

People as Property: On Being a Resource and a Person

Jedediah Purdy[♥]

Two approaches to understanding the function of a property regime 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. First, people need resources, from air and water through land and technology, to ideas and the labor of others, to accomplish much of anything. The world is thus full of desired resources, things to which people want access. Second, many of these resources are scarce, not in the sense of being rare, but in that there is competition over them; that is, they are not so abundant as to be effectively non-exclusive.¹ These facts underlie the great gains to social coordination and productivity from creating property rights.²

[♥] Assistant Professor of Law, Duke University. A.B. Harvard College, J.D. Yale Law School. This paper reflects my deep and continuing debt to David Grewal and Sanjay Reddy for conversations on the political economy of freedom. I have benefited greatly from comments on an earlier draft by Jeff Powell, Laura Underkuffler, James Boyle, Chris Schroeder, Catherine Fisk, Christopher Elmendorf, and by other participants in Duke Law School's Early Stages workshop and the Freedom-Oriented Political Economy Seminar. I am indebted to Jessica Areen for research assistance and productive discussion. This is the second of three projected articles on the theme of property and freedom. The first, *A Freedom-Promoting Approach to Property*, is forthcoming in 72 U. CHI. L. REV. 1237 (2005).

¹ Property law may, of course, operate to produce artificial scarcity, in the sense of competition over the resource, by introducing exclusivity as a legal matter to "naturally" non-excludable goods. Intellectual property is the great example of this aspect of the economic function of property law.

² See, e.g., RICHARD A POSNER, *THE ECONOMIC ANALYSIS OF LAW* 32-34 (6th ed. 2003); Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1320-21 (1993) (defining the "efficiency thesis" as that "land rules within a close-knit group evolve so as to minimize its members' costs"). 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, e.g., Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003); Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUDIES 359 (2002); David D. Haddock and Lynne Kiesling, *The Black Death and Property Rights*, 31 J. LEGAL STUDIES 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, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUDIES 421 (2002) (arguing that the competing stories of efficiency and interest-group opportunism leave uncertain whether property regimes reliably secure efficiency); Gary D. Libecap and James L. Smith, *The Economic Evolution of Petroleum Property Rights in*

These benefits are conventionally designated gains to static and dynamic efficiency. Static efficiency concentrates on the present allocation of resources. Clear property rights enable people to identify the present owners of resources they believe they can put to a higher-value use, and trade around until all resources are in the hands of those who most value them.³ Dynamic efficiency concentrates on improving 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 rap songs.⁴

The functional description of property as the law of resources has been important at least since Aristotle, and has been the dominant strain in Anglo-American legal thought for several centuries.⁵ With the rise of the law-and-economics perspectives in

the United States, 31 J. LEGAL STUDIES 589 (2002); Thomas W. Merrill, *The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUDIES 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 (2002); 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); 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).

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 rights, which may be greater than the gains the rights make possible. The canonical treatment of this issue in modern legal scholarship is Harold Demsetz, *Toward a Theory of Property Rights*, AM. ECON. REV., May 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* n. 2 at 333 (2002).

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* n. 2 (discussing “large,” “medium,” and “small” events, for which externalities are, respectively, diminishingly important.)

⁵ See Aristotle, POLITICS 44 (Ernest Barker ed., Clarendon Press 1946); John Locke, *Second Treatise Of Government*, in TWO TREATISES OF GOVERNMENT 314–16 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); William Blackstone, COMMENTARIES *4–10.

recent decades, it has become central to the teaching of property and to 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 benefits of property rights, allowing for transaction costs and externalities, describe most of the purpose of property regimes.⁸ There is, however, a competing strain of thought that takes the same functional description of property regimes, but addresses their effects on individuals with scant property who can make a living only by selling their time and talents, often on unfavorable terms. In American legal law, the canonical expression of

⁶ On scholarship, *see supra* n. 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 while 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, *see id.* at 179–86; understanding the perennial threats to effective policy, such as externalities, commons tragedies, and collective-action problems, *see id.* at 186–90; and presenting one’s own commitments in a language generally available to other citizens in the public sphere, *see 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. 37-57 (1990) (arguing that the neoclassical microeconomic account of rational behavior cannot account for the cooperation and modest altruism that enable property institutions to arise and persist).

⁷ This is the logic of the economic analysis in the scholarship cited in n. 2, *supra*. *See* POSNER, *supra* n. 2 in particular. Posner’s attempt to vindicate wealth-maximization as a theory of justice has not found much success, even with the later Posner, 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, i.e., inhibit transactions that would otherwise take place. For an innovative application of this analysis to overextended property rights, *see* Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (arguing that too many people in post-Soviet Russian held the power to exclude others from property, creating transaction costs that prevented transfer of the property to higher-value uses). 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) (arguing that the traditional limit on the number of forms property rights may take limits information costs and enables property markets to achieve allocative (static) efficiency). For Posner’s more ambitious philosophical project, *see* RICHARD M. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

⁸ Ellickson, *supra* n. 2, provides a classic and powerful encomium to this conception of property rights. *See generally* the work cited in nn. 2, 6-7, *supra*. 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 SUCCEEDS IN THE WEST AND FAILS EVERYWHERE ELSE* 39-67 (2001) (outlining the efficiency effects of legally designating the productive aspects of resources as the objects of fungible and universally transferable right-claims).

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 object that static and dynamic efficiency do not necessarily maximize these qualities.¹⁰

The second major 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: autonomous over a certain sphere of one's own choices and possessions, and correspondingly protected in that sphere from the intruding demands of others.¹¹ On this account, ownership of resources, with the power to exclude others from them, creates a bulwark against interpersonal invasion and a sphere of autonomous action.¹² In some

⁹ See ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 3-34, 385-99 (diagnosing property rights as establishing economic relationships of reciprocal threat and exploring modes of legal mitigation and equalization of threat). Joseph W. Singer has continued to do important and theoretically ambitious work in Hale's vein. See in particular 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 STUDIES FORUM 327 (1991) (reviewing Hale's account of law and connecting it with other radical theories of power); *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 209-21 (1979) (laying out an analytics of private-law rights as a mode of mediating between autonomy and interdependence).

¹⁰ Hale himself addresses this issue in a glancing way. See *id.* 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, see BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 37-70 (1998) (describing the progressive thought of T.H. Green, John Dewey, John Stuart Mill, and others). Nobel Economist Amartya Sen has developed a capabilities-oriented account of welfare economics in part 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) (introducing the terminology of personhood to American legal debate through a discussion of legal doctrine and Hegel's theory of identity). 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.* and nn. 13-15, *infra*.

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 Others place more stress on self-ownership as synecdoche, an aspect of property rights that expresses the logic or essence of the whole scheme of private property, and indeed of rights-holding itself.¹⁴ Still others regard ownership as filling out and enriching identity by enabling owners to identify with and express themselves through the external objects they control.¹⁵

The description of property rights as based in personhood, like that of property rights as oriented resource governance, is compatible with more than one normative

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, *The Guardian of Every Other Right: A Constitutional History of Property Rights* 26 (Oxford 1998) (describing how “the protection of property ownership was an integral part of the American effort to fashion constitutional limits on governmental authority”). See also Richard Pipes, *Property and Freedom* (Knopf 1999) (arguing that property is a necessary prerequisite for political liberty); Richard A. Epstein, *Takings: Private Property and the Eminent Domain* (Harvard 1985) (arguing in favor of an absolutist conception of property rights, where such rights include exclusive use, disposition, and full alienability). 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). 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 Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing the moral-psychological effects of thinking of, e.g., organs and human beings as commodities). A similar argument that goes more to the self-conception of the property-holder than to her view of the objects she may hold is JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 207-11 (describing “the distorted lens of property” (1992)). 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.” 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.” *Id.* at *24.

¹⁵ Far and away the outstanding piece in this vein remains Radin, *supra* n. 11. She has developed aspects of the personhood theme, in conjunction with the market-inalienability theme, in MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN BODY PARTS, AND OTHER THINGS 54-101 (1996) (arguing for a capabilities-oriented conception of personhood that concentrates on whether property rights facilitate the realization of a full complement of human potential, a condition Radin styles flourishing. This criterion falls close to the argument I have made in Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1273 (2005).

evaluation. The major strain of the personhood approach has praised property rights as supportive of freedom.¹⁶ Another school, particularly associated with Jennifer Nedelsky, has argued 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 perfectly appropriate for resources that we in fact value 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 goods as market resources distorts and sometimes violates their importance to personhood and may devalue personhood itself.¹⁹

¹⁶ See n. 13, *supra*.

¹⁷ See n. 14, *supra*. This critical perspective has tended 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* n. 9. See also Eduardo Penalver, *Property as Entrance* (forthcoming U. VA. L. REV. (2006) (arguing that libertarian conceptions of the importance of property neglect our need for human relationships and social participation, which property rights facilitate and which should be the normative measure of property regimes).

¹⁸ See n. 15, *supra*.

¹⁹ See *id.* For some applications of this argument to specific legal and policy questions, see Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 Harv L Rev 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); Margaret Jane Radin, *Conceiving a Code for Creation: The Legal Debate Surrounding Human Cloning*, 53 Hastings L J 1123, 1126 (2002):

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

Jennifer Fitzgerald, *Geneticizing Disability: The Human Genome Project and the Commodification of the Self*, 14 Issues L & Med 147, 151–52 (1998) (arguing that regarding the self as a bundle of alienable resources stunts the ability to discern noneconomic value in persons); David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 Ind J Global Legal Stud 621, 655 (1998) (considering the argument that a market in organs will reduce altruism); Norman W. Spaulding, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 Stan Envir L J 293, 311–13 (1997) (considering the psychological experiences of “commodity fetishism” and “alienation” as consequences of commodification). See also 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”).

