

## HISTORY, HUMAN NATURE, AND PROPERTY REGIMES: FILLING IN THE CIVILIZING ARGUMENT

JEDEDIAH PURDY\*

Carol Rose's paper exemplifies qualities I have admired in Carol's work since I first read her in 1999 and 2000. It also raises questions about her work and that of anyone who tries to follow in her footsteps. Because I am one of those chasers after methodological Rose petals, I am (at least) doubly interested in these questions.

Like almost everything Carol writes, her paper reflects the basic insight that "economic" and "political" approaches to property are not alternatives, either competitive (so that one would turn out to be right and the other misguided) or just incommensurable (so that, say, people who like history would produce political accounts while people who prefer math would tend to economic accounts). Rather, the two approaches are complementary. And even *complementary* is too weak a word, because it suggests pleasant contrast, like a light salad of Bibb lettuce to accompany a thick steak. (Economists would have no doubt about which approach is the fancy, low-calorie lettuce and which is the steak.) It would be more accurate to say that the two approaches are structurally entwined. That is, any property regime—any set of principles defining what is property, who can own it, and what the incidents of ownership are—will unavoidably answer both the questions the economic approach poses and those that the political approach poses. Moreover, the answers a property regime gives to one set of questions will substantially affect the set of answers it can give to the other set. Choices about the terms and values of economic life are also choices about the terms and values of political life. I have said all of this in a very compressed way here, but I will return to it in the rest of this Comment.

Carol's paper also expresses an attitude toward history that informs all her work, and which I find very attractive. There are prominent ways of looking at history that are not all that productive. One is abject reverence, as toward the Constitution's framers. Another is debunking condescension: in some periods, and in some precincts of the academy and popular culture, the Framers get plenty of this as well. Because Carol is temperamentally incapable of abject reverence and too much of a grown-up to go for crude debunking, these

---

\* Assistant Professor of Law, Duke University School of Law.

attitudes are both off the table, and we are on to more interesting alternatives. Those alternatives have to do with how far we can expect to understand and, maybe, learn from the past. On the one hand, some people like to say that the past is a foreign country, remote and strange, and leave it at that. The lesson is that we should not expect to grasp all that much about our alien ancestors. On the other hand, some people approach the past as if it were pretty much the present with different technology: wherever you go, there we are.

Carol splits the difference in a nice way. I think the premise of most of her historical writing is that the past is a foreign country inhabited by people a lot like us. She starts from the assumption that you can make sense of the past, but that it will take work, and that some of the work will be imaginative: getting a grasp of how the world looked to people who thought rather differently from us. But, because they were like us, long-ago folks wrestled with many of the same questions we do, and, because they were like us, some of them were pretty smart. Sometimes, looking at what they had to say about those questions puts our own answers in an altered light or reminds us that things we think of as obviously true may not be so obvious after all.

A lot of what I have said about Carol's method sets it athwart the last couple of decades of legal scholarship. The trend is toward the modes of economic theory and empirical social science: setting out axioms and tracing implications, controlling the number of variables, distinguishing between the phenomena that get designated causes (independent variables) and others that count as effects (dependent variables). The drift of Carol's work is in an entirely different direction. Axioms include "it depends" and "things are complicated." Lots of social, political, and legal phenomena are both causes and effects of one another. There is an inescapable interpretive dimension to putting all the pieces together. And it matters who is doing the interpreting. One thing that anyone who has read and been around Carol will say is that she has judgment: an eye for an apt connection, a nose for nonsense. That may be necessary, but it is hard to formalize and not much easier to teach to graduate students.

By now, I suspect my Comment has provoked grumbling and irritation in some readers. If judgment and interpretation are so important, if there are such significant limits to formalization, how do we know whether legal scholarship is progressing? How do we distinguish between good work and what just reinforces our prejudices? If law faculties already tend too much to reproduce their own values and methods from generation to generation, does not this kind of argument just reinforce the bad old idea that you should trust your gut?

Those are important questions, and I will not be able to say much about them here, other than that I do not mean to dismiss them. But in talking about what is attractive and interesting in Carol's work, I think it is inevitable to point out how much she goes against the current grain. What I want to do here

is to make some general points about Carol's kind of argument, and how it holds together as an approach to property law.

## I.

What kinds of arguments are the "political arguments" for property that Carol surveys? Broadly speaking, they are arguments about the relationship between institutional design and social and political activity. The form of the argument is that, if a society institutes "X" form of property right, then, holding other things constant, "Y" form of behavior will become more common in the social world. For instance, the "civilizing argument"<sup>1</sup> suggests that if you put in place a scheme of rights (property and the power of contract) and institutions (enforcement mechanisms for these rights would be a good start), people will devote themselves to pleasing, persuading, and pitching one another rather than, say, going to war over theological disputes.

