hamiltonian (protection of commerce), Jeffersonian (maintenance of a democratic system), Jacksonian (populist values, military strength), and Wilsonian (moral principle)—that have interacted to produce better policy than any single one would have achieved alone).

¹³⁶ See generally Amy Guttmann and Dennis Thompson, *Democracy and Disagreement* (Belknap 1996) (outlining ways in which fractious democratic societies deliberate complex and divisive issues); Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT 1989) (Thomas Burger and Frederick Lawrence, trans) (describing the development and decline of "the public sphere").

do with systematic presentation and assessment of reasons than with the opportunity of ordinary citizens to portray the emperor unclothed. The model wielder of this liberty, the “paradigm case,” is the skeptical and creative citizen who refuses to have his cultural field defined by CNN, CBS, and FOX News. The appropriative artist is, in archetypal spirit, what the poacher once was: a populist hero defying the prerogatives of Enclosure. Free speech, one is reminded, has a pair of complementary functions. On the one hand, it contributes to the structural integrity of democracy by permitting the open vetting of issues and personalities; on the other hand, it makes possible the existence of a certain kind of citizen: iconoclastic, self-confident, willing to play David to the nearest Goliath. The interest of “semiotic democracy” spans both dimensions: democratic functioning and democratic personality.

This idea of democratic personality evokes an antidomination note in Lessig’s conception of freedom. He draws a contrast between *free culture*, in Boyle’s sense of “[f]ree access to innovation and expression,”¹³⁷ and *permission culture*, that is, an intellectual property regime in which rippers and mixers would need the permission of owners to use cultural materials.¹³⁸ The choice of *permission* as the contrast to freedom indicates Lessig’s special concern with the nonreciprocal, potentially dominating relationship between the owner of cultural material and the permission-seeker, whom the owner can exclude at her whim. The thrust of the idea is that *one should not have to ask permission* to use a part of one’s own culture. The spirit of this claim is in the vein of antidomination.

A distinct set of concerns guides Yochai Benkler’s discussion of the social and economic potential of peer production technologies. For Benkler, the main issue is freedom in the sense of a broader range of viable alternatives among forms of productive activity. The range of viable choices is substantially a product of the institutional and technological structure of production. Benkler contends that modern, industrial societies have voluntarily restricted themselves to hierarchical, spatially centralized forms of production—the model being the capitalist factory—because the technologies of the industrial age made this the most productive mode of organization. New technologies, however, may allow high levels of productivity alongside voluntary and decentralized production.¹³⁹

How, in terms of capabilities, should one understand this new possibility? Specifically, what could people do under an optimal peer

¹³⁷ Boyle, 66 L & Contemp Probs at 58 (cited in note 3).

¹³⁸ Lessig, *Free Culture* at 8, 192–93 (cited in note 94).

¹³⁹ See generally Benkler, 52 Duke L J 1245 (cited in note 12).

production scheme that would not be possible in hierarchical production? I would suggest a few candidates.

First is the capability to work out of inclination as much as out of necessity. Achieving this would mean blurring the distinction between work and leisure. Where that distinction is stark, we trade our time and energy in work for a sum of satisfactions in leisure. The more we find our satisfactions *within* our main expenditure of time and energy, the less stark the distinction. The difference then diminishes between the “work” activity in which we are not “fully ourselves,” because we do it to purchase “our own” time, and the activity in which we recognize ourselves as fully present and satisfied.

The second aspiration made achievable by peer production is the capability to be generous without being self-sacrificing. Ever since Aristotle identified the rich man’s capacity for magnanimity as a justification of economic inequality, the idea has stuck that social arrangements are better, other things equal, if they enable people to express generosity. This is so not because Aristotle’s defense of inequality was entirely satisfactory (that version of generosity relies on another’s deprivation, after all), but because of the recognition that generosity is a great virtue to be able to exercise.¹⁴⁰ Participants in peer production projects such as SlashDot¹⁴¹ are magnanimous: they meet a need by the voluntary expenditure of their time and skill. They win in return both the subjective moral satisfaction and the social esteem that accompany the magnanimous spending of skill and resources. The more peer production came to dominate important industries, the more magnanimity could coincide with the basic motivation of self-support.

One might object that participating in production under a standard firm model has the same benefits: making a living by contributing to the production of something that, by the definitions of market analysis, satisfies existing demand—that is, a (perceived and effective) need. The response is phenomenological: you can’t be magnanimous on a chain gang. The psychology of magnanimity depends directly on the voluntary character of the activity, which is why no defense of tax-paying as magnanimous has arisen to match Aristotle’s defense of inequality.

The third capability made possible by peer production is a profoundly democratic one: participation in the experimental, incremental reorganization of basic collective activity—in this case, economic production. Because our institutional structures profoundly affect the set of

¹⁴⁰ Aristotle, *Nicomachean Ethics* 18–19 (Dutton 1911) (D.P. Chase, trans.).