This article achieves a partial reconciliation of these two approaches to property law. My argument is not that the two are “closer than they think” or “getting at the same thing,” for they are not: they are different. It is an important part of my argument, however, that the two are not just incommensurably distinct approaches. Rather, they describe inextricably entwined aspects of property law. Both are present in any property regime. Moreover, each sets limits on the other, so that any conception of property as the law of resources will imply some features of a conception of personhood, and vice-versa.²⁰

The relationship is in important part a product of legal choices. The key terms of the competing schools are not self-defining. There is no a-historical, context-free meaning of “personhood.”²¹ Neither is there any timeless and placeless definition of

²⁰ A problem may seem to arise here. In our 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 in and what it shuts out – as mutually constitutive of the domain governed by the definition, see James Boyle, *The Opposite of Property?*, 66 *LAW & CONTEMP. PROBLEMS* 1 (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 in 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. The great statement of this project is CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989). Many of the same themes recur – with greater attention to political and social thought alongside philosophical, religious, and cultural conceptions of personality – in a smaller and more accessible work, CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004). Foucault’s work takes a very different tack from Taylor’s, attending not to *ideas* about personality, but instead to the institutional practices, the “disciplines,” in which modern personality is formed, with special attention to those that are “normative” in the sense of embodying their workings in the persons who inhabit them. See MICHEL FOUCAULT,

what counts as a resource.²² 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 qualities.

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, I carry 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. In Part I, I examine two clusters of doctrinal problems dealing with the terms of labor discipline in antebellum slave states and in post-Civil War Free Labor jurisprudence. I argue that in each case, courts struggle to define a

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 MICHEL FOUCAULT, 2 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 ORLANDO PATTERSON, 1 FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE (1991) (arguing that ideas of freedom developed in the West out a series of contrasts with slavery, which reveal the essential interdependence between freedom and the limits imposed by our need for and vulnerability to others); BARRINGTON MOORE, JR., INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1978) (asking how, historically, inequality and oppression have come to be recognized as “injustice” and those subjected to them have newly conceived of themselves as competent and entitled to resist and demand a reform of the social order that imposes those conditions).

²² For discussions of exogenous changes in the value of resources and their relationship to the development of property rights, see Demsetz, *supra* n. 3 (discussing the effect on rights in land and hunting among Native Americans of the rise of the European market for beaver pelts); Liebcap & Smith, *supra* n. 2 (on 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* n. 3; Liebcap & Smith, *supra* n. 2; Rose, *supra* n. 22.

relationship between two intertwined features of human beings: their character as resources and their personhood. In Part II, I examine the debates in political economy and moral psychology that drove the critique of slave relations and the vindication and critique of Free Labor economies. I show that 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. In Part III, I present an analytic account of the relationship between serving as a resource and standing as a person: I argue that 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 personhood is thus essential to setting up the *terms of recruitment*, the rules and bargaining positions that structure our reciprocal recruitment. In Part IV, I apply 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 freed by directing interpersonal recruitment toward relative reciprocity rather than hierarchy.

I. Personhood and Property in Slave Relations and Labor Markets

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.²⁴ The question was vexed because it was

²⁴ 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. *See 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

inescapable that designating someone as property did not erase her humanity as a matter of fact; yet the designation was plainly incompatible with the recognition of 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 – and what each of those categories meant.

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.”²⁶ “The laws of Georgia ... recognize the negro as a man, whilst they hold him property,” observed that state’s supreme court in 1851.²⁷ The Supreme Court of Mississippi remarked, “In some respects, slaves may be considered as chattels, but in others, they are regarded as men.”²⁸

discipline in a land of abundant resources. *See 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). Adrienne Davis has given a penetrating study of the private-law regulation of sexual intimacy between masters and slaves, with particular attention to masters’ efforts to leave property by testament to women who had been both their intimates and their property. *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

²⁵ On these issues, *see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 179-201 (1973) (on the law of status in nineteenth-century America, with particular attention to the propertyless, women, and slaves); 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); 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).

²⁶ *United States v. Amy*, 24 F. Cas. 792, 810 (1859).

²⁷ *Neal v. Farmer*, 1851 WL 1474 at *16 (9 Ga. 555).

²⁸ *State v. Isaac Jones*, 1820 WL 1413 at *1 (1 Miss. 83). 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*, 1828 WL 1332 at *3 (23 Ky. 644).

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*, 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.²⁹ In most cases, however, the problem arose from violence against slaves: the question was whether the violence at issue crossed lines of immunity which the slave enjoyed under her aspect as a legal person, or instead fell within the owner's power to manage his property.³⁰ The issue was particularly acute in labor discipline: how far could a master go in coercively extracting a slave's labor? The question went directly 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. The model of this approach was a dissent in *Commonwealth v. Turner*, argued before the General Court of Virginia in 1827. The majority upheld a master's demurral to an indictment "for cruelly beating his own slave."³¹ The majority

²⁹ See *supra* n. ___. 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 v. Patterson*, *supra* n. ___, dealt with a claim by a master that a law entitling the city of Richmond to jail at his expense a slave found unattended. 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 *4.

³⁰ In *State v. Isaac*, *supra* n. ___, 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?" *Id.* at *1. In *Neal v. Farmer*, *supra* n. ___, 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. See *id.* at *16.

³¹ *Commonwealth v. Turner*, 1827 WL 1087 at *1 (26 Va. 678).

reasoned from the existence of a state statute, passed in 1788, which forbade the killing of a slave as of a freeman.³² That statute replaced two far more permissive laws, a 1669 statute exculpating any master “for killing his slave under correction for resistance” and a 1723 statute extending the same immunity to a master killing a slave “for any offence whatever.”³³ Noting that the common law had not recognized and thus not regulated the slave relationship, the court reasoned that the 1788 statute must represent the extent of the law’s protection of slaves from their masters’ discipline, and that to enforce broader common-law restrictions on the master would be judicial overreach.³⁴

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, “and 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.*”³⁵ Brockenbrough proposed that this formula was simply an application to the slave relationship of the standard that the common law imposed on the disciplinary actions of other status superiors against their subordinates, such parent to child, tutor to pupil, and, above all, master to servant: discipline must fall within “bounds of due moderation.”³⁶ 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 “correction for disobedience.”³⁷ Severe beatings, however, were as a matter of law unnecessary to labor discipline and thus outside the “bounds of due moderation.”

³² *See id.* at *5.

³³ *Id.* at *4-5.

³⁴ *See id.*

³⁵ *Id.* at *6 (emphasis added).

³⁶ *Id.* at *5.

³⁷ *Id.* at *6.

Because permissible discipline was restricted to what was necessary to manage people in their status as things, the law could regard the slave as a person in judging such overreaching punishment, and could this extend the protection of the criminal common law. On this reasoning, Brackenbrough satisfied himself that he could “see no incompatibility between this degree of protection [of the slave’s legal personhood] and the full enjoyment of the [master’s] right of property.”³⁸

The Tennessee Supreme Court took a view similar to Brackenbrough’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.³⁹ 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.⁴⁰ 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.”⁴¹ The rights of such status-based relationships were not transferable by a contract for services.⁴² 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

³⁸ *Id.*

³⁹ *James v. Carper*, 1857 WL 2493 (Tenn.) (36 Tenn. 397). The court was not clear on its view of the scope of the master’s power to punish a slave, noting that a parent possessed of the status based “paternal power ... may not exceed the bounds of moderation,” but also suggesting “for the sake of 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 *2-3. The precise bounds of the master’s power were not, of course, at issue in the case.

⁴⁰ *Id.* at *2.

⁴¹ *Id.*

⁴² *See id.*

necessity be regarded as possessing the right to inflict reasonable corporal punishment on the slave, for insubordination, disobedience of lawful commands, wanton misconduct, or insolent behavior.”⁴³ Such corporal punishment was not status-based in the same sense as the inherent power to punish of the master, but was governed functionally by the 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 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.”⁴⁴ Moderation was, of course, relative to the task of compelling a human being to conduct himself as property by yielding up whatever of value he could produce, and surrendering his body to punitive coercion if he failed or declined to do so.

Other courts, while equally committed to the legality of slavery, regarded the conciliatory approach as a pleasant delusion. As they analyzed the slave relationship, the brutality inherent in extracting unfree labor necessarily overwhelmed any guarantees of personhood in the slave. In one of the most mercilessly reasoned slavery cases, *State v. Mann*,⁴⁵ 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.”⁴⁶ 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.⁴⁷ 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 entirely by the functional requirements of labor discipline.

⁴³ *Id.*

⁴⁴ *Id.* at *2.

⁴⁵ *State v. Mann*, 1829 WL 252 (N.C.) (13 N.C. 263).

⁴⁶ *Id.* at *1.

⁴⁷ *Id.* at *2.

Because those requirements were the same for the renter as for the master, labor discipline had the same bounds in both situations.⁴⁸

Ruffin's rejection of the domestic-relations analogy was critical to leaving behind the conciliatory approach. The several categories of 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.⁴⁹ "With slavery it is far otherwise," Ruffin wrote.⁵⁰ The end is the profit of the master, his security and the public safety."⁵¹ The slave should be regarded as purely instrumental to these ends. Put differently, Justice Ruffin defined the 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."⁵² The master faced a particular challenge in extracting productive labor from a human being in that position. Where a laborer has no affirmative incentive to work, because no prospect of improving his situation, "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.*"⁵³ The slave's only incentive was avoiding cruel treatment. That cruelty had to be potentially unbounded,

⁴⁸ *See id.*

⁴⁹ On the law of status in Antebellum U.S. law, *see n. 25, supra*, and works cited therein.

