

PEOPLE AS RESOURCES: RECRUITMENT AND RECIPROCITY IN THE FREEDOM-PROMOTING APPROACH TO PROPERTY

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ABSTRACT

Theorists usually explain and evaluate property regimes either through the lens of economics or by conceptions of personhood. This Article argues that the two approaches are intertwined in a way that is usually overlooked. Property law both facilitates the efficient use and allocation of scarce resources and recognizes and protects aspects of personhood. It must do both, because human beings are both resources for one another and the persons whose moral importance the legal system seeks to protect. This Article explores how property law has addressed this paradox in the past and how it might in the future.

Two bodies of nineteenth-century law highlighted this paradox: the law of labor discipline for slaves in the antebellum South and for free workers in the laissez-faire “Lochner era.” The law struggled over how to balance recognition of laborers’ bodies as resources with regard for them as legal persons. These jurisprudential problems tracked contemporary debates in political and economic thought about the nature of property in human beings. Both the legal debates

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and their broader counterparts responded to the underlying problem of designating a boundary between those respects in which people are to be regarded as resources and those in which their personhood comes first. Disputes over this boundary are disputes over both claims on resources and the moral importance of human beings.

This analysis illuminates the stakes of two contemporary issues: voluntary peer production in digital media and the entrance of women in developing countries into the paid workforce. Both demonstrate how legal, technological, and social changes in people's status as resources interact with changes in how they do or may value one another. When the resource-regime changes are in the direction of greater reciprocity, they may help to produce a more robust conception of personhood and a more egalitarian and attractive social life.

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INTRODUCTION

How should we think about the law of property, the law that distributes claims on the useful, beautiful, and pleasurable things in the world? Should we try to understand how it makes us rich, and ask how it could make us even richer? Should we explore how it makes us who we are, and ask how the law can reinforce or change those identities? Or should we ask how it makes us free, and how it could make us even freer? I take the last approach. Choosing that approach raises several questions, which this Article addresses.

First, setting out the freedom-promoting approach requires explaining its relationship to other approaches, particularly the ones concentrating on property's economic advantages and its connection to personhood, which indisputably describe deep human interests and important ways in which property regimes can advance them. Second, the freedom-promoting approach needs a working definition of freedom, a multifarious concept that is a challenge to make analytically tractable. Third, it needs an account of what property systems do that shows how promoting freedom is not just an attractive idea in general, but an apt account of the activity of these legal regimes in particular.

In a previous article I identified a freedom-promoting tradition in property thought and connected it with some current debates in property reform and theory.¹ Here I take on the challenges I have just

1. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005).

listed. I show how property regimes, in some of their central operations, confront the fact that people are at once bearers of personhood and economic resources for one another. Neither the economic nor the personhood approach takes full account of this fact, which spans and confounds their respective concerns. By exploring some of the ways that this difficulty has shaped doctrine and political history, I develop a description of property that takes account of both features of human beings. I argue that property regimes come closest to reconciling these conflicting qualities when they maximize reciprocity among persons, which makes it necessary to take others' personhood into account even when seeking to treat them as resources for one's own purposes. I argue further that a theory of reciprocity goes some distance toward specifying what freedom means in evaluating property regimes.

Two approaches to understanding property regimes have dominated legal scholarship for decades. The first, the *economic approach*, understands the function of property regimes as being the allocation of resources. From this point of view, property rights respond to certain basic facts about the social world. People need resources, from air, water, and land to technology, ideas, and the labor of others, to accomplish much of anything. The world is thus full of desired resources, things that people want to control. 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 nonrivalrous. These facts underlie the great gains to social coordination and productivity that property rights produce.²

2. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32–34 (6th ed. 2003) (“[L]egal protection of property rights creates incentives to exploit resources efficiently.”); Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1320–21 (1993) (defining the “efficiency thesis,” that “land rules within a close-knit group evolve so as to minimize its members’ costs” (emphasis removed)). 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 addressed the economic efficiency secured by the coordinated pursuit of respective self-interest. See generally Stuart Banner, *Transitions Between Property Regimes*, 31 *J. LEGAL STUD.* 359 (2002) (discussing a possible way “societ[ies] can overcome the obstacles that might block a transition to a more efficient property regime”); David D. Haddock & Lynne Kiesling, *The Black Death and Property Rights*, 31 *J. LEGAL STUD.* 545 (2002) (applying Harold Demsetz’s proposal that the development of property rights reflects cost-benefit ratios to changes in medieval property rights after the Black Death); Saul Levmore, *Property’s Uneasy Path and Expanding Future*, 70 *U. CHI. L. REV.* 181, 181 (2003) (“The law and economics literature has advanced the optimistic view that property rights have evolved in a way that promotes economic efficiency. I suggest . . . there is an alternative and skeptical view that is interest group, or politically driven.”); Saul Levmore, *Two Stories About the Evolution of*

These benefits are conventionally designated as gains to static and dynamic efficiency. Static efficiency aligns the present allocation of resources with effective demand—desire backed by purchasing power. Clear property rights enable potential purchasers to identify the present owners of resources they believe they desire and to trade around until all resources are in the hands of those who most value them (and can pay).³ Dynamic efficiency maximizes the productivity of resources 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 songs.⁴

The description of property as the law of resources has been important at least since Aristotle, and has been central to Anglo-

Property Rights, 31 J. LEGAL STUD. 421 (2002) (arguing that the competing stories of efficiency and interest-group opportunism leave uncertain whether property regimes reliably secure efficiency); Gary D. Libecap & James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUD. 589, 589 (2002) (examining “Harold Demsetz’s prediction that property rights emerge as the benefits of doing so exceed the costs in the context of oil and gas resources in the United States”); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331 (2002) (reviewing Demsetz’s theory while noting its silence on the question of how institutions take advantage of potential efficiency gains by changing property rights); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 456 (2002) (examining “the relationship between exclusion and governance as elements of property rights over resources of varying sizes, in the presence of changing resource values”); Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677 (1999) (applying these concerns to new issues of resource governance); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005) (emphasizing the relevance of political institutions to the success or failure of property law in changing to take advantage of potential efficiency gains).

3. 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 Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Also significant here are the costs of creating and enforcing property regimes, 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, 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. *See, e.g.*, Merrill, *supra* note 2, at 333 (“It said virtually nothing about the precise mechanism by which a society determines that the benefits of property exceed the costs.”).

4. 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 to different types of resource use appears in Ellickson, *supra* note 2, at 1327–35 (discussing “large,” “medium,” and “small” events, for which externalities are, respectively, diminishingly important).

American legal thought for several centuries.⁵ With the rise of the law-and-economics perspective in recent decades, it has become dominant in the teaching of property and property scholarship.⁶

This description may be either celebratory or critical, depending what one takes as the normative purpose of a property regime. A normative commitment to wealth-maximization, perhaps with some side-constraints, has characterized a fair amount of the commentary on property regimes.⁷ From this perspective, the static and dynamic

5. See ARISTOTLE, *THE POLITICS OF ARISTOTLE* 20, 44 (Ernest Barker ed., Clarendon Press 1946) (“[P]roperty of this order [that is to say, for the purpose of subsistence] is evidently given by nature to all living beings.”); JOHN LOCKE, *Second Treatise of Government, in TWO TREATISES OF GOVERNMENT* 285, 314–16 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (“And thus, without supposing any private Dominion, and property in *Adam*, over all the World exclusive of all other Men, which can no way be proved, nor any ones Property be made out of it; but supposing the *World* given as it was to the children of Men in common, we see how *labour* could make Men distinct titles to several parcels of it for their private uses”); WILLIAM BLACKSTONE, 3 *COMMENTARIES* *1–2, *4–10 (St. George Tucker ed., 1803) (“There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of any other individual in the universe.”).

6. On scholarship, see *supra* note 2, and works cited therein. For some respectful questions about the uses and limits of economics in understanding and normatively guiding the law of resources, see Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175 (2003). Thompson emphasizes that although a maximizing calculus may not in practice provide a satisfactory comprehensive schedule of social welfare, the analytic tools of economics are invaluable in the following respects: for designing efficient means to ends however selected, *id.* at 179–86; understanding the perennial threats to effective policy, such as externalities, commons tragedies, and collective-action problems, *id.* at 186–90; and presenting one’s own commitments in a language generally available to other citizens in the public sphere, *id.* at 194–95. For a more theoretical and playful take on the same issues, see Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, (1990), which argues that the neoclassical microeconomic account of rational behavior cannot account for the cooperation and modest altruism that enable property institutions to arise and persist, *id.* at 37–57.

7. This is the logic of the economic analysis in the scholarship cited in note 2, *supra*. See POSNER, *supra* note 2 in particular. Posner’s attempt to vindicate wealth-maximization as a theory of justice has not found much success, and Posner himself has abandoned it, but the wealth-maximization criterion remains a default position as analysts seek to point out where avoidable transaction costs or missed opportunities for propertization produce deadweight loss by inhibiting transactions that would otherwise take place. For an innovative application of this analysis to overextended property rights, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998), which argues that too many people in post-Soviet Russia held the power to exclude others from property, creating transaction costs that prevented transfer of the property to higher-value uses, *id.* at 658–59. For a discussion of the doctrinal structure of property law in light of efficiency considerations, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000), for an argument that the

benefits of property rights make up most of the benefits of property regimes.⁸ A competing normative approach starts from the same economic description of ownership, but criticizes its effect on individuals with scant property who can make a living only by selling their time and talents, often on unfavorable terms. In American law the canonical expression of this approach is the work of the legal realist and institutional economist Robert Hale, who continues to inspire critical property scholars.⁹ Representatives of this competing normative tradition characteristically claim an idea of freedom or well-being as their standard, and argue that static and dynamic efficiency do not necessarily maximize these qualities or do not produce a just distribution of them.¹⁰

traditional limit on the number of forms property rights may take limits information costs and enables property markets to achieve allocative (static) efficiency, *id.* at 4–9. For Posner's more ambitious philosophical project, see generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

8. Ellickson, *supra* note 2, provides a classic and powerful encomium to this conception of property rights. See generally works cited *supra* notes 2, 6–7. Outside the legal academy but in the realm of legal reform, a particularly evocative presentation of the market-enabling power of property rights is HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 39–67 (2000), which outlines the efficiency effects of legally designating the productive aspects of resources as the objects of fungible and universally transferable right-claims.

9. See ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 3–34, 385–99 (1952) (diagnosing property rights as establishing economic relationships of reciprocal threat and exploring modes of legal mitigation and equalization of threat). Joseph William Singer has continued to do important and theoretically ambitious work in Hale's vein. See Joseph W. Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611, 650–51 (1988) (“As Hale tried to teach us, every transaction takes place against a background of property rights. And the definition, allocation, and enforcement of those entitlements represent social decisions about the distribution of power and welfare. No transaction is undertaken outside this sphere of publicly delegated power; the public sphere defines and allocates the entitlements that are exchanged in the private sphere. At the core of any private action is an allocation of power determined by the state.”). Duncan Kennedy has also pursued Hale's line of analysis, both with explicit acknowledgement and under implicit influence. See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *LEGAL STUD. F.* 327, 327 (1991) (reviewing Hale's account of law and connecting it with other radical theories of power); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 209–21 (1979) (analyzing private-law rights as a mode of mediating between autonomy and interdependence).

10. Hale himself addresses this issue in a glancing way. See HALE, *supra* note 9, at 541–50 (discussing the role of economic liberty under democratic government). For a discussion of the effort to recast ideas of liberty in light of critical analytics of legally constituted private power and a description of the progressive thought of T.H. Green, John Dewey, John Stuart Mill, and others, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 37–70 (1998). Nobel Economist Amartya Sen has developed a capabilities-oriented account of welfare economics in part

The second leading approach to property is the *personhood approach*. From this perspective, the function of property law is to express and enforce a specific conception of personhood: autonomy over a certain sphere of one's own choices and possessions and corresponding protection in that sphere from the intruding demands of others.¹¹ In this account, ownership of resources, including the power to exclude others from them, creates a bulwark against interpersonal invasion and a sphere of autonomous action.¹² 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 a protection against outright ownership by others.¹³ Other accounts 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 rights-holding itself.¹⁴ Still others regard

because of the recognition that static conceptions of efficiency bear only minimally on the actual condition of life enjoyed by those who participate in the allocation of resources to their highest-value users. I briefly introduce Sen's account in Part IV.A.1, *infra*.

11. The classic discussion of the personhood perspective is in Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), which introduces the terminology of personhood to American legal debate through a discussion of legal doctrine and Hegel's theory of identity, *id.* at 957. Because I distinguish among several quite distinct perspectives on the personhood approach, of which Radin's is one, I present their representatives respectively in the following footnotes rather than lump them together here.

12. See *id.*; *infra* notes 13–15.

13. For writers from this perspective, 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, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992) (“[T]he protection of property ownership was an integral part of the American effort to fashion constitutional limits on governmental authority.”); see also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 331–34 (1985) (arguing in favor of an absolutist conception of property rights, where such rights include exclusive use, disposition, and full alienability); RICHARD PIPES, PROPERTY AND FREEDOM, at xii (1999) (arguing that property is a necessary prerequisite for political liberty). As I discuss particularly in Part II, *infra*, this perspective emerges historically from the free labor politics of the nineteenth century, but in its property-absolutist version is something of a caricature of that rich and socially informed idea of the importance of self-ownership.

14. Carol Rose calls this the “symbolic argument” for the importance of property rights. See Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 349–51 (1996) (“If property is so important for the visualization of all rights, then property itself becomes the critically important right: it is the symbolic means through which people convey and receive the meaning of all rights.”). Margaret Jane Radin's argument that treating certain kinds of resources as property creates an instrumental subject-object relationship to them is a critical version of this argument. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing the moral-psychological effects of considering, for example, organs and human beings as commodities). A similar argument that goes more to the

ownership as enriching identity by enabling owners to identify with and express themselves through the external objects they control.¹⁵

The personhood approach, like the economic approach, is a description that allows more than one normative evaluation. The major strain of the personhood approach praises property rights as supportive of freedom.¹⁶ Another school, particularly associated with Jennifer Nedelsky, argues that the conception of personhood that property rights promote is normatively unattractive: too rigidly bounded, too individualistic, and correspondingly obtuse to the extent and importance of human interdependence.¹⁷ A third, identified with Margaret Jane Radin, takes a pluralist approach, arguing that property rights aimed at allocating resources in market-efficient ways are appropriate for resources valued chiefly as commodities, but that certain possessions, such as the home, the body, and objects with intimate associations, have value more closely related to the identity of the person who owns them.¹⁸ On this account, governing those

self-conception of property-holders than to their views of the objects they may hold is JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS ON AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 207–11 (1990) (describing “the distorted lens of property”). For a more positive and traditional view of ownership as synecdoche for autonomy, see 4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *23 (12th ed. 1873) (1823). Kent explains, “An estate of freehold . . . denoted anciently an estate held by a freeman, independently of the mere will and caprice of the feudal lord.” *Id.* at *23. He continues, “By the ancient law, a freehold interest conferred upon the owner a variety of valuable rights and privileges. He became a suitor of the courts, and the judge in the capacity of a juror; he was entitled to vote for members of Parliament, and to defend his title to the land; . . . and he had a right to call in the aid of the reversioner or remainderman, when the inheritance was demanded. These rights gave him importance and dignity as a freeholder and freeman.” *Id.* at *24.

15. Far and away, the outstanding piece in this vein remains Radin, *supra* note 11. She has developed aspects of the personhood theme, in conjunction with the market-inalienability theme, in MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996), in which she argues for a capabilities-oriented conception of personhood that concentrates on whether property rights facilitate the realization of a full complement of human potential, *id.* at 54–101, a condition Radin styles as flourishing. This criterion falls close to an argument I have made previously. See Purdy, *supra* note 1.

16. See *supra* note 13.

17. See *supra* note 14. This critical perspective tends to accompany an emphasis on the importance of interdependence in human life, and on its necessity for any adequate conception of well-being. See, e.g., Singer, *supra* note 9; see also Eduardo Penalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1893–94 (2005) (arguing that libertarian conceptions of the importance of property neglect the need for human relationships and social participation, which property rights facilitate and which should be the normative measure of property regimes).

18. See *supra* note 15.

goods as market resources distorts their meaning for personhood, and may devalue personhood itself.¹⁹

This Article partially reconciles these two approaches to property law. My argument is not that the two are “closer than their proponents think” or “getting at the same thing,” for they are not: they are different. It is an important part of my argument, however, that they are not incommensurably distinct approaches. Rather, they describe two inextricably entwined aspects of property law. Both are present in any property regime. Each influences and may set limits on the other, so that any conception of property as the law of resources will imply or prohibit some features of a conception of personhood, and vice versa.²⁰ This Article concentrates on the situation in which

19. See *id.* This argument has been applied to specific legal and policy questions. See 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 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); 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 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 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); Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 689 (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); 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”).

20. A problem may seem to arise here. In the market regime, the general prohibition on recruitment through threat of violence is a point of criminal law and the ban on slavery a tenet of constitutional law. What does it mean to set these up as essential contrasts to market means of recruitment in an account of *property* law? This concern rests on a confusion of the present boundaries of property law with the “nature” of property. If it is helpful to describe property law as governing the terms of recruitment for cooperative activity, then it is unsurprising that actions (such as the threat of violence) and legal relationships (such as slavery) that have been categorically excluded from such recruitment should no longer stand as part of property law, but should instead become part of the “outside of property” law that, by prohibition on certain acts or relationships, defines how property rights cannot come about or transactions be consummated, and which rights may not be exchanged. For an excellent discussion of the perennial tendency to lose track of the two-sided character of any legal definition—what it takes

the intersection between the two strands is most fraught and complex: where the resource that law governs is the time, effort, or bodies of human beings, and so resource and person are literally coextensive even as the law strives to disentangle them.

The relationship is a product of legal choices. The key terms of the competing approaches are not self-defining. There is no ahistorical, context-free meaning of personhood.²¹ Neither is there any timeless and placeless definition of what counts as a resource, or what legal consequences follow from that status.²² Being a person and

in and what it shuts out—as mutually constitutive of the domain governed by the definition, see James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 29–32 (Winter/Spring 2003). At the point of historical origin, however, it was clear that the abolition of slavery and the designation of labor power as personal property alienable only on certain terms (at retail rather than wholesale, as it were) that defined the triumph of the free labor movement were significant revisions to the law of property itself. Any particular property regime, then, may be diagnosed by reference to both its circumstances and its rules of recruitment—in sum, by the terms of recruitment it sets up for engaging others in one’s projects.

21. 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. See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989) [hereinafter TAYLOR, *SOURCES OF THE SELF*]. 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 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 2 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE USES 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 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 reconceived 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 a need for and vulnerability to others).