¹⁴¹ See <http://slashdot.org> (visited Sept 18, 2005) (hosting a collaborative news site maintained by 250,000 volunteers).

viable alternatives from which we choose in shaping our lives, the capability to engage with and reform institutions is as important as any more immediate capability: it is a sort of metacapability, as electoral democracy is a metarule of political life. The more legal rules open up experiments with peer production, the greater this democratic capability becomes; the more those rules foreclose experimentation, the more this democratic capability is diminished.

Enhancement of capabilities; enhancement of the metacapability to affect the scope of one's future capabilities; and aversion to domination, whether interpersonal or structural: these are eminently the concerns of the freedom-promoting tradition in property thinking. To say this, though, is to say that the "Copy Left" has already arrived—for purposes of its fairly specific, local disputes—at the program I am trying to revive. Does revival of the tradition, then, have anything to add?

I think it does, in three ways. First, recognition of the freedom-promoting tradition counters a perception of idiosyncrasy, a certain peninsular aspect that may seem to attach to the critical scholars and reformists of the intellectual property world. "*Copyright?*" asks the skeptic incredulously. "You mean you're the guys who think Negativland and 2 Live Crew are bulwarks of freedom?" To be able to answer partly in terms of a tradition of political economy and legal reform, of which the battle over the socially best uses of new information technologies is an emblematic part, is an aid not just to rhetoric, but also to thought. This is the advantage Lessig pursues in adverting to the tradition of "free culture." The tradition of the freedom-oriented economy steered by law is a formidable inheritance.

Second, the tradition of freedom-oriented political economy has always understood that property rights are instruments for the promotion of capabilities and resistance to domination, not naturally fixed categories. This insight is a kind of immunization against the perception that the movement to rewrite intellectual property rules is "anti-property," or that the public domain the movement seeks to protect is "the opposite of property."¹⁴² Rather, the present debate over intellectual property falls squarely *within* the tradition of property thought.

Finally, recognition of the tradition means recognition of a common cause. Both traditions and movements rest partly on *self-interpretations* that enable people to think of themselves as joined in a coherent set of projects across space and time. Membership in a movement or tradition is thus not a simple fact, but rather the product of activity interpreted, which in turn inspires further activity in keep-

¹⁴² See Boyle, 66 L & Contemp Probs at 50 (cited in note 3).

ing with the interpretation.¹⁴³ Proponents of the public domain, advocates of formal rights in slum dwellings, and architects of complex risk-management contracts are not disparate public-policy eccentrics. It might not be too much to say that they are part of a movement, if only they could see themselves as such.

IV. THE CRITIQUES OF PROPERTY RECONSIDERED

In this Part, I return from specific reform programs to the more abstract matter of the three critiques of expanded property rights. I take the critiques in turn, arguing that the freedom-promoting approach helps both to answer them and to identify cases where they have particular force.

A. The Anticommodification Critique

This critique contends that redefining resources as alienable property, that is, as commodities, produces an instrumental attitude that drains them, and activity connected to them, of qualitative meaning. The freedom-promoting standpoint has two large advantages in confronting this sort of objection.

First, its emphasis on the variation in property regimes across time and space highlights an empirical correction to the anticommodification critique: whether propertization of resources fosters an instrumental attitude toward them depends on both the structure of the property rights themselves and on the cultural background of valuation of the resources that the rights govern. Imagining the contrary—that an institution as broad as “property” must always and everywhere have the same cultural and psychological significance—is a simple lapse into institutional essentialism. It may be true that, other things equal, commodification invites emphasis on the economic, instrumental value of the resources commodified.¹⁴⁴ Other things are almost

¹⁴³ See generally Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso rev ed 1991) (investigating the relationship between nation-building projects and the media); David Bromwich, *A Choice of Inheritance: Self and Community from Edmund Burke to Robert Frost* (Harvard 1989) (arguing that the tension between self and community—between individualism and public-mindedness—has been a motive for great writing from the end of the eighteenth century to the beginning of the twentieth); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame 2d ed 1984) (arguing that the abandonment of Aristotelian teleology has rendered hollow moral discourse and practice in the modern world).

¹⁴⁴ The economist will credibly say in response that commodification only facilitates the already-present ambition to extract economic value from the resource by removing impediments such as overlapping rights or inalienability. For an example, see Ellickson, 102 Yale L J at 1315 (cited in note 13) (arguing that “land rules arise not so much from law as from customary norms”).

never equal. The same commodified form of land tenure that John Clare lamented is now, in a time of relative prosperity and a high estimation of open space, the basis of private land trusts and conservation easements, by far the fastest-growing method of land preservation.¹⁴⁵ To regard this innovation as an aberration, somehow “the opposite of property,” would be confused essentialism.¹⁴⁶ Both enclosure and conservation easements are property in land, dependent on the law’s creation, delimitation, and enforcement of private claims on resources.