There are two ways of thinking about how an argument like this would work. One, which I am deliberately going to put a little bit crudely, imagines people as operating pretty much like the elements of a chemical reaction, so that if you change the proportion of one ingredient, you get a predictably different result. Most likely, people would be regarded as utility-maximizing little elements that bond with whatever adjacent elements will help them to achieve the optimal balance of atomic valences. So, the choice between engaging in commerce and signing up for a religious war would be just a larger-drawn version of the tradeoff between marginal hours of labor and leisure, or the decision whether to graze two more steers in your Coasean pasture. A decade ago, I would have joined the Lutheran jihad against the Papal Antichrist in Rome; but now that the institutional backdrop of my decision has changed, I find that the utility-maximizing option is instead to open a small shop and hope I can sell cloth and spices to both Catholics and Protestants.

The other way of understanding the argument would be that people—the elements of our chemical equation—change from setting to setting. People are unique animals—as far as we know—in that everything we do happens under self-conscious descriptions of what we are trying to accomplish, what is important, what is good or dignifying and what terrible or ridiculous, and so forth. And, the argument goes, these descriptions change in basic ways from time to time and place to place. For most Americans today, the fact that owning a restaurant franchise seems so much more attractive than going to war against Catholics (or Protestants) is not just a matter of how pro-commercial institutions have arrayed the utility consequences of the alternatives. Rather, we are people for whom the idea of going to war over doctrinal fine points has

---

1. Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 718 (2006).

become entirely alien. (Some of us may be heading back in that direction, to judge by the recent disputes over teaching evolution, but none of this is meant as a guarantee that history never reverses itself.) Similarly, even though slavery is more inefficient in high-technology economies than in simple agrarian ones, the reason we now rank it among the worst crimes against humanity is that we are different people from the Justices who decided *Dred Scott v. Sandford*<sup>2</sup> or the lawyers who defended owning human beings on conflict-of-laws grounds in *Somerset v. Stewart*.<sup>3</sup>

I think the second is the more interesting version of the argument, partly because its premise—that human self-understanding changes in basic ways through time—strikes me as irresistible. (I do not mean to say that there is nothing to the more static version of the argument, focused on simple utility-maximization, just that it is not the whole story.) Taking Carol's approach in this way, however, raises a serious question of method. As cultural and institutional contexts change through time, the springs of human motivation change, too. The Civilizing Argument was aimed at a very different time and place, inhabited by people who understood themselves differently not just from us, but from anyone to whom we would be inclined to apply the argument today.<sup>4</sup> So it is not obvious whether the Civilizing Argument—to stay with that example—is the kind of argument that can travel across time and space and work in the same way where it lands as where it was launched.

Having raised this question, I now want to do a few things. First, I flesh out the Civilizing Argument by showing how it figured in Adam Smith's thinking about the ways that commercial society would shape the character of those who inhabited it. Second, I propose an account of how this example lets us understand the relationship between institutions and human behavior in a way that takes into account how self-understandings and motives change across time. Finally, I say in a more general way how this picture fills out the relationship between the economic and the political aspects of property regimes.

---

2. 60 U.S. (19 How.) 393 (1856).

3. (1772) 98 Eng. Rep. 499, 510 (K.B.). In this case, Justice Mansfield ruled that a slave who had been brought to England by his master became free upon arrival, because no positive English law recognized slavery, and the slave status was so repugnant to the spirit of the law that it could not be recognized on comity grounds. *Id.* at 510.

4. Today's jihads may come to mind as a counter-example. I do not mean to say that everyone in today's world looks and behaves like modern Japanese or Europeans, just that the reason, say, Europeans are no longer slicing one another up over doctrinal disputes is more complicated and culturally embedded than the increase in options for a career in business.

## II.

Adam Smith is famously the prophet of commercial society. His *Wealth of Nations*<sup>5</sup> contains the seminal statement of the idea that the “invisible hand” of the market aggregates many individuals’ pursuits of self-interest to achieve the wealth-maximizing allocation of resources.<sup>6</sup> Somewhat less famously, he also gave one of the most cogent and powerful statements of the Civilizing Argument in *The Theory of Moral Sentiments*<sup>7</sup> and his *Lectures on Jurisprudence*.<sup>8</sup> What I want to understand here is what Smith and his early-modern partisans understood a “market” to be. What was the social reality that they envisioned accompanying their institutional prescriptions, and how was that linked to the Civilizing Argument?