22. For discussions of exogenous changes in the value of resources and their relationship to the development of property rights, see Demsetz, *supra* note 3 (discussing the effect on rights in land and hunting among Native Americans of the rise of the European market for beaver pelts);

being a resource are both conditions that reflect the ideas, social relations, and economic activity of the times and places in which people live, not freestanding abstractions that individuals in concrete times and places approach more or less closely. In its approach to both resources and personhood, therefore, a legal system does not simply respond to facts about the world that precede the formulations of law—although, of course, it also does that.²³ Rather, law's designation of certain things as resources and certain qualities in people as constitutive of personhood helps to define both.

My argument is made up of three complementary strands: doctrine, history, and theory. After sketching how the two dimensions of property law interact and depend on each other, this Article carries the analysis through a contrast between property systems based on slavery or feudal relations, on the one hand, and those based on universal self-ownership, or “free labor,” on the other. Part I examines two clusters of doctrinal problems dealing with the terms of labor discipline in antebellum slave states and in post-Civil War free labor jurisprudence. In each setting, courts struggled to define a relationship between two intertwined features of human beings: their character as resources and their personhood. Part II examines the debates in political economy and moral psychology that drove the critique of slave relations and the vindication and critique of free labor economies. These debates fill out the conceptual problem of the doctrinal history by revealing what contemporaries thought was at stake in the choice of property systems. Part III presents an analytic account of the relationship between serving as a resource and standing as a person: human beings' dependence on one another in nearly all our projects means that we perennially need to recruit others to our undertakings. The law's mediation of resource and

Libecap & Smith, *supra* note 2 (describing exogenous changes in the value of petroleum resources as a fossil-fuel-based economy arose); Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990) (exploring changes in water rights that emerged as water became an energy-producing resource with the rise of mills in New England). A classic study treating the commodification of labor and reshaping of social life along market lines as a partly endogenous change is KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1965). Another methodologically complex view attentive both to changes in the logic of resources with the rise of industrial capitalism and to the internal workings of legal doctrine is MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) (describing private law as changing, particularly in its conception of property, to accommodate and facilitate a market-enabling instrumental view of resources).

23. See Demsetz, *supra* note 3; Libecap & Smith, *supra* note 2; Rose, *supra* note 22.

personhood is thus essential to setting up the *terms of recruitment*, the rules and bargaining positions that structure our reciprocal recruitment. Part IV applies this analysis normatively, considering two applications at opposite poles of social and technological development: the production of culture and knowledge in a digital age and the entrance of Indian women into the labor market. Both examples show that property law benefits human freedom by directing interpersonal recruitment toward relative reciprocity rather than hierarchy. I argue that an important standard for assessing changes in legal regimes is whether they move the terms of recruitment toward reciprocity, and that increases in reciprocity constitute a gain in human freedom.

I. PERSONHOOD AND PROPERTY IN SLAVE RELATIONS AND LABOR MARKETS

In this Part, I trace the personhood-resource relationship through strands of jurisprudence in two property regimes: the slave relations of the antebellum American South and the free labor employment relations of the latter half of the nineteenth century. To avoid a possible confusion it is worth stressing that I treat both regimes as ideal types, recognizing that they contained enormous varieties of actual relations, and that judges and legislatures marshaled multifarious common-law and statutory approaches in both settings.²⁴ My aim is not even to begin a unifying account of

24. A wealth of studies have greatly enriched scholars' understanding of the complex particulars of both the slave relationship itself and the world of ideas, institutions, and interests in which it stood. The great study of the political and legal struggle over slavery in the Anglo-American world is DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823* (1975). Davis addresses the status of slavery under law, with special attention to moments where legal distinctions came under pressure, either through the conjunction of property and personhood in a single human being, or through the conflict of laws between free and slave jurisdictions. *Id.* at 469–522. Also valuable on these themes is EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975). Morgan argues that slavery arose in part in response to the challenge of maintaining labor discipline in a land of abundant resources. *Id.* at 295–98. On political and constitutional debates in the years just preceding the Civil War, see WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* (1996). All three scholars may be broadly described as liberal students of slavery, inasmuch as they take ideas and political institutions as substantial drivers of history, although all necessarily take serious account of the status of slavery as an economic relationship. Two scholars whose classic studies of the topic represent a sophisticated form of Marxian method, treating ideas and political institutions with full seriousness but assigning ultimate explanatory power to the limits and imperatives of economic relations, are EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE*

either regime, but to demonstrate the continuity of the personhood-resource problem between two regimes whose advocates and interpreters tended to understand them as essentially opposed.

A. *“Inherent in the Relationship”*: *People as Resources in American Slavery*

Antebellum courts wrestled with the doctrinal consequences of defining one human being as the property of another. The question was vexed because it was inescapable that designating someone as property did not erase that person’s humanity as a matter of fact; yet the designation prohibited recognition of full legal personhood, even in a time when that category was considerably more differentiated (by gender, for instance) than it now is.²⁵ Courts thus had to determine in what respects slaves were to be treated as property and in what respects as persons. Concurrently, they had to determine what each of those categories meant.²⁶

WORLD THE SLAVES MADE (1974), and MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981). The latter two are particularly helpful in understanding the variety of concrete conditions and practices contained within the category of slavery.

Two invaluable resources for appreciating the complexity of the contrast between slavery and free labor are ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974) (offering a less important and disputed conclusion that slavery was sometimes superior in economic efficiency to free labor, but also documenting slaveowners’ ready combination of pecuniary inducements and bodily threats to maintain labor discipline, which highlights the complex interaction of these categories in any actual economy), and ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* 3–38 (2001) (arguing that elements of pecuniary inducement and bodily coercion coexisted in nominally free-labor relations, and documenting some of the forms of coercion prominent in nineteenth-century labor ties).

25. On these issues, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 179–201 (1973) (expounding the law of status in nineteenth-century America, with particular attention to the propertyless, women, and slaves); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 137–242 (1997) (describing citizenship and status between the adoption of the Constitution and the *Dred Scott* decision); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 11–94 (1992) (describing social hierarchy and its intersection with political membership and authority in colonial America).

26. As I show, the distinction frequently arose in these terms in judges’ language. It also appears in contemporary legal commentary. See THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 83 (Univ. of Georgia Press 1999) (1858) (“[T]he negro slave in America, protected . . . by municipal law, occupies a double character of person and property.”). The seeming paradox routinely draws observations from historians and commentators. See, e.g., Peter Charles Hoffer & N.E.H. Hull, *Editors’ Preface*, in MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE*, at ix (2003) (“The statutes of slavery . . . invariably defined slaves as the personal property . . . of the master. But the rigor of statutory law existed in constant tension with an

Courts across several decades and many jurisdictions formulated the problem as one of drawing a line between personhood and property. “In expounding [the] law,” Chief Justice Taney wrote while riding circuit in Virginia in 1859, “we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property.”²⁷ “The laws of Georgia . . . recognize the negro as a man, whilst they hold him property,” observed that state’s supreme court in 1851.²⁸ The Supreme Court of Mississippi remarked, “In some respects, slaves may be considered as chattels, but in others, they are regarded as men.”²⁹

The problem of setting this boundary arose when legal dimensions of personhood came into conflict with the legal incidents of property. Justice Taney’s pronouncement in *State v. Amy*,³⁰ for instance, concerned a claim by a slaveholder that imprisonment of his slave for pilfering from a post office constituted a taking under the Fifth Amendment: although she was criminally liable as a legal person, her status as his property made her imprisonment a deprivation of his ownership claim.³¹ More frequently, however, the problem arose from violence against slaves: the question was whether the violence at issue crossed lines of immunity the slave enjoyed

inescapable social fact: slaves were not things, like parlor furniture, nor domestic animals, like dray horses. Slaves were people, like their masters.”). One piece of legal scholarship takes account of the problem in these terms, although in the context of a broader survey of the uses of the personhood concept in American law. See Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1747–50 (2001).

27. *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14,445).

28. *Neal v. Farmer*, 9 Ga. 555, 583 (1851).

29. *State v. Jones*, 1 Miss. (1 Walker) 83, 85 (1820). Sometimes, however, the matter was put so as to suggest no legal salience in the slave’s humanity. Thus, the Kentucky Court of Appeals opined that “Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (*negotium*), a thing, as he stood in the civil code of the Roman Empire. In other respects, slaves are regarded by our laws, as in Rome, not as persons, but as things.” *Jarman v. Patterson*, 23 Ky. (7 T.B. Mon.) 644, 644 (1828).

30. *Amy*, 24 F. Cas. at 810.

31. See *id.* at 799. Taney ruled that slaves were regarded as legal persons for purposes of enforcing criminal law against them, and that where the government’s bodily expropriation of a slave was with respect to her as a legal person, the protection of property under the Fifth Amendment was not triggered. Similarly, *Jarman* dealt with a claim by a master that a law entitling the city of Richmond to jail at his expense a slave found unattended. 23 Ky. (7 T.B. Mon.) at 644. The court ruled that the statute was a reasonable regulation of property, not in excess of the power “of compelling the owners of such property, so to use it as not to injure and annoy the rights or repose of others.” *Id.* at 646.

under her aspect as a legal person, or instead fell within the owner's power to manage his property.³² The issue was particularly acute in labor discipline: how far could a master go in coercively extracting a slave's labor? The question went to the slave's character as a value-producing resource, which here came directly into conflict with the bodily integrity, dignity, and autonomy of personhood.

Some judges took the attitude that the conflict was illusory or, at worst, an unnecessary product of masters' overreaching: there was no inherent conflict between property and personhood.³³ A model of this approach appears in the dissent in *Commonwealth v. Turner*,³⁴ argued before the General Court of Virginia in 1827.³⁵ The majority upheld a master's demurrer to an indictment "for cruelly beating his own slave."³⁶ The majority based its acceptance of the demurrer on the existence of a state statute, passed in 1788, that forbade the killing of a slave as of a freeman.³⁷ As the majority observed, that statute replaced two far more permissive laws, a 1669 statute exculpating any master "for killing his slave under correction for resistance" and a

32. In *Jones*, the issue was whether it was possible to commit common-law murder against a slave; the court found that it was, reasoning in part that "a slave may commit murder and be punished with death; why then is it not murder to kill a slave?" *Jones*, 1 Miss. (1 Walker) at 83. In *Neal*, the court found by contrast that the killing of a slave was not a felony under the common law, as the slave relationship was not recognized in common law and thus was not subject to common law regulation. *Neal*, 9 Ga. at 583.

33. See William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, in *SLAVERY AND THE LAW* 43–85 (Paul Finkelman ed., 1997) (offering an illuminating portrait of this paternalist approach to justifying the slave relationship, which assimilates it into a broader logic of reciprocal duties up and down the lines of a social and economic hierarchy). Fisher contrasts this approach to a racist model of slavery that "solves" the problem of the personhood-resource relationship by demoting Africans to a status less than fully human. *Id.* For a textured discussion of the paternalist attitude, see ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, *THE MIND OF THE MASTER CLASS: SLAVERY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW* 365–82 (2005) (describing the interaction of chivalric ideas of duty with the self-understanding of slaveholders).

34. *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827).

35. *Id.* at 689–90 (Brockenbrough, J., dissenting).

36. *Id.* at 678 (majority opinion). Andrew Fede presents *Turner* and *State v. Mann*, which I discuss *infra* at notes 52–62 and accompanying text, as joint evidence that as slaves, women and men alike were subject to legally sanctioned and effectively unrestricted forms of violence. Andrew T. Fede, *Gender in the Law of Slavery in the Antebellum United States*, 18 *CARDOZO L. REV.* 411, 419–24 (1996). Leon Higginbotham and Anne Jacobs note *Turner* as an instance of the general emptiness of nominal legal protections for the slaves in the course of a survey of the bodily outrages sanctioned by the law of slavery. A. Leon Higginbotham & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 *N.C. L. REV.* 969, 1034 (1992).

37. *Turner*, 26 Va. (5 Rand.) at 687.

1723 statute extending the same immunity to a master killing a slave “for any offence whatever.”³⁸ Noting that the common law had not recognized the slave relationship, and thus did not regulate it, the court reasoned that the 1788 statute must represent the extent of the law’s protection of slaves from their masters’ discipline. To enforce common-law restrictions on the master beyond statutory law would be judicial overreach.³⁹

In dissent, Judge Brockenbrough argued that the common law contained principles of labor discipline that courts could legitimately extend to reconcile the two dimensions of slave status. “The slave was not only a *thing*, but a *person*,” he wrote.⁴⁰ “[A]nd this well-known distinction would extend its protection to the slave as a person, *except so far as the application of it conflicted with the enjoyment of the slave as a thing*.”⁴¹ Brockenbrough proposed that this formula simply applied to the slave relationship the standard that the common law imposed on the disciplinary actions of other status superiors against their subordinates, such as parent to child, tutor to pupil, and, above all, master to servant: discipline must fall within “bounds of due moderation.”⁴² In Brockenbrough’s formula, permissible discipline included “every power which was necessary to enable the master to use his property,” including sale of the slave and “correct[ion] . . . for disobedience.”⁴³ Severe beatings, however, were as a matter of law unnecessary to labor discipline and thus outside the “bounds of due moderation.”⁴⁴ Permissible discipline was restricted to what was necessary to manage people in their status as things. When a master overstepped these bounds, the law could thus regard the slave as a person and offer the protection of the criminal common law. On this reasoning, Brockenbrough satisfied himself that he could “see no

38. *Id.* at 687–88.

39. *Id.* Proslavery legal commentator Thomas R.R. Cobb thus cited *Turner* in his account of the origin and place of the slave’s personhood within American law. COBB, *supra* note 26, at 83–84. Cobb’s main point was that the personhood dimension arises only with statutory protection for the slave, and is not inherent in the relationship. *Id.* Cobb wrote, “So long as [the slave] remained purely . . . property, an injury upon him was a trespass upon the master’s rights. When the law . . . recognizes his existence as a person, he is as a child just born, brought for the first time within the pale of the law’s protecting power.” *Id.*

40. *Turner*, 26 Va. (5 Rand.) at 689 (Brockenbrough, J., dissenting).

41. *Id.* (emphasis added).

42. *Id.* See also FOX-GENOVESE & GENOVESE, *supra* note 33, for an elaboration of these themes.

43. *Turner*, 26 Va. (5 Rand.) at 689 (Brockenbrough, J., dissenting).

44. *Id.*

incompatibility between this degree of protection [of the slave's legal personhood] and the full enjoyment of the [master's] right of property."⁴⁵

The Tennessee Supreme Court took a view similar to Brockenbrough's in *James v. Carper*, an 1857 trespass action by a master against a man who had rented his slave, then beaten the slave severely upon false allegations that he had stolen money from a white transient in the neighborhood.⁴⁶ The defendant argued that the master's inherent right to punish the slave had traveled with his leasing of the slave, and the trial court accepted this view.⁴⁷ The Supreme Court disagreed, opining that the master's general right of punishment against the slave was among "certain peculiar rights" that attached inherently "[t]o this, as to the various other domestic relations."⁴⁸ The rights of such status-based relationships were not transferable by a contract for services.⁴⁹ The renter was thus liable to the master for harm to the slave.

The court did, however, undertake its own inquiry into the problem of labor discipline and slavery. This inquiry followed the logic of Brockenbrough's proposal to reconcile personhood and property status by limiting punishment to acts necessary for the management of property. Someone who rented a slave, the court noted, "must of necessity be regarded as possessing the right to inflict reasonable corporal punishment on the slave, for insubordination, disobedience of lawful demands, wanton misconduct, or insolent behavior."⁵⁰ Such corporal punishment was not status based in the same sense as the master's inherent power to punish, but was bounded by the functional requirements of extracting labor from an unfree human being. The court acknowledged the vagueness of this power and its dependence on the circumstances of any particular act

45. *Id.*

46. *James v. Carper*, 36 Tenn. (4 Sneed) 397, 397 (1857). The court was not clear on its view of the scope of the master's power to punish a slave, noting that a parent possessing the status-based "paternal power . . . may not exceed the bounds of moderation," but also suggesting "for the sake of the argument, that the owner of the slave, in virtue of his absolute right of property, might take the law into his own hands, and avenge the crime committed by the slave without appeal to the law." *Id.* at 401–02. The precise bounds of the master's power were not, of course, at issue in the case.

47. *Id.* at 401.

48. *Id.* at 402.

49. *See id.*

50. *Id.*

of discipline, noting that “the hirer must always, at his peril, be able to show that there existed reasonable ground for the chastisement, and that it did not, either in the extent or manner of it, exceed the bounds of moderate correction.”⁵¹ Moderation was, of course, relative to the task of compelling human beings to conduct themselves as property by yielding up whatever of value they could produce, and surrendering their bodies to punitive coercion if they failed or declined to do so.

Other courts, while equally committed to the legality of slavery, regarded the conciliatory approach as a pleasant delusion. In their analysis of the slave relationship, the brutality inherent in extracting unfree labor necessarily overwhelmed any guarantees of personhood in the slave. In the mercilessly reasoned case of *State v. Mann*,⁵² a North Carolinian shot and wounded a slave whom he had rented for one year, as she fled after he chastised her for “some small offence.”⁵³ Unlike the court in *James*, Justice Ruffin in *Mann* held that a renter of a slave had exactly the same power of labor discipline as a master.⁵⁴ This was so because the master’s power was not part of “domestic relations,” such as parent-child and master-apprentice ties, but a legally unique relationship governed by the functional requirements of labor discipline. Because those requirements were the same for the renter as for the master, labor discipline had the same bounds in both situations.⁵⁵

Ruffin’s rejection of the domestic-relations analogy was critical to leaving behind the conciliatory approach. Status-constituting domestic relations had as their purpose the improvement and eventual emancipation of the dependent party, as with children, or an idea of mutual advantage and obligation, as with servants.⁵⁶ “With slavery it is far otherwise,” Ruffin wrote.⁵⁷ “The end is the profit of the master, his security and the public safety.”⁵⁸ The slave’s legal status should be defined purely by reference to these ends, with no independent dimension of personhood. Justice Ruffin defined the

51. *Id.*

52. *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829).

53. *Id.* at 263.

54. *Id.* at 266–67.

55. *Id.*

56. On the law of status in antebellum U.S. law, see works cited *supra* note 25.

57. *Mann*, 13 N.C. (2 Dev.) at 267.

58. *Id.*

question of the master's authority as one entirely of resource management.

The slave presented a uniquely difficult problem in these terms, because he was a conscious agent who, although legally unfree, retained free will. As a slave, denied any share of what he produced, he had no incentive to work except bare survival. He was, Ruffin observed, "doomed . . . to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits."⁵⁹ The master faced a particular challenge in extracting productive labor from a human being in that position. Where laborers have no affirmative incentive to work, because no prospect of improving their situation exists, "obedience is the consequence only of uncontrolled *authority over the body*. There is nothing else which can operate to produce the effect. *The power of the master must be absolute, to render the submission of the slave perfect.*"⁶⁰ The slave's only incentive was avoiding cruel treatment. That cruelty had to be potentially unbounded, because anything less would give the slave a sticking point, where he might choose a known measure of suffering over relentless exploitation with no reward. Such a "discipline" was thus "inherent in the relation of master and slave," not because of the relationship's status quality—the quality in which Brockenbrough had identified "inherent" terms in the relationship—but because of the functional necessities of disciplining unfree labor.⁶¹ The doctrinal

59. *Id.*

60. *Id.* (emphasis added).