The form of the property institution is only the beginning of the story: the rest comprises the ways that people already value the resource to which property claims apply, and what they accordingly want to do with it. People can (1) create novel types of rights to pursue their interests in the commodified resources and (2) use existing property rights in novel ways. Both have happened in connection with conservation trusts. Both are within the realm of property. To identify property rights with cold-hearted instrumentalism is an analytic mistake both because property rights may be structured, for instance, to support conservation as well as for other purposes and because property rights need not make cold-hearted exploiters of those who were not already inclined to that attitude.¹⁴⁷

The second advantage to addressing the anticommodification critique through the freedom-promoting approach rests on the way this approach understands the social character of property. The image of commodification as fostering an instrumental relationship to commodified resources rests on a specific image: of the bearer of property rights as *subject* and the resource to which the property rights apply as *object*, the passive vehicle of the right-holder’s preference satisfaction. This is, however, to overlook that property rights define how people can recruit *one another*, and the resources they control, for collaborative projects. This is not (to put it in an overstylized way) a subject-object relationship, but an intersubjective relationship. This relationship may be more or less reciprocal. It may tend to prerogative on one

¹⁴⁵ See Julia R. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va L Rev 739, 742 (2002) (“The number of acres protected by conservation easements held by private, nonprofit organizations increased from 450,000 in 1990 to 2.6 million in 2000.”).

¹⁴⁶ For an argument to this effect, see *id.* at 743–45.

¹⁴⁷ For a discussion of some ways in which property concepts are compatible with conservationist values, see Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J Land Use & Envir L 279, 302 (1998) (describing a property-ownership narrative in which property rights are limited to using the land in its natural state and for its natural uses); Rose, 83 Minn L Rev at 163–64 (cited in note 4) (analyzing environmental rights as “hybrid property” rights); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 Ecol L Q 351 (1998) (discussing the idea of the public trust—that at least some resources, such as waterways, are especially subject to public claims—and whether the public trust is property “owned” by the public).

side and mere obedience on the other, or it may tend to relatively symmetrical negotiation.¹⁴⁸ That is the proper focus of the inquiry as to whether any particular instance of propertization produces an instrumental attitude toward other persons in particular.

Consider the free-labor property regime that Adam Smith advocated in light of this argument. The commodification of labor power—making people the owners of alienable personal property in their time, energy, and skill—represented a dramatic increase in reciprocity in the social process of recruiting labor, relative to the hierarchical, deeply conventional allocation of labor power in the quasi-feudal setting that preceded this commodification.¹⁴⁹ In brief, this was so because under the new regime people had to be induced, not ordered, to labor, and retained the option of exit—that is, putting down their tools and leaving.

This exemplary case contains a general point. Once property is understood as forming, among other things, a set of social rules for the recruitment of resources, it becomes clear that an extension or intensification of property rights need not tend in the direction of “instrumental” relations—not, at least, where any intersubjective exchange is present.¹⁵⁰ Where the change in the property regime imposes greater reciprocity in such recruitment, its effect will be counter-instrumentalizing: it will require people to pay more, not less, heed to the interests and commitments of others. This is the case, for instance, in the commodification of present earnings expectations that Shiller proposes. By reducing vulnerability to misfortune and expanding viable vocational options, Shiller’s proposal would make less common the unhappy situation in which people must choose between a bad option and a worse alternative. Where someone has multiple viable options, another who wishes to recruit her must appeal to something other than her desire to avoid deprivation—for instance, a sense of vocation or some other intrinsic satisfaction in the activity proposed. The need to make this appeal moves the recruiting effort from substantial prerogative to substantial reciprocity.

If anything, the same change is more dramatically envisaged in de Soto’s proposed reforms, which would turn informal possessors, who are always vulnerable to the threat of extralegal expropriation, into legally protected owners who can use their assets as a bulwark against coercion. With such a bulwark, it is possible to enforce at least a modicum of reciprocity in the appeals others can make to recruit one’s resources and effort. Both commodifying reforms would require ap-

¹⁴⁸ See Parts II.A–B.

¹⁴⁹ See Smith, *The Theory of Moral Sentiments* at 61–66 (cited in note 47).

¹⁵⁰ A pure relationship of person to land might be the exception.

proaching others not only as means to one's own ends, but also as having ends of their own.

B. The Critique of Expropriation

This critique contends that programs to extend or intensify property rights tend in fact to be asset-grabs by powerful social groups that use newly created rights to claim resources for themselves or their allies. Alas, the freedom-promoting approach to property has no power to dissolve this problem.¹⁵¹ However, the freedom-promoting perspective does offset this problem, in part, by incorporating distributive considerations, not as side-constraints or ad hoc exceptions to avoid unhappy results from its main principles, but as the heart of its criteria.

To understand this argument, consider the claims the anti-expropriation critique may bring to bear against property reform. The critical claim cannot be simply that the creation of new property rights provides an opportunity for unscrupulous and powerful groups to augment their coffers and those of their friends. However lamentable, this claim applies to any legal instrument that redistributes rights in resources: nationalization, privatization, eminent domain, criminal forfeiture, even adverse possession or homesteading rights. To observe this is only to observe that power gives opportunity to cupidity—hardly a new insight or a fine point of legal analysis. The claim must rather be that something in the rationale or operation of reforms that expand property rights obscures their opportunistic motives and inegalitarian results, so that property expansion is an instrument specially suited to the theft of “the common off the goose.”