There are several interlinked answers—including the dignity of labor, opportunity and mobility, and the idea of the equality of persons—and, of course, the increase in social wealth that Smith argued followed from the operation of markets.<sup>9</sup> I want to suggest, however, that a central part of the early-modern conception of markets was of something more: *terms of recruitment* that resulted from a property regime essentially different from the feudal and slave orders that came before. By “terms of recruitment,” I mean the rules and social circumstances that frame the invitations we all must make to one another if we are to accomplish anything that we cannot do alone: *join me*, whether to make money or to do much of anything else. Terms of recruitment say what threats and inducements we may make—for instance, a threat to life, or an offer of payment for sexual services; they say what bargains we may strike—for instance, daily work for hourly pay or outright ownership of one person by another. These rules in turn shape the alternatives against which people bargain: a feudal lord’s negotiation over terms of tribute with a serf who is legally bound to the land is very different from an employer’s negotiation with a laborer who is free to exit the negotiation, but at the cost of unemployment. Both are different from the employer’s negotiation with a trust-fund baby or a contemporary Swede, who can retreat into a comfortable living without working. The human interaction between the bargainers will vary depending on all these factors in its emotional tenor as well as in the bargain it produces. And, because we need one another for almost all our projects, the interaction will be repeated many times over.

---

5. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell & A.S. Skinner eds., Oxford Univ. Press 1976) (1776) [hereinafter WEALTH OF NATIONS].

6. *See id.* at 453–54.

7. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759) [hereinafter MORAL SENTIMENTS].

8. ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1766) [hereinafter LECTURES].

9. *See generally* WEALTH OF NATIONS, *supra* note 5.

The terms of recruitment that early-modern market advocates described broke with those of feudal and slave orders in one critical respect, which was captured in the idea of “free labor,” or, for Smith, “natural liberty.”<sup>10</sup> The organizing principle of this idea was a property rule: energy, time, and talent—in a word, labor—were defined as inherently the property of the person in whose body they resided.<sup>11</sup> They were alienable, but only, as it were, at retail, not at wholesale.<sup>12</sup> One could sell one’s time and energy, or the products of one’s labor; but one could not sell oneself into a condition of servitude, in which the dispensation and products of one’s labor belonged categorically (and, usually, indefinitely) to another. This principle thus barred the type of property in other people that defined slavery and, in a more complicated way, feudal systems.

Ending outright ownership of persons lifted the threat to survival or bodily integrity that had been the backdrop of the slave-owner’s prerogative.<sup>13</sup> The right of exit would have been meaningless if the other party could have answered the threat of exit with overt coercion. Although the free worker might be seriously constrained in her alternatives, she could not be kept in place by the threat of any consequence more severe than denial of her part of the bargain she had struck with her present employer, that is, the threat of unemployment.<sup>14</sup>

10. 2 WEALTH OF NATIONS, *supra* note 5, at 687.

All systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men.

*Id.*

11. *See generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 1–72 (1970).

12. *See id.*

13. The extent of the master’s prerogative over the body of the slave was an object of intense inquiry in early American cases. The most extreme pronouncement in favor of the master’s power came in *State v. Mann*, 13 N.C. 263, 266 (1829). There, Judge Ruffin opined that the master’s near-absolute power was functionally necessary to labor discipline in a relationship governed by force and terror. *Id.* Other courts tried to bound the master’s prerogative by an idea of “moderation.” *See, e.g.*, *James v. Carper*, 36 Tenn. (4 Sneed) 397, 401–02 (1857); *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678, 689–90 (1827) (Brockenbrough, J., dissenting).

14. A fascinating anxiety about the terms of recruitment and command emerges in the oral arguments of the pro-slavery side in *Somerset v. Stewart*. The lawyer Mr. Dunning imagines that, if the slave James Somerset is released, servants will no longer accept orders from their masters:

It would be a great surprize [sic], and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither [to England], must take care of his carriage, his horse, and himself, in whatever method he might have the luck to invent. He must find his way to London on foot. He tells his servant, Do this; the servant replies, Before I do it, I think fit to inform you, sir, the first step on this happy land sets all men on a perfect level; you

In consequence, all labor relations were bounded in principle by the right of exit: as the ultimate owner of his labor, a worker could take it elsewhere when presented with a better bargain or mired in an intolerable arrangement. This meant that the recruitment of labor was inevitably a matter of *negotiation*. The negotiation might, of course, take place in profoundly unequal circumstances; but it could no longer be formally a matter of *prerogative*, in which the subordinate figured only as an instrument of the superior's will.