⁵⁰ *Id.* at *2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (emphasis added).

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 sense in which Brockenbrough had identified “inherent” terms in the relationship – but because of the necessities of disciplining unfree labor. The doctrinal result was a massive effacement of any legal personhood in the slave, justified as the functional requirement of rendering the slave valuable as property.⁵⁴

In the antebellum slave cases, then, we find the concerns of both branches of property thought interwoven: personhood and resources entwined in single bodies of law, in single cases, even in the bodies of the slaves themselves, who stand in some respects as legal persons, 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 simultaneously as resources, whose efficient use implied powers of control in those whose property they were. 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

⁵⁴ 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.” *Id.* at *3. 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.”

choice.⁵⁵ By the reciprocal logic, 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. These cases show that an essential task of the law is to define the boundary between the aspects in which slaves are persons and the aspects in which they are resources, thus defining certain incursions on others as violations of personhood, others as simple exercises in resource use. 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 decisively 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.⁵⁶ The organizing principle of this idea was a property rule: energy, time, and talent – in a word, labor – were defined as inherently the property of the person in whose body they resided.⁵⁷ They were alienable, but only, as it were, at retail, not wholesale.⁵⁸ One could

⁵⁵ A particularly explicit reflection on this difficulty came in *Jarman v. Patterson*, *supra* n. __ at *4. 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."

⁵⁶ 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, *Address to the Wisconsin State Agricultural Society*, in *LINCOLN: 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).

⁵⁷ See FONER, *FREE LABOR* 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

sell one's time and energy, or the products of one's labor; but one could not sell oneself into a condition of servitude, in which the dispensation and products of one's labor belonged categorically (and, usually, indefinitely) to another.⁵⁹ 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.

Free Labor lifted the threat to survival or bodily integrity that had been the backdrop of the slave-owner's prerogative.⁶⁰ The right of exit would have been meaningless if the other party could answer the threat of exit with overt coercion. Although the worker might be seriously constrained in her alternatives, she could not be

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." JOHN LOCKE, Bk. V, sec. 27, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT (Cambridge ed., Peter Laslett, ed., 1988) (1689). It had its culmination in the passage of the Thirteenth Amendment to the United States Constitution: "Neither slavery nor involuntary servitude ... shall exist within the United States." CONSTITUTION OF THE UNITED STATES, AM. XIII.

⁵⁸ See FONER, *supra* n. 57 and other works cited in that note. This is a corollary of the prohibition on ownership outright of another's labor power.

⁵⁹ See *id.*

⁶⁰ The defenders of slavery *did not* accept that it was best characterized as an institution founded on a continuing, absolute power of the master over the slave. The argument in *Somerset v. Stewart* addressed this issue specifically, through an appeal to the idea of slavery as regulated institution consonant with the general spirit of ordered liberty, and also macabre humor that must have drawn on the racist fears and taboos of the listeners:

If it were necessary to the idea and the existence of James Somerset [the slave], that his master, even here [in England], might kill, nay, might eat him, might sell living or dead ... this, how high soever my ideas may be of the duty of my profession, is what I should decline pretty much to defend or assert ... I should only speak of it to testify my contempt and abhorrence. But this is what at present I am not at all concerned in; unless Captain Knowles, or Mr. Stewart, have killed or eat him. Freedom has been asserted as a natural right, and therefore unalienable and unrestrainable; there is perhaps no branch of this right, but in some at all times [sic], and in all places at different times, has been restrained: nor could society otherwise be conceived to exist. *Somerset v. Stewart* at 505.

Naturally, Justice Ruffin's opinions and the others discussed in Part I.A support a contrary view.

kept in place by the threat of any consequence more severe than denial of her part of the bargain she had struck with her present employer.⁶¹

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 sharply *distinguished* personhood from the *property of others*, by making the slave relationship impossible and thus 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 his own productive capacity, his own aspect as a resource, was as complete as the master's claim on the slave's body had been in Ruffin's opinion.

This solution, however, did not dissolve the problem we have been exploring: the relationship between a human being's character as a person and her character as a resource. Rather, 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 she owns herself? The question moved from addressing the limits of overt coercion between a free master and an unfree slave to the limits of

⁶¹ A fascinating anxiety about the terms of recruitment and command emerges in the oral arguments of the pro-slavery side in *Somerset v. Stewart*. The lawyer Mr. Dunning imagines that, if the slave James Somerset is released, servants will no longer accept orders from their masters:

It would be a great surprise, 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 nor inferior, both go without their dinner.
Somerset v. Stewart at 506.

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

bargaining among free persons. In seeking to hire another, what may you demand of her, what may you offer her, and how may you threaten her to get the arrangement you prefer? 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?

2. “A real equality of right”? Personhood and Resources in the *Lochner* era

I explore two stands 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*,⁶² the “right of contract”⁶³ that grounded Justice Peckham’s opinion striking down New York’s maximum-hours statute for bakers was derived from constitutional text in another case, *Holden v. Hardy*.⁶⁴ There, Justice Brewer 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.”⁶⁵ 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,”⁶⁶ for it would permanently exclude those who presently lack property from all the benefits of ownership. In a third step, Justice Brewer derived the right to contract from the right to acquire property: “as property can only be legally acquired, as between living persons, by contract, a general prohibition against

⁶² 198 U.S. 45 (1905)

⁶³ *Id.* at 53.

⁶⁴ 169 U.S. 366 (1898).

⁶⁵ *Id.* at 387.

⁶⁶ *Id.*

entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.”⁶⁷ The right to contract was therefore derived, at two stages’ remove, from the due process clause’s protection of property rights. 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 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.⁶⁸ 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.

This right, though, was qualified by two considerations. One, protection of the health and welfare of certain classes of workers, had what might today seem a counter-intuitive basis: that people were *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, “The state still retains an interest in his welfare, however reckless he may be ... when the individual health, safety, and

⁶⁷ *Id.*

⁶⁸ Chancellor Kent would be a good one to quote here; and maybe some material from Foner.

welfare are sacrificed or neglected, the state must suffer.”⁶⁹ 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 their physical and mental capacity to serve the state[.]”⁷⁰ In *Muller v. Oregon*, 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 children⁷¹ Oregon’s maximum-hours law was thus “not imposed solely for [women’s] benefit, but also largely for the benefit of all.”⁷² Although I will not pursue this theme 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 us 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 (1) the extent and intensity of their need and (2) 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. It was explicit that the slave-owner’s offer to his slave was a Hobson’s choice – obey or be punished, with the

⁶⁹ 169 U.S. 366 at 390.

⁷⁰ 198 U.S. 45 at 72.

⁷¹ *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

⁷² *Id.* at 422.

legal boundaries of punishment set by the necessities of labor discipline.⁷³ Free Labor repudiated this arrangement; but when did exigent circumstances leave 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 pro-regulatory opinion in *Holden v. Hardy*, where Justice Brewer laid out the problem of unequal bargaining power:

[T]he proprietors of these establishments [mines and smelters] and their [employees] do not stand on an equality, and ... their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes [sic], 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.⁷⁴

The essential threat of the employer was to invoke Brewer’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*. Justice Brewer noted that the women of Oregon had been granted “equal contractual and

⁷³ See TAN 26-55, *supra*.

⁷⁴ 169 U.S. at 390.

personal rights with men,” and thus that in economic life “they stand on the same plane as the other sex.”⁷⁵ 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.”⁷⁶ Rather, formal liberty took its substance – choice among meaningful alternatives – only “where some legislation to protect her” was provided “to secure a real equality of right.”⁷⁷ 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 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 Massachusetts Supreme 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 the alternatives they faced. Oliver Wendell Holmes, then chief justice of the Massachusetts Court, gave the classic statement of this doctrine

⁷⁵ 208 U.S. at 418.

⁷⁶ *Id.* at 422.

⁷⁷ *Id.*

in *Lamson v. American Ax & Tool*,⁷⁸ 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.⁷⁹ Lamson had earlier complained about his Damoclesan axes, but "was answered, in substance, that he would have to use the [new] racks or leave."⁸⁰

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 happen. . . . He complained, and was notified that he could go if he would not face the chance. He stayed, and took the risk."⁸¹ It was critical to Holmes that he identify, and accept, the hard place Lamson was up against: "He [assumed the risk] none the less that the fear of losing his place was one of his motives."⁸² 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 clearest expression of the logic governing these cases came in *Leary v. Boston & A.R. Co.*,⁸³ 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.⁸⁴ He sought damages from his employer when he was injured, and was refused. The court acknowledged that the plaintiff had accepted the dangerous additional duty in the face of

⁷⁸ 177 Mass. 144 (1900).

⁷⁹ *Id.* at 144-45.

⁸⁰ *Id.* at 145.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 139 Mass. 580 (1885).

⁸⁴ *See id.* at 586-87.

a threat of firing⁸⁵ but it was precisely this choice that constituted his assumption of the risk of his employment.⁸⁶ Much as Justice Ruffin had done in his steely-eyed North Carolina opinion, 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."⁸⁷ It is, however, only the practical power created by the reciprocal rights of Free Labor relations: the employee's right to sell her 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.

C. The Perennial Problem

The upshot of these cases, then, is 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 definitions of (1) what constitutes legal personhood and (2) which aspects of human beings may be regarded as property, who may own this property, and on what terms. In each case, then, 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

⁸⁵ *Id.* at 587.

⁸⁶ *See id.*

⁸⁷ *Id.*

human beings, and two respects in which we may approach one another as resources and those in which we must respect one another as persons. This work falls to law because the central terms of the two aspects of property law are not self-defining: what is personhood and what a resource, and what each of those categories permits and prohibits in practice, is a matter of interdependent definitions.