How might this work? Imagine a de Soto-style program to assign formal title to resources, which creates a highly inegalitarian initial allocation of property. The titling scheme supersedes an informal possessory system that was considerably more egalitarian in distribution, even though it displayed all the inefficiencies that de Soto identifies in such systems. If the reform were justified on (somewhat simplistic) economic grounds—say, that clear and enforceable property rights are necessary to produce both static and dynamic efficiency in resource use—then the inegalitarian effect might appear incidental to evaluat-

¹⁵¹ De Soto claims the conversion can take place without changing the allocation of resources. De Soto, *The Mystery of Capital* at 49–54 (cited in note 1). If de Soto is not flatly wrong, he is at least describing the exceptional case. As I have explained, it seems more likely to me that he is wrong: even converting informal to formal claims in the same claim-holders and over the same spatial domains will have distributive consequences (although they may be egalitarian consequences).

ing the program. The rationale for reform would thus provide an effective apology for an expropriative reform.¹⁵²

By contrast, the freedom-promoting approach would treat as central to its analysis the danger that an inegalitarian reform might rob enough people of enough effective access to resources to leave them with diminished capabilities. The freedom-promoting approach would not take the efficiency advantages of the inegalitarian formal system to justify the system by themselves: the question would be whether they increased freedom overall. From the freedom-promoting standpoint, the informal but relatively egalitarian system would be preferred. Efficiency gains are attractive because, other things being equal, they promote freedom, but they may come at the cost of reductions in freedom, and if the losses to freedom outweigh the gains, the freedom-promoting approach will reject the reform.¹⁵³

The vital heart of the critique of expropriation is that property-expanding programs tend to confuse means—property rights—with the end of promoting human welfare (which I think is better cast as freedom).¹⁵⁴ This confusion obscures the harm to freedom that can come from property-based reforms that provide the efficiency benefits of clear rights to resources while causing losses to freedom in certain respects—for instance, through highly unequal distribution. An approach that concentrates clearly on the ends being pursued—the promotion of overall freedom, understood as capabilities—will keep attention on the right criteria. This is the best guarantee a reform-guiding theory can provide against opportunistic use by rent-seeking elites.

C. The Critique of Productive Organization

This critique contends that the expansion of property rights draws those in whom the rights are vested into hierarchical, market-governed relations of production, and thus closes off any potential opportunity to structure their productive activity according to other

¹⁵² This is, alas, not a fantasy. For a discussion of how property fundamentalism facilitated inegalitarian (and, at least in the medium term, unproductive) privatization in Russia, see Stiglitz, *Globalization and Its Discontents* at 166–79 (cited in note 110).

¹⁵³ I do not mean to say that all proponents of economic efficiency would *prefer* the inegalitarian arrangement to a more egalitarian allocation of formal rights; if they were nondogmatic, they might well opt even for the informal system in my hypothetical, when confronted with the choice. That, however, would be an ad hoc exception to the general pursuit of efficiency. The reason to prefer the freedom-promoting standpoint is not that it “picks the right results” with less jiggering than its stylized alternatives, but that it *specifies the right reasons* to consider in evaluating any set of measures.

¹⁵⁴ See Amartya Sen, *Inequality Reexamined* 39–72 (Harvard 1992) (distinguishing between “functionings,” or the wellbeing of a person measured in terms of the person’s achievement, and “capability,” or the freedom to pursue different functions).

criteria. This critique has bite today at the level of land reform, where it is sounded by skeptics of Hernando de Soto's program,¹⁵⁵ and in critiques of the neoliberal privatization program at large.¹⁵⁶

Only an institutionally essentialist view of what "property" is would support the idea that the issue here is whether to be for or against the expansion of property rights. The freedom-promoting perspective is a reminder that "commodification" has many faces. Property is no more a determinate system of increasingly concentrated and hierarchical production than it is a relentless instrument of moral flattening or inequalitarian expropriation. The issue is rather what forms of productive relations any particular scheme of property rights makes possible, and which forms, if any, it excludes.

This theme is intimately related to the freedom-promoting approach's second response to the anticommodification critique of property: that property rules set the terms on which people can recruit one another for joint projects, and thus direct social and economic interaction between the poles of reciprocity and arbitrary power. In the same way, a scheme of property rights gives shape to production, which emerges from the coordination of resources and activity among people. For example, the capitalist production characteristic of the industrial age in the noncommunist world is premised on (1) private ownership of the large and concentrated capital goods, such as factories, that make production possible; and (2) free labor, that is, individual ownership and sale of time, energy, and talent. The consequence is that those who wish to produce and be paid must offer to sell their labor to those who hold the tools of production—the capitalists. From a basic allocation of private ownership follows a system of production: employees contracting to spend their days and energies at work with the tools of others—the factory system.