What was the consequence of inevitable negotiation? Smith, a theorist of moral psychology as well as a jurist and political economist, gave a particularly coherent answer. He believed the strong taste for domination over others arose from legal arrangements in which it was possible to exercise such powers, to treat a subordinate as the mute instrument of the master's will.<sup>15</sup> It was critical to Smith's description of such masters that they scorned "to condescend to bargain and treat with those whom they look upon as their inferiors and are inclined to use in a haughty way."<sup>16</sup> The use of "bargain and treat" inevitably suggests Smith's famous reference to the human "propensity to truck [and] barter."<sup>17</sup> That is what the master scorns to engage in and seeks to avoid in his recruitment: bargaining with others.

What did bargaining mean for Smith? He explained in the *Lectures on Jurisprudence* that "the propensity to truck, barter, and exchange" was "founded [in] the naturall inclination every one has to *persuade*."<sup>18</sup> He continued:

The offering of a shilling, which to us appears to have so plain and simple a meaning, is in reality offering an argument *to persuade one to do so and so as it is for his interest*. Men always endeavour to persuade others to be of their opinion even when the matter is of no consequence to them. . . . And in this manner, every one is practising oratory on others thro the whole of his life.— You are uneasy whenever one differs from you, and you endeavour to persuade [him] to be of your mind; or if you do not it is a certain degree of self command, and to this every one is breeding thro their whole lives. In this manner they acquire a certain dexterity and adress in managing their affairs, or

---

are just as much obliged to obey my commands. Thus neither superior, or inferior, both go without their dinner.

98 Eng. Rep. at 506.

The abolition of the relationship of prerogative is here envisioned as a breakdown in the means of social coordination as such, so that the loss of hierarchy verges on the loss of social control. It is surprising that Dunning did not envision the newly licentious servant proposing to eat his former master to make up the lack of dinner.

15. LECTURES, *supra* note 8, at 186.

16. *Id.*

17. See 1 WEALTH OF NATIONS, *supra* note 5, at 25 ("This division of labour . . . is the . . . consequence of a certain propensity in human nature which has in view no . . . extensive utility; the propensity to truck, barter, and exchange one thing for another.")

18. LECTURES, *supra* note 8, at 352 (emphasis added).

in other words in managing of men . . . . That is bartering, by which they address themselves to the self interest of the person and seldom fail immediately to gain their end. The brutes have no notion of this . . . .<sup>19</sup>

This is an extraordinarily rich passage. To give it complete exposition would require a treatment of Smith's account of the social "passions," or what we would call social psychology, in *The Theory of Moral Sentiments*.<sup>20</sup> Let us take its main ideas. First, persuasion, the effort to bring other minds in line with one's own, is one of the basic activities of human life, and motivation for it exists independent of any instrumental use we have for it.<sup>21</sup> Second, bartering is persuasion directed at interest: in bartering one makes a case to another about the content and implications of her self-interest.<sup>22</sup> (It is worth noting that Smith seems to have regarded self-interest not as fixed but as a matter of self-interpretation, which others may induce one to revise.) Third, persuasion is refined by practice, and with enough practice can become a central element of character.<sup>23</sup>

What is it to be engaged in persuasion? It is, first, to be aware of living in a world of other persons, each with her own interests and, indeed, her own self-conception, including goals, aversions, and bases of dignity. Second, it is to recognize the relativity of one's own interests and self-conception to those of others. Announcing your own purposes without considering how they fit or clash with others' interests and self-conceptions will all but guarantee that your purposes—so far as they depend on the recruitment of others—will go unachieved. To live in a world where cooperation requires bartering is to inhabit a *social* world, where one must be aware of interdependence with other people who are as much persons as oneself.

This is not to suggest that persuasion must produce compassion or genuine egalitarianism. A skilled manipulator is as apt to succeed at persuasion as a fair-minded sympathizer—perhaps more so because of the instrumental clarity of his vision.<sup>24</sup> What it does suggest, however, is that the ungoverned

19. *Id.* (emphasis added).

20. See MORAL SENTIMENTS, *supra* note 7, at 3–90. In this portion of the book, Smith outlines his account of "the passions," or the basic psychological motives that he takes to be general to human beings. See *id.* at 32–52. Smith identifies sympathy, the desire that our thoughts and feelings should be in harmony with those of others, and emulation, a specific attraction to the powerful, wealthy, eminent, and graceful, as among the basic principles of our social interactions. See *id.* at 11–28. I provide a sketch of passions theory, particularly Smith's, in Jedediah Purdy, *A World of Passions: How to Think About Globalization Now*, IND. J. GLOBAL LEGAL STUD., Summer 2004, at 1, 23–28.