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 bounded by personhood-based principles of autonomy took place against a backdrop of political and economics 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, 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. In this part, I present three such contemporaneous theoretical positions: the critical account of slave societies as founded a definition of property that implied a degrading definition of personhood and commensurately degrading social relations; 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; and the critical account of this pro-market 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 the last Part: the antebellum courts' ambivalent attitude toward the human character of slave relations, the Free Labor courts' embrace of formally voluntary arrangement as self-ratifying even in grotesque circumstances, and those courts' doubts about 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

An initial note: 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.⁸⁸ Participants in the debate I am canvassing, however, regarded the systems as so similar as to be continuous with each other.⁸⁹ They were opponents of slavery and feudalism and advocates of a

⁸⁸ It is also worth saying that 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.

⁸⁹ 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 villeinage, including both the outright ownership of persons and the ownership of persons appurtenant to land (serfdom). See RICHARD

commercial alternative based on voluntary contract, the right of exit, and the free sale of labor.⁹⁰ In linking slavery and feudalism, they were classifying both systems by reference to what I will call 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, 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

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 depredations 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 and 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 twenty slaves or each 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. ed.) (Oxford University Press 1978) (1762-63). Smith also characterized "feudall" Europe as "cultivated by villains [sic] 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.

⁹⁰ For a survey of the major themes and commitments of the Free-Labor school, see ERIC FONER, *LABOR at 1-1-72* (on the relationship of the ideal of self-ownership and of a commercial society organized on the free sale of labor and talent to (1) the self-conception of Northern United States society and (2) 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 127-57* (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).

account, the historian and anti-slavery theorist Richard Hildreth described relations between slaves and masters as founded purely on the threat of violence. In his account, slavery 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.⁹¹ A subtler account came from Adam Smith, who recognized the possibility of sympathy and reciprocity between masters and slaves under certain circumstances.⁹² 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.⁹³ On 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 might stay the master’s hand from actual violence, the master’s prerogative was such that there was no need to appeal to the material or other interests of the slave (interests in what I have called prosperity and flourishing) to *induce* obedience: command alone sufficed as a legal matter, because the slave had no right to refuse a

⁹¹ 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, DESPOTISM at 35-38.

⁹² 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, 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, LECTURES at 184-85.

⁹³ Describing slavery in the classical world, Smith wrote, “1st, with regard to their lives, they were at the mercy of the master . . . he might put them to death on the smallest transgression 2^{dly}, as his life was, 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, “The 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.”

command.⁹⁴

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.⁹⁵ Smith contended that masters' lifelong experience of giving orders which their subordinates could not refuse structured slave-holders' preferences so that they came to prize "domination and tyrannizing" over their material interest in the efficient exploitation of their resources.⁹⁶ 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

⁹⁴ 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 those his co-partisans has a dual character. On the one hand, it is a form of social inquiry concerned with how economic and legal regimes shape concrete social interactions among persons, which in turn shape individual psychology and – so far as it 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, we get a picture, 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 we 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.

⁹⁵ 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* 111-119 (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 *AELXANDRE KOJEVE, INTRODUCTION TO THE READING OF HEGEL: LECTURES ON THE PHENOMENOLOGY OF SPIRIT* 3-30 (trans. James H. Nichols, Jr., ed. Allan Bloom) (1969) (1947) (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) (on the development of a recognition-based social theory out of Hegel's philosophical foundations).

⁹⁶ SMITH, *LECTURES* at 186.

productivity that free labor relations promised.⁹⁷ Slave and feudal regime seemed to their opponents both to produce such personalities and to provide a field for the satisfactions they seek.⁹⁸ 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.”⁹⁹

The arbitrary and absolute relationship to another human being was at the core 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.¹⁰⁰ For the Free Labor theorists, such personalities were incompatible with the rise of commercial economy: 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.¹⁰¹ Tyrannical personalities were also ill-suited to a conception of democratic society that required a

⁹⁷ *Id.*

⁹⁸ 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, 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 (University of Chicago Press, 1975) (William Thomas, ed.) (1820).

⁹⁹ HILDRETH, *DESPOTISM* at 143.

¹⁰⁰ *Id.* at 142-57.

¹⁰¹ See HILDRETH, *DESPOTISM* 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, render useful industry, respectable. But this step can never be taken, so long as labor remains the badge of a servile condition.”).

measure of mutual regard toward one's fellow citizens and a willingness to pause, to listen, to debate, and to compromise.¹⁰²

B. Commercial society as a property regime: new terms of recruitment

The anti-slavery and anti-feudal position I have been exploring was also a pro-market or pro-capitalist position. Adam Smith was famously a prophet of the market regime, and has been lionized and vilified, in that capacity.¹⁰³ 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 threat¹⁰⁴ In endorsing commercial society,

¹⁰² 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* 36-52, at 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 Bromwich, *Lincoln* at 48-49.

¹⁰³ 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.").

¹⁰⁴ For a hostile account of the relationship between abolitionism and markets, see GEORGE FITZHUGH, *CANNIBALS ALL! OR SLAVES WITHOUT MASTERS* 217-19 (C. Vann Woodward, ed.) (1960) (1857) ("The whole morale of free society is, 'Every man, woman, and child for himself and for 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."). Versions of this anti-industrial and anti-commercial note, sounded still as a North-South battle, persisted at least as late as *I'll Take My Stand*, the 1930 collection of broadly anti-modern essays by the so-called "Vanderbilt Agrarians." See, e.g., Lyle H. Lanier, *A Critique of the Philosophy of Progress*, in *I'LL TAKE MY STAND* 122-154 (1930). Lanier wrote of the "unsalutary psychological and social consequences of the diminution of agriculture upon the general patterns of American life" and warned of an "unsavory sequel of industrialism" in social degradation. He urged, "If there exists any effective social and political intelligence in the country it might profitably be mobilized for the conduction of a specific program of rehabilitation of the agrarian economy and the 'old individualism' [broadly civic republican] associated with it." *Id.* at 153.

the critics of slavery and feudalism meant to embrace several interlinked values, including the dignity of labor, opportunity and mobility, and idea of the equality of persons – and, of course, the increase in social wealth that Smith seminally argued followed from the operations of markets.¹⁰⁵ To varying degrees these were directly connected with their central analytic idea in their account of markets: market relations were *terms of recruitment*, rules for enlisting the labor and talents of others. As noted earlier, the property rule that owned one’s own labor and could sell it freely at retail but not become wholesale the property of another meant that to recruit another’s labor, one had to *negotiate*, to appeal to the interest and self-conception of the other. The negotiation might, of course, 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 the 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.”¹⁰⁶ The use of “bargain and treat” inevitably suggests Smith’s famous reference to the human “propensity to truck and barter.”¹⁰⁷ That is what the master scorns to engage in and seeks to avoid in his recruitment: bargaining with others, that is, negotiating with them.

¹⁰⁵ See generally ADAM SMITH, THE WEALTH OF NATIONS (R.H. Campbell and A.S. Skinner, eds.) (1976) (1776).

¹⁰⁶ SMITH, LECTURES at 186.

¹⁰⁷ See SMITH, 1 WEALTH 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.”)

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*.”¹⁰⁸ 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 [him] to be of your mind In this manner [people] acquire a certain dexterity and address [sic] in managing their affairs, or in other words in managing of men That is bartering, by which they address [sic] themselves to the self interest of the person and seldom fail immediately to gain their end. The brutes have no notion of this¹⁰⁹

Giving this passage complete exposition would require presenting Smith’s account of the social “passions,” or what we would call social psychology, in the *Theory of Moral Sentiments*.¹¹⁰ Without that excursion, let us take the main ideas 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 her self-interest. Self-interest is not fixed but 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.

Engaging in persuasion has several implications for the way one conceives of oneself and others. First, it means being aware of living in a world of other persons, each

¹⁰⁸ SMITH, LECTURES at 352 (emphasis added).

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ 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 our thoughts and feelings should be in harmony with those of others, and emulation, a specific attraction to the powerful, wealthy, eminent, and graceful, as among the basic principles of our social interactions. 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 (Issue 2) (2004).

with her own interests and her own self-conception, including goals, aversions, and bases of dignity. Second, it means recognizing the relativity of one's own interests and self-conception to those of others. Announcing your own purposes without considering how they fit or clash with others' interests and self-conceptions will all but guarantee that your purposes – so far as they depend on the persuading other to join you in them – will 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.

This is not to suggest that persuasion must produce compassion or genuinely egalitarian sentiment. A skilled manipulator is as apt to succeed at persuasion as a fair-minded sympath – perhaps more so because of the instrumental clarity of his vision.¹¹¹ 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. When Smith remarks that “brutes have no notion” of the form of sociability founded on persuasion, one wonders whether he is not referring to slave-masters and feudal lords as well as to the violent African monkeys whose squabbling he

¹¹¹ The vision of market societies as producing skilled manipulators is of course a part of the concern of anti-modern critics such as Fitzhugh. See FITZHUGH, CANNIBALS.

describes to make his point.¹¹² The awareness of and responsiveness to others that persuasion requires is, in the normative sense of *humane*, a humanizing trait.¹¹³

C. The critique of capitalist recruitment: formal and substantive voluntarism

The argument that market persuasion increases sympathy and reciprocity has been dogged from the beginning by a pair of critiques, one conservative, the other from the left. Critics of both camps reject the picture of labor markets as inducing voluntary and reciprocal recruitment.