Of course, this story is too simple. First, the arrangement just sketched could be vastly changed by purely distributive measures: the factory could be owned by its employees; although the physical activity of production would be identical, and while legally it would be identically premised on private ownership of capital goods and of labor, it would not reflect a division between a capital-holding class and a laboring class. Second, the factory system reflects not just a legal regime, but also a technological background: capital-intensive production of material goods in the last two centuries put the capital requirements of large-scale production outside the reach of independent

¹⁵⁵ See notes 106–07 and accompanying text.

¹⁵⁶ See generally Walden Bello, *The Future in the Balance: Essays on Globalization and Resistance* (Food First 2001).

or guild artisans and virtually required many workers to come together in a single factory. Moreover, the combination of many producers at work along, let us say, a single assembly line, requires a form of labor discipline that will be hierarchical from the point of view of any Bartleby or whimsy-chaser; the order to fall in line may come from the owner or from the workers' management committee, but either way, it must come. No arrangement of legal rights, no matter how fanciful, could hope to overcome these features of production based on large-scale and concentrated physical capital. A scheme of production, therefore, results from a concatenation of technology, distributive politics, and property law. Identifying property law with a particular scheme of production would not only be essentialist; it would also be fetishistic, that is, it would imagine property law as exercising a more nearly exclusive power over the structure of production than it does.

The fact remains, however, that property rights are an instrument to seize the opportunity presented by a new technology: depending on the shape property law takes, the technological potential for new productive relations may reach fruition or may go unrealized. Take the case of the newly possible forms of peer production discussed earlier.¹⁵⁷ The promise of these activities, as Yochai Benkler has argued, is that they might reconcile high productivity with individual autonomy in the selection of productive activity. Their capacity to achieve this reconciliation depends on new technological possibilities. The productive capital at work in these forms of peer production—networked computers—is no less productive when dispersed than when concentrated in one location. Moreover, this form of production does not require hierarchical organization to ensure productivity: dispersed, voluntary use of networked personal computers gets the job done.¹⁵⁸

Technology, however, is not fate. In any case, it is not all of fate. Whether peer production emerges to realize the full technological potential of the moment depends on the background of property law. The most important resources for the peer-production arrangements sketched above, other than dispersed capital, are the cultural materials that voluntary producers draw on to make their contributions. For peer production to proceed, these must be accessible, in the sense ei-

¹⁵⁷ These sites are online at <http://www.wikipedia.org/> and <http://slashdot.org/> (visited Sept 18, 2005). Perhaps most impressive for its utter non-triviality is the website that assembles a daily newspaper out of thousands of surreptitious individual reports from North Korea—the only possible semblance of a free press under a regime that would crush any such activity more spatially concentrated than peer production. Interview with Ethan Tucker, Fellow, Berkman Center for Internet and Society, Harvard Law School (Apr 17, 2004).

¹⁵⁸ See generally Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 Yale L J 273 (2004).

ther of being unowned or in the more restricted sense that their owners cannot exclude potential users from access. Otherwise, peer producers will be communards without a common. The debate over the future of intellectual property that I sketched in the earlier discussion of Benkler's and Lessig's thought is pivotal in this question. Forms of intellectual property law that ensure widespread access to cultural resources will facilitate peer production; those that forbid the first will significantly impede the second.

Therefore, either an industrial model or a peer-production model of cultural activity will be a product not just of technology, but also of politics and the legal rights that instantiate political outcomes. As Boyle has pointed out, there is no "outside" of law, no "opposite of property" in the assignment of legal rights.¹⁵⁹ The question is whether the boundaries of property rights are set so that they permit, say, the Disney corporation to exclude peer producers and cultural innovators from using its images and stories, or whether, alternatively, the company's rights are so bounded by time and nonowners' use-rights as to prevent it from stopping novel uses of cultural resources.

To say that property rights promote hierarchical forms of production, therefore, is to overlook both the variety of forms that property rights can take and, just as important, the variety of productive capital (from factory machines to dispersed computing capacity) and resources (from natural raw materials to labor power to cultural goods) that property rights may govern. The interaction of any specific scheme of property rights with these other variables will shape the resulting organization of production. By viewing property rights as flexible tools that enable societies to seize technological opportunities for new productive relations, the freedom-promoting perspective helps to show that there is no single relationship between property schemes and the organization of production, and also to identify those relationships that are desirable from the standpoint of freedom.

V. ONE VIEW OF THE PURPOSES AND BOUNDS OF PROPERTY

I now address some objections to the argument I have made. The purpose of this Part is to clarify some of the ambitions and limitations of the argument so far, not to vindicate it against all comers. The objections I consider are, first, that my account of freedom is so broad and encompassing as to be merely formal and thus useless as a guide to practice or judgment; second, in quite a different direction, that my account of freedom is imperial, in the sense that it threatens—or at

¹⁵⁹ Boyle, 66 L & Contemp Probs at 29–30 (cited in note 3).

least pretends—to override other values that also deserve respect; and, third, that this account of freedom is so anthropocentric, so relentlessly focused on human capabilities and aspirations, that it neglects important nonhuman values such as the aesthetic or intrinsic worth of the natural world, which also do and should shape property regimes.