21. See generally MORAL SENTIMENTS, *supra* note 7.

22. *Id.*

23. *Id.*

24. The vision of market societies as producing skilled manipulators is of course a part of the concern of anti-modern critics such as Fitzhugh. See generally GEORGE FITZHUGH, *CANNIBALS ALL!* (C. Vann Woodward ed., 1960).



satisfaction in working one's will on others—the tyrannical character that views people as things—will not fare well in a world that requires bartering, and hence persuasion, to recruit labor. When the formal terms of recruitment require reciprocity, one cannot expect the highest virtues of reciprocity to emerge in consequence; but at least the appearance of respect and concern for the interests and self-conceptions of others will be an advantage and often a necessity in recruitment. When Smith remarks that “brutes have no notion” of the form of sociability founded on persuasion, one wonders whether he is not referring to slave-masters and feudal lords as well as to the violent African monkeys who populate his literal example of the proposition.<sup>25</sup> The awareness of and responsiveness to others that persuasion requires is, in the normative sense of *humane*, a humanizing trait. We might just as well call it civilizing.

A striking contemporary empirical finding tends to support Smith's view that markets, reciprocity, and self-esteem are mutually supportive and generative. The finding arises from “ultimatum game” experiments, in which the first of two players proposes a two-way division of a sum of money; if the second player accepts, the money is actually disbursed according to the consensus division; if the second player rejects it, neither takes any money.<sup>26</sup> While models of pure maximizing behavior suggest that the second player should accept even the smallest amount of money—say a \$9.95/\$.05 split of \$10—in practice fairness considerations lead players to reject offers they find insultingly inequitable.<sup>27</sup> In developed countries, offers as low as a 4/1 proportion are rejected about half the time.<sup>28</sup> However, “the least-educated groups ever studied . . . conform *most* closely to the game-theoretic model (based on self-interest) . . . . [T]he degree of market integration is positively correlated with equality of offers across a dozen or so small-scale societies, as if market exchange either requires or cultivates norms of equal sharing.”<sup>29</sup>

### III.

What emerges in this picture is a dynamic idea of how institutions and human nature interact in reciprocal change. Certain things are constant in human life: the need to recruit one another to our projects, the appetite for the esteem of others, the existence of ideas about how and why people matter. These broadly stated constants interact in the concrete nexus of recruitment negotiations. The proportion between prerogative and persuasion in these

---

25. LECTURES, *supra* note 8, at 352–53. Smith recounts a description of monkeys robbing fruit, then, without a way of negotiating its division, fighting over the spoils until many are dead. *Id.* at 352–53 n.29.

26. COLIN F. CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION 8 (2003).

27. *See id.* at 9.

28. *See id.* at 9–10.

29. *Id.* at 114.

negotiations is a function of the terms of recruitment, which institutional structures, and property regimes in particular, do much to produce. The terms of recruitment, in turn, both express and shape ideas about the importance of human beings: how we should see one another, how it is acceptable to approach one another, which kinds of threats or inducements are incompatible with our humanity.

Having given this idea some flesh through Smith's version of the Civilizing Argument, I will now say something toward a more general account of the interaction of the economic and political aspects of property regimes.

Two approaches to understanding the function of a property regime have dominated legal scholarship for decades. The dominant approach understands the function of property regimes as being the allocation of resources. From this point of view, property rights and associated modes of transferring property<sup>30</sup> respond to a few basic facts about the social world. First, people need resources, from air and water through land and technology to ideas and the labor of others, to accomplish much of anything. The world is thus full of valued resources, things to which people want access. Second, many of these resources are scarce, not in the sense of being rare, but in that there is competition over them, that is, they are not so abundant as to be effectively non-rivalrous.<sup>31</sup> In consequence, there are considerable gains to social coordination and productivity from assigning property rights in such resources.<sup>32</sup>

These benefits are conventionally designated gains to static and dynamic efficiency. Static efficiency concentrates on the present allocation of resources. Knowing who owns what enables people to identify present owners of the resources they believe they can put to the highest-value use, and trade around until all resources are in the hands of those who most value them.<sup>33</sup> Dynamic efficiency concentrates on improving the productivity of resources

---

30. Contract is the most obvious of these, but liability rules are also ways of transferring property rights.

31. Rivalrousness may be induced artificially by law, as with intellectual property.

32. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32–34 (6th ed. 2003); Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1320–21 (1993) (defining the “efficiency thesis” as that “land rules within a close-knit group evolve so as to minimize its members’ costs”).