The critique from the right is communitarian. It proposes that market actors come to regard one another exclusively as sources of profit (or other selfish satisfactions).¹¹⁴ Conservative critics contrast markets with traditional forms of life that allocate social and economic roles so that each person and class has a part to play.¹¹⁵ Living in such a society means identifying with one's role and learning to honor others in keeping with

¹¹² SMITH, LECTURES at 352-53. Smith recounts a description of monkeys robbing fruit, then, without a way of negotiation its division, fighting over the spoils until many are dead.

¹¹³ 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. While models of pure maximizing behavior suggest that the second player should accept even the smallest amount of money – say a \$9.95/\$.05 split of \$10 – in practice fairness considerations lead players to reject offers they find insulting inequitable. In developed countries, offers as low as a 4/1 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).

¹¹⁴ See FITZHUGH, CANNIBALS; Lanier, *A Critique*. Fitzhugh concluded *Cannibals All!* with an open letter to the abolitionist William Lloyd Garrison, assaulting the heartless exploitation of the "free labor" system and asking, "Is not slavery to capital less tolerable than slavery to human masters?" and "Is not Laissez-Faire, in English, 'Every man for himself, and devil take the hindmost, your whole theory and practice of government?'" FITZHUGH, CANNIBALS at 258-59.

¹¹⁵ Fitzhugh, for instance, argued that the natural society was based on the reciprocal hierarchy of the family, and contended that "Abolition contemplates the total overthrow of the Family and all other existing social, moral, religious and governmental institutions." FITZHUGH, CANNIBALS at 198.

their status in, and contribution to, a shared way of life.¹¹⁶ Although such a society may not treat people as nominal legal equals, it creates *substantive* reciprocity by teaching to value others according to their place in the social whole.¹¹⁷ By contrast, market relations respond only to individual self-interest and thus train people to regard others as they would fungible resources: as opportunities to maximize their own satisfaction.¹¹⁸ On these grounds, conservative critics claim that in market relations one learns to regard others entirely as resources, and only oneself as person with morally important purposes. They have thus defended feudalism, stable agrarian communities, and even slavery as morally superior to markets.¹¹⁹

From this perspective, market advocates are mistaken when they describe feudal and slave relations as resting on an ultimate threat to survival or bodily integrity. Their mistake is projecting into traditional societies the market view of persons as self-interested individualists. Indeed a self-interested individualist might agree to work as a serf or slave only in the face of a threat to survival, because her only motive would be her subjective well-being. In an actual traditional society, the argument goes, the situation would be very different: social superiors and inferiors would understand their respective

¹¹⁶ See FITZHUGH, *CANNIBALS* at 216-17 (“Especially ... is it true with slaves and masters that to ‘do as they would be done by’ is mutually beneficial. Good treatment and proper discipline renders the slaves happier, healthier, more valuable, grateful, and contented. Obedience, industry, and loyalty on the part of the slave, increases the master’s ability and disposition to protect and take care of him. The interests of all the members of a natural family, slaves included, are identical. Selfishness finds no place, because nature, common feelings and self-interest dictate to all that it is their true interest ‘to love their neighbor as themselves,’ and ‘to do as they would be done by’ – at least, within the precincts of the family.”).

¹¹⁷ See FITZHUGH *supra* n. 104 (attack on “laissez-faire”).

¹¹⁸ See *id.*

¹¹⁹ For a hostile but often informative survey of these tendencies in thought, see STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* (1993) (claiming common motives and objections to modernity among fascists, romantics, and political and philosophical communitarians). Another deeply hostile account that proceeds through a much richer interpretive sympathy with the psychology of anti-modern thought comes in ISAIAH BERLIN, *The Counter-Enlightenment, in THE PROPER STUDY OF MANKIND* 243-68 (Henry Hardy, ed.) (1998); *Joseph de Maistre and the Origins of Fascism, in THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 91-174 (Henry Hardy, ed.) (1991).

prerogatives and duties as expressing a meaningful social order, and their roles would express substantive reciprocity.¹²⁰

I think that this line of argument typically reflects either reactionary romanticism or a frantic casting-about for any weapon with which to assault markets. The versions that celebrate traditional hierarchy are morally irredeemable. The versions that eschew such reactionary fantasies and concentrate on the alleged depersonalizing effects of markets are not odious, but are at best nostalgic for a form of reciprocity that likely never existed.¹²¹ In any event, this conservative critique has little influence on American law. The last major expression of status-based solidarity was Justice Taney’s originalist endorsement of a white-supremacist conception of citizenship in *Dred Scott v. Sandford*. That alone is suggestive evidence that we are better off without this way of thinking.

The critique from the left, however, deeply influenced the *Lochner*-era jurisprudence of constitutionalized economic relations that I described in Part I by providing the concern about what counts as “a real equality” among bargainers. This critique concentrates not so much on the reciprocity on the voluntarism of market relations, which it attacks as merely formal and seeks to replace with substantive voluntarism. The nub of this critique is that, in market societies, the choices people make in accepting or declining offers of recruitment – chiefly employment, but also other invitations to joint action – are constrained in ways that belie their advertised voluntarism. This argument is neatly captured in Anatole France’s famous remark on formally equal legal status: the law alike forbids rich and poor to sleep beneath the

¹²⁰ See FITZHUGH, CANNIBALS at 216-17 (quoted *supra* n. ____).

¹²¹ See, e.g., Lanier, *A Critique* (arguing that the agrarian ideal has been destroyed and should be reconstituted).

bridges of Paris.¹²² Depending on the allocation of wealth and other resources (such as acquirable skills and knowledge), nominally free bargainers may find themselves choosing between one very bad alternative and several abominable ones, with the very bad choice effectively enforced by the implicit threat of having to move on to one of the abominables. The point of such an argument is to dispose of the glib libertarian claim that formal voluntarism alone makes social relations “free,” and to focus instead on the distribution of resources that frames bargaining circumstances.

This criticism is intelligible from the perspective of any person who must choose among better or worse options, and may reasonably ask, *Why these options?* Why must I choose between lousy and worse, when others, by virtue of the allocation of wealth (and perhaps other resources) choose among versions of splendid and fine? Why call our choices free in just the same sense, when in mine I feel deeply constrained, and that lucky other person feels genuinely free in his?

In this part, I have presented the arguments in political economy that formed the backdrop to the doctrinal problem that opened the 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 its members. In the next part I bring together these doctrinal and historical discussions in a theoretical account of

¹²² Quoted in Robert M. Solow, *An Impractical Solution*, THE BOSTON REVIEW, available at <http://www.bostonreview.net/BR20.2/Solow.html>.

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 our 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.¹²³ Here I explain how human beings are both 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.

A. The Sources of Autonomy and Interdependence

Human beings have a dual nature.¹²⁴ We are resources for one another: our talents, training, time, energy, our minds, bodies, and even feelings are necessary to

¹²³ See generally works of Margaret Jane Radin cited in n.13, *supra*.

¹²⁴ Thinking of human beings as having a dual nature – as objects of causal forces and as subjects of action, as the creatures of their circumstances but also the makers of those circumstances, as resources for others and as ends in themselves – has its modern point in origin in Immanuel Kant's account of the perspective of causation and the perspective of free action as respectively ineliminable and mutually irreducible. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 464-79 (Norman Kemp Smith, trans.) (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

advance others' projects. We need one another. We are susceptible, literally, to exploitation. Moreover, we are scarce as well as desired resources:¹²⁵ 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, co-venturers, employees, or lovers. Our wants, dreams, and self-images are hostage to our success or failure in recruiting others to them.¹²⁶

At the same time that we are resources, means to one another's purposes, we also each have our own purposes, wishes, and ends. Indeed, we recognize one another as "ends," other purposeful and self-conscious beings owed a duty of reciprocal forbearance.¹²⁷ This concept is a cornerstone of modern law and ethics, whether it is rendered as Kant's characterization of persons as ends in themselves,¹²⁸ rights theorists' specification that each person carries the same complement of basic powers and immunities,¹²⁹ the utilitarian axiom that the pleasures and pains of each shall count

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).

¹²⁵ The definition of a valuable resource as one that is both scarce and desired comes from RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* sec. 3.2 (2d ed., 1998).

¹²⁶ 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 our 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 intended a psychoanalytic aim: to act without illusion or neurosis, the compulsive repetition of or return to the source of some developmental trauma. The concern of 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.

¹²⁷ 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."

¹²⁸ For an account of this position, see J.B. Schneewind, *Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy*, in *THE CAMBRIDGE COMPANION TO KANT* 342-66 (Paul Guyer, ed.) (1992).

¹²⁹ The late Robert Nozick is probably the best-known modern rights theorist. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (outlining a theory of social justice on the basis of an account of natural rights). For a treatment of rights-based arguments in general, including Nozick's, with special concern for the law of property, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 62-105 (1988) (detailing the structure of rights-based arguments in general).

alike,¹³⁰ the contemporary economist's commitment to revealed preference as the sole evidence of interests,¹³¹ or the principle of equal protection under law.¹³² Each such account of persons places some limits on how we may recruit one other to our purposes: respectively, under rules that pass the strait gate of the categorical imperative, consistent with their basic rights, consistent with the greatest happiness of the greatest number, by means of their voluntary accession to our effective demand, 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 terms of recruitment: how you may enlist others to your projects selects those projects that reach fruition.

Both our usefulness to others as resources and our status as ends deserving others' forbearance have histories. Technological and economic history describe our changing character as resources: how we have become relatively less valuable in one aspect – for instance, as agricultural laborers – and more in another – say, as designers of video games or, more generally, practitioners of “symbolic manipulation.”¹³³ The history of culture, politics, and religion has substantially to do with how ideas of the distinctive

¹³⁰ For an account of the power and limits of the utilitarian position that remains more or less contemporary, *see* J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM; FOR AND AGAINST* (1973) (in which Smart presents the argument that the right is determined by the greatest good of the greatest number and Williams argues the contrary, although not in favor of any specific alternative).