A. The Objection of Emptiness: Ranking and Distribution

Is the account I have given of freedom empty? To be sure, it does not settle either of two essential questions. First, what interpersonal distributive principle should apply in evaluating social states as more or less free? Should it count against a property regime that it purchases a significant increase in the freedom of some with denial of the freedom of others? Second, what ranking should apply among capabilities? Considering that people may have or lack an enormous variety of capabilities, from singing opera and playing polo to reading and writing in their native language and participating in their government—or even to walking and talking—it is not clear how a focus on capabilities should help us to assign priorities among these. The aim of this project is to contribute to the evaluation of property regimes according to the states of affairs they bring about in social life, by asking whether people under one regime are more or less free than they would be under another, where freedom is evaluated by capabilities. With neither a distributive nor a ranking principle, however, it seems the project might be stuck at the level of mere description, observing that certain people in one society are able to do certain things, while others in another setting can do certain other things—a judgment that could charitably be called unilluminating.

I begin with the ranking problem both because it is more amenable than the distributive problem to distinctive contributions from a capabilities theory of freedom, and because a capabilities-oriented response to the ranking problem helps to address the distributive problem. Concern with promoting capabilities gives priority to two specific classes of capabilities: what I call *foundational capabilities* and *metacapabilities*. Foundational capabilities are those on the basis of which all other capabilities are exercised. Examples include physical mobility, linguistic capacity, literacy, and the ability to appear in public without shame. Deprivation of these capabilities is, perforce, deprivation of all (or virtually all) others.

Metacapabilities are those that enable people to expand, refine, or revise their existing capabilities, either by effort directed at themselves, or by changing the legal, cultural, or institutional context in which they exercise their capabilities. Literacy, command of money, and freedom from interference, for instance, would all be metacapabilities

for purposes of making changes directed at oneself—say, learning a new language by contracting for instruction. The capacity to participate in self-government, by contrast, is a metacapability for revising one's context. This might mean, for instance, gaining official recognition for a language one already speaks, or legislatively mandating the construction of wheelchair ramps for the disabled.

As the examples suggest, foundational capabilities and metacapabilities are not mutually exclusive categories, and in many cases they may overlap. They do, however, exclude large numbers of capabilities that fall into neither class. Musical or athletic capacity, computer programming, auto mechanics, portraiture, legal training, and gardeners' green thumbs represent a variety of significant human values; however, they are neither necessary conditions for the development of other capabilities nor, in any distinctive degree, instruments for the revision of one's capabilities. Because foundational capabilities and metacapabilities are basic to the development and exercise of capabilities generally, a freedom-oriented perspective owes a special emphasis to capabilities in these classes.

Moreover, the most straightforward way to apply this emphasis in concrete institutional decisions is in distributive terms—specifically in the distribution of the resources that promote foundational capabilities and of political rights and other metacapabilities that promote self-improvement and the revision of contexts. For instance, faced with a choice between restrictive intellectual property rights that promoted the production of entertainment in somewhat greater quantity than otherwise, and more permissive rules that promoted widespread appropriation and commentary, an emphasis on metacapabilities would lead one to prefer the latter. Deciding between a risk-management regime on Shiller's model that increased access to higher education and another regime that produced greater returns to economic "winners" at the cost of more risk-averse educational decisions by others (resembling, perhaps, the present arrangement in the United States), an emphasis on foundational capabilities would lead one to opt for the first.

It may appear that I am using an answer to the ranking problem to smuggle in a partial answer to the distributive problem. I would concede that the distributive answer emerges from the ranking answer, but would dispute whether "smuggling" is the right characterization of the relationship. One well-established way of reasoning about distributive justice is to start from a picture of the kind of society one wishes to promote, then proceed to specify the distributive scheme

that would advance such a society.¹⁶⁰ A freedom-oriented normative picture of social life envisions a society in which both foundational capabilities and metacapabilities are widely held and exercised. That such a picture has distributive consequences should be entirely unsurprising. There is, then, real content to the idea of a freedom-oriented approach to property rights, although such an approach will almost certainly interact with independent views about distributive justice and the appropriate hierarchy of capabilities.¹⁶¹

B. The Objection of Overreach

If the freedom-promoting approach is right, then it may seem to raise quite a different problem. Perhaps the trouble with the approach I have recommended is not that its conception of freedom is uninformative, but rather that it is too ambitious. The other prevalent normative accounts of property, which focus on preserving negative liberty and promoting economic efficiency, are pervasive and powerful.¹⁶² The “positive freedom” accounts of property law as promoting conceptions of personhood are also important.¹⁶³ Is an orientation to freedom, understood as capabilities, intended to displace or encompass these well-established strands of thought? If so, is this ambition even remotely credible?¹⁶⁴

I do want to make a modest version of the extravagant claim that the objection contemplates. The freedom-oriented approach to property is intended in part to redescribe the other approaches in ways that diminish the impression of competition among them. This is not intended as an exercise in normative monism. On the contrary, I suppose that there are deep and persistent conflicts of value both among persons and within individual commitments.¹⁶⁵ That said, however, the freedom-oriented approach has some advantage in its power to capture aspects of the appeal of putatively competing approaches. In ad-

¹⁶⁰ For the view that this teleological approach is the only meaningful way to reason about distributive justice, see Macintyre, *After Virtue* chs 1–2 (cited in note 143).