61. *Mann* has drawn commentators' interest for well over a century. In a book-length treatment of *State v. Mann*, Mark Tushnet partly rejects this interpretation. TUSHNET, *supra* note 26, at 37. As Tushnet rightly points out, Ruffin not only expresses ambivalence about the moral status of slavery and disapproval of brutality toward slaves. He also suggests that the legislature may in the future choose to govern the master-slave relation in more humane ways than Ruffin's decision does. *Id.* In this respect, the decision is one concerned with the relative power of courts and legislatures to govern slave relations, not with the "logic of slavery." *Id.* Yet, Tushnet concedes, readers of the case who had taken the language I discuss at face value, from abolitionist novelist Harriet Beecher Stowe to historian Eugene Genovese, "were not wrong" because "Judge Ruffin implicitly relied on deep-lying notions about how slavery was embedded in the life of Southern communities." *Id.* Indeed, the case does not purport to prohibit legislatures from regulating the institution, and Judge Ruffin appears to look favorably on that prospect, suggesting he cannot consistently regard his armchair sociology of the master-slave relation as being quite as invariant as he elsewhere insists. Nonetheless, his analysis of the reasons for the courts' abstention relies on the "inherent" logic of the relationship, which he presents adamantly. The opinion appears to be divided, as it may be that Ruffin's mind was on the issue. As Tushnet points out, as early as his college years at Princeton, Ruffin seems to have written to his father expressing moral concerns about slavery. *Id.* at 91–92. The letter his father wrote in return indicated that he regarded slavery as a great evil, but could see no way for the

result was a massive effacement of any legal personhood in the slave, justified as the functional requirement of rendering the slave valuable as property.⁶²

In the antebellum slave cases, then, both branches of property thought are interwoven: personhood and resources entwine in single bodies of law, in single cases, even in the bodies of the slaves themselves, who stand in some respects as legal persons, and in others as mere resources for the value-maximizing use of their owners. The courts in these cases struggled to understand the relationship between these two aspects of single entities: human beings as persons, with responsibilities, aims, and immunities of their own, and human beings as resources, whose efficient use implied powers of control in those

South to extricate itself from the institution. *Id.* This expression of a divided consciousness “bears an uncanny resemblance to the structure of Ruffin’s opinion in *State v. Mann.*” *Id.* at 92. This analysis is broadly consistent with Tushnet’s 1981 analysis of the case in *The American Law of Slavery*, where he argues that Ruffin meant to indicate the limits of judicial principle in governing slavery: although humane sentiments might guide the legislature in drawing lines to prohibit certain abuses, a common-law analysis of the relationship had to choose between treating the master’s power as absolute and accepting lines of reasoning that would call the institution itself into question. TUSHNET, *supra* note 24, at 54–65. Judicial competence was thus particularly restricted in regard to slavery, on Tushnet’s account of Ruffin’s analysis. *Id.*

Citing Harriet Beecher Stowe, who was “appalled at the legal system’s capacity to reduce a man of intellect and insight to a tool for oppression,” Robert Cover emphasized the aspect of Ruffin’s reasoning that I have been discussing. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 78 (1975). He referred with a kind of admiration to “Ruffin’s unusual refusal to clothe an exploitative and brutal relationship with the trappings of anything save power,” comparing Ruffin in this quality to Oliver Wendell Holmes, Jr. *Id.* at 77–78. Cover did seem to make an unfounded inference from Ruffin’s strong language to “a legislative policy of the utmost brutality,” which he believed Ruffin inferred from “the mere existence of slavery.” *Id.* at 78 (emphasis added). I believe Tushnet is right on this point to direct attention to Ruffin’s apparently inconsistent declarations, including allowance for legislative reform of slavery, and to the hints of divided consciousness beneath this inconsistency. Eugene Genovese was moved to a remark on the case similar to Stowe’s: “Never has the logic of slavery been followed so faithfully by a humane and responsible man.” GENOVESE, *supra* note 24, at 35.

Tushnet’s 2003 interpretation is consistent with that of contemporary proslavery commentators. Thomas R.R. Cobb cited *State v. Mann* for the proposition that slavery was not a feature of the common law, and thus “it required municipal law,” i.e., statutes, to protect the slave’s personhood. COBB, *supra* note 26, at 83. Cobb, like most Southern commentators, stressed the statutory regimes that purported to protect slaves against various specific abuses. *See id.* at 82–96 (surveying state statutes).

62. A nice formulation of the erasure of slaves’ legal personhood comes in Ruffin’s opinion: “The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.” *Mann*, 13 N.C. (2 Dev.) at 267. A bit later, Ruffin concluded, “this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination.” *Id.*

whose property they were. In so doing, the courts gave content to both personhood and persons' status as property. They found consistently that the definition of the one category—the slave's character as a resource—implied some specific content for the other category, the slave's character as a person. Whether the master's power was notionally limitless or bounded by a principle of "moderation," it took its contours, and the slave's personhood conversely took its limits, from the requirements of exploiting a resource that possessed the powers of reason and choice.⁶³ Conversely, to begin with a stronger notion of the slave's personhood than antebellum courts followed would have negated the possibility of the slave relationship in the dimension of resources. There is no separating the logic of resources from the logic of personhood in these cases.

B. *Labor Discipline under Free Labor*

1. *The Free Labor Formula.* The master-slave relationship was legally erased by the Thirteenth Amendment, and the Fourteenth Amendment's guarantee of due process became, in the decades after the Civil War, the keystone of a new jurisprudential account of the relationship between personhood and property. This new relationship expressed what was often called the free labor idea of personhood, property, and social life.⁶⁴ The organizing principle of this idea was a

63. A particularly explicit reflection on this difficulty came in *Jarman v. Patterson*, 23 Ky. (7 T.B. Mon.) 644 (1828). There the Kentucky Court of Appeals, considering the extent of the state's police power to regulate property in slaves, observed: "If the use of any property can be . . . restrained, certainly that of slaves needs it more than any other; for to the power of locomotion, they add the design and continuance of human intellect, and of course are more capable than other animals to injure and annoy society." *Id.* at 646.

64. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 1–37 (1970) (describing the premises and social vision of free labor ideology). For an exemplary contemporary statement of the outlook, see ABRAHAM LINCOLN, *From Address to the Wisconsin State Agricultural Society, Milwaukee, Wisconsin*, in *SELECTED SPEECHES AND WRITINGS* 233–37 (Don E. Fehrenbacher ed., 1992) (1859) (contending for the dignity of labor and the reality of social mobility, and denying that market society implies an opposition between permanent classes of owners and laborers).

Within legal scholarship, the emphasis on the continuity between antebellum free labor ideology and the laissez-faire jurisprudence of the Gilded Age marks what is sometimes still called the revisionist view of the *Lochner* era, although there is no longer much to revise of the previously dominant idea. That older idea began in the Progressive critique of *Lochner* jurisprudence as mere dishonesty, a blend of interest-group politics and constitutionally implausible ideology. The Progressives were more interested in changing a recalcitrant Supreme

property rule: energy, time, and talent—in a word, labor—were defined as inherently the property of the person in whose body they resided.⁶⁵ They were alienable, but only at retail, not wholesale.⁶⁶ One

Court than in explaining the intellectual and political origins of its obstructionist attitude to labor legislation.

Legal scholarship in the revisionist vein was indebted to Foner's *Free Soil* and the aligned work of Charles McCurdy, who contributed to a renewed understanding of the ideological stakes of the ideas of self-ownership and liberty of contract in the nineteenth century. See Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law, in THE STATE AND FREEDOM OF CONTRACT* 161, 161–97 (Harry N. Scheiber ed., 1998) (tracing the origins of the free labor idea in a rejection of the Southern slave relation and an ideal of economic independence and exploring its jurisprudential interactions with the Progressive idea of the benefits that "social legislation" should provide to the disadvantaged). The most extensive treatment of the *Lochner* era from this point of view is HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1–18 (1993) (explaining the historiographic origins and methodological stakes of the revisionist approach). For a sketch of this historiographic development, see Manuel Cachan, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 *LAW & HIST. REV.* 541 (2002). For a very rich interpretation of the variety of historical narratives, political visions, and jurisprudential agendas that long placed the *Lochner* era in the "anti-canon" of cases that must be wrong on any constitutional theory, and have brought it back into either context-specific or (less plausibly) general validity, see Jack M. Balkin, *"Wrong the Day It Was Decided": Lochner and Constitutional Historicism*, 85 *B.U. L. REV.* 677 (2005). See also Stephen A. Siegel, *The Revision Thickens*, 20 *LAW & HIST. REV.* 631 (2002) (proclaiming that future observers will come to appreciate that historical jurisprudence was the preeminent form of legal thought in the Gilded Age and that Gilded Age legal development was a product of diverse contributions); James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888–1910*, 27 *CUMB. L. REV.* 139, 140–41 & n.6 (1997) (commenting that an avalanche of revisionism is descending on the 1888–1910 Supreme Court record).

A magisterial expression of the "revisionist" position is 8 OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* (1993). Fiss rejects the "strategic" interpretation of the *Lochner* Court's jurisprudence as "camouflage" for class interests as inconsistent both with what one can tell of the Justices' understanding of their activity and with a view of the law as a potentially autonomous domain of reason-giving rather than a plaything of interests. *Id.* at 3–21. In his discussion of the Supreme Court's treatment of labor legislation, Fiss contends that a particular strength of his interpretive approach is its power to make sense not just of the cases in which the Court struck down regulations, but also those in which it upheld them as appropriate exercises of legislative power, particularly *Holden v. Hardy*, 169 U.S. 366 (1898), and *Muller v. Oregon*, 208 U.S. 412 (1908). *Id.* at 155–84. I discuss both cases *infra* notes 75–92 and accompanying text, and believe their harmony with the rest of the labor jurisprudence of the free labor period indicates the strength of this interpretive approach.

65. See FONER, *supra* note 64, at 11–13, 40–51 (describing the basic tenets of free labor thought and its stark contrast with the slave system of the antebellum South). Free labor thought in the United States had its ultimate origin in John Locke's famous declaration, "[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands . . . are properly his." LOCKE, *supra* note 5, at 287–88. It had its culmination in the passage of the Thirteenth Amendment to the United States

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 of one's labor belonged categorically (and, usually, indefinitely) to another.⁶⁷ It followed that 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.⁶⁸

Regarded as an ideal type, free labor lifted the threat to survival or bodily integrity that had been the backdrop of the slaveowner's prerogative.⁶⁹ The right of exit would have been all but meaningless if the other party could have answered the exit threat with overt coercion. Although workers might be seriously constrained in their alternatives, they could not be kept in place by any threatened

Constitution: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." U.S. CONST. amend. XIII.

There is an important contrasting conception of free labor, which William E. Forbath develops in *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767. Forbath identifies the free labor tradition I trace to Adam Smith and other progenitors of classical liberal political economy, who concentrated on self-ownership and the right to alienate one's labor on terms of one's choosing. *Id.* He also describes a competing view, which he identifies with the American Republican inheritance and with the mid-nineteenth century labor movement, which identified free labor with ownership of the means of production or, at least, a right to enjoy the fruits of one's labor. *Id.* at 768–82. Forbath regards the latter tradition as democratic and cooperative, the former as functionally, if not intentionally, an apology for the often merciless relations of nineteenth-century capitalism.

66. See FONER, *supra* note 64, and other works cited in that note. This is a corollary of the prohibition on ownership outright of another's labor power.

67. *Id.*

68. This is the key characteristic of free labor in the account of Robert J. Steinfeld, who gives a helpful and corrective account of free labor as an ideology overdrawn in its proud contrast with slavery. See STEINFELD, *supra* note 24, at 1–2 (noting that "[w]hat was crucial in making free wage labor *free* was that wage workers were never forced to perform their labor agreements" either because their employment was terminable at will or because employers had no meaningful remedy against them for breaching employment contracts by leaving).

69. As noted in the introduction to this Part, the ideal-typical character of this claim is a crucial limit on its descriptive accuracy. For accounts of some of the ways that bodily threats and other forms of nonpecuniary coercion figure into nominally free labor relations both before and after the Thirteenth Amendment, see STEINFELD, *supra* note 24, and ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 155–68 (1988) (describing the conditions of limited or nonexistent alternatives in which freedmen entered their contracts; the contracts' oppressive terms, which often included a prohibition on leaving employment over a yearlong contract; and outright refusal by employers to honor the compensation clauses of their contracts). As Foner notes, although Northern laborers often entered contracts under straitened circumstances, Southern freedmen from the start struggled with a system in which even the formal liberty of free labor contracts was at best uncertain and, as Reconstruction crumbled, became almost entirely fictional. *Id.*

consequence more severe than denial of their part of the bargain they had struck with their present employer.⁷⁰

Free labor thought thus solved on its face the paradox of slavery jurisprudence: how to regard a human being as both a person and an object of property. The free labor solution sought to eliminate the terrible paradox of slavery by making personhood legally incompatible with becoming the property of others. Outlawing the slave relationship made immunity from being owned a feature of personhood under the Constitution of the United States. By the same token, the free labor solution assimilated property in oneself to personhood: self-ownership became a feature of individual legal identity under the Constitution. The individual's ultimate and absolute claim on her own productive capacity, her own aspect as a resource, was as complete as the master's claim on the slave's body had been in Ruffin's version of the common law.

In the aftermath of the Civil War, partisans of free labor praised it as "the noblest principle on earth" and called freedom of contract "the foundation of civilization," a perfect reconciliation of "free choice and social order."⁷¹ Free labor's promise to solve the problem slavery crystallized accounts for much of its nearly millenarian appeal. This vision nonetheless cloaked the often violent and almost uniformly exploitative return of former slaves to dependent agricultural labor.⁷² Even where it succeeded on its own terms, moreover, the newly regnant principle did not dissolve the problem

70. A fascinating anxiety about the terms of recruitment and command emerges in the oral arguments of the pro-slavery side in *Somerset v. Steward*, (1772) 98 Eng. Rep. 499 (K.B.). 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, 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 are just as much obliged to obey my commands. Thus neither superior, or inferior, both go without their dinner." *Id.* 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. *Id.* 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. *Id.*

71. FONER, *supra* note 69, at 155 (quoting "a Tennessee agent" of Reconstruction); *id.* at 164 (quoting "a Northern Republican" reporting from New Orleans in 1867). The characterization of contract as reconciling free choice and social order—in the eyes of free labor partisans—is quoted from Foner.

72. *Id.* at 155–68.

we have been exploring, which it purported to resolve. The relationship between a human being's character as a person and her character as a resource remained a puzzle for the law. Rather than disappear, the problem shifted, still under the general rubric of labor discipline. In its new version, the question came to be: on what terms can you extract labor from another person, allowing that one owns oneself? The problem had been to define the limits of overt coercion between a free master and an unfree slave. The new problem was to set the limits of bargaining among free persons. In seeking to hire another, what may one demand of that person, what may one offer and what may one threaten to get the arrangement one prefers? Where will the law draw the line between the protections and powers of personhood and the transfer and disposal of resources, where both inhere in the same human being?

I stress that I am not making the naively cynical claim that free labor reproduced the slave relationship in "wage slavery" (except in oppressive Southern labor contracts that violated free labor principles). Nor am I suggesting that treating slavery through the same analytic lens as contractual relations should diminish in any way the recognition of slavery as a historically unique wrong. I am saying instead that there is a fundamental problem wherever the law seeks to regulate people's control over the productive capacity of others, their character as resources, and that although legal change can affect the answer to that problem in profound and morally imperative ways, the structure of the problem persists. The problem itself and the moral and political stakes of legal responses to it are the theme of this Article.

2. "*A Real Equality of Right*"? *Personhood and Resources in the Lochner Era*. I explore two strands of free labor jurisprudence, one rooted in the Civil War amendments to the Constitution, the other in the common law of labor relations. Although the constitutional strand is most famously associated with *Lochner v. New York*,⁷³ the "right of contract"⁷⁴ that grounded Justice Peckham's opinion striking down New York's maximum-hours statute for bakers was derived from constitutional text in an earlier case, *Holden v. Hardy*.⁷⁵ There, Justice

73. *Lochner v. New York*, 198 U.S. 45 (1905).

74. *Id.* at 53.

75. *Holden v. Hardy*, 169 U.S. 366 (1898); see also Forbath, *supra* note 65, at 777–82 (tracing the appearance of this constitutional vision in Supreme Court jurisprudence to Justice

Brown began his analysis with the observation that “due process of law” in the Anglo-American tradition included the principle that property, “or right to property, shall [not] be taken for the benefit of another, or for the benefit of the state, without compensation.”⁷⁶ He then proposed a corollary of that principle: if the Due Process Clause protects existing property rights, it must also protect the right to acquire property. A prohibition on this right “would also be obnoxious to the same provision,”⁷⁷ for it would permanently exclude those who presently lack property from all the benefits of ownership. In a third step, Justice Brown derived the right to contract from the right to acquire property: “[A]s property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.”⁷⁸ The right to contract was therefore derived, at two stages’ remove, from the Due Process Clause’s protection of property rights.⁷⁹ Two essential presuppositions marked this reasoning. The first was that the right to property, including ownership of one’s own labor, was not mainly a right to static enjoyment of what one already has. Rather, property rights were instrumental to participation in a world of free

Field’s argument for the plaintiff butchers in the *Slaughterhouse Cases*. Field argued that the Civil War amendments had made economic liberty a part of the Constitution and should forbid interference such as the regulation the majority upheld). Because this Article is not a history of free labor jurisprudence as such, I begin my discussion with the fuller and victorious doctrinal formula of *Holden v. Hardy*. For Owen Fiss’s discussion of *Holden* as a key to an integrated understanding of the labor jurisprudence of this period, see FISS, *supra* note 64, at 172–74.

76. *Holden*, 169 U.S. at 390.