¹³¹ It is not an entirely conventional view that the methods of neo-classical economics reflect a commitment to an idea of persons as “ends,” even in the loose sense I am using – as worthy of some standard of equal respect. For an account that gets at this idea, *see* AMARTYA SEN, *RATIONALITY AND FREEDOM* 7-13, 19-25, 510-12 (arguing that both a plausible account of persons as bearers of preferences and the market commitment to protecting their liberty to act on the preferences they hold incorporate recognition of the person as a rational agent able to deliberate and freely choose among values).

¹³² *See* CONSTITUTION OF THE UNITED STATES, AM. XIV (“No State shall ... deny to any person within its jurisdiction the equal protection of the laws”).

¹³³ I do not mean to claim that everything that is called “property” must be best described by the account I am giving here. It strikes me as naïve and artificial to suppose that a sprawling and historically complex area of law would prove magically all to have the same hidden form – a kind of realist recapitulation of Langdellian doctrinal essentialism. If, however, I can describe a good deal of what property law does in terms of a distinctive and persuasive account of specific and important features of social relations, that will help to illuminate both what property law does and what we might want it to do that it does not do now.

value and importance of human beings have changed over time.¹³⁴ In any time and place, our terms of recruitment reflect the interaction between these two domains.

1. The taxonomy of dependence:

I earlier pronounced that we are valuable to one another and are thus susceptible, literally, to exploitation. I will now give more specific content to this claim. We need others for a variety of purposes, which we cannot accomplish without their assistance. What we need may be affirmative contributions or may take the form of forbearance. We need one another to *survive*, to *prosper*, and to *flourish*. Each of these terms designates a set of purposes, widely held and highly valued, to which one may appeal in seeking to recruit others to her projects. The first step in understanding the idea of *terms of recruitment* is to appreciate these distinct aspects of our reciprocal dependence.¹³⁵

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 he 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.¹³⁶

¹³⁴ See works cited in n.21, *supra*.

¹³⁵ The account I give bears some similarity to that of Axel Honneth in *The Struggle for Recognition* (Joel Anderson, trans.) (1995). 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 in *Dependent Rational Animals* (1999).

¹³⁶ Orlando Patterson presents the relationship between slave status and the threat to survival in two ways. First, “Slavery ... 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, FREEDOM at 9. Second, “The slave is always conceived of as someone, or the descendant of someone, who

It is not implausible that the majority of the recruitment of human effort throughout history has been in these 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 target of recruitment wants – “than you otherwise would.” This is the signal appeal of market society. This is how we are accustomed to 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.¹³⁷

We need one another to *flourish*. We need the cooperation of others in intrinsically fulfilling ways 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, usually productive activity in which we feel ourselves expressed, augmented, or improved.¹³⁸ Another is *love*, the non-instrumental 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

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.

¹³⁷ See RICHARD A. POSNER, *SEX AND REASON* (1992) (arguing throughout that sexual and romantic behavior can be explained by the aim of maximizing sexual gratification relative to a variety of exogenous constraints).

¹³⁸ See TAYLOR, *SOURCES*, *supra* n. 21 at 211-47 (on “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).

activity.¹³⁹ 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.¹⁴⁰ Appeal to flourishing 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.¹⁴¹ 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.)

2. The terms of recruitment

This taxonomy of interdependence describes the 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

¹³⁹ See TAYLOR, SOURCES, *supra* n. 21 at 289-91 (on the rising ideal of companionate marriage and intimacy as a high good).

¹⁴⁰ See PATTERSON, FREEDOM *supra* n.15 at 9 (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).

¹⁴¹ For a discussion of different motives in and attitudes toward productive activity, see UNGER, SOCIAL 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 and imaginative setting of the individual’s life.” *Id.* at 29.

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 her. 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 the account through a brief exposition of the thought of Robert Lee Hale, the Legal Realist and institutional 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.”¹⁴² 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 hold¹⁴³ – 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

¹⁴² HALE, *supra* n. __ at 15.

¹⁴³ For a discussion and economic rationale of the limited number of forms that property rights take, see Merrill and Smith, *Optimal Standardization in the Law of Property*, *supra* n. __.

distributive background, in which each person's starting point is unlike every other person's.

Building on this account of bargaining, Hale describes economic life as a system of mutual coercion among all participants. Hale's innovation is to concentrate on (1) the power of exclusion that attends most forms of ownership¹⁴⁴ and (2) the threat effect of proposing to exercise the power of exclusion against other individuals who need your resources to pursue their projects of survival, prosperity, or flourishing. This description amounts to an inversion of the conventional account of market relations as comprising voluntary exchange for mutual advantage, which highlights instead (1) the power of alienation or transfer and (2) the inducement to another to become better off by consummating an exchange.¹⁴⁵ To that inducement, Hale contends, there corresponds the threat of non-consummation, of sticking at exclusion and denying the other the benefit of your 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, which the threat of exclusion enables them to do.¹⁴⁶ 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

¹⁴⁴ 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.

¹⁴⁵ For the basic account of allocative efficiency by mutual advantage in the law of property, *see* POSNER, *ECONOMIC ANALYSIS OF LAW*, sec. 3.2 (2d ed. 1998).

¹⁴⁶ *See* HALE, *FREEDOM* 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.”)

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.¹⁴⁷ It is important to underscore that even in a situation of great inequality, the coercion is *mutual*: the propertyless worker exercises coercion over the factory owner in declining to work; it is simply a weaker coercion that what the factory owner exercises in refusing to pay the non-compliant worker.¹⁴⁸ On Hale's account, "coercion" represents not a judgment about the balance of power in a specific transaction, but the elementary term of description for 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 is a rhetorical choice intended to highlight certain aspects of transactions that can also be described in Paretian 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.¹⁴⁹ The libertarian jurisprudence that Hale attacked in his pre-New Deal writings arose from the constitutional "right 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,

¹⁴⁷ "[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." HALE, FREEDOM at 18.

¹⁴⁸ See *id.*

¹⁴⁹ See FRIED, *supra* n. __ 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.

blackmail, or some other “overt” coercion.¹⁵⁰ 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 a bodily or other direct threat.¹⁵¹

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. 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 very small threat of his withholding his labor) with the very great coercive power of the employer (the very great threat of withholding employment).¹⁵²

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 of market society’s rules of recruitment as given and set out to show that they were not enough to secure 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 certain threats – appeals to certain dimensions of interdependence – are out of bounds.

¹⁵⁰ See FRIED, PROGRESSIVE at 29-33 (on laissez-faire theorists’ “bland self-assurance in describing private economic activity as a bastion of freedom”).

¹⁵¹ Fried quotes the Harvard economists 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.” FRIED, PROGRESSIVE at 31.

¹⁵² On Hale’s efforts to distinguish between acceptable and unacceptable instances of coercion, see FRIED, PROGRESSIVE at 59-70.

Yet to do this slights the moral achievement of market rules. It is no minor fact that under the laissez-faire law that Hale attacked, recruitment could not involve threats to survival. That prohibition was not ideological legerdemain, although Hale seemed to suggest the contrary. As discussed in Part II, it was the moral core of a law of recruitment that arose in direct repudiation of slavery and feudalism.¹⁵³ 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*¹⁵⁴ 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.¹⁵⁵ The heart of the idea was that honest labor under conditions of equal opportunity (1) meant a fair chance for all (2) was dignifying in itself. No one was condemned by birth to inferior status; instead everyone had a shot at becoming a person of substance.¹⁵⁶

The question Hale might have asked, had he taken a different direction, was not just 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 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 we regard human beings as mattering morally. The other is to ask, normatively, what is the best potential in one’s own tradition of understanding the relationship between resources and personhood? In the next part, I propose a normative orientation that emerges from the historical

¹⁵³ See the discussion in II.A, *supra*, and accompanying notes.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

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 be our terms of recruitment, and why? I argue that the normative touchstone that emerges from the discussion so far has two aspects: first, maximizing *reciprocity*, relative equality in interdependence and thus in recruitment; and second, increasing the share of recruitment appeals that speak to the axis of *flourishing* rather than survival or prosperity. As in earlier portions of this paper, I offer several complementary modes of argument. First, I lay out a feature of the contemporary legal and policy landscape that presents the prospect of a gain along these normative dimensions. Second, I present a two-part analytic account of these dimensions, concentrating specifically on how recruitment proceeds under relatively reciprocal and flourishing-oriented conditions. Third, following the earlier discussion of political culture as providing the conceptual backdrop to law, I describe a tradition in American political thought that fills out the ideas of reciprocity and flourishing: a view of democracy as an ongoing exercise in persuasion.

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.¹⁵⁷ I have no ambition to persuade readers who are

¹⁵⁷ 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

determinedly unmoved by appeals to freedom and reciprocity. Rather, my argument addresses (1) the best understanding of what it means to be committed to freedom and reciprocity and (2) the implications of that commitment where it is properly understood.¹⁵⁸ 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 should have two kinds of implications. First, it should affect the evaluation of property regimes by drawing attention to the terms of recruitment that they establish.¹⁵⁹ Second, it should affect the conception of freedom itself by emphasizing its relational character and its constant tension with the interdependence that is the basis of our interwoven need for and vulnerability to one another.

A. Prospects: Margin of reciprocity at two edges of the modern world

relatively minimalist, up-to-date, and secular version of this view, *see* JURGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 19-111 (Ciaran P. Cronin, trans.) (1993) (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's portion of GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY (1996).

