Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being

Dave Fagundes[*]

ABSTRACT: The twin notions of exclusion and possession dominate our cultural and legal conceptions of property. This Article uses the lens of hedonics—the emergent science of happiness—to make a case for the less appreciated notions of inclusion and dispossession. Evidence from this new field shows that owners maximize their welfare, not when they amass land and chattels and keep others away from them, but when they pursue the polar-opposite strategies of inclusion and dispossession, such as sharing their property, donating it to charity, or giving it away. This Article begins its defense of inclusion and dispossession by providing background about the idea of happiness and law, an increasingly important conceptual framework for welfarist analysis of law and policy. It then reviews the hedonics evidence about property, which reveals that despite the hegemony of exclusion and possession, what increases owners' subjective well-being is using their property to create social ties, to give it to a meaningful cause, or just to get rid of it. The Article then considers specific strategies of inclusion and dispossession. The Article reveals unappreciated ways that inclusion and dispossession enhance owners' subjective well-being, and then suggests particular forms of choice architecture that have the potential to optimize the overall social welfare produced by each of them. Finally, this Article concludes by considering the implications for property theory of the novel notions of inclusion and dispossession, emphasizing that this claim works to enrich, not undermine, the institution of private ownership.

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I. INTRODUCTION: INCLUSION & DISPOSSESSION IN PROPERTY LAW

The twin notions of possession and exclusion lie at the center of our cultural and legal understanding of property. Consider the American obsession with possession. We recently elected a President with no experience holding a public office to a large extent based on widespread admiration for his great wealth.[1] Television shows from Antiques Roadshow to Flipping Out to Top Gear also fetishize having both real property and chattels.[2] In fact, many of America's leading industries are devoted to protecting and enhancing possession: the financial industry, which seeks to grow extant wealth into even more of it; the insurance industry, which seeks to protect people against the loss of their property; and even assorted businesses that allow people to showcase and warehouse the things they accumulate throughout their lives.[3]

Possession is also central to our legal understanding of property. Leading property scholars from Carol Rose to Richard Epstein consider the notion of possession central to and inextricable from the idea of property itself.[4] The doctrines of first possession and adverse possession, while rarely invoked in practical terms, occupy a disproportionate amount of space in the first-year property curriculum and in law reviews.[5] And while the hoary cliché that "possession is nine tenths of the law" is not quite right, it does reflect a notion that actual possession of property gives a purported owner a strong presumptive case to legal title.[6] In light of all this, it is unsurprising that Jill Fraley recently observed that legal "theorists . . . obsess over possession."[7]

If any notion can compete with possession's stranglehold on how we think about property, it is exclusion. The intuition that we should be able to

1. Michael McGrath, *Why Voters Love Donald Trump's Wealth—but Despised Mitt Romney's*, GUARDIAN (Mar. 15, 2016, 4:38 PM), https://www.theguardian.com/us-news/2016/mar/15/donald-trump-wealth-money-mitt-romney.

2. Indeed, the national preoccupation with owning stuff has even resulted in its own pathology—hoarding—where people acquire and keep things compulsively in much the same way that alcoholics guzzle booze (which disorder has also become a point of public fascination so great that it too has led to a TV show devoted to it, Hoarders).

3. Examples include the Container Store, which sells only things to store other things, as well as the vast storage industry, which rents out space for the many people who can no longer fit all their stuff in their home or garage. For a fascinating account of how Americans continue to run out of space for their things even as houses grow ever larger, see JOHN DE GRAAF ET AL., AFFLUENZA: HOW OVER-CONSUMPTION IS KILLING US—AND HOW TO FIGHT BACK 28–33 (3d ed. 2014).

4. *Compare* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221 (1979), *with* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 74–75 (1985).

5. For example, the leading 1L property text devotes nearly 50 pages to adverse possession alone, despite not featuring a major case decided after the 1970s. *See* JESSE DUKEMINIER ET AL., PROPERTY 116–64 (7th ed. 2010).

6. The Roman doctrine of *uti possidetis* entitled possessors in property disputes to occupy the property unless and until it was determined not to belong to them. John Duncan, Uti Possidetis*: Is Possession Really Nine-Tenths of the Law? The Acquisition of Territory by the United States: Why, How, and Should We?*, 38 MCGEORGE L. REV. 513, 513 (2007). In American folklore, a judge is said to have invoked this notion in a dispute between the feuding Hatfields and McCoys, awarding ownership of title in a pig to its possessor, Floyd Hatfield, since no credible evidence could show that the McCoys lacked title.