77. *Id.*

78. *Id.*

79. While observing that *Holden* was the Supreme Court’s first application of its Fourteenth Amendment jurisprudence to labor contracts, Howard Gillman emphasizes a more conventional dimension of the judgment’s reasoning: the effort, which ran through the jurisprudence and public debates of the time, to distinguish between legislation proper under the police power because it promoted the public good and “class legislation” that represented mere successful rent-seeking by factional economic interests. GILLMAN, *supra* note 64, at 120–29 (“*Holden* stood for the proposition that the police powers could be used not only to promote the general well-being of the community but also the specific physical well-being of a class of workers who were not in a position to make contracts favorable to their health and safety.”). This is clearly a major consideration of such jurisprudence, and is particularly salient in Gillman’s view of *Lochner*-era jurisprudence as deriving from the antimonopoly animus of Jacksonian democracy and the earlier antifactionalism of the Revolutionary generation. That said, it is important, and consistent with the revisionists’ own emphasis on the concerns and logic internal to jurisprudence, to appreciate the respect in which Justice Brown presents the opinion as working out the implications of a property concept.

exchange and self-betterment, so that merely to protect existing property claims without setting into motion the churn of contractual exchange would be to obliterate the social purposes of property: mobility and opportunity.⁸⁰ The second presupposition was the core of free labor thought: the property governed by this rationale included the labor power of individuals. Legal personhood was marked by the power to acquire and alienate property, including labor itself, which courts rendered as the right of contract. In this way freedom of contract became the keystone right in the free labor account of self-ownership: it was, in effect, the power of alienation over the property one held in oneself.⁸¹

This right, though, was qualified by two considerations. One was protection of the health and welfare of certain classes of workers. This judicial concern arose from the idea that people were in certain respects *state resources*, and the demands of private industry must not degrade them past being able to reproduce and fight wars, two functions a state was thought to require of its citizens. Thus in *Holden*, the Court wrote that even though a miner might consent to work until his health broke, “[t]he state still retains an interest in his welfare, however reckless he may be [W]hen the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.”⁸² Dissenting in *Lochner*, Justice Harlan defended New York’s statute on the grounds that long hours of work “may endanger the health and shorten the lives of the workmen, thereby diminishing

80. See 2 KENT, *supra* note 14, at *329 (“When the laws allow a free circulation to property . . . the operation of the steady laws of nature will, of themselves, preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate.”). Alienation and the circulation it facilitated were thus instrumental to an idea of equality of opportunity. On the role of equality of opportunity in sustaining free labor ideology, see FONER, *supra* note 64, at 29–33.

81. See Forbath, *supra* note 65, at 785–94. Forbath connects the triumph of this interpretation with several strains of political culture in the Gilded Age. *Id.* One is the rise of industrial capitalism in the North and the resulting presence of a powerful community of interest in employers anxious not to be restricted in their contracts with employees. *Id.* Another is the prominence in the bar, particularly the judiciary, of elite lawyers, often previously employed by these corporations and shaped by experience and association to identify with their interests. *Id.* A third is an ideological transformation by which many formerly populist Jacksonians, who had begun their political careers as enemies of monopolies and politically favored banks, came to see labor unions and regulation-friendly legislatures as a new generation of “monopolistic” barriers to the liberty of ordinary people. *Id.* In this way a populist tradition of economic liberty melded with the interests of a growing class of large employers in a synthesis that many readers will recognize from present political experience. *Id.*

82. *Holden*, 169 U.S. at 397 (internal quotation marks omitted).

their physical and mental capacity to serve the state”⁸³ In *Muller v. Oregon*,⁸⁴ upholding a maximum-hours law for women employees, Justice Brewer wrote that, “as healthy mothers are essential to vigorous offspring, the physical well-being of a woman becomes an object of public interest and care in order to preserve the strength and vigor of the race,” that is, women must be healthy enough to bear children.⁸⁵ Oregon’s maximum-hours law was thus “not imposed solely for [women’s] benefit, but also largely for the benefit of all.”⁸⁶ Although this theme does not figure further in this Article, it represented an important element of thought about the relationship between self-ownership and the claims of others on the resource of one’s body.

The second consideration returns to the theme of the slavery cases: the limits of permissible labor discipline. Free labor solved this question notionally by enshrining self-ownership, so that the terms of labor were always the products of free agreement, never coerced in the manner of slave relations. The difficulty was that parties reached their free agreements always in light of the extent and intensity of their need and the other options open to them. Depending on these factors, their decision “freely” to accept any specific set of terms could be either a choice among meaningful alternatives or an empty choice between a single tolerable option and privation. The slaveowner’s offer to his slave was something worse than a Hobson’s choice, a Hobbes’s choice: obey or be punished, with the legal boundaries of punishment set by the necessities of labor discipline.⁸⁷ Free labor repudiated this arrangement, but it left open the possibility of a Hobson’s choice. The new problem was thus to determine when, if ever, exigent circumstances made the “free” laborer’s decision so constrained that his contract was not a product of genuinely free choice, but instead brought him too near the abject position of the slave.

This was a major concern of the proregulatory opinion in *Holden v. Hardy*, where Justice Brown laid out the problem of unequal bargaining power:

83. *Lochner v. New York*, 198 U.S. 45, 72 (1905).

84. *Muller v. Oregon*, 208 U.S. 412 (1908).

85. *Id.* at 421.

86. *Id.* at 422.

87. *See supra* text accompanying notes 25–55.

[T]he proprietors of these establishments [mines and smelters] and their [employees] do not stand upon an equality, and . . . their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employ[e]es, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.⁸⁸

The essential threat of the employer was to invoke Brown's "fear of discharge," withdrawing the employee's opportunity to work in the employer's enterprise. Of course, firing was enshrined in the logic of free labor. The freedom of exit, the employee's power to quit, marked an essential distinction between a free laborer and a slave, and the power to fire was a corollary of the power to quit. The critical question was how hard a bargain the threat could induce an employee to accept. That, in turn, was a function of the employee's alternatives: only a worker with a bleak set of options would take a grim offer rather than leave.

The most aggressive application of the idea that hard circumstances could undercut free choice was also the instance likely to strike the modern eye as most unpalatable: the sex-based defense of the maximum-hours law for women in *Muller v. Oregon*.⁸⁹ Justice Brewer noted that the women of Oregon had been granted "equal contractual and personal rights with men," and thus that in economic life "they stand on the same plane as the other sex."⁹⁰ This formally equal liberty, however, did not mean that the logic of free labor jurisprudence applied alike to men and women. On the assumption that women were less physically able than men, and thus at a competitive disadvantage in the labor market, the Court found that "from the viewpoint of the effort to maintain an independent position in life, [women are] not upon an equality."⁹¹ Rather, formal liberty took its substance—choice among meaningful alternatives—only "where some legislation to protect her" was provided "to secure a

88. *Holden*, 169 U.S. at 397.

89. *Muller*, 208 U.S. at 412.

90. *Id.* at 418.

91. *Id.* at 422.

real equality of right.”⁹² The distinction between formal equality and “a real equality of right” bespoke the line free labor courts sought to draw between the circumstances in which labor agreements expressed free choice and those in which they reflected choice among such straitened alternatives that “real equality” gave way to unjust exploitation.

3. “*Fear of Losing His Place*”: *Free Bargaining and Coercion at Common Law*. The starkest judicial commitment to the employer’s power to extract concessions with the threat of firing came not in the substantive due process of *Lochner*-era jurisprudence, but in a contemporaneous line of common-law Massachusetts Supreme Judicial Court decisions. Those cases addressed employees’ injuries in hazardous workplaces where they had remained, after objecting to a manifest risk, only because the certainty of firing was worse than the probability of being hurt. Massachusetts applied a common-law version of free labor principles, holding that when employees accepted a hard bargain they ratified all its consequences, however unpalatable their alternatives might be. Oliver Wendell Holmes, then chief justice of the Massachusetts Court, gave the classic statement of this doctrine in *Lamson v. American Ax & Tool*,⁹³ just five years before his dissent in *Lochner*. The plaintiff in *Lamson* was an employee whose position painting hatchets became dangerous when his employer purchased new racks, which tended to drop the hatchets on Lamson’s head.⁹⁴ Lamson had earlier complained about his Damoclean axes, but “was answered, in substance, that he would have to use the [new] racks or leave.”⁹⁵

Holmes found that Lamson had assumed the risk of his employment by declining to exercise his free labor right to leave. As Holmes put it, “He perfectly understood what was likely to

92. *Id.*

93. *Lamson v. Am. Ax & Tool*, 177 Mass. 144 (1900). When mentioned at all, this case is usually interpreted as a tort matter involving employees’ assumption of risk in the conditions of employment. *See, e.g.*, Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 292–93 (2006) (describing the case as an instance of the doctrine that employees can assume the risk of employment conditions not by virtue of the reasonableness of the risk, but rather by virtue of the voluntariness of the transaction). Richard Epstein has described the opinion in passing in the course of linking Holmes’s strong voluntarism there to his rejection of the unconstitutional conditions doctrine. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10 n.14 (1988).

94. *Lamson*, 177 Mass. at 144–45.

95. *Id.* at 145.

happen. . . . He complained, and was notified that he could go if he would not face the chance. He stayed, and took the risk.”⁹⁶ It was critical to Holmes that Lamson identify, and accept, the hard choice he was up against: “He [assumed the risk] none the less that the fear of losing his place was one of his motives.”⁹⁷ The choice between being fired and remaining in what the sketchy facts of the case suggest was an unreasonably dangerous workplace was a free and self-authorizing one, and the worker who took the option of staying legally accepted the consequences as well. The threat of firing was merely the legitimate corollary of the free labor right of exit.

The starkest expression of the logic governing these cases came in *Leary v. Boston & A.R. Co.*,⁹⁸ where a plaintiff employed as a laborer was ordered to ride a locomotive as a fireman, a considerably more dangerous duty than his ordinary job.⁹⁹ He sought damages from his employer when he was injured, and the railroad refused to compensate him. The court acknowledged that the plaintiff had accepted the dangerous additional duty in the face of a threat of firing, but it was precisely this choice that constituted his assumption of the risk of his employment.¹⁰⁰ Much as Justice Ruffin had done in his merciless decision in *State v. Mann*,¹⁰¹ the court recognized the aspect of threat and coercion in the employer’s presentation of alternatives, but found them legally in-bounds: “To morally coerce a servant to an employment the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh.”¹⁰² It was, however, only the practical power created by the reciprocal rights of free labor relations: the employee’s right to sell labor or exit and take it elsewhere, and the employer’s right to hire and fire at will. That these decisions might be taken in hard corners—in conditions of need and with few or no palatable alternatives—made them no less free according to the courts of Massachusetts, which found for these purposes that any free employee stood, in the words of the Supreme Court, “upon an equality” with his employer.

96. *Id.*

97. *Id.*

98. *Leary v. Boston & A.R. Co.*, 139 Mass. 580 (1885).

99. *Id.* at 586–87.

100. *Id.* at 587.

101. *See supra* notes 52–62 and accompanying text.

102. *Id.*

C. *The Perennial Problem*

These cases demonstrate that the same problem persists through two very different legal contexts: the master-slave relationship and the relationship, whether constitutional or at common-law, of free laborers and their employers. Both regimes are premised on interrelated legal definitions of personhood and property. In each case a regime of property in human bodies, energy, and talents comprises both the law of resources and the law of personhood. An essential function of this legal regime is to define the relationship between these two aspects of human beings. This work falls to law because the central terms of these two aspects of property law are not self-defining. What is personhood and what counts as a resource, and what each of those categories permits and forbids people to do to one another, are interdependent questions.

II. FROM DOCTRINE TO HISTORY: RESOURCES AND PERSONHOOD IN EARLY-MODERN PROPERTY AND POLITICAL ECONOMY

Because “personhood” and “resources” are not self-defining terms, the next step in understanding their shifting significance is to open the investigation to consider the backdrop of political thought and struggle that framed and informed jurisprudential change. The law’s shifting designation of certain aspects of human beings as property and other aspects as protected (or criminally accountable) personhood took place against a backdrop of political and economic thinkers’ attempts to understand slave economies and free-labor economies as distinct kinds of social orders. Such thinkers treated labor recruitment and discipline—the management of people as resources—as among the most important *social* relations, which they saw as shaping individual character and political culture. The logic of these social relations emerged directly from the interdependent legal designations of people as resources and as persons. Political and economic thought thus provided a conceptual vocabulary and orienting values that filled out the stakes for social life of the law’s interdependent definitions of property and personhood. This Part presents two such contemporaneous theoretical positions: the free labor account of slave societies as embodying a definition of property that implied a degrading definition of personhood and commensurately degrading social relations; and the celebratory account of market societies as reconciling human beings’ character as property with their character as persons by making the sale of one’s

own time and talent a matter of formally voluntary agreement. (In my discussion of Robert Hale in Part III, I turn to the critical account of this promarket position as an ideological cloak concealing inequalities of economic power that, when revealed, showed consistent violations of the idea of equal personhood.) These positions comprise the views of property and personhood at work in the doctrinal discussion of Part I: the antebellum courts' ambivalent attitude toward the human character of slave relations and the free labor courts' embrace of formally voluntary arrangement as self-ratifying even in grotesque circumstances. Doubts about the adequacy of the celebratory free-labor account powered those courts' inquiries into whether the formal equality of free bargainers put them "upon a real equality" that properly balanced their usefulness to one another as resources with their status as legal persons.

A. *The Case against Slavery and Feudalism*

It may seem eccentric to assimilate slavery and feudalism to each other. The two are often treated separately, in large part because American discussion is shaped by the experience of New World slavery, with its basis in racial distinction. Feudalism, as a hierarchical arrangement of social and economic role *within* an ethnic community, seems quite a different phenomenon in contrast.¹⁰³ Participants in the debate I am canvassing, however, regarded the systems as so similar as to be continuous with each other.¹⁰⁴ These thinkers were opponents

103. I mean "feudalism" to designate not just the arrangements of early Norman England or even the Europe of the early Middle Ages, but, generally, a social and economic order in which stable and marked hierarchy (1) designates fairly specific functions in *both* the social and economic spheres, which (2) are interdependent, so that occupying a certain economic position will imply playing a corresponding social role, and (3) are hierarchical in the sense that certain prerogatives attach to superior positions in commanding both the economic activity and the social obeisance of inferiors.

104. Richard Hildreth, a prominent campaigner against American slavery, began his discussion of the status of enslavement in the Old World with a survey of English and Central European villenage, including both the outright ownership of persons and the ownership of persons appurtenant to land (serfdom). RICHARD HILDRETH, *DESPOTISM IN AMERICA: AN INQUIRY INTO THE NATURE, RESULTS, AND LEGAL BASIS OF THE SLAVE-HOLDING SYSTEM IN THE UNITED STATES 177-78* (Augustus M. Kelley Publishers 1970) (1854). The *philosophe* Denis Diderot described the deprivations of slavery in Europe from Athens and Rome through the long decline of feudal serfdom, then lamented of New World slavery, "But hardly had domestic liberty been reborn in Europe than it was buried in America." DENIS DIDEROT, *POLITICAL WRITINGS 185-86* (John Hope Mason & Robert Wokler eds., 1992). Diderot wrote of ancient societies, "The more these societies became enlightened, wealthy and powerful, the more the number of slaves increased, and the more wretched became their fate. Athens had

of slavery and feudalism and advocates of a commercial alternative based on voluntary contract, the right of exit, and the free sale of labor.¹⁰⁵ In linking slavery and feudalism, they classified both systems by reference to what this Article calls the *terms of recruitment*—the rules by which one may enlist and govern the activity, in this case the labor, of another. They understood the basic features of recruitment in slave and feudal societies to be command backed by threat. In commercial or free labor societies, on their understanding, the basic terms were reciprocal negotiation aimed at free assent. These terms, in turn, produced distinct social relations with consequences for individual character and political culture.

There was variety in thinkers' rendering of these themes. In a particularly stark account, the historian and antislavery theorist Richard Hildreth described relations between slaves and masters as founded purely on the threat of violence. In his account, slavery

twenty slaves per citizen. The disproportion was far greater in Rome when it became mistress of the universe. In both republics slavery led to the worst excesses of exhaustion, poverty, and shame. Since it has been abolished among us the people are a hundred times happier, even in the most despotic empires, than they were formerly in the best-ordered democracies." *Id.* at 186. Adam Smith, too, assimilated feudal and slave relations, remarking in his *Lectures on Jurisprudence*, "We are apt to imagine that slavery is entirely abolished at this time, without considering that this is the case in only a small part of Europe; not remembering that all over Moscovy and all the eastern parts of Europe, and the whole of Asia, that is, from Bohemia to the Indian Ocean, all over Africa, and the greatest part of America, it is still in use." ADAM SMITH, LECTURES ON JURISPRUDENCE 181 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1762–63). Smith also characterized "feudall" Europe as "cultivated by villains or slaves in the same manner as by the slaves in the ancient governments of Rome and Greece," in the course of arguing for the exceptional character of the circumstances that ended feudalism in Western Europe. *Id.*

105. For a survey of the major themes and commitments of the free labor school, see FONER, *supra* note 64, at 1–72 (commenting on the relationship of the ideal of self-ownership and of a commercial society organized on the free sale of labor and talent to the self-conception of Northern United States society and the Republican critique of Southern society in the decades preceding the Civil War). For an ambivalent characterization of the ideology, with a focus on its cost in conceptions of community and civic virtue as well its gains in liberty and dynamism, see GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 127–57 (1997) (describing the views of political economy of jurist and New York Chancellor James Kent, who endorsed a free labor conception of American law and society but, late in life, regretted the older order those had swept away). A similar ambivalence appears in Michael Sandel's treatment of the theme, which is pitched at the level of political philosophy as much as at that of history. Sandel characterizes the emphasis on personal autonomy and voluntary social relations in the free labor movement as representing "a diminished aspiration" from "the standpoint of the political economy of citizenship" and as marking "a decisive moment in America's transition from a republican public philosophy to the version of liberalism that informs the procedural republic." MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 200 (1996).

extended a “state of war” into social life: the master extracted labor from the slave on the basis of a direct threat to the slave’s life.¹⁰⁶ A subtler account came from Adam Smith, who recognized the possibility of sympathy and reciprocity between masters and slaves under certain circumstances.¹⁰⁷ Nonetheless, Smith’s account of the slave bond had the same core as Hildreth’s: the master’s prerogative was in principle absolute, requiring only orders, not negotiation. Mortal threat lurked in the background.¹⁰⁸ In this theoretical account, then, the slave and feudal relations had a pair of features. First, they were either immediately or ultimately founded on a threat to survival: a villein or slave obeyed the master’s will in order to live. Second, even where a legal constraint stayed the master’s hand from actual violence, the slave’s legally protected options were so restricted that the master had no need to appeal to the material or other interests of the slave to induce obedience. Command alone sufficed because the slave had no right to refuse a command and exit the relationship.¹⁰⁹

106. Hildreth wrote,

The relation of master and slave, like most other kinds of despotism, has its origin in war. By the confession of its warmest defenders, slavery is at best, but a substitute for homicide. . . . Slavery then is a continuation of the state of war. . . . The relation of master and slave, as we may conclude from the foregoing statements, is a relation purely of force and terror. Its only sanction is the power of the master; its best security, the fears of the slave.

HILDRETH, *supra* note 104, at 35–38.

107. Smith was concerned to show that relatively poor societies, in which masters worked at the same business as their slaves and might share quarters with them, resulted in more sympathy and less brutality between masters and slaves. He wrote,

[A] North-American planter, as he is often at the same work and engaged in the same labour, [he] looks on his slave as his friend and partner, and treats him with the greatest kindness; when the rich and proud West Indian who is far above the employment of the slave in every point gives him the hardest usage.