¹⁵⁸ This approach to normative argument is consistent with the broadly "hermeneutic" account of Charles Taylor: while 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* CHARLES TAYLOR, 1 PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 105-112 (1985) (so arguing). I believe this mode of argument is also compatible with the concept of democratic persuasion that I describe in TAN ____ - __, *supra*.

¹⁵⁹ Among reforms that might fare well under this standard are those I discuss in Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1273, 1266-84 (2005) 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. 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.

There are many places to begin a discussion of how changes in the terms of recruitment can move in the directions of 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 the pressure toward gender equity that the data from India reflect.¹⁶⁰

Alternatively, one might look to innovative programs such as proposed risk-sharing markets in the earning power of sectors of specialized training, which by permitting voluntary spreading of the risk to specialization might increase real freedom to choose unconventional courses without merely subsidizing eccentricity.¹⁶¹ I have discussed both of these examples elsewhere. Here I take up two very different cases, one set in the developing world, the other on the frontiers of technology. The first concerns how women's participation in labor markets affects their power to negotiate decisions in the household, and how changing proportions of interdependence in these spheres express themselves in the valuation of females both as resources and as persons. The second addresses the rise of voluntary modes of non-hierarchical production in technologically advanced areas of cultural production, which present new possibilities for appeals to flourishing in recruitment. Taken together, they suggest the breadth of application of the theoretical model I have developed here.

1. Reciprocity in markets and households: resource value as personhood value

¹⁶⁰ See generally Hernando de Soto, *The Other Path: The Economic Answer to Terrorism* (Basic 2d ed 2002) (arguing that Peru's poor represent a distinct entrepreneurial class); Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic 2000) (arguing that capitalism fails in poor countries because the poor lack property rights in their assets).

¹⁶¹ See generally Robert J. Shiller, *The New Financial Order: Risk in the 21st Century* (Princeton 2003) (proposing a new risk management infrastructure that utilizes financial inventions to insure the gains made by workers).

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 hundred million young men and boys in excess of the corresponding female populations in India, Pakistan, China, Taiwan, and neighboring countries.¹⁶² 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.¹⁶³ This

¹⁶² See VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: THE SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 59-66 (2004).

¹⁶³ 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 China*, 27 POPULATION AND DEVELOPMENT REV. No. 2 at 259 (June 1, 2001) (observing that many Western observers were skeptical that sex-determination technology was widely available in China, while Chinese scholars resisted the suggestion that post-natal 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 post-natal addition to the ratio must be regarded as additional, not supplanting. See *infra* TAN ___ - ___. 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* at 8-10 (unpublished paper: on file with author). As Poston and Glover note, however, Taiwan's sex disproportion at birth approaches China, 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* (this note) (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, improving health overall. Many more male than female fetuses are conceived, but because female fetuses are hardier 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 Dhairiyarayar Jayaraj & Sreenivasan Subramanian, *Women's Wellbeing and the Sex Ratio at Birth: Some suggestive evidence from India*, 40 J. DEVELOPMENT STUD. No. 5, at 91 (June 1, 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

differential valuation contributes to sex-selective abortion to eliminate female fetuses and greater spending on medical care and nutrition for boys.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ Wealth and medical resources increase opportunities to have 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

For one account of the significance of differential valuation of sons and daughters in this phenomenon, see VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: THE SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 131-32 (2004).

¹⁶⁴ a start on the dispute, see HUDSON & DEN BOER, *supra* n. ___ 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 pre-natal 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.

¹⁶⁵ See AMARTYA K. SEN, DEVELOPMENT AS FREEDOM 197 (1999).

¹⁶⁶ 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 *Goods and People*, at 509 in *Resources, Value, and Development*, *supra* n. 66; *Markets and Freedoms*, in RATIONALITY AND FREEDOM 501 (2003); *Opportunities and Freedoms*, in RATIONALITY AND FREEDOM 583; *Freedom and the Evaluation of Opportunity*, in RATIONALITY AND FREEDOM 659; and *passim* in AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

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, though, 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."¹⁶⁷ 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.¹⁶⁸ Any solution includes both a set of priorities and an effective, usually informal set of decision-making procedures for setting or balancing priorities.¹⁶⁹ 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.¹⁷⁰ A family is thus, among other things, a site of negotiation over the terms

¹⁶⁷ See SEN, DEVELOPMENT AS FREEDOM at 192-93. . 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).

¹⁶⁸ See SEN, DEVELOPMENT AS FREEDOM at 192-93; AGARWAL, A FIELD OF ONE'S OWN at 53-81.

¹⁶⁹ See both sources cited in immediately previous footnote.

¹⁷⁰ 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* n. ___ 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 has emphasized the importance of an idea of false consciousness in this connection, suggesting that experience of empowerment reveals interests previously obscure to the interest-holder. See SEN, *The Possibility of Social Choice*, 65, 90-92 in RATIONALITY AND FREEDOM (2002); Martha Nussbaum, *Charles Taylor: Explanation and Practical Reason*, in THE QUALITY OF LIFE 232-41 (Nussbaum & Sen, eds.) (1993). Others have argued 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). 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 CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN

of cooperation, conducted among people who address a complex and interwoven set of one another's needs for survival, prosperity, and flourishing.¹⁷¹ What happens when the relative balance of dependence 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 pro-female preferences. Specifically, two variables correspond to reduced sex inequality in childhood survival rates: women's literacy and women's participation in the workforce.¹⁷² 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 development, although they operate mostly in the public setting of the market, redound to the household by improving women's bargaining position. This improvement 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

SCIENCE: PHILOSOPHICAL PAPERS 2 at 34-37 (arguing for the place of self-understanding in constituting activity such as politics or negotiation) (1985).

¹⁷¹ 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 non-reciprocal.

¹⁷² 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, while 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.

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 imagine that women have a constantly sex-neutral or pro-female concern for their children, which increasingly control of resources enables them to insist upon. 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.¹⁷³ These examples correspond to distinct and complementary conceptual possibilities: 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 is connected with 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 egalitarian preferences as their experiences and

¹⁷³ The reference, of course, 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 than when women can and do earn income outside the household, this tends to enhance the relative position of women in the distributions within the household." *Id.* 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.

capabilities grow.¹⁷⁴ Where women work outside the home, the result is a new set of everyday interactions, experiences of competence, and resulting expectations, all redounding to the sense of agency in oneself and to one's idea of how other women's lives might be lived.¹⁷⁵ Literacy, too, broadens awareness of possible lives, both those in existence elsewhere and those that might be in one's own setting.

The problem I have described begins from a differential valuation of female personhood, a judgment enforced at the level of the family that girls and women matter less than males. Increases in agency or capability at the family level seem not to diminish the problem. 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 early-modern liberal 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, relative to the same negotiations where women's resource value counts only in the domestic or other informal economy, that liberal forecast seems to

¹⁷⁴ 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, DEVELOPMENT AS FREEDOM at 189-203. For a recent summation of arguments and data supporting this view, see Isobel Coleman, *The Payoff from Women's Rights*, FOREIGN AFFAIRS (May – June 2004) (“Educated 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”).

¹⁷⁵ See AGARWAL, *supra* n. __ at 421-66 (describing in several case-studies as well as theoretically 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 pro-natalist warnings of “race suicide.” 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.” See LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 100-01 (2002)

come true in developing countries today. Moreover, there is reason to speculate that the change is dynamic, and that 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 household in the developing world, 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 into the service of justifying harsh and practically unequal economic relationships. Nonetheless, the power of controlling a disbursing a resource in oneself is real and considerable, and to the extent that it creates reciprocity in other spheres of life, it makes possible a relatively 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 has recently argued that digital technology has changed the capital structure of the production of culture and ideas in ways that create new opportunities for substantive voluntarism.¹⁷⁶ The backdrop to this thesis is a mostly unexamined claim that, under conditions of industrial production – particularly the necessity of concentrated capital, with the factory as the exemplar – the governors of modern economies opted for rules that promoted maximum productivity:

¹⁷⁶ See Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004); *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245 (2003). More specific citations to both articles accompany the following discussion.

allocation of resources by markets and management of productive relations through hierarchically organized firms.¹⁷⁷ (By “unexamined,” I do not mean to suggest that Benkler is naïve; rather, he sets aside the question whether the judgment that these rules were the ones best suited to maximizing productivity was meritorious or ideological, and does not treat the political process by which the rules were formed.) Those rules had the incidental effect of inhibiting substantive voluntarism, just as critics of market relations contended.¹⁷⁸ The burden of Benkler’s argument is that, even assuming the appropriateness of this earlier decision, new technologies make substantive voluntarism potentially compatible with maximum productivity.

Benkler’s analysis concentrates on several technological phenomena. One is the proliferation of productive capital on a scale appropriate to individual ownership, in packages that routinely include substantial excess capacity.¹⁷⁹ The model 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.)¹⁸⁰ 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, it may result in uses that are just as socially productive. Benkler offers as examples schemes in which computer users turn over their excess capacity for large-scale

¹⁷⁷ See Benkler, *Freedom* 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.”)

¹⁷⁸ 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.”)

¹⁷⁹ See Benkler, *Sharing* 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).

¹⁸⁰ See *id.* at 281-89.

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.¹⁸¹

From the example of networked computers, Benkler moves by a clever (but mostly implicit) analogy to suggest that people, like their laptops, frequently hold excess productive capacity relative to what the market induces them to sell: we 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.¹⁸² Benkler’s favorite examples are free, open-source software; the wikipedia, a collaborative encyclopedia; and Slashdot, a collaborative news-and-commentary compendium for techies.¹⁸³ These are significant technological and cultural products, generated by the voluntary and decentralized coordination of talents and energies not otherwise demanded by the market. 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, even play.¹⁸⁴

Network technology makes these collaborative productions possible, turning many who might have been solitary hobbyists into participants in social production. Another technological innovation gives complementary advantage to substantive

¹⁸¹ See *id.* at 289-96 (describing the efficiency advantages of distributed computing).