¹⁶¹ For instance, there could be meaningful disagreement over how much weight to place on the widespread achievement of foundational capabilities, or over whether certain rarefied skills, such as rhetoric or filmmaking, should be regarded as important metacapabilities undergirding cultural and political commentary. See, for example, Lessig, *Free Culture* at 25–26 (cited in note 94) (noting the importance of comics to Japanese culture as compared to the relative disdain Americans hold for this kind of culture).

¹⁶² See notes 13–14 and accompanying text.

¹⁶³ See note 23 and accompanying text.

¹⁶⁴ This discussion represents an initial grappling with these questions. I anticipate a much fuller discussion in a sequel, tentatively titled *Persons as Resources and as Ends: Freedom, Dignity, and the Law of Property*.

¹⁶⁵ See notes 78–82 and accompanying text.

addressing the economic efficiency account of property rights, the freedom-oriented approach adopts Sen's contention that we approve of markets in large part because they promote freedom in two ways: by securing people from interference in coordinating their activity, market rules protect the process aspect of freedom; and by allocating resources efficiently and increasing aggregate social wealth, they promote the opportunities aspect of freedom.¹⁶⁶ Both aspects of freedom ultimately redound to the measure of capabilities.¹⁶⁷ Affirmative views of property as a promoter of personhood also fit within the freedom-as-capabilities approach: such views conceive of property as promoting a specific set of capabilities, which may be more or less consonant with the freedom-oriented approach's emphasis on foundational capabilities and metacapabilities.

I do not mean to insist that the capabilities-promoting approach to property can assimilate either the economic efficiency or the personhood approach without remainder; but it can express, and sometimes clarify, a good deal of what is attractive in each, suggesting that the field of values bearing on property regimes may be less fragmented than conventional oppositions suggest. That said, I am not so confident that the capabilities approach can substantially capture the appeal of the aim of securing negative liberty. While it would no doubt be *possible*, even straightforward, to redescribe negative liberty in terms of what it enables people to do, whether the redescription would be *convincing* as an account of what we value in negative liberty is less clear. Although this is not the place to pursue the phenomenology of negative liberty at any length, the appeal of the idea seems to rest on a strong intuition about the integrity and inviolability of the individual, not so much with promoting *activity* as with acknowledging *existence* of a certain kind. Insisting that this commitment "really" has to do with promoting capabilities is rather like redescribing religious or romantic life in terms of self-interest maximization: while possible as a formal matter, it rings false as an account of value, not least because the people whose commitments it purports to describe would be unlikely to accept the description as true to their experience of the matter.¹⁶⁸

In some ways, the genuine plurality of values bearing on the evaluation of property regimes softens the difficulty presented by the first objection, the charge of emptiness. The contrast between promot-

¹⁶⁶ See Sen, *Markets and Freedoms* at 501–02 (cited in note 13).

¹⁶⁷ Id at 506 (discussing the "opportunity aspect" of freedom, which is that it "gives us the opportunity to achieve our objectives [and is] thus, concerned with our actual capability to achieve").

¹⁶⁸ See Taylor, *Sources of the Self* at 3–4 (cited in note 75).

ing capabilities and securing negative liberty suggests that no unified evaluative calculus will be possible in principle. This conclusion finds support not just in the contrast between promoting capabilities and securing negative liberty, but also in the divisions within a capabilities-promoting approach along the axes of both distribution and ranking, and in the distinctive aspirations of the various personhood-promoting conceptions. This point in turn suggests that the proper aim in assessing property regimes is to understand as clearly as possible the competing values of different normative standpoints, in both their overlap and their points of genuine disagreement, and to state precisely the sacrifices that pursuit of one value would require of others.¹⁶⁹ Proceeding in this way is, of course, entirely compatible with arguing for a particular normative approach, but it recognizes that a plurality of mutually irreducible considerations will structure the evaluative field.

C. The Objection of Anthropocentrism

I have less to say about the third objection, the charge of a narrow anthropocentrism. I hope that my response to the second objection has in some ways prepared the ground for this response. Just as a plurality of expressly person-regarding (or, if one prefers, anthropocentric) values structures the evaluative field of property regimes, so the distinct values that concern the nonhuman world will also make their contribution to the puzzle.¹⁷⁰ In principle, I see no greater difficulty in this recognition than in the acknowledgement of competing human-regarding values.¹⁷¹ The interest lies in understanding how peo-

¹⁶⁹ For an example of such reasoning, see Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton 2004) (asking how to balance the interests of security and liberty in the midst of a struggle against terrorism).