SMITH, *supra* note 104, at 184–85 (second alteration in original).

108. Describing slavery in the classical world, Smith wrote,

1st, with regard to their lives, they were at the mercy of the master . . . [H]e might put a slave to death on the smallest transgression . . . 2nd, as his life, so was his liberty at the sole disposal of his master; and indeed properly speaking he had no liberty at all, as his master might employ him at the most severe and insupportable work without his having any resource.

Id. at 176–77. Smith was skeptical about the prospects for reform of the institution in the modern world, proposing that under republican governments, “[t]he persons who make all the laws . . . 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.” *Id.*

109. This is an appropriate time to note an inevitable problem in addressing this issue through the thought of open and committed opponents of slavery in the public sphere—in a word, propagandists. In this respect, Smith’s thought and that of his copartisans has a dual character. On the one hand, it is a form of social inquiry concerned with how economic and

It was a major part of the argument against slavery that these terms of recruitment psychologically shaped both masters and slaves, training the dominant group in tyranny and the subordinates in abasement.¹¹⁰ Smith contended that masters' lifelong experience of giving orders which their subordinates could not refuse would influence slaveholders' preferences so that they came to prize "domination and tyrannizing" over their material interest in the efficient exploitation of their resources.¹¹¹ That is, "the pleasure men take in having everything done by their express orders, rather than to condescend to bargain and treat with those whom they look upon as their inferiors," came to be a source of satisfaction in itself, which masters would not surrender for the mere gains in productivity that free labor relations promised.¹¹² Both slave and feudal regimes

legal regimes shape concrete social interactions among persons, which in turn shape individual psychology and—so far as they are distinguishable—cultural attitudes. On the other hand, this body of thought is polemic, which strenuously presents one side of a hotly contested argument. What can be said for this way of proceeding? Perhaps the weaker point in favor of it is that scant alternative exists. The episodes I am discussing did not occur in an era of systematic and objective social inquiry: synthetic speculation, usually informed by political commitments, was the order of the day. The stronger defense is that the thought of partisans is not a second-best source of information, but rather the best source of a particular kind of information: what those who participated in the debates regarded as (1) the values to which they were obliged to appeal and (2) the empirical claims that would most forcefully support their appeal to these values. In other words, a picture emerges, first, of the critical and justificatory scheme of values in which debates over property reform were set and, second, of the picture of the social world in which these values had their force. The recurrence of appeal to certain values (voluntarism and reciprocity over coercion and legally enshrined hierarchy) and of certain empirical claims (that the way people recruit one another affects the psychological and cultural viability of these values) is itself a piece of evidence for the way that a series of political cultures have understood the purpose and importance of property law.

110. The psychological significance of the interaction between master and slave also became an important part of the Continental tradition of ethical and social thought, specifically the theory of recognition. The seminal discussion is G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 111–19 (A.V. Miller trans., 1977) (1807) (describing the interaction of "lord" and "bondsman" in which the two archetypes, one absolutely powerful, the other absolutely dependent, struggle for survival and recognition). Alexandre Kojève elevated this exchange to particular attention, concentrating on Hegel as a theorist of recognition, in ALEXANDRE KOJEVE, *INTRODUCTION TO THE READING OF HEGEL: LECTURES ON THE PHENOMENOLOGY OF SPIRIT* 3–30 (Allan Bloom ed., James H. Nichols, Jr. trans., 1969) (commenting on the "dialectic of master and slave"). The foremost contemporary theorist in this tradition is Axel Honneth, who expressly develops his theory of recognition as a driver of social life out of Hegel. See AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 31–63 (Joel Anderson trans., 1995) (describing the development of a recognition-based social theory out of Hegel's philosophical foundations).

111. SMITH, *supra* note 104, at 186.

112. *Id.*

seemed to their opponents to produce such personalities.¹¹³ As Hildreth put it, “[h]abituated to play the tyrant at home, unshackled regent and despotic lord upon his own plantation, where his wish, his slightest whim, is law, the love of domineering possesses all [the master’s] heart.”¹¹⁴

Free labor’s partisans argued that this unbounded authority over another human being was at the source of what Hildreth described as an ungoverned Southern planter personality: given to fierce anger, alcoholism, spendthrift habits—in short, made chaotic by its basic experience of social relations in which nothing checked the expression of appetite and whim.¹¹⁵ For free labor theorists, such personalities were incompatible with the rise of commercial economy because the irregular and domineering Southern character was ill-suited to the steady and self-denying habits of accumulation and production that Hildreth and others saw as key to the rise of industry and commerce in place of slave agriculture.¹¹⁶ Tyrannical personalities were also ill-suited to a conception of democratic society that

113. Smith’s account almost perfectly parallels that of James Mill, English reformer, colonial administrator, and father of the philosopher John Stuart Mill, in Mill’s account of the motives of “feudal” landholders in India, which he regarded as having thwarted reformist efforts to induce a transition to commercial modernity through reform in land tenure. Despite the incentive the reforms provided to contract free labor rather than maintain feudal relations with dependent peasants, the landholders preserved feudalism, Mill wrote, because “men . . . as education and government have previously moulded their minds, are more forcibly drawn by the love of absolute power, than by that of money, and have a greater pleasure in the prostrate subjection of their tenants than the increase of their rents.” JAMES MILL, *THE HISTORY OF BRITISH INDIA* 491–92 (William Thomas ed., Univ. of Chicago Press 1975) (1820).

114. HILDRETH, *supra* note 104, at 143.

115. *Id.* at 142–57. This theme also emerged in slave narratives. Frederick Douglass, the former slave and abolitionist writer and orator, reflected on the character of his own childhood master, “[H]e was not by nature worse than other men. . . . The slaveholder, as well as the slave, is the victim of the slave system. . . . [T]here is no relation more unfavorable to the development of honorable character, than that sustained by the slaveholder to the slave. Reason is imprisoned here, and passions run wild.” FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 32 (John Stauffer ed., 2003) (1855).

116. See HILDRETH, *supra* note 104, at 154–57 (“The institution of slavery deprives a large portion of the people of their natural occupation [production]. But as man is essentially an active animal, to supply this deficiency it is necessary to create artificial occupations. [Hildreth proceeds to describe the respective places of gambling, drinking, and politics, in Southern culture.] It is impossible to make men virtuous or happy unless by giving them some steady employment that shall innocently engage their attention and pleasantly occupy their time. The most essential step in the progress of civilization, is, to render useful industry, respectable. But this step can never be taken, so long as labor remains the badge of a servile condition.”).

required a measure of mutual regard among citizens and a willingness to pause, to listen, to debate, and to compromise.¹¹⁷

B. Commercial Society as a Property Regime: New Terms of Recruitment

The antislavery and antifeudal position I have been exploring was also a promarket position. Adam Smith was famously a prophet of the market regime, and has been lionized and vilified in that capacity.¹¹⁸ Abolitionists, too, were partisans of free labor, understanding the voluntary sale of energy and time on a labor market as the antithesis of prerogative and threat.¹¹⁹ In endorsing commercial society, the critics of slavery and feudalism meant to embrace several interlinked values, including the dignity of labor,

117. For a splendid evocation of this idea, see David Bromwich, *Lincoln and Whitman as Representative Americans*, in *DEMOCRATIC VISTAS: REFLECTIONS ON THE LIFE OF AMERICAN DEMOCRACY* 36, 47 (Jedediah Purdy ed., 2004) (“The imaginative work that persuasion implied for a man with Lincoln’s aims was immense, and it required him to help his listeners discover what it was that created the value of life for them.”). Bromwich argues, for instance, that Lincoln labored to put his Northern listeners in the proverbial shoes of the Southerners they frequently despised, seeking to draw them into the partial, even grudging sympathy of recognizing at once the contingency of their own position and the difficult fact of a shared national fate—on both points the very opposite of state or sectional chauvinism. *See id.* at 48–49.

118. *See* EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT* (2001) (arguing, besides her very rich and sensitive account of the moral motives of Smith’s thought, that he was much more favorably disposed to the state’s role in shaping and governing economic life than the libertarian view sometimes traced to him would suggest). For an instance of the libertarian perception of Smith, see ALAN RYAN, *PROPERTY* 86–87 (1987) (“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.”).

119. For a hostile account of the relationship between abolitionism and markets, see GEORGE FITZHUGH, *CANNIBALS ALL! OR SLAVES WITHOUT MASTERS* 218–19 (C. Vann Woodward ed., 1960) (1857) (“The whole morale of free society is, ‘Every man, woman, and child for himself and herself.’ . . . Christian morality is the only natural morality in slave society, and slave society is the only natural society. . . . In such society it is natural for men to love one another. The ordinary relations of men are not competitive and antagonistic as in free society; and selfishness is not general, but exceptionable. . . . Man is not naturally selfish or bad, for he is naturally social. Free society dissociates him, and makes him bad and selfish from necessity.”). For a broad and learned treatment of this Southern critique of Northern social life, see FOX-GENOVESE & GENOVESE, *supra* note 33, at 41–68 (depicting the Southern view that the revolutionary politics of the early nineteenth century threatened property and social order unless checked by an economic system based on slavery), 201–24 (commenting on the place of slavery in Southern social thought and historiography), 566–86 (describing the connections Southerners drew among Northern capitalism, individualism, and skepticism) (2005).

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 operations of markets.¹²⁰ To varying degrees these were directly connected with the central analytic idea in the free labor account of markets: market relations were *terms of recruitment*, rules for enlisting the labor and talents of others. Free labor meant that to recruit another's labor, one had to *negotiate*, appeal to the interest and self-conception of the other. The negotiation might take place in profoundly unequal circumstances; but it could no longer be formally a matter of prerogative.

What was the consequence of inevitable negotiation? Smith, a theorist of moral psychology as well as a jurist and political economist, provided a particularly rich answer. He believed the taste for domination over others arose from legal arrangements that made domination possible by authorizing some to treat others as mute instruments. In Smith's description, such masters scorned "to condescend to bargain and treat with those whom they look on as their inferiors and are inclined to use in a haughty way."¹²¹ The use of "bargain and treat" inevitably suggests Smith's famous reference to the human "propensity to truck and barter."¹²² That is what the master scorns to engage in and seeks to avoid in his recruitment: bargaining with others, that is, negotiating with them.

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 natural inclination every one has to *persuade*."¹²³ 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 in 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

120. See 1 ADAM SMITH, *THE WEALTH OF NATIONS* 376–427 and *passim* (R.H. Campbell & A.S. Skinner eds., 1976) (1776) (laying out comparisons among nations' economic development).

121. SMITH, *supra* note 104, at 186.

122. See SMITH, *supra* note 120, at 25 ("The division of labor . . . is the . . . consequence of a certain propensity in human nature which has view no . . . extensive utility; the propensity to truck, barter, and exchange one thing for another.").

123. SMITH, *supra* note 104, at 352 (emphasis added).

[him] to be of your mind In this manner [people] acquire a certain dexterity and address in managing their affairs, or 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 this¹²⁴

Giving this passage complete exposition would require presenting Smith's account of the social "passions," or what today is called social psychology, in *The Theory of Moral Sentiments*.¹²⁵ Without that excursion, consider the main ideas that Smith offers about negotiation. First, persuasion, the effort to bring other minds in line with one's own, is one of the basic activities of human life; people are motivated to persuasion for its own sake, not just instrumentally. Second, bartering is persuasion directed at interest: in bartering one makes a case to another about the content and implications of that person's self-interest. A corollary claim is that self-interest is not fixed but at least in some measure a matter of self-interpretation, which others may induce one to revise. Third, sustained practice of persuasion can make it a central element of character.

In the free labor account, engaging in persuasion had several implications for the way one conceived of oneself and others. First, it meant being aware of living in a world of other persons, each with distinct interests and a self-conception, including goals, aversions, and bases of dignity. Second, it meant recognizing the relativity of one's own interests and self-conception to those of others. Announcing one's own purposes without considering how they fit or clashed with others' interests and self-conceptions would all but guarantee that these purposes, so far as they depended on persuading the other to join in them, would go unachieved. To live in a world where cooperation requires negotiation is to inhabit a *social* world, where one must be aware of interdependence with others who are as much persons as oneself.

124. *Id.* (emphasis added).

125. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 3–90 (Prometheus Books 2000) (1759). 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. Smith identifies sympathy, the desire that one's 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 social interactions. I provide a sketch of passions theory, particularly Smith's, in Jedediah Purdy, *A World of Passions: How to Think about Globalization Now*, 11 *IND. J. GLOBAL LEGAL STUD.* 1, 23–28 (2004).

This is not to suggest that persuasion must produce compassion or egalitarian sentiment. A skilled manipulator is as apt to succeed at persuasion as a fair-minded sympathizer—perhaps more so because of the tactical clarity of the manipulator’s vision.¹²⁶ What this exposition does suggest, however, is that the satisfaction of wreaking one’s will on others—the satisfaction of the tyrannical character that views people as things—will not fare well in a world where persuasion is necessary to recruit labor. When the terms of recruitment rest on legal reciprocity, one probably cannot expect robust social and emotional reciprocity to emerge in consequence; but successful recruitment will tend to require at least the appearance of respect and concern for the interests and self-conceptions of others. This was the social hope of the free labor position. When Smith remarks that “brutes have no notion” of the form of sociability founded on persuasion, one wonders whether he refers not only to the African monkeys whose violent squabbling over food he describes to make his point, but also to slave-masters and feudal lords.¹²⁷ Sophisticated free labor thinkers regarded the awareness of and responsiveness to others that persuasion required as a humanizing trait, in the normative sense of *humane*.¹²⁸ In their vision a new property regime implied a new set of characteristic social interactions, with implications for the shape of human personality.

In this Part, I have presented the arguments in political economy that formed the backdrop to the doctrinal problem that opened the

126. The vision of market societies as producing skilled manipulators is of course a part of the concern of antimodern critics such as Fitzhugh. See FITZHUGH, *supra* note 119, at 219 (“Man is not naturally selfish or bad, for he is naturally social. Free society dissociates him, and makes him bad and selfish from necessity.”).

127. SMITH, *supra* note 104, 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.

128. A striking 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. Although models of pure maximizing behavior suggest that the second player should accept even the smallest amount of money—say a \$9.95 to \$.05 split of \$10—in practice fairness considerations lead players to reject offers they find insulting or inequitable. In developed countries, offers as low as a 4 to 1 proportion are rejected about half the time. However, “the least-educated groups ever studied . . . conform *most* closely to the game-theoretic model (based on self-interest) [and] the 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.” COLIN F. CAMERER, *BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION* 113–14 (2003).

Article: how to draw the line between human beings' character as resources and their character as persons. I have shown that concern with the *terms of recruitment* drove theorists' conceptions of feudal, slave, and market societies. The practical question that focused the theoretical problem in the doctrinal discussion of the first Part was the limits of labor discipline: how might one person recruit and retain another's effort, and where did her power to induce or coerce cooperation end? This Part has shown that this question was thought to have sweeping theoretical consequences for the character of social life and of individuals. In the next Part I bring together these doctrinal and historical discussions in a theoretical account of the features of human life that make the problem of recruitment perennial and place it at the nexus of property and personhood: the thoroughgoing interdependence that coexists with human autonomy.

III. THE ANALYTICS OF INTERDEPENDENCE AND RECRUITMENT

As noted at the beginning of the Article, the resources-based account of property law begins from a description of the world in which law operates: a world of scarce and desired resources. Similarly, the personhood-based account begins from a description of the human nature with which law interacts: the nature of a species for which continuity of experience and the capacity to see one's will and self-understanding instantiated in the external, physical world are essential sources of identity.¹²⁹ Here I explain how human beings are at once bearers of personhood and scarce and desired resources for one another's ends, and thus how a property regime that addresses the recruitment and discipline of people must incorporate mutually dependent definitions of both what is a resource and what constitutes personhood.

129. See generally works of Margaret Jane Radin cited *supra* notes 11, 14-15.

A. *The Sources of Autonomy and Interdependence*

Human beings have a dual nature.¹³⁰ People are resources for one another. Our talents, training, time, energy, our minds, bodies, and even feelings are necessary to advance others' projects. We need one another. We are susceptible, literally, to exploitation. Moreover, like less controversial objects of property regimes, we are scarce as well as desired resources.¹³¹ 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 need—and mostly fail—to recruit others as investors, coventurers, employees, or lovers. Our wants, dreams, and self-images are hostage to our success or failure in recruiting others to them.¹³²

At the same time that we are resources, means to one another's purposes, we each have our own purposes, wishes, and ends. Indeed, in one version of moral theory we recognize one another as ends, other purposeful and self-conscious beings owed a duty of reciprocal forbearance.¹³³ This concept is a cornerstone of modern law and

130. 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 of 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., 1929) (1781) (elaborating the “third antinomy of 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 TASK, A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* 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).

131. The definition of a valuable resource as one that is both scarce and desired comes from RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.2 (2d ed. 1998).

132. The poet W.H. Auden wrote in his *Elegy for Sigmund Freud*, “To be free is often to be alone.” Auden's formula, however bleak, captures only half of the unhappiness in the human situation. To be alone is also to be unfree, in the sense of being unable to realize any of the aims that depend on the recruitment of others. By “free” Auden meant a psychoanalytic goal: to act without illusion or neurosis, the compulsive repetition of or return to the source of some developmental trauma. The concern of this Article is to say something about how law, and specifically the law of property, might make it more nearly possible to be free and yet not alone, free among others.

133. This phrase, and not a particularly Kantian conception, is all that I mean by “ends” in this Article. I mean it as synonymous with the qualities captured in the term “personhood.”

ethics, whether it is rendered as Kant's characterization of persons as ends in themselves,¹³⁴ rights theorists' specification that each person carries the same complement of basic powers and immunities,¹³⁵ the utilitarian axiom that the pleasures and pains of each shall count alike,¹³⁶ or the principle of equal protection under law.¹³⁷ Each such account of persons places some limits on how people may recruit one another to their 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, or within the bounds of the Fourteenth Amendment. Therefore the governing conception of personhood, freedom, dignity, or equality does much to determine the set of human purposes that will be achieved in any social order. This connection works through the

politics, and religion has substantially to do with how ideas of the distinctive value and importance of persons have changed over time.¹³⁹ In any time and place, our terms of recruitment reflect the interaction between these two domains.