7. Jill Fraley, *The Meaning of Dispossession*, 50 IND. L.J. 517, 518 (2017).

exclude others from our land matches with deep-rooted instincts.[8] One modern expression of the drive toward exclusion is the proliferation of gated developments, often featuring manned security entrances, sold to buyers as "exclusive communities."[9] The burgeoning home security industry feeds this desire for exclusion by selling alarm systems, security cameras, and signs designed to enforce the exclusivity of our real property. These modern trends find a historical analog in early cases expressing ambivalence—and sometimes outright approval—of "spring guns" designed to kill any intruder who as much as opened a strange door without permission.[10]

The notion of exclusion similarly preoccupies property theorists. Scholars readily concede that exclusion is central to the idea of property;[11] the only question is whether it is merely one of a handful of rights that comprise the legal notion of ownership or the defining feature of property itself.[12] The idea that exclusion is central to property goes back at least to Blackstone, who famously (if inaccurately) referred to property as "that . . . despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[13] The development of property law tracks this preoccupation with exclusion. In the past decade, for example, 32 states have revived the castle doctrine under the rubric of "stand your ground."[14]

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8. *See generally* Jeffrey Evans Stake, *The Property 'Instinct*,*'* 359 PHIL. TRANSACTIONS ROYAL SOC'Y B 1763 (2004) (summarizing literature and finding commonalities in property-related behavior among human and non-human animals).

9. For a fascinating treatment of the exclusion-oriented "bunker mentality" of modern gated communities, see Rich Benjamin, *The Gated Community Mentality*, N.Y. TIMES (Mar. 29, 2012), http://www.nytimes.com/2012/03/30/opinion/the-gated-community-mentality.html.

10. The most famous spring gun case in torts history is *Katko v. Briney*, in which the Iowa Supreme Court held that a landowner had a duty not to set potentially deadly traps for trespassers. Katko v. Briney, 183 N.W.2d 657, 660 (Iowa 1971). In response to the case, though, many states sought to pass "Briney bills" to allow landowners to do so, reflecting a widespread popular moral approbation of spring guns.

11. The recent efflorescence of pluralism and progressive-property theories has emphasized values and features of property other than exclusion, but even adherents of this new school agree that exclusion has a prominent (even if not sole or prioritized) place in any theory of legal ownership. *See, e.g.*, Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1415 (2012).

12. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*.").

13. 2 WILLIAM BLACKSTONE, COMMENTARIES *1–2. While this aphorism remains a popular distillation of the essence of property, many scholars have pointed out that it does not even reflect Blackstone's own view of the field at the time, since he used the "despotic dominion" phrasing as a jumping-off place to show how owners' rights were riddled with exceptions. *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603 (1998) (critiquing reliance on Blackstone's famous dictum).

14. *See* Benjamin, *supra* note 9 (cataloguing this trend).

Yet there is, and has long been, a countercurrent to the notion that property is predominantly about possession and exclusion. Early Western critiques of property ownership emerged in the asceticism of Epictetus and other ancients and in the Judeo-Christian tradition.[15] The latter in particular espoused the moral worth of generosity,[16] as well as the more radical notion that the very idea of excessive ownership is antithetical to an ethical life.[17] These ideas have analogues even in the affluenza-crazed contemporary West, where they animate an emergent opposition to the prevalent culture of fetishizing belongings and exclusion. In contrast to cultural data points that celebrate maximizing one's possessions lies the stubborn fact that there are countless charities for worthy causes to which Americans donate their money and physical property in ever-increasing volumes.[18] And however much exclusion rules the roost in property theory, the rise of the sharing economy illustrates how the value of the things we own can be maximized by including others rather than excluding them.[19] Finally, a combination of post-recession necessity and dissatisfaction with consumerism has led an increasing number of Americans to choose minimalist lifestyles that entail reducing down to as few possessions as possible,[20] as well as choosing to live in small-footprint tiny houses or communally oriented micro-housing units.[21]

Despite these emerging trends, inclusion and dispossession have not gotten nearly as much attention in property scholarship or substantive law as exclusion and possession. A handful of property scholars have made gestures in this direction,[22] but, as yet, no work has answered the fundamental question

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15. EMRYS WESTACOTT, THE WISDOM OF FRUGALITY: WHY LESS IS MORE—MORE OR LESS 6–20 (2016) (discussing the ancients who lionized simplicity and rejected property, most notably the itinerant philosopher Diogenes).

16. The New Testament, for example, admonishes that "[i]t is more blessed to give than to receive." *Acts* 20:35; *see also* ARISTOTLE, POLITICS 85 (H. Rackham trans., Harvard Univ. Press 1932) (c. 350 B.C.E.) (exhorting the appeal of common property though acknowledging its challenges).

17. The Gospel of Matthew, for example, states that "[i]t is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God." *Matthew* 19:24.

18. *See Charitable Giving Statistics*, NAT'L PHILANTHROPIC TR., https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics (last visited Mar. 11, 2018) (showing upward trend in annual giving by U.S. households).