¹⁷⁰ I have nothing to say here concerning the meta-ethical or ontological question whether the value of the natural world is necessarily understood as a product of human valuation (aesthetic, religious, or otherwise) or subsists in itself and is simply apprehended by human beings. For an argument of the first sort, see generally Christine M. Korsgaard, ed, *The Sources of Normativity* (cited in note 75) (examining four accounts of the source of normativity that have been advocated by modern moral philosophers—voluntarism, realism, reflective endorsement, and the appeal to autonomy—and showing how Kant's autonomy-based account emerges as a synthesis of the other three). For the second view, see, for example, Arne Naess, *Ecology, Community, and Lifestyle: Outline of an Ecosophy* (Cambridge 1989) (David Rothenberg, trans) (reflecting on the relevance of philosophy to the problems of the degradation of life conditions on Earth, and rethinking the relationship between man and nature). The question strikes me, on Kantian grounds, as essentially unanswerable from the human perspective, in which value is perceived as "real for us," but also necessarily as *perceived*, that is, as real *for us*.

¹⁷¹ The perception that there is an essential, even an insurmountable difficulty here seems to take its force from an idea that once value is identified with the human standpoint or human interests, an unbridgeable gap is opened between human values and whatever value may be regarded as inhering in natural phenomena. All is subsumed under the human will or human self-interest maximization. This attitude has proponents on both the left and the right. See gen-

ple have weighed these values against each other in practice, and have reinflected some values in light of their relation to values of other sorts. To do that question any justice would require an historical examination of ideas about the natural world and their relationship to law generally and property regimes in particular.¹⁷²

CONCLUSION

The approach to property that I have defended here concentrates on the promotion of freedom. Its conception of property is dynamic, oriented to reform in the domain, intensity, and content of property rights. Its conception of freedom centers on the development of capabilities, with special emphasis on expanding people's set of viable choices and replacing relations of domination and subordination with reciprocity. This approach is realistic, reformist, and attentive to the interaction between on-the-ground reforms and general conceptions. It expresses and gives new inflection to a tradition going back at least as far as the Scottish Enlightenment.

Adopting this approach means not supplanting, but supplementing, the more conventional accounts of property's purpose. In this respect, the freedom-promoting approach is the very opposite of dogmatic: it represents one region of a constellation of considerations that bear on the evaluation, design, and reform of property regimes. However, adopting the freedom-oriented approach both enriches the defense of property rights relative to major lines of criticism and helps to clarify the proper limits of property regimes.

erally Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford 2002) (Gunzelin Schmid Noerr, ed) (Edmund Jephcott, trans) (suggesting in 1944 that modern Western society, rather than fulfilling the promise of the Enlightenment, sunk into a new barbarism); Leon R. Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (Encounter 2002) (arguing that modern biotechnology debases, rather than celebrates, human dignity). I have given some attention to this position over the years, and am unconvinced. For an account of the irreducible plurality of moral experience and the interaction between human-regarding and nature-regarding values, see Charles Taylor, *Heidegger, Language, Ecology*, in Charles Taylor, *Philosophical Arguments* 100 (Harvard 1995); Taylor, *Sources of the Self* (cited in note 75).

¹⁷² See generally William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (Hill & Wang 2003) (explaining the effects European colonists' sense of property and their pursuit of capitalism had upon the ecosystems of New England); Roderick Nash, *Wilderness and the American Mind* (Yale 4th ed 2001) (examining the history and evolution of American attitudes toward nature). I take up some of these issues in the context of the law of waste in Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 Cornell L Rev (forthcoming 2005) (asking "what causal forces account for the development of property regimes across time?" and concluding that all of the following played a role in the American development of waste doctrine: economic analysis, republican political culture, and "the belief that European settlers were under a natural obligation to subdue the American wilderness and make it a fruitful, agrarian landscape").

The first contribution to understanding property's appropriate boundaries is the recognition that there is no "outside," or "opposite" of property. The question is better framed not as "whether property," but "what kind of property," and "in whom?" This recognition dissolves the property/nonproperty opposition favored by some critics of property regimes and inadvertently reinforced by institutional essentialists with a nondynamic view of property rules.

The second contribution is to highlight a set of considerations that help to define reform and its proper limits. Extension or intensification of property rights is desirable, other things equal, when it can make people freer in any of several ways: by helping them to resist interpersonal domination; by expanding the set of viable alternatives from which they choose in directing their life courses; by creating the social preconditions for psychological attitudes supporting self-regard and autonomous decision-making; and by otherwise maximizing people's capabilities relative to both their present levels and the levels offered by alternative reforms. The mere form of property rights, however, does not guarantee any of these results. Depending on allocation and various dimensions of context, the extension or intensification of property rights may be neutral or negative in its effect on freedom. The point is to keep in view the aim of promoting freedom understood as capabilities, and not to confuse it with any particular institutional instrument that has successfully promoted it in a particular context.

Property law exists to serve human values. Freedom is among the greatest of these. People are free to the extent that they can turn their full complement of potential into actual capabilities. The law of property sets the terms of social and economic cooperation, prescribing the ways we may enlist one another in common projects. It is also how we seize opportunities for new forms of productive activity. In choosing among property regimes, we allocate capabilities in ways that make people more or less free. The freedom-promoting approach to property seeks to understand the consequences of these choices and to direct property law toward greater freedom.