B. *The Taxonomy of Dependence*

I earlier pronounced that people are valuable to one another and are thus susceptible, literally, to exploitation. I will now give more specific content to this claim. People need others for a variety of purposes, which we cannot accomplish without their assistance. What they need may be affirmative contributions or may take the form of forbearance. They need one another to *survive*, to *prosper*, and to *flourish*. Each of these terms designates a set of interests to which one may appeal in seeking to recruit others to one's projects. The first step in understanding the idea of *terms of recruitment* is to appreciate these distinct aspects of people's reciprocal dependence.¹⁴⁰

We need one another to *survive*. That is, we are physically vulnerable animals, and in consequence we depend on one another's protection and forbearance—especially those of stronger individuals—for our continuing lives. To recruit a person by appealing to survival is to make an offer that person cannot refuse. This is the alternative presented to the targets of recruitment in at least three settings: forced labor in authoritarian societies, enslavement, and the feudal compact. Come work with me—in whatever capacity—goes the offer, and I will not kill you, nor will I let others kill you.¹⁴¹ It is not implausible that the majority of the recruitment of human effort throughout history has been in these

139. See works cited *supra* note 21.

140. The account I give bears some similarity to that of HONNETH, *supra* note 110. Honneth recognizes three basic requirements for which we depend on others both individually and at the level of collective organization: *love*, or bodily integrity and security; *respect*, or acknowledgement of equal basic rights; and *recognition*, or acknowledgement of our particularity. Another account of necessary interdependence, which stresses the social and psychological preconditions of autonomous action, is that of ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* (1999).

141. Orlando Patterson presents the relationship between slave status and the threat to survival in two ways. First, “[s]lavery . . . is . . . a form of personal domination. One individual is under the direct power of another or his agent. In practice, this usually entails the power of life and death over the slave.” PATTERSON, *supra* note 21, at 9. Second, “[t]he slave is always conceived of as someone, or the descendant of someone, who should have died, typically as a result of defeat in war, but also as a result of poverty. His physical life was spared” at the price of the total alienation of his freedom. *Id.* at 10.

terms.

We need one another to *prosper*. For our material well-being, we depend on opportunities to engage in productive activity and to consume the fruits of that activity. With the exception of primitive forms of cultivation and gathering, we produce wealth cooperatively and consume what others have produced. Recruitment that appeals to this aspect of interdependence says, “Come work with me, and you will have more”—measured in whatever the person being recruited wants—“than you otherwise would.” This is the signal appeal of market society. It is how we solicit one another in the labor market, the market for capital (“give me your money, and you will enjoy higher returns than you otherwise would”), and, if one believes certain explanations of human behavior, in the “markets” for marriage and sexual gratification.¹⁴²

We need one another to *flourish*. We need the cooperation of others in intrinsically fulfilling modes of being or becoming what it is we wish to be. At least two distinct branches of flourishing require the recruitment of others. One is *vocation*, the search for a defining, often productive activity in which we feel ourselves expressed, augmented, or improved.¹⁴³ Another is *love*, the noninstrumental relations to other people in which we exercise and develop compassion and generosity; come through reciprocal recognition to understand our own experience and personality more fully or clearly than we otherwise could; and, within the relative safety of intimacy and trust, can revise our character by taking chances with new modes of desire, expression, and activity.¹⁴⁴ The appeal to flourishing proposes, “Join me, and you will be more fully yourself than you could otherwise be.”

Different types of interdependence can be nested within the same appeal. Survival is the limit condition of the appeal to prosperity, the boundary at which the person recruited is choosing between a recruiter’s offer and starvation.¹⁴⁵ Appeal to flourishing

142. See generally RICHARD A. POSNER, *SEX AND REASON* (1992) (arguing that sexual and romantic behavior can be explained by the aim of maximizing sexual gratification relative to a variety of exogenous constraints).

143. See TAYLOR, *SOURCES OF THE SELF*, *supra* note 21, at 211–47 (discussing “the affirmation of ordinary life,” the protestant development of the idea that in social life and work—including vocation—people approach the divine as nearly as is possible in this world).

144. See *id.* at 289–91 (discussing the rising ideal of companionate marriage and intimacy as a high good).

145. See PATTERSON, *supra* note 21, at 10 (noting that the basis of slavery is historically the exchange of freedom for the sparing of one’s life, either in war or in the face of starvation).

will, for the fortunate, be compatible with choosing an attractive bundle of “prosperity” goods. That is the position, for instance, of relatively well-compensated writers, artists, and scholars.¹⁴⁶ It is not too wild-eyed a generalization to suggest that most people give considerations of flourishing relatively greater weight to the extent that they believe these considerations are compatible with acceptable choices along the dimension of prosperity. In a very rough sense, then, the three purposes—survival, prosperity, and flourishing—are nested in the order in which I have presented them, with survival inmost. (This is too simple, of course: aesthetes, spiritualists, and others may well choose flourishing over prosperity and even over survival.)

C. *The Terms of Recruitment*

This taxonomy of interdependence describes the human needs that law confronts. In defining personhood and resources in human beings, law both responds to and shapes our interdependence.

Law does this in two ways. First, it sets *rules of recruitment*. These specify which forms of dependence one may appeal to in recruiting others, and in what ways. For example, one basic rule of recruitment forbids recruiting people by means of threats to their survival. Despite the fact that we depend on one another's forbearance and protection for survival, private individuals may not threaten to withhold that forbearance—that is, threaten to kill another—to recruit that person. Second, by allocating claims on resources, law sets the *circumstances of recruitment*, the framing facts of wealth and poverty that substantially determine the relative bargaining positions of the parties to recruitment. Together these dimensions of law make up what I have been calling the *terms of recruitment*, the combination of legally constituted facts of ownership and the set of legally permissible combinations of inducement and threat one may use in recruiting others.

I will develop this account through a brief exposition of the thought of Robert Lee Hale, the legal realist and institutional

146. For a discussion of different motives in and attitudes toward productive activity, see UNGER, *supra* note 130, at 26–35. Unger distinguishes among ideas of work as *honorable*, fulfilling a settled and dignified role in a relatively stable or intelligible social order; *instrumental*, or enabling one to survive for other satisfactions, but not fulfilling in itself; and as a *transformative vocation*, work that “connects self-fulfillment and transformation: the change of any aspect of the practical or imaginative setting of the individual's life.” *Id.* at 29.

economist who gave the classic statement of property law as making up terms of recruitment, and then show how my formulation moves beyond his. Hale described what I have called the circumstances of recruitment this way: “The law confers on each person a wholly unique set of liberties with regard to the use of material goods and imposes on each person a unique set of restrictions with regard thereto. The privileges, rights, and duties of each person differ from those of every other person.”¹⁴⁷ Hale’s emphasis on the *uniqueness* of each person’s rights and duties under property law expresses an emphasis not on the abstract categories of the law—the forms of ownership, for instance, which define the several bundles of rights over things that people may hold¹⁴⁸—but on the concrete social world in which each person is the owner of certain resources and not of others. Recruitment takes place against this distributive background, in which each person’s starting point is unlike every other person’s.

Building on this account of bargaining, Hale described economic life as a system of mutual coercion among all participants. Hale’s innovation was to concentrate on the power of exclusion that attends most forms of ownership¹⁴⁹ and the threat effect of proposing to exercise that power against other individuals who need one’s resources to pursue their projects of survival, prosperity, or flourishing. This description amounts to a rhetorical inversion of the conventional account of market relations as comprising voluntary exchange for mutual advantage, which highlights instead the power of alienation or transfer and the inducement to another to become better off by consummating an exchange.¹⁵⁰ To that inducement, Hale contended, there corresponds the threat of nonconsummation, of sticking at exclusion and denying the other the benefit of one’s own resources. The point of Hale’s shift of focus is not that owners want to exclude others from their resources, but that they want to exact the most favorable terms of access from others who need their resources,

147. HALE, *supra* note 9, at 15.

148. For a discussion and economic rationale of the limited number of forms that property rights take, see Merrill & Smith, *supra* note 7.

149. Important exceptions are rife, but generally recognized as exceptions: for instance, in real property implied easements and the right of access in certain circumstances of public officials or medical professionals; and in intellectual property, the right of fair use.

150. For the basic account of allocative efficiency by mutual advantage in the law of property, see POSNER, *supra* note 131, § 3.2.

which the threat of exclusion enables them to do.¹⁵¹ On this account, the allocation of resources essentially shapes the threats one party may make against another, that is, the consequences of enforcing the power of exclusion: if both parties are relatively well-endowed, the cost of being excluded from the other's resources—put differently, the opportunity cost of declining a proffered bargain—will not be so difficult to absorb. If, however, one party is so poorly endowed as to *need* the resources at issue, while the other party is well-enough endowed to be relatively indifferent to the outcome of the bargain, then the poorer party will be subject to significant coercion.¹⁵² Even in describing situations of great inequality, Hale saw the coercion as mutual. The propertyless worker exercises coercion over the factory owner in declining to work. That is simply a weaker bit of coercion than what the factory owner exercises in refusing to pay the noncompliant worker.¹⁵³ In Hale's account, coercion represents not a judgment about the balance of power in a specific transaction, but the elementary term in his analysis of economic life as a system of coordination based on the balance of threat.

Hale's account of property relations as reciprocal coercion is neither falsifiable nor verifiable. It was a rhetorical choice intended to highlight certain aspects of transactions that can also be described in market-friendly terms of mutual benefit or libertarian terms of voluntary exchange. That is not to say, however, that Hale's description has no implication for the assessment of property regimes. Rather, by concentrating on the *circumstances of recruitment*, Hale sought to shift the meaning of "voluntary" relations.¹⁵⁴ The libertarian jurisprudence that Hale attacked arose from the constitutional right

151. See HALE, *supra* note 9, at 17 ("[A] manufacturer of goods . . . values his right to prevent their use by others merely as a means of enabling him to exact money from those others. If successful, he will not, in fact, deny to all others the liberty of using his products, but because he may deny that liberty he is in a position to impose conditions with which a person who acquires the liberty must comply.").

152. "[A] man who for one reason or another is unable to acquire property by which he can exact a money income from others cannot easily escape the restrictions which other people's property rights place on his freedom. If he is unable to own sufficient property of this type, he may be compelled to accept employment as the only condition on which he can obtain the money essential to purchase the freedom to eat." *Id.* at 18.

153. See *id.*

154. See FRIED, *supra* note 10, at 47–59 (discussing Hale's leveling attack on the formal conception of voluntary relations that had been a leading legitimating principle in laissez-faire ideology). Fried's book is in general an impressively lucid and informative exposition of both Hale's thought and the backdrop of intellectual and jurisprudential disputes against which he and his legal realist contemporaries worked.

of contract and common-law free labor position discussed in Part I. That jurisprudence concentrated on *formal voluntarism*, characterizing as free nearly any transaction undertaken without threat of violence, blackmail, or some other overt coercion.¹⁵⁵ This was not an empty, merely nominal voluntarism: rather, it concentrated on the *rules of recruitment*, albeit to the near-total exclusion of the *circumstances of recruitment*. In this view, the fact that a bargainer had to choose between one highly disadvantageous option and several truly dreadful alternatives would not make the resulting transaction less voluntary, so long as it was not exacted under threat of overt coercion, such as harm to body or property.¹⁵⁶

Hale's descriptions of the various quanta of threat that different parties could bring to their recruitment efforts shifted the focus from formal to *substantive* voluntarism, attention to the range of viable alternatives each party confronted, and the costs and benefits associated with each alternative. Hale showed the implausibility of simply blessing as "voluntary" a labor contract resulting from the encounter of the worker's very small coercive power (the threat of withholding labor) with the very great coercive power of the employer (the threat of withholding employment).¹⁵⁷

Having taken Hale as the exemplar of attention to the circumstances of recruitment, I now want to move beyond his position. Hale's description of economic life as a system of mutual coercion revealed a great deal, but it also obscured the importance of the *rules of recruitment*. Hale took market society's rules of recruitment as given and argued that they were not enough to secure a compelling version of economic freedom. Ironically, then, even as he redescribed markets as systems of unequal power, Hale inadvertently naturalized the basic terms of market relations, in which overt coercion was out of bounds.

Yet to do this slight the moral achievement of market rules. It is no minor fact that under the *laissez-faire* law that Hale attacked,

155. See *id.* at 29–33 (describing *laissez-faire* theorists' "bland self-assurance in describing private economic activity as a bastion of freedom").

156. Fried quotes the Harvard economist Thomas Carver, writing in 1921: "The most important characteristic of the economic life of civilized people is its freedom from compulsion. Nearly every economic act of the average individual is one which he does voluntarily. . . . Among all free people one private citizen is forbidden to exercise compulsion over any other." *Id.* at 30–31 (quoting THOMAS CARVER, PRINCIPLES OF NATIONAL ECONOMY 101 (1921)).

157. On Hale's efforts to distinguish between acceptable and unacceptable instances of coercion, see *id.* at 59–70.

recruitment could not turn on overt coercion. That prohibition was not ideological legerdemain. As discussed in Part II, it was the moral core of a law of recruitment that arose in direct repudiation of slavery and feudalism.¹⁵⁸ It was for this reason that free labor thought also included an idea of democratic community. In contrast to the white-supremacist vision of citizenship that Chief Justice Taney had expressed in *Dred Scott*¹⁵⁹ and the “mud-sill” theory that social life depended on a degraded class of workers who did society’s demeaning work, free labor contended for a different conception of personal dignity and social membership.¹⁶⁰ The heart of the idea was that honest labor under conditions of equal opportunity meant a fair chance for all and was dignifying in itself. No one was condemned by birth to inferior status. Rather, everyone had a shot at becoming a person of substance.¹⁶¹

The question Hale might have asked, had he taken a different direction, was not only what was false in the free labor promise to reconcile our character as resources with our character as persons, but also what would be necessary to make it true. Addressing this question requires at least two steps that Hale did not take. One is to give the rules of recruitment equal standing with the circumstances of recruitment, as an historically varied and contested effort to give effect to ways that human beings matter morally. The other is to ask normatively what is the best potential in the tradition of understanding the relationship between resources and personhood. In the next Part, I propose a normative orientation that emerges from the historical developments I have surveyed. This orientation concentrates first on maximizing reciprocity in recruitment and second on maximizing appeals to considerations of flourishing.

IV. A NORMATIVE ORIENTATION: THE ANALYTICS, TRADITION, AND PROSPECTS OF RECIPROCITY

What should the terms of recruitment be, and why? I argue that the normative touchstone that emerges from the discussion so far has two aspects. The first is maximizing *reciprocity*, relative equality in interdependence and thus in recruitment. The second is increasing the

158. See discussion *supra* Part II.A.

159. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 399–454 (1857).

160. See discussion *supra* Part II.A.

161. See discussion *supra* Part II.A.

share of recruitment that appeals to *flourishing* rather than survival or prosperity. As in earlier portions of this Article, I offer several complementary modes of argument. First, I lay out two issues in contemporary law and policy where a gain in these values is possible. Second, I present an analytic account of the normative criteria I have laid out, using the examples of prospective reform to show how recruitment happens, and might happen, under relatively reciprocal and flourishing-oriented conditions. Before I speak more specifically to the normative implications of my argument so far, I want to pause over the word “normative.” I take it that the arguments of this Article catch its audience mid-stream in the sense that it addresses them in light of the commitments they already hold.¹⁶² I have no ambition to persuade readers who are determinedly unmoved by appeals to freedom and reciprocity. Rather, my argument addresses the best understanding of what it means to be committed to freedom and reciprocity and the implications of that commitment where it is properly understood.¹⁶³ I have presented an account of how law interacts with changing technologies and values on the one hand and permanent facts about interdependence on the other. The aim of this account is to show how changing terms of recruitment can change the concrete terms of interaction, generating either greater practical capability and wider choices, or lessened capability and narrowed options. For those who already accept the goodness of freedom and reciprocity, concurring with my description may have two implications. First, it may affect the evaluation of property regimes by

162. This is in contrast to a polar pair of views. The first is that it is possible to produce normative principles, and arguments vindicating them, whose authority is independent of the starting point of the arguers. For a relatively minimalist, up-to-date, and secular version of this view, see JURGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 19–111 (Ciaran Cronin trans., 1993) (1991) (describing and defending an ethical theory based on the structure of communication). The second is that normative assessment is irremediably subjective and insusceptible to rational elaboration that persuades beyond what the arguers already believe. See Gilbert Harman, *Moral Relativism*, in GILBERT HARMAN & JUDITH JARVIS THOMSON, *MORAL RELATIVISM AND MORAL OBJECTIVITY* 1, 1–64 (1996).

163. This approach to normative argument is consistent with the broadly “hermeneutic” account of Charles Taylor: although we cannot hope altogether to escape the context of attitudes and concepts from which we reason, we can clarify and expand our beliefs and, in doing so, transform them in what we take to be the direction of greater insight. See 1 CHARLES TAYLOR, *PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE* 105–12 (1985) (so arguing). I believe this mode of argument is also compatible with the concept of democratic persuasion that I describe. See *supra* text accompanying notes 123–28.

drawing attention to the terms of recruitment they establish.¹⁶⁴ Second, it may affect the conception of freedom itself by emphasizing its relational character and its constant tension with the interdependence that is the basis of humans' interwoven need for, and vulnerability to, one another.

A. *Prospects: Margin of Reciprocity at Two Edges of the Modern World*

There are many places to begin a discussion of how changes in the terms of recruitment can increase reciprocity. One might begin with land titling programs for urban squatters in developing countries, which appear to increase labor-market participation by reducing the monitoring cost of household security, and may thus set in motion a trend toward gender equity that I will soon discuss in the context of India.¹⁶⁵ Alternatively, one might look to innovative programs such as proposed risk-pooling markets which, by mitigating any individual's share of the risk of obsolescence inherent in specialization, might increase real freedom to choose specialized training in line with one's gifts, passions, or entrepreneurial ambitions.¹⁶⁶ I have discussed both examples elsewhere.¹⁶⁷ Here I take up two other cases, one set in the developing world, the other on the frontiers of technology. The first suggests that women's participation in labor markets affects their power to influence household decisions, with significant effects for gender equity generally. The second describes the rise of voluntary and nonhierarchical production in some technological and cultural sectors, which presents new possibilities for appeals to flourishing in

164. Among reforms that might fare well under this standard are those I discuss in Purdy, *supra* note 1, at 1266–84: turning informal possession of real property into formal title, creating sophisticated risk-pooling markets that effectively commodify the expectation of good fortune and high earnings (and thus hedge against their opposites), and ensuring widespread access to the technologies of cultural production and voluntary peer production. *Id.* In the third article in this series I intend to take up the program of asset-creation as a concrete way to explore a freedom-promoting view of recruitment regimes.

165. See generally HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (Basic Books reprint ed. 2002) (arguing that Peru's poor represent a distinct entrepreneurial class); DE SOTO, *supra* note 8 (arguing that capitalism fails in poor countries because the poor lack property rights in their assets).

166. See generally ROBERT J. SHILLER, *THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY* (2003) (proposing a new risk-management infrastructure that utilizes financial inventions to insure the gains made by workers).

167. See Purdy, *supra* note 1, at 1266–71 (discussing Hernando de Soto's theory on land titling programs); *id.* at 1272–78 (discussing Robert Shiller's proposal to manage risk according to an employment sector index).

recruitment. Taken together, these examples suggest the breadth of application of the theoretical model I have developed here.