19. Rubicon, *The Sharing Economy: A New Way of Doing Business*, KNOWLEDGE@WHARTON (Dec. 11, 2015), http://knowledge.wharton.upenn.edu/article/the-sharing-economy-a-new-way-of-doing-business (casting the sharing economy as a phenomenon where value derives from inclusion rather than exclusion strategies).

20. *See* Alex Williams, *Why Self-Help Guru James Altucher Only Owns 15 Things*, N.Y. TIMES (Aug. 6, 2016), https://www.nytimes.com/2016/08/07/fashion/james-altucher-self-help-guru.html.

21. Ronda Kaysen, *The Millennial Commune*, N.Y. TIMES (July 31, 2015), https://www.nytimes.com/2015/08/02/realestate/the-millennial-commune.html (discussing micro-housing); Alec Wilkinson, *Let's Get Small: The Rise of the Tiny-House Movement*, NEW YORKER (July 25, 2011), https://www.newyorker.com/magazine/2011/07/25/lets-get-small (discussing tiny houses).

22. *See, e.g.*, Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 866–70 (2014) (describing ways property law enables inclusion as well as exclusion); Eduardo M. Peñalver,

that should underlie the legal and theoretical defenses of exclusion and possession: What is the optimal strategy for regulating ownership? Does it make us better off when we amass property and exclude others from it? After all, a—if not the—fundamental question law must face in making regulatory choices is whether or not those choices improve the well-being of those affected.[23] From a utilitarian perspective,[24] if exclusion and possession do not make us better off, we should rethink whether these concepts should be so central to property law.

And indeed, a growing body of literature that empirically examines what increases our felt sense of well-being suggests that we may have possession and exclusion all wrong. Economists and social psychologists who engage in the scientific study of happiness—otherwise known as hedonics[25]—have addressed precisely this issue, and their work has yielded a surprising result: Keeping property all for ourselves does not improve our subjective sense of our own well-being.[26] And perhaps even more counterintuitive, what owners can do with their property to increase their happiness is to share it or even give it away.[27] However much self-made wealth represents the American ideal, there is a growing body of evidence that spending our money prosocially does far more for subjective well-being than acquiring more wealth.[28] Moreover, despite property law's emphasis on exclusion, the way to use property to increase happiness is not to keep others out, but to let them in: Establishing and maintaining social ties, strong and weak alike, is strongly associated with increased subjective well-being.[29] Finally, giving away property can increase happiness by decreasing debt, increasing mobility, and refocusing time and attention on rewarding activities rather than mere objects.[30]

Property as Entrance, 91 VA. L. REV. 1889, 1940–41 (2005) (discussing property as a source of social bonds and interpersonal connection).

23. *See* JOHN BRONSTEEN ET AL., HAPPINESS & THE LAW 24–25 (2015) (arguing the intuitive point that above all, laws seek to, and should seek to, make people better off).

24. This Article adopts such a perspective in making its case for inclusion and dispossession in property. This framework, discussed in more detail in Part II.A, flows from the simple and widely held intuition that law should aspire to improve, on-balance, the lives of those it affects.

25. For one good overview of the field of hedonics, see generally RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2006).

26. I discuss some evidence related to this point in David Fagundes, *Buying Happiness: Property, Acquisition, and Subjective Well-Being*, 58 WM. & MARY L. REV. 1851 (2017); *see infra* notes 57–60.

27. *See, e.g.*, Elizabeth W. Dunn et al., *Spending Money on Others Promotes Happiness*, 319 SCIENCE 1687, 1687–88 (2008); *see also infra* Part II.B (exploring the relationship between one's happiness and charity or inviting others to use one's property).

28. For numerous cross-cultural studies, see *infra* note 62.

29. *See, e.g.*, Lara B. Aknin et al., Does Social Connection Turn Good Deeds into Good Feelings?: On the Value of Putting the "Social" in Prosocial Spending 8–9 (2013) (unpublished manuscript), http://www.hbs.edu/faculty/Publication%20Files/aknin%20dunn%20sandstrom%20norton_ecebf8d6-171f-484e-b4b5-1939bf2b5d8c.pdf.

30. *See infra* notes 81–88.

This Article explores the challenging question of how to incorporate the hedonic upsides of inclusion and dispossession into a body of law that has long been oriented around exclusion and possession. It may seem that the answer is to deemphasize owners' rights,[31] but hedonics evidence suggests that simply taking away property rights would fail to increase owners' subjective well-being.[32] This Article considers three specific contemporary topics in property relevant to inclusion or dispossession—the sharing economy, tax deductions for charitable donations, and property minimalism—and examines different kinds of "choice architecture" that promise to optimize their hedonic upsides.[33] This analysis shows how property law can focus on inclusion and dispossession (the antitheses of exclusion and possession) in a way that increases social well-being while still respecting freedom of ownership. In so doing, this Article challenges the normative appeal of the two notions—exclusion and possession—that lie at the center of property while offering a way forward that preserves rather than tears down the notion of private property.