33. Transaction costs complicate this claim by impeding exchanges that, absent transaction costs, would produce gains to both parties. The classic statement of the relevance of transaction costs to the design of property rights is R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960). Also significant here are the costs of creating and enforcing property rights, which may be greater than the gains the rights make possible. The canonical treatment of this issue in modern legal scholarship is Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347 (1967). As many commentators have noted, Demsetz gave no account of the governance structure that would translate individual desires for property rights into explicit, enforceable rights.

over time. Owners are assured of being able to capture the increase in value from the improvements they make, and thus have incentive to make these improvements by turning deserts into fields, sand into silicon chips, and words into sonnets and rap songs.<sup>34</sup>

The functional description of property as the law of resources has been important at least since Aristotle, and it has been the dominant strain in Anglo-American legal thought for several centuries.<sup>35</sup> With the rise of the law-and-economics perspectives in recent decades, it has become central to the teaching of property and to property scholarship.<sup>36</sup>

A commitment to wealth maximization, perhaps with some side constraints, has characterized a fair amount of economically oriented commentary on property regimes.<sup>37</sup> From this perspective, the static and dynamic benefits of property rights, allowing for transaction costs and externalities, describe most of the normative purpose of property regimes, that is, most of the reason we should judge them as good or criticize them as bad. There is, however, a competing strain of thought that takes the same functional description of property regimes, but concentrates on the unequal and sometimes quite unappetizing effect they may have on individuals who own little property and thus can make a living only by selling their time and energy on relatively unfavorable terms. In the American legal tradition, this attitude has its canonical expression in the work of the legal realist and institutional economist Robert Hale, and persists in realist and critical property scholars who descend from him.<sup>38</sup> Representatives of this competing normative tradition characteristically claim an idea of freedom or well-being as their

---

34. Dynamic efficiency works perfectly only with perfect internalization of all benefits and costs attending the exercise of one's property rights—an improbable condition, but one that reality approximates under some circumstances. A major discussion of the differential relevance of externalities concerns two different types of resource-use appears in Ellickson, *supra* note 32, at 1322–26 (discussing “large,” “medium,” and “small” events, for which externalities are, respectively, diminishingly important).

35. See ARISTOTLE, *THE POLITICS OF ARISTOTLE* 47–48 (Ernest Barker trans., Clarendon Press 1948); 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 4–10 (Univ. of Chicago Press 1979) (1766); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 24–26 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).

36. See POSNER, *supra* note 32, at 32–34; Ellickson, *supra* note 32, at 1322; Demsetz, *supra* note 33. The classic statements by these authors underlie such current work as that of Henry Smith and Thomas Merrill. See, e.g., Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331 (2002); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002).

37. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

38. The classic statement of this perspective is ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 13–15 (1952).

standard, and object that static and dynamic efficiency do not necessarily maximize these qualities.<sup>39</sup>

There is a competing tradition of thought which takes quite a different descriptive starting point. From this perspective, the function of property law is to express and enforce a specific conception of personhood: autonomous over a certain sphere of one's own choices and possessions, and correspondingly protected in that sphere from the intruding demands of others. On this account, ownership of resources, with the power to exclude others from them, creates a bulwark against interpersonal invasion and a space into which one can retreat from such invasion.<sup>40</sup> In some versions, the most important aspect of this function is self-ownership, the power to dispose of one's person and time freely and immunity against outright ownership by others.<sup>41</sup> Others place more stress on self-ownership as synecdoche, an aspect of property rights that expresses the logic or essence of the whole scheme of private property, and indeed of personal rights as such. (This is Carol's Symbolic Argument.)

The description of property rights as based in personhood, like the one based in resource governance, can take more than one normative attitude. The major strain of this approach has praised property rights as supportive of freedom.<sup>42</sup> Another school, particularly associated with Jennifer Nedelsky, has argued that the conception of personhood that property rights promotes is normatively unattractive: too rigidly bounded, too individualistic, and correspondingly indifferent to the extent and importance of human interdependence.<sup>43</sup> Yet another school, identified with Margaret Jane Radin, takes a pluralist approach, arguing that property rights aimed at allocating resources in market-efficient ways are perfectly appropriate for resources that we in fact value chiefly as commodities, but that certain possessions, such as

---

39. For a helpful reconstruction of Hale's views on these matters, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998). Fried's book is in general an impressively lucid and informative exposition of both Hale's thoughts and the backdrop of intellectual and jurisprudential disputes against which he and his Legal Realist contemporaries worked. *Id.*

40. An excellent discussion of this aspect of property law and scholarship appears in Eduardo M. Penalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1898-90 (2005); see also JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (2d ed. 1998); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 22 (1985); RICHARD PIPES, *PROPERTY AND FREEDOM* 117-18 (1999).