1. *Reciprocity in Markets and Households: Resource Value as Personhood Value.* One of the more striking and troubling symptoms of the differential value human beings place on one another is the sex asymmetry among children and young adults in East and South Asia. Better known as the problem of missing women, the phenomenon now comprises some 100 million young men and boys in excess of the corresponding female populations in India, Pakistan, China, Taiwan, and neighboring countries.¹⁶⁸ Although scholars offer competing accounts of the causes behind the asymmetry, no one seriously disputes that one major cause is that sons are culturally more valued than daughters in the countries where the asymmetry has developed.¹⁶⁹ This differential valuation inspires both sex-selective

168. See VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: THE SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 58–66 (2004) (“In 1990 . . . more than 100 million women were missing nationwide.”).

169. There is considerable debate on the relative proportions of gender disproportion caused by each of a variety of factors. One class of factors expresses a preference for sons over daughters, exercised at different points in the cycle of conception and childhood: sex-selective abortion, infanticide, and preferential caregiving and medical expenditures resulting in higher levels of childhood mortality in girls than in boys. For an outline of the debate over proportions among these causes, see Junhong Chu, *Prenatal Sex Determination and Sex-Selective Abortion in Rural Central China*, 27 POPULATION & DEV. REV. 259, 259 (2001) (observing that many Western observers were skeptical that sex-determination technology was widely available in China, while Chinese scholars resisted the suggestion that postnatal sex discrimination or infanticide caused the sex disparity). Today it is clear that China's domestic production capacity makes possible widespread sex-determination technology, and reported levels of sex ratio *at birth* show such a dramatic disproportion that any postnatal addition to the ratio must be regarded as additional, not supplanting. See *infra* text accompanying notes 170–81. Another candidate is inaccurate reporting: some suggest that births of girls are underreported, either because of low cultural valuation of females or because, under China's one-child policy, parents who wish to have a son may conceal the birth of a daughter in an effort to avoid enforcement of the policy. For a discussion of this question, see Dudley L. Poston & Karen S. Glover, Too Many Males: Marriage Market Implications of Gender Imbalances in China 8–10 (Sept. 1, 2004) (unpublished paper, on file with the *Duke Law Journal*). As Poston and Glover note, however, Taiwan's sex disproportion at birth approaches China's, despite near 100 percent reporting and no legal constraint on fertility, making underreporting seem unlikely to explain the bulk of China's sex ratio. See *id.* at 9. Moreover, although reliable studies of the nominally illegal practices of prenatal sex-determination and sex-selective abortion are difficult to come by, Junhong Chu's study of one village in which she had earned the trust of participants showed high levels of both practices. See Chu, *supra*, at 270, 273 (reporting 39 percent use of ultrasound sex testing during first pregnancies, 55 percent use in second pregnancies, and 67 percent use in additional pregnancies; 27 percent of respondents reported at least one abortion, and 86 percent of that group reported at least one sex-selective abortion). A third candidate is, paradoxically,

abortion to eliminate female fetuses and greater spending on medical care and nutrition for boys than for girls.¹⁷⁰ In consequence, fewer girls than boys are born, and fewer of those survive to adulthood. My interest here is not in this very important demographic problem per se, but in taking sex differentials in survival as a statistical expression of the differing personhood value placed on girls and boys. By aggregating the results of hundreds of millions of family decisions, these numbers reveal who counts in the marginal decisions of families often on the edge of privation. They also suggest when and how the valuation of personhood changes.

Essential indicators of development, such as male literacy, average income, urbanization, and access to medical care do not reduce the sex asymmetry; on the contrary, they sometimes correspond to growing sex gaps.¹⁷¹ Although perhaps unsettling to anyone inclined to believe in a unified theory of progress, these facts are unsurprising on the assumption that families prefer sons over daughters. The effect of increases in basic development is to enable people to effect their will in more ways than they could otherwise do.¹⁷² Wealth and medical resources increase opportunities to have

improving health overall. Many more male than female fetuses are conceived, but because female fetuses are harder than males, the natural proportion at birth only slightly favors males. Hence, other things equal, an improvement in the health of pregnant women, which decreases the rate of fetal wastage (miscarriages and stillbirths) should increase the proportion of male fetuses. For this argument, see generally Dhairiyarayar Jayaraj & Sreenivasan Subramanian, *Women's Wellbeing and the Sex Ratio at Birth: Some Suggestive Evidence from India*, 40 J. DEV. STUD. 91 (2004). Although attractive for its note of optimism (perhaps not all news of sex disproportion is bad news!) and for its application of medical insight to social inquiry, this explanation cannot go far. The world's richest countries, where fetal wastage rates are presumably much lower than in India or China, do not even approach the sex disproportions registered in those countries. In short, it is very difficult to get away from the conclusion that sex-selective abortions have contributed substantially to sex imbalance.

For one account of the significance of differential valuation of sons and daughters in this phenomenon, see HUDSON & DEN BOER, *supra* note 168, at 131–32.

170. For a start on the dispute, see HUDSON & DEN BOER, *supra* note 168, at 112–13. One study of a hospital in Punjab in the 1980s and 1990s found that 13.6 percent of mothers of boys admitted—with reticence which may suggest underreporting—having undergone prenatal sex-selection; the comparable figure was 2.1 percent for mothers of girls. The other female fetuses presumably were not carried to term. *See id.* at 112.

171. *See* AMARTYA K. SEN, DEVELOPMENT AS FREEDOM 197 (1999) (“[V]ariables that relate to the *general* level of development and modernization *either* turn out to have no statistically significant effect, *or* suggest that modernization . . . can even *strengthen*, rather than weaken, the gender bias in child survival.”).

172. This is a shorthand statement of the theory, associated with Amartya Sen, that freedom should be measured partly in capabilities, i.e., the range of human potential that people are able to realize in their lives. Sen has developed this position in many essays. *See* AMARTYA SEN,

sex-selective abortions by making the necessary procedures accessible and affordable. So does the access to information about medical procedures that literacy brings. Apart from this direct means of enforcing the preference for sons, increased household wealth may increase overall childhood survival rates, yet also increase the survival gap if a disproportionate share of the increase goes to investments in the health of boys.

The picture becomes more complicated if one disaggregates the family, asking whether the preference for sons is common to all members or enforced by husbands, and, if the latter, under what conditions women might enforce contrary preferences. In addressing the problem this way, it is helpful to adopt Amartya Sen's description of families as sites of "cooperative conflict."¹⁷³ In this model, the various members of a family hold partly overlapping and partly conflicting interests and values, which, taken together, produce a single solution for the family's use of resources.¹⁷⁴ Any solution includes both a set of priorities and an effective, usually informal set of decision-making procedures for setting or balancing priorities.¹⁷⁵ A solution may be either relatively egalitarian or inegalitarian, either in its weighing of the preferences of various family members or in the role it gives each member in decision-making procedures.¹⁷⁶ A family

Goods and People, in *RESOURCES, VALUES AND DEVELOPMENT* 509, 509–10 (1984) (“[T]he process of economic development is best seen as an expansion of people’s ‘capabilities.’”); AMARTYA SEN, *Markets and Freedoms*, in *RATIONALITY AND FREEDOM*, 501, 506 (2003) (“The opportunity aspect of freedom is, thus, concerned with our actual capability to achieve.”); AMARTYA SEN, *Opportunities and Freedoms*, in *RATIONALITY AND FREEDOM*, *supra*, at 583, 585 (“[M]ore freedom gives us more *opportunity* to achieve those things that we value, and have reason to value. This aspect of freedom is concerned primarily with our *ability to achieve*.”); AMARTYA SEN, *Freedom and the Evaluation of Opportunity*, in *RATIONALITY AND FREEDOM*, *supra*, at 659 (analyzing formal features of the relationship between opportunity aspects of freedom and individual preferences); and SEN, *supra* note 171, *passim* (describing the connections between human development and increasing freedoms).

173. See SEN, *supra* note 171, at 192–93 (describing “decision making in the family” as a “form of pursuing cooperation with some agreed solution . . . of the conflicting aspect”). For a particularly helpful discussion and elaboration of Sen’s model, see BINA AGARWAL, *A FIELD OF ONE’S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA* 53–81 (1994).

174. See SEN, *supra* note 171, at 192–93; AGARWAL, *supra* note 173, at 53–81.

175. See SEN, *supra* note 171, at 192–93; AGARWAL, *supra* note 173, at 53–81.

176. As Bina Agarwal points out, the variables that figure here are not just control of resources, but also cultural ideas of which issues are at stake in negotiation and which are so clearly settled as to be off-limits to bargaining. See AGARWAL, *supra* note 173, at 73–75. Another important variable is which conditions women perceive as “problems” (whether or not open to negotiation) bearing on their well-being or that of their children, and which are accepted (preceding even the question of negotiability) as untroubling. Sen emphasizes the

is thus, among other things, a site of negotiation over the terms of cooperation, conducted among people who address a complex and interwoven set of one another's needs for survival, prosperity, and flourishing.¹⁷⁷ What happens when the balance of interdependence changes in the negotiation of family decisions?

There is provocative evidence that when women's bargaining power increases, survival rates for girls rise relative to those for boys. That is, the family's decisions become more sex-egalitarian as women increasingly enforce egalitarian or profemale preferences. More precisely, two variables correspond to reduced sex inequality in childhood survival rates: women's literacy and women's participation in the workforce.¹⁷⁸ These are, of course, indicators of development in general; but they are also, specifically, indicators of how much *women* have participated in the benefits of development.

These data suggest that something in these particular changes enables women to enforce greater concern for daughters than male-dominated households evince. That is, certain kinds of women's

importance of an idea of false consciousness in this connection, suggesting that experience of empowerment reveals interests previously obscure to the interest-holder. See Martha Nussbaum, *Charles Taylor: Explanation and Practical Reason*, in *THE QUALITY OF LIFE* 232, 232–41 (Martha Nussbaum & Amartya Sen eds., 1993); SEN, *The Possibility of Social Choice*, in *RATIONALITY AND FREEDOM*, *supra* note 172, at 65, 90–92. Others argue that the poor are always in some measure aware of their disadvantage, and simply require practical opportunities, not enhanced insight, to challenge it. See, e.g., JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (1985) (explaining class relations using insights of the peasants). Although I tend to follow Sen and Nussbaum in believing that exposure to new experiences and ideas can revise one's estimation of one's interests—and that to believe the contrary would be more condescending than even a crude false consciousness view—the present argument does not require a judgment on this point. Increased capacity, or substantive freedom, is open to interpretation as either a source of insight into one's interests or an instrument for pursuing and enforcing interests already recognized. On reasons to believe that self-understanding frames any negotiating process, see 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCE: PHILOSOPHICAL PAPERS* 34–37 (1985), arguing for the place of self-understanding in constituting activity such as politics or negotiation. *Id.*

177. Families, that is, pool resources for relative prosperity and provide forms of protection that increase bodily security and integrity. Just as important, they provide intimacy and forms of complex and ongoing interpersonal recognition—which may be on terms ranging from quite reciprocal to highly nonreciprocal.

178. See ALAKA MALWADE BASU, *CULTURE, THE STATUS OF WOMEN, AND DEMOGRAPHIC BEHAVIOUR: ILLUSTRATED WITH THE CASE OF INDIA* 160–81 (1992) (surveying and interpreting findings to this effect from India and elsewhere, including Latin America and sub-Saharan Africa). Basu notes that, although sex ratios in childhood survival improve with both variables, maternal employment is sometimes associated with reduced overall rates of childhood survival, most likely because of the sacrifice of direct caregiving implied by the decision to work outside the home, particularly for families on the edge of survival. See *id.* at 170–73.

development, although active mostly in the public setting of the market, redound to the household by strengthening women's bargaining position. This change marks an increase in reciprocity within the household, a reciprocity that enables women to enforce their preferences in the negotiation that produces the family's solution in cooperative competition. It figures, in other words, in the ongoing reworking of terms of recruitment, and thus of cooperation, among profoundly interdependent people.

How might the enforcement of women's preferences improve the personhood status of females in household bargaining? One picture would portray women as having a constantly sex-neutral or profemale concern for their children, which increasing control of resources enables them to enforce. In this model, control of material resources, above all bringing wages into the household, would appear to be the most significant change. Literacy would figure chiefly as instrumental to employment. Women might spend their own wages to care for their daughters, threaten to withhold money if a husband demands a sex-selective abortion, or use the possibility of economic self-reliance to threaten exit in a high-stakes dispute over a household decision.¹⁷⁹ These examples correspond to distinct and complementary aspects of women's bargaining power: respectively, personal control over resources contributed to household expenditure; ability to withdraw resources from the household pool; and the possibility of exit without privation or material dependence on extended family, which of course makes possible the credible threat of exit even for those who do not really wish to exercise it.

One might also take a more dynamic view of the relationship between women's control over resources and their preferences. Perhaps the economic status of women directly or indirectly influences their self-regard and their estimation of their daughters' prospective lives so that they do not simply enforce pre-existing preference as their bargaining power grows, but develop increasingly

179. The reference is to ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). For his part, Sen notes "considerable evidence that when women can and do earn income outside the household, this tends to enhance the relative position of women even in the distributions within the household." SEN, *supra* note 171, at 194. He also suggests that literacy and education make women aware of alternatives and give them some confidence in insisting on the legitimacy of their desires. *Id.* at 198–99. The phenomenology of these suggestions is of mixed voice and exit, which seems right.

egalitarian preferences as their experiences and capabilities change.¹⁸⁰ Where women work outside the home, the result may be a new set of everyday interactions, experiences of competence and recognition, and newly resulting expectations about the regard others should show them, all redounding to the sense of agency in oneself and to one's idea of how other women's lives might be lived.¹⁸¹ Literacy, too, broadens awareness of possible lives that one might hope to lead.

The sex disparity I have described arises when female children are regarded as less valuable as persons than males and family decisions enforce that valuation. Increases in the family's level of resources and capabilities seem not to diminish the disparity. What does make a difference is women's power to assert value as resources, measured in the labor market, in the negotiations that form the family's cooperative conflict. In a striking historical continuity, the critical institution in this change, the labor market, is the same that figured so centrally in the free labor account of how changes in the rules of recruitment could make the resource and personhood dimensions of human beings mutually reinforcing. At least in the family's internal negotiations, compared to negotiations over the same decisions where women's resource value counts only in the

180. This is a kind of moral-psychological corollary of the growing recognition that women's agency is a critical factor in economic and social development, not merely in the passive sense that it makes women bearers of greater quanta of well-being, but in the active sense that women's empowerment contributes to development processes that affect both women and men. This thesis is the thrust of the discussion in SEN, *supra* note 171, at 189–203. For a recent summation of arguments and data supporting this view, see Isobel Coleman, *The Payoff from Women's Rights*, FOREIGN AFF., May/June 2004, at 80, noting that “[e]ducated women have fewer children; provide better nutrition, health, and education to their families; experience significantly lower child mortality; and generate more income than women with little or no schooling. Investing to educate them thus creates a virtuous cycle for their community.” *Id.* at 83.

181. See AGARWAL, *supra* note 173, at 421–66 (describing theoretically and in several case-studies how struggles over resources are also “struggles over meanings,” that is, over what women's and men's interests are and how they should count). “Struggles” should be underscored: women's increasing control of resources has often resulted in both violence and a recrudescence of male-supremacist politics. See *id.* at 271–76 (describing such reactions). The view that changes in economic structure and opportunity and changes in individual values go hand in hand appears to find confirmation also in the decline in native-born white American fertility rates around the beginning of the nineteenth century, which prompted pronatalist warnings of “race suicide.” See LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 100–01 (2002) (“The race-suicide alarm was a response to the transformation of an entire society . . .”). Summarizing historians' views of that period, Linda Gordon concludes, “The economic reorganization that made smaller families more economical also made upper- and middle-class women eager for broader horizons, which in turn made them desire smaller families.” *Id.* at 100.

domestic or other informal economy, the early-modern liberal vision of free labor seems to come true in developing countries today. Moreover, as I have argued, the change may be dynamic, reflecting a change in which women in the workforce—particularly literate women—come to value their own and other women’s personhood more highly than before, so that the preferences they insist upon are partly the fruits of the same changes that increase their bargaining power within the family.

I do not mean to overlook the extent of suffering and injustice in both the labor markets and households of developing countries, nor would I want to portray participation in an often merciless private economy as a simple experience of emancipation. That would recapitulate the too-simple optimism of free labor ideologues, who brought a once-emancipatory idea of formal equality and voluntarism into the service of justifying harsh and effectively unequal economic relationships. Nonetheless, the power of controlling a resource in oneself is real and considerable, and to the extent that this power creates reciprocity in other spheres of life, it can foster an increasingly egalitarian idea of personhood, that is, of how and why people matter.

2. *Appeals to Flourishing in the Production of Culture and Knowledge.* I now move to a very different setting. Yochai Benkler argues that digital technology has changed the capital structure of the production of culture and ideas in ways that create new opportunities to organize some economic activity by appeals to flourishing rather than prosperity.¹⁸² The backdrop to this thesis is the idea that because industrial production requires concentrated capital, exemplified by the factory, political decisionmakers have chosen to govern modern economies by rules that promote maximum productivity under conditions of capital concentration: allocation of resources by markets and management of productive relations through

182. See generally Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245 (2003) [hereinafter Benkler, *Freedom in the Commons*] (discussing the social transformations resulting from the “networked information economy”); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004) [hereinafter Benkler, *Sharing Nicely*] (discussing the emergence of social sharing in the technology industry and its capacity to decrease transaction costs and increase efficiency). More specific citations to both articles accompany the following discussion.

hierarchically organized firms.¹⁸³ Those rules have the incidental effect of inhibiting individual initiative in production and creativity, both because individuals often lack access to enough capital to produce industrial-era goods and because they tend to find themselves in hierarchically organized firms.¹⁸⁴ The burden of Benkler's argument is that, even assuming the appropriateness of these industrial-era arrangements, new technologies make maximum productivity compatible with much greater individual initiative in production.

Benkler's analysis concentrates on several technological phenomena. One is the proliferation of productive capital on a scale suited to individual ownership, in packages that routinely include substantial capacity in excess of what the individual owner wishes to use.¹⁸⁵ The paradigm is the personal computer, which typically holds much more computing capacity than its owner uses at any time. (Other goods that have the excess-capacity feature, although they are not "productive capital," include automobiles and backyard swimming pools.)¹⁸⁶ The heart of Benkler's argument is that, in many circumstances, voluntary sharing of this excess capacity may be a lower-cost way of deploying it than use of a pricing scheme. Moreover, such sharing may result in uses that are just as socially productive as the uses that market transfers would produce. Benkler cites schemes in which computer users turn over their excess capacity for large-scale computational, mapping, and other tasks which are more cheaply performed by many networked units than by a single mega-unit—particularly where the first alternative is given gratis.¹⁸⁷

From the example of networked computers, Benkler moves by a clever (but mostly implicit) analogy to suggest that people, like their

183. See Benkler, *Freedom in the Commons*, *supra* note 182, at 1247–48 (“An underlying efficient limit on how we can pursue *any* mix of arrangements to implement our commitments to democracy, autonomy, and equality . . . has been the pursuit of productivity and growth. . . . [W]e have come to toil in the fields of political fulfillment under the limitation that we should not give up too much productivity in pursuit of these values.”).