¹⁸² See Benkler, Freedom at 1256-60 (discussing voluntary, loosely collaborative “peer production”).

¹⁸³ See *id.*

¹⁸⁴ 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 at 328 (citations omitted).

voluntarism. This is the diminution in the cost of capital necessary to produce culture. Video, music, and books are now relatively inexpensive to create and costless at the margin to reproduce, facts that threaten the industrial-model gatekeepers of culture with obsolescence.¹⁸⁵ In a sense, this situation promises to return cultural production to the craftsman ideal that 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).¹⁸⁶ Record companies, publishing houses, and the film industry all played the role of factories: when production and reproduction of culture required concentrated capital, those who wanted to live by creating had to go through them. Now that may cease to be true, or at least may diminish in its force and categorical character.

B. The Analytics of Reciprocity

In a previous article, *A Freedom-Promoting Approach to Property*,¹⁸⁷ I urged evaluating property regimes by the level of human freedom they produce, where freedom is conceived of as capabilities in the manner Amartya Sen has advocated. Attempting to avoid the pitfall of complete un informativeness, I proposed that priority be given to (1) capabilities relating to the satisfaction of basic needs and (2) 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

¹⁸⁵ See Benkler, *Freedom* 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* at 349-51.

¹⁸⁶ 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* 21-42 (John Brewer & Susan Staves, eds.) (1996).

¹⁸⁷ See Purdy, *supra* n. 15 at 1292-94.

collectively (for instance, through political participation).¹⁸⁸ The first criterion amounts to a variant on classical utilitarianism in that it proposes a metric that supposes something like diminishing marginal returns from command of resources as one's purposes move from the essential to the elective.¹⁸⁹ The second criterion runs in the direction 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 they should take.

This Article has developed two points with major implications for thinking about the relationship of property regimes to freedom. The first is the importance of understanding freedom *relationally*, in two senses. On the one hand, our capabilities reflect not just resources we control as individuals (from currency to charisma), but our 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. On the other hand, ideas essential to filling out any relational conception of freedom have histories in which law, culture, politics, and technology interact. What threats and inducements may we direct at one another? Which purposes are so important that we must be protected in them, either by prohibition (so that the value of life rules out threats to survival as recruitment devices) or by guarantee (so that everyone enjoys access to a public domain, or cultural commons of words, images, and music from which to furnish their own expressive activity)? The answers to

¹⁸⁸ *See id.*

¹⁸⁹ 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 utility. For a discussion of some of the epistemic and political motives of this shift, *see* David Singh Grewal, *Toward a Critique of Paretianism* (unpublished manuscript, on file with author).

these questions implicate views of people as ends: how we matter, which qualities make us 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, so that in our social relations we conceive of and approach one another in keeping with conceptions of personhood that are compatible with whatever normative idea of the person we nominally embrace.

The chief distinction I propose is between *reciprocal* and *non-reciprocal* dependence. Which one it is will have major consequences for the terms of recruitment. The slave relationship is founded on non-reciprocal dependence for survival: you can kill me, but I cannot (with any roughly even level of confidence) threaten to kill you; so I accede to your recruiting offer.¹⁹⁰ By contrast, the Hobbesian social contract, forged to avert the war of all against all, rests on reciprocal dependence for survival: all of us are threats to each of us, unless and until we enter a compact designating a single authority to govern our relations.¹⁹¹ While 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 non-reciprocal dependence for prosperity, that is, along the axis of need. The core of Hale's critique of formal voluntarism was insistence on the importance of this distinction: if you can withhold from me resources that I badly need, such as access to industrial capital to make my labor productive, then your threat is much more significant to me than is my threat to you to withhold my labor.¹⁹² If, however, I enjoy access to capital of my own (such as digital technology), have a wide set of

¹⁹⁰ See PATTERSON, FREEDOM, *supra* n. 21 at 9 (so characterizing the slave relationship).

¹⁹¹ See THOMAS HOBBS, LEVIATHAN 86-138 (Richard Tuck, ed., Cambridge University Press, 1991) (1651).

¹⁹² See III.A.2, *supra* (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* n. ___ (Barbara Fried making this point as to Hale).

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 bargaining position 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 non-reciprocal 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 pro-market reformers.¹⁹³ 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 non-reciprocal dependence, particularly the dependence of women on men (debatably biological in some dimension of its origins but pervasively and violently socially enforced in any case). One aim of the continuing struggle over gender relations is to make possible genuinely reciprocal foundations for our entreaties to love and recognition.

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 non-reciprocal 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

¹⁹³ See Part II.A, *supra*.

the possibility of change: the insight that non-reciprocal dependence is now an artifact of human arrangements, not natural necessity, and a proposal as to why a different arrangement would be better. The pro-market program I sketched earlier was one instance; the proposal to link substantive voluntarism with democratic political economy is another. Third 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. In other words, to understand the potential for reform in any setting, one must be able to say something about (1) how people in that setting are valuable and necessary to one another as resources; (2) how they respect one another as ends; (3) how either of these might be open to change; and (4) what program of reform could promote changes now possible but as yet unrealized. 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 intersection of objective possibility and deliberate 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? Our ideas of people as ends 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 our relationship to fairness, justice, and freedom as a dynamic one. This would mean asking not whether we are approaching more closely to these

standards, understood in a fixed and absolute sense, but rather by what process we are forming and reforming our understanding of what these standards entail. This would be to conceive of the meaning of personhood as indeterminate, but influenced in distinct ways by our concrete social relations. Specifically, in seeking to enlist others in our aims, do we bring to bear outright coercion, the subtle and problematic coercion of need and constraint, or the more difficult and multifarious appeal of persuasion? So far as our conditions of dependence, and consequently our terms of recruitment, are reciprocal, persuasion will occupy a greater place in our appeals. We would then have to pose our particular view of human purposes – or just of our own purposes – as founded not on prerogative or privilege, but on and only on 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; but my discussion draws attention to a specific consequence of reciprocity in dependence and the terms of recruitment. Reciprocity makes everyone free to engage with the meaning, purposes, burdens, and hazards of freedom, to participate by experiment and persuasion in its continuing and open-ended definition. This alone goes some distance toward emancipating some from the need to accede to others' ideas of human purpose just to get by in the world, 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 resist them and shape alternatives.

C. Analytics II: Recruitment under Relative Reciprocity

How ought we to understand the potential of reciprocity in the terms at the core of this paper, the relationship between our character as resources and our character as ends? The most powerful and credible account involves a specific relationship between individual autonomy and democratic culture, and provides a glimpse of what a “democratic economy” might be. This idea appears in fragments in scholarly discussions of decentralized and voluntary production, but no one has drawn together the strands or shown how these ideals of democracy and autonomy require a specific mode of recruitment if they are ever to be made good. Diagnosing this idea in the peer-production setting offers an image of what it might mean generally.

All the criticisms of formal voluntarism in favor of substantive voluntarism share recognition of a basic – probably willful – confusion in Adam Smith’s characterization of market relations as free and reciprocal.¹⁹⁴ The offer of a shilling is *not* an exercise in persuasion.¹⁹⁵ It *is* of course an appeal to interest, and the very fact of the appeal carries the 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 appeal to her wish to avoid deprivation – at the limit, absolute deprivation.¹⁹⁶ (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, the worker knows both what his labor is worth and how much he must earn to satisfy basic needs and non-basic wants; all bargaining

¹⁹⁴ See TAN 95-101, *supra*.

¹⁹⁵ See SMITH, LECTURES., *supra* n. 109.

¹⁹⁶ See III.A.2, *supra* (discussing Hale’s thought).

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 non-market production motivated by desire for the esteem of peers, consonance with one's own values, or self-expression?¹⁹⁷ 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, digital videos, or other products he wishes to solicit. How will he distinguish himself from any other would-be impresario of the peer-production world? First, he *cannot* do it by simple capital accumulation, because his mode of production is premised on widely distributed productive capital; where a factory owner can distinguish himself in bargain by the fact of controlling a major piece of capital whose concentration is necessary to industrial production, that advantage is not available here.¹⁹⁸ Second and relatedly, whatever appeal he makes will have to take account of competition from other entrepreneurs with similarly low capital-based barriers to entry. Third and more speculatively, in recruiting non-fungible, creative resources, he 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

¹⁹⁷ See Benkler, *supra* n. 176 (both works cited therein).

¹⁹⁸ 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, FREEDOM, *supra* n. ___ (discussing the bargaining advantage of the factory owner).

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 and consequentially than a grudgingly completed SUV oil-change or sheetrocking job.

A part of the recruitment appeal under substantive voluntarism, 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.¹⁹⁹ 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; bumptious and aggressive drivers of Hummers; and so forth.²⁰⁰ 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 prospective worker, is part of the compensation. The effect of the shift I am imagining, however, 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.

¹⁹⁹ 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.

²⁰⁰ *See id.* at 223-30 (discussing the self-conceptions that branding campaigns appeal to and seek to shape).

V. Conclusion

We 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 – to body forth our personhood – we must recruit the time, effort, 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 novel 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 our inevitable relations of recruitment, and thus to make interactions more free and appeal to flourishing – our own ideas of how and why we matter – more prominent.

The meaning of our personhood has no fixed and permanent form. At least a part of that nature consists in 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 the mutilation that our nature as resources has visited over and 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 and social world 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?”