41. See ELY, *supra* note 40, at 26; PIPES, *supra* note 40, at 119.

42. 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. ELY, *supra* note 40, at 26; EPSTEIN, *supra* note 40, at 22; PIPES, *supra* note 40, at xii.

43. See Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162, 167 (Robert Post ed., 1991).

the home, the body, and objects with intimate associations, have value more closely related to the identity of the person who owns them.<sup>44</sup> On this account, governing those goods as market resources distorts their significance and sometimes violates personhood itself.<sup>45</sup>

There is an essential relationship between the two approaches, so that any conception of property as the law of resources will imply some features of a conception of personhood, and vice-versa. The reason for this relationship is that the key terms of the competing schools are not self-defining. There is no ahistorical, context-free meaning of “personhood.” Neither is there any timeless and placeless definition of what counts as a resource. In its approach to both resources and personhood, a legal system does not simply respond to facts about the world that precede the law. Rather, the law’s designation of certain things as resources and certain qualities in people as constitutive of personhood helps to define both qualities. Moreover, the definition of one of these concepts has important implications for the definition of the other.

We cannot get away from this problem, because one of the distinguishing qualities of human beings is a dual nature.<sup>46</sup> We are resources for one another:

---

44. See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

45. See Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 703–04 (2003) (surveying in particular arguments concerned with the devaluation of commodified goods and relationships, and proposing that the 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); Jennifer Fitzgerald, *Geneticizing Disability: The Human Genome Project and the Commodification of 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 non-economic value in persons); David E. Jeffries, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 654–55 (1998) (considering the argument that a market in organs will reduce altruism); Margaret Jane Radin, *Cloning and Commodification*, 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 expect them to maximize our pleasure in life, we might start actually trading them some day.”); Norman W. Spaulding III, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 311–13 (1997) (considering the psychological experiences of “commodity fetishism” and “alienation” as consequences of commodification); see also 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”).

46. Thinking of human beings as having a dual nature—as objects of causal forces and as subjects of action, as the creatures of their circumstances but also the makers of those circumstances, as resources for others and as ends in themselves—has its modern point in origin in Immanuel Kant’s account of the perspective of causation and the perspective of free action as respectively ineliminable and mutually irreducible. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 464–79 (Norman Kemp Smith trans., St. Martin’s Press, 1965) (1781) (elaborating his

our talents, training, time, and energy, our minds, bodies, and even feelings are necessary to advance other people's projects. We need one another. We are susceptible, literally, to exploitation. Moreover, we are scarce as well as desired resources:<sup>47</sup> of all the schemes and wishes in human minds, from making money to making art to making love, only a small fraction will ever be realized. Those who invent or adopt these projects mostly fail to recruit others as investors, co-venturers, employees, or lovers. Our wants, dreams, and self-images are hostage to our success or failure in recruiting others to them.

At the same time that we are resources, means to one another's purposes, we also each have our own purposes, wishes, or ends. Indeed, we recognize one another as "ends," other purposeful and self-conscious beings owed a duty of reciprocal forbearance. This concept is a cornerstone of modern law and ethics, whether it is rendered as Kant's characterization of persons as ends in themselves,<sup>48</sup> rights theorists' specification that each person carries the same complement of basic powers and immunities,<sup>49</sup> the utilitarian axiom that the pleasures and pains of each shall count alike,<sup>50</sup> the contemporary economist's commitment to revealed preference as the sole evidence of interests,<sup>51</sup> or the

---

third "antinomy of pure reason," the respectively irresistible but mutually irreducible character of human beings as the effects of objective causes and as sources of free action). In the contemporary legal academy, the most influential expositor of an explicit dual-nature theory is Roberto Unger. See ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 18–23 (1987) (describing human beings as at once the products of the cultural, economic, and political contexts in which they are born and as agents capable of seizing opportunities to revise these contexts and thus remake their world and themselves).

47. The definition of a valuable resource as one that is both scarce and desired comes from POSNER, *supra* note 32, §3.1, at 33.

48. For an account of this position, see J.B. Schneewind, *Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy*, in *THE CAMBRIDGE COMPANION TO KANT* 309, 322 (Paul Guyer ed., 1992).