This Article navigates the under-examined territory of inclusion and dispossession in four steps. Part I provides a brief overview of hedonics and explains why this evidence provides the best basis for making judgments about optimal policy choices in a utilitarian welfarist framework. Part II then outlines the surprising results of numerous hedonics studies about property, which suggest that inclusion and dispossession represent the best strategies for owners to maximize their subjective well-being. The subsequent three Parts provide concrete illustrations of this latter point. Part III turns to a leading inclusion approach to property—the sharing economy—and then shows how it enhances well-being in unappreciated ways and what law can do to facilitate this dynamic. Part IV considers a chief means by which law seeks to encourage voluntary dispossession of property—the charitable donation tax deduction—and shows both why present approaches are suboptimal and how we might remedy them. Part V analyzes a new dispossessive trend—minimalist approaches to real and chattel property—and outlines the counterintuitive reasons that getting rid of property can make us happier, and

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31. This notion is immanent, if not explicitly stated, in the work of progressive property scholars. *See, e.g.*, Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 983 (2009) (arguing that progressive property theorists "advocat[e] removing any presumption in favor of owners' exclusion rights"). *But cf.* Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1066 (2009) (rejecting the notion that progressive property is inconsistent with strong owners' rights).

32. The reason, explained in much more detail *infra* Part II.B, is that the evidence indicates that only volitional inclusive or dispossessive uses of one's property increase subjective well-being. *See* Netta Weinstein & Richard M. Ryan, *When Helping Helps: Autonomous Motivation for Prosocial Behavior and Its Influence on Well-Being for the Helper and Recipient*, 98 J. PERSONALITY & SOC. PSYCHOL. 222, 240 (2010); *infra* Part II.B.

33. *See generally* Eric J. Johnson et al., *Beyond Nudges: Tools of a Choice Architecture*, 23 MARKETING LETTERS 487 (2012) (discussing choice architecture and its applications).

how law can do better to encourage this trend. Finally, the Conclusion reflects on what it would mean to incorporate the inclusion and dispossession into the edifice of private property, showing that these notions do not require us to abandon the institution of ownership but rather point toward a superior way to understand and govern it.

II. THE HEDONIC UPSIDES OF INCLUSION AND DISPOSSESSION

Few would disagree with the claim that governments should pass laws that make affected citizens better off. But what does it mean to increase societal well-being? The most common proxy is monetary wealth, hence the predominance of Gross Domestic Product as an overall measure of nations' well-being. Such proxies may no longer be necessary in light of recent advances in the nascent field of hedonics. These advances allow scholars to measure directly how much a given activity or event increases or decreases an individual's subjective well-being. This research has generated some surprising new insights into what does—and does not—make us happier. Nowhere is this truer than in the context of property, where happiness studies have revealed a weak relationship between possession or exclusion and subjective well-being. These new insights suggest that what increases our happiness is just the opposite: inclusive and dispossessive property strategies. This Part discusses hedonics first in general terms, focusing on its theoretical and empirical underpinnings as well as why it provides the best approach to measuring social welfare. It then catalogues a series of findings about the counterintuitive relationship between happiness and ownership.

A. *HAPPINESS & THE LAW: A BRIEF OVERVIEW*

"Happiness," legal philosopher Matthew Adler recently observed, "is all the rage."[34] This is certainly true with respect to popular culture, where there appears to be a generalized obsession with what makes us happy and how to be happier. Modern bookstores are cluttered with authors giving advice on how to increase happiness.[35] This cultural trend has twinned with a recent efflorescence in the scientific study of happiness—a field specialists call "hedonics"—that empirically examines what external events and individual

34. Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use?*, 62 DUKE L.J. 1509, 1511 (2013).

35. Familiar examples include DALAI LAMA ET AL., THE BOOK OF JOY: LASTING HAPPINESS IN A CHANGING WORLD (2016); MOOREA SEAL, 52 LISTS FOR HAPPINESS: WEEKLY JOURNALING INSPIRATION FOR POSITIVITY, BALANCE, AND JOY (2016). Ironically, a conscious focus on making oneself happier may be counterproductive, since active attempts to raise one's own happiness actually tend to reduce it—a relationship known as the "happiness paradox." This may explain why authors report that their strenuous attempts to raise their own happiness have typically fallen short. *See generally* GRETCHEN RUBIN, THE HAPPINESS PROJECT (2012) (recounting the author's year-long failed attempt to find happiness).

qualities cause people higher or lower affective states.[36] The results of the new hedonics research have