184. See *id.* at 1248 (“Efforts to advance workplace democracy have . . . often foundered on the shoals—real or imagined—of these limits, as have many plans for redistribution in the name of social justice. Market-based production has often seemed simply too productive to tinker with.”).

185. See Benkler, *Sharing Nicely*, *supra* note 182, at 275–81 (designating as “lumpy” those capital goods that typically come in packages that include excess capacity and as “mid-grained” those whose scale encourages widespread personal ownership).

186. See *id.* at 281–89 (describing carpooling as a form of social sharing resulting from this excess capacity of automobiles).

187. See *id.* at 289–96 (describing the efficiency advantages of distributed computing).

laptops, frequently hold excess productive capacity relative to what the market induces them to sell: people have free time and unused talent. The same technology that makes possible the networking of otherwise unused computing capacity to achieve more than a single production unit could do permits *voluntary combination* of talents and energy to productive ends.¹⁸⁸ Dispersed knowledge and decentralized effort are easily integrated through unifying programs and databases, and participants not only provide their respective ingredients to the stone soup, but also correct and improve one another's contributions. Benkler's favorite examples are free, open source software, which powers much of the world's information processing; the Wikipedia, a collaborative encyclopedia; and Slashdot, a collaborative news-and-commentary compendium for technophiles.¹⁸⁹ These are significant technological and cultural products, generated by the voluntary and decentralized coordination of talents and energies. Although Benkler is deliberately agnostic as to the motivation that leads people to this work, it is not much of a stretch to suppose that some part of it falls along the axis of flourishing: self-expression, the development of a sense of vocation, and even play.¹⁹⁰

Network technology makes these collaborative productions possible, turning many who might have been solitary hobbyists into participants in social production. Voluntary and decentralized production gets a boost from another technological innovation, the digital devices that have radically reduced the cost of the capital necessary to produce and distribute cultural goods. Video, music, and books (where electronically rendered) are now relatively inexpensive to create and costless at the margin to reproduce—facts that threaten the industrial-model gatekeepers of culture with obsolescence.¹⁹¹ In a

188. See Benkler, *Freedom in the Commons*, *supra* note 182, at 1256–60 (discussing voluntary, loosely collaborative “peer production”).

189. See *id.*

190. Benkler goes so far as to say, “Capturing the potential for human action that could be motivated by the exchange of love, status, and esteem, a personal sense of worth in relations with others, is the strong suit of social production Social production rewards action either solely in these forms or, if it adds money, organizes its flow in such a way that it at least does not *conflict* with and undermine the quantum of self-confidence, love, esteem, or social networking value obtained by the agent from acting.” Benkler, *Sharing Nicely*, *supra* note 182, at 328 (citations omitted).

191. See Benkler, *Freedom in the Commons*, *supra* note 182, at 1252–54 (discussing the character of information as “nonrival,” a quality now attaching to cultural goods that can be electronically reproduced and transmitted as mere information); Benkler, *Sharing Nicely*, *supra*

sense, this situation promises to return cultural production to the craftsman ideal that long attracted both left-wing and right-wing critics of industrial market production: independent creation by people who control their own productive capital and thus can operate outside hierarchical firms (if not outside market imperatives).¹⁹² Record companies, publishing houses, and the film industry have all played roles analogous to that of factories in industrial production: those who wanted to live by creating had to go through them. Now that may cease to be true, at least for some creators.

B. The Analytics of Reciprocity: Reciprocity as a Vehicle of Freedom

In a previous article, *A Freedom-Promoting Approach to Property*,¹⁹³ I urged evaluating property regimes by the level of human freedom they produce, where freedom is defined in the manner Amartya Sen advocates, as the achievement of a suite of capabilities that both secure the autonomy of choice and engage a meaningful set of choices among courses of action and life that people value. I proposed that priority be given to capabilities relating to the satisfaction of basic needs and to meta-capabilities, those that enable people to acquire still other capabilities or to revise their framing circumstances, whether individually (through, say, skills acquisition or therapeutic insight) or collectively (for instance, through political participation).¹⁹⁴ The first criterion amounts to a variant on classical utilitarianism in that it supposes rough-and-ready interpersonal comparability of levels of capabilities and diminishing marginal returns from command of resources as one's purposes move from the essential to the elective.¹⁹⁵ The second criterion runs in the direction

note 182, at 349–51 (“[I]n displacing industrial distribution, peer-to-peer distribution is thought both by its critics and by some of its adherents to be likely to undermine the very possibility of industrial *production* of music.”).

192. For a discussion of this idea, see Ian Shapiro, *Resources, Capacities, and Ownership: The Workmanship Ideal and Distributive Justice*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 21, 21–42 (John Brewer & Susan Staves eds., 1995) (describing the workmanship ideal of ownership as centering around “the conviction that so long as the resources with which people mix their productive capacities are justly acquired they may legitimately own the product of that conjunction”).

193. See Purdy, *supra* note 1, at 1292–94 (describing a capabilities theory of freedom and the ranking hierarchy of different capabilities).

194. See *id.*

195. Abandoning this view was an important move in the change from utilitarian to formal Paretian accounts of efficiency, as well as the move to a substantive wealth-maximization criterion. Both moves surrender the assumption even of weak interpersonal comparability of

of a liberal conception of positive freedom: it makes a priority of those capabilities that enable one to determine one's own activity and character, but does not stipulate the forms that activity and character should take.

This Article has developed two points with implications for thinking about the relationship of property regimes to freedom. The first is the importance of understanding freedom *relationally*, in a double sense. People's capabilities reflect not just resources they control (from currency to charisma), but their power to recruit others, without whom major aims along all dimensions—survival, prosperity, flourishing—will go unrealized. There are therefore significant limits on any capabilities-based understanding of freedom that does not give attention to the rules and circumstances of recruitment. At the same time, ideas essential to filling out any relational conception of freedom depend on law, culture, politics, and technology to bring them to life in social relations. What threats and inducements may people direct at one another? Which purposes are so important that people must be protected in them, either by prohibition (so that the value of autonomy rules out the threat to survival as a recruitment device) or by guarantee (so that all enjoy access to a public domain, a cultural commons of words, images, and music from which to furnish their own expressive activity)? The answers to these questions implicate views of people as ends: how human beings matter, which qualities make them important and entitled to respect. The vitality, even the plausibility of these ideas, however, depends in part on whether they are expressed and reinforced in the terms of recruitment, that is, how people conceive of and approach one another in concrete social relations.

The chief distinction I propose is between *reciprocal* and *nonreciprocal* dependence. As an ideal type, the slave relationship is founded on nonreciprocal dependence for survival: the master can kill the slave, but the slave cannot (with any roughly even level of confidence) threaten to kill the master; so the slave accedes to the master's recruiting offer.¹⁹⁶ By contrast, the Hobbesian social contract, forged to avert the war of all against all, rests on reciprocal

utility. For a discussion of the origins and stakes of this change, see Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong about Welfare Economics?*, 22 J. ECON. LIT. 507, 520–24 (1984).

196. See PATTERSON, *supra* note 21, at 9 (characterizing the slave relationship as a form of personal domination).

dependence for survival: all are threats to each, unless and until individuals enter a compact designating a single authority to govern their relations.¹⁹⁷ Although liberal market society (not alone, but prominently) has eliminated this recruitment appeal, much of the politics of that society concerns the balance between reciprocal and nonreciprocal dependence for prosperity. The core of Hale's critique of free labor jurisprudence was his insistence on the importance of this distinction: if another can withhold from me resources that I badly need, such as access to industrial capital to make my labor productive, then that person's threat is much more significant to me than is my threat to that person to withhold my labor.¹⁹⁸ If, however, I enjoy access to capital of my own (such as digital technology), have a wide set of alternative ways to meet my needs and wants (because of broad skills or some endowment in material resources), or can withhold labor collectively to tilt the balance of bargaining power in favor of myself and others in my position, then our interdependence may be more nearly reciprocal. Along the axis of flourishing, too, the arrangements people make may reflect either reciprocal or nonreciprocal dependence. The identity of the slaveholder, the meaning of his life—and not only his prosperity—depended on nearly unqualified domination of other persons. Making this form of identity and vocation impossible was a signal aim of early-modern promarket reformers.¹⁹⁹ The self-understanding of wealthy patrons in a service economy may be a mitigated version of the same form of personality. In intimate relations, both erotic satisfaction and the forms of identity that interweave with it have long been deeply shaped by nonreciprocal dependence, particularly the socially enforced dependence of women on men. One aim of the continuing struggle over gender relations is to make possible genuinely reciprocal foundations for entreaties to love and recognition.

197. See THOMAS HOBBS, *LEVIATHAN* 86–138 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (describing the natural laws that make man predisposed to competition and necessitate a social contract to govern interactions).

198. See discussion *supra* Part III.A.2 (discussing Hale's position). Of course, in a working labor market, the relevant difference will be in the aggregate bargaining positions of capital and labor in any particular sectors, not the difference between individual bargainers; but although the former largely determines the prices of the latter, it also rests on their aggregation. On this point, see *supra* note 10 (Barbara Fried making this point as to Hale).

199. See discussion *supra* Part II.A (describing slave and feudal relations as being incompatible with the free labor theorists' basic views of commercial economy).

The historical trajectory of critique, reform, and renewed critique toward further reform that this Article has sketched follows a single arc: the incremental replacement of nonreciprocal forms of dependence with reciprocal forms. In each episode, successful reform requires three elements. One is material conditions that make a change in relative dependence possible, for instance, by increasing the overall social surplus that is up for contest (as the rise of industrial production did) or changing the capital structure of production in ways that affect bargaining positions (as digital technology has done in the production of culture and knowledge). Another is ideological or cultural recognition of the possibility of change: the insight that some dimension of nonreciprocal dependence is now an artifact of human arrangements, not natural necessity, and a proposal as to why a different arrangement would be better. The free labor agenda in law and political economy was one instance of that recognition, and the proposal to take advantage of digital technology to facilitate voluntary and distributed production is another. The third element present in each episode is a program of institutional action that can concretely change the circumstances of recruitment, the rules of recruitment, or both. Such programs range from the Thirteenth Amendment, to minimum-wage laws, to guarantees of access to cultural material for purposes of low-capital creative activity. An increase in reciprocity is likely to be neither a pure artifact of political will nor a sheer bequest of changed material conditions, but rather the product of moral and institutional imagination exercised at the juncture of novel technological potential and deliberate social and political choice.

Why should seizing opportunities for increased reciprocity in recruitment be an appropriate goal for reform of property regimes—and correlatively, why should reciprocity be an attractive metric for evaluating property regimes? Ideas of personhood give substance to such concepts as fairness, justice, and freedom. These ideas have histories rather than essences, and correspond—if that is the word—not to eternal facts but to social practices, institutional forms, and legal rules. Therefore, it may be productive to conceive of a legal regime's relationship to fairness, justice, and freedom as a dynamic one. This would mean asking not whether the law is approaching more closely to these standards, understood in a fixed and absolute sense, but rather by what process it contributes to the ongoing process of interpreting them and enforcing those interpretations. Specifically, in seeking to enlist others in their aims, can people bring to bear

outright coercion, or must they rely on the often subtle coercion of need and constraint, or the more difficult and multifarious appeal of persuasion? So far as conditions of dependence and, consequently, terms of recruitment, are reciprocal, persuasion will occupy a greater place in interpersonal appeals. Each person must then pursue his or her purposes partly through their power to win the energies, the talents, even the devotion of others.

The point of reciprocity, then, is not simply that it is just or makes people more free. It *is* just, as measured by important expressions of that idea, and it does make people more free in many relevant respects. Just as importantly, however, reciprocity makes everyone free to engage with the meaning, burdens, and hazards of freedom, to participate by experiment and persuasion in its continuing definition. This alone goes a distance toward freeing some from acceding to others' ideas of human purpose just to get by because they depend for survival, prosperity, or flourishing on those others. It also helps in freeing all from the grip of inherited ideas about human value and purpose that have persisted only because those who bear their cost have lacked the chance to question or resist them and shape alternatives.

C. *Analytics II: Appeals to Flourishing under Relative Reciprocity*

What is the best understanding of reciprocity in terms of the core problem of this Article, people's dual character as resources and as ends? The most powerful and credible account involves an increase in the significance of appeals to flourishing in organizing economic life. This idea appears in fragments in scholarly discussions of decentralized and voluntary production as a contributor to autonomy, but no one has drawn together the strands or shown how ideals of autonomy might require a specific mode of recruitment if they are ever to be made good. Setting out this idea in the peer-production setting offers an image of what it might mean generally.

There is a basic and probably willful confusion in Adam Smith's characterization of market relations as free and reciprocal.²⁰⁰ The offer of a shilling is *not* an exercise in persuasion.²⁰¹ It *is* of course an appeal to interest, and the very fact of the appeal carries the

200. See *supra* text accompanying notes 93–102.

201. See SMITH, *supra* note 104 (stating feudalism in Europe is not an abolishment of slavery, but a different form).

concession that was so important to the early defenders of markets: that people must be recruited by winning their assent, not by wresting it bodily from them. As Hale recognized, however, in offering a shilling one proposes to win the other's assent by appealing to a wish to avoid deprivation—at the limit, absolute deprivation.²⁰² (Naturally, once one has a sum of money, one may do all sorts of things with it that go well beyond avoiding starvation. These will be in one's mind in accepting or rejecting a money offer.) Moreover the appeal to need is not really an interpersonal one: with the prices of all resources set by market aggregation, workers know what their labor is worth and how much they must earn to satisfy basic needs and nonbasic wants; all bargaining proceeds in the matrix of market pricing, so that a recruitment appeal to one individual's need is in a real sense just an instance of a general calculus of need. The participants are from this perspective fungible features of the system.

How might this change where an economy takes on some of the qualities Benkler identifies: diffusion of productive capital; an increase in the economic value of unique rather than fungible human capital, such as creativity, aesthetic or ethical judgment, or broad and synthetic knowledge; and increasing opportunities to participate in nonmarket production motivated by desire for the esteem of peers, consonance with one's own values, or self-expression?²⁰³ The critical difference will be in the type of recruitment appeal likely to be most effective. Consider, for instance, how an entrepreneur in a peer-production scheme will appeal to contributors whose music, essays, videos, or other products she wishes to solicit. How will she distinguish herself from any other would-be impresario of the peer-production world? First, she *cannot* do it by simple capital accumulation, because her mode of production is premised on widely distributed productive capital; where a factory owner can distinguish himself in recruitment by the fact of controlling a major piece of capital whose concentration is necessary to industrial production, that advantage is not available here.²⁰⁴ Second, whatever appeal she makes will have to take account of competition from other entrepreneurs

202. See discussion *supra* Part III.A.2 (discussing Hale's thought).

203. See *supra* note 182 (describing Benkler's articles which identify social sharing and increased efficiency as several of many qualities of the networked-information economy).

204. This point follows Hale's observation that the market actor who succeeds in accumulating a good deal of productive capital thus achieves a significant advantage in bargaining position over one who does not have the same success in accumulation. See HALE *supra* note 9, at 17–18 (discussing the bargaining advantage of the factory owner).

with similarly low capital-based barriers to entry. Third and more speculatively, in recruiting nonfungible, creative resources, she may have to consider a dynamic relationship between the manner of the recruitment and the quality of the product: more dramatically than in the case of replicable physical tasks, the quality of creative products reflects the state of mind of the creator. A grudgingly composed sonnet, symphony, or screed, absent certain perverse forms of genius (both O. Henry and Douglas Adams were reportedly locked in hotel rooms to induce them to finish their best work), will likely reflect the resentment of the creator more vividly than a grudgingly completed oil-change or sheetrocking job.

A part of the recruitment appeal under such circumstances, then, may be precisely to the self-understandings of the recruited participants: their estimation of what in their activity and in the larger world gives meaning to their lives. This type of appeal is familiar from advertising and branding, that is, appeals to people as consumers rather than producers.²⁰⁵ It is standard in those areas to appeal to people's ideas of who they are or would like to be: progressive and environmentally conscious shoppers at Whole Foods supermarkets; discriminating and upscale diners at Babbo, Chez Panisse, or Per Se; sleek and athletic wearers of the Nike Swoosh; elevated and intimidating drivers of Hummers; and so forth.²⁰⁶ In the recruitment of people as producers it is a commonplace that the pleasantness of the work, which may include short or flexible hours or some more basic compatibility with the tastes of a prospective worker, is part of the compensation. The effect of the shift I am imagining would be to increase the importance of this aspect of recruitment, even making it central to the recruitment appeal. This would mean tilting recruitment away from the need-prosperity axis and in the direction of the flourishing axis, whose chief appeals are those of vocation and love: join me, and you will be more yourself than you would otherwise be.

205. I discuss the significance of the creation, appropriation, and subversion of brand identity in cultural politics and in the politics of global economic regulation in JEDEDIAH PURDY, *BEING AMERICA: LIBERTY, COMMERCE, AND VIOLENCE IN AN AMERICAN WORLD* 221–40 (2003). In that discussion I draw attention both to the historical continuity between Adam Smith's idea of commerce as persuasion and the contemporary politics of branding, and to the way the latter politics has shaped the fight over sweatshop regulation in poor countries. *Id.* at 232–40.

206. *See id.* at 223–30 (discussing the self-conceptions that branding campaigns appeal to and seek to shape).

CONCLUSION

People need one another, and this makes us valuable to one another. It also makes us dangerous to one another. To make good our purposes, plans, and wishes we must recruit the time, effort, and even the beliefs and sentiments of others. We are one another's hostages and one another's completion.

This often painful paradox in human life produces one of the essential tasks of law, and particularly the law of property: defining the boundary between those respects in which people must approach one another as persons, and those in which they may lay claim to one another as resources. I have shown the interaction of these two inextricable dimensions of human activity in legal doctrine, the framing debates of political and economic thought, and a theoretical account of interdependence and autonomy. I have also argued that quite disparate aspects of contemporary life present opportunities to seize a margin of reciprocity in relations of recruitment. This could make people more free and appeals to flourishing more prominent.

At least a part of our personhood arises from our capacity to pose the question, "What should I do?" and to understand the answer as a matter of right and wrong, better and worse. Our nature as resources has led us constantly to override this capacity in others, to win them to us by open or subtle threat, not by free judgment and assent. In ordering our relations to one another as resources—what I have called our relations of recruitment—by principles of reciprocity, we redress some of the mutilation that our nature as resources has visited over and over again on our nature as ends. By making persuasion the means of winning over others, we partly redeem the universal capacity of freedom, the power to ask the question whose answer lies in conceptions of freedom, of human value and purpose: "What should I do?" An economy may be called freedom-promoting in the measure that it makes the answer to this question the touchstone of the other question we are always addressing together: "What shall we do today?"