49. The late Robert Nozick is probably the best-known modern rights theorist. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (outlining a theory of social justice on the basis of an account of natural rights). For a treatment of rights-based arguments in general, including Nozick's, with special concern for the law of property, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 62–105 (1988).

50. For an account of the power and limits of the utilitarian position that remains more or less contemporary, see, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973) (presenting the argument, by Smart, that the right is determined by the greatest good of the greatest number; Williams argues the contrary, although not in favor of any specific alternative).

51. It is not an entirely conventional view that the methods of neo-classical economics reflect a commitment to an idea of persons as "ends"—even in the loose sense I am using—as worthy of some standard of equal respect. For an account that gets at this idea, see AMARTYA SEN, *RATIONALITY AND FREEDOM* 7–13, 19–25, 510–12 (2002) (arguing that both a plausible account of persons as bearers of preferences and the market commitment to protecting their liberty to act on the preferences they hold incorporate a recognition of the person as a rational agent able to deliberate and freely choose among values).

principle of equal protection under law.<sup>52</sup> Each such account of persons places some limits on how we may recruit others to our purposes: respectively, under rules that pass the strait gate of the categorical imperative, consistent with their basic rights, consistent with the greatest happiness of the greatest number, by means of their voluntary accession to our effective demand, within the bounds of the Fourteenth Amendment.

There is therefore a connection between the governing conception of personhood, freedom, dignity, or equality, and the definition of resources that, taken together, structure any property regime. Technological and economic history are substantially about our changing character as resources: how we have become relatively less valuable in one aspect—for instance, as agricultural laborers—and more in another—say, as designers of video games or, more generally, practitioners of “symbolic manipulation.” The history of culture, politics, and religion has much to do with how ideas of the distinctive value and importance of human beings have changed over time.<sup>53</sup>

52. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

53. Two of the most important and influential treatments of this theme are the very different histories of Charles Taylor and Michel Foucault. Taylor, following G.W.F. Hegel in the broadest sense, describes the development in Western thought of an increasingly “deep” and complex idea of the human being as a bearer of interests, rights, personality, and even a form of subjective (but not arbitrary) truth. The great statement of this project is CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989). Many of the same themes recur—with greater attention to political and social thought alongside philosophical, religious, and cultural conceptions of personality—in a smaller and more accessible work, CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004). Foucault’s work takes a very different tack from Taylor’s, attending not to *ideas* about personality, but instead to the institutional practices, the “disciplines,” in which modern personality is formed, with special attention to those that are “normative” in the sense of embodying their workings in the persons who inhabit them. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977). Late in his life, Foucault took a tack that in some ways brought him nearer Taylor, developing a new interest in the way that *self-understanding* gave *ethical* shape to people’s relations to their own bodies and their intimate dealings with others. See, e.g., 2 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE USE OF PLEASURE* (Robert Hurley trans., 1985). Although less celebrated in recent scholarship, two other works on the historical development of ideas of dignity and freedom are particularly valuable for their attention to the relationship of these ideas to economic life, and are in general exceptionally rich. See, e.g., BARRINGTON MOORE, JR., *INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT* (1978) (asking how, historically, inequality and oppression have come to be recognized as “injustice” and those subjected to them have newly conceived of themselves as competent and entitled to resist and demand a reform of the social order that imposes those conditions); 1 ORLANDO PATTERSON, *FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE* (1991) (arguing that ideas of freedom developed in the West out of a series of contrasts with slavery, which reveal the essential interdependence between freedom and the limits imposed by our need for and vulnerability to others).

An economic system is, among other things, a legal designation of certain features of the world as resources, along with a set of rules for how we can get our hands on, and what we can do with, the things that are so designated. A political system and a political culture are, among other things, institutional and social expressions of ideas about how and why people matter, which ways of approaching one another are mandatory, which ones off-limits, and where the rest fall along the spectrum between these poles. To my mind, Carol's way of thinking about property regimes manages to keep a binocular focus on both these sets of facts, and to understand how they interact in concrete relationships of recruitment and negotiation. I see all of this as helping to put together a systematic way of thinking about property law that nonetheless has plenty of space for historical variability and multi-directional causal arrows. I suspect Carol, who makes no apologies for her approach, would find everything I have said a little too schematic and concerned with getting formulations right at high levels of abstraction. Nonetheless, I hope she would also find some useful prompts in this initial attempt to do what I think all her work does: put property at the center of a historically informed approach to thinking about social life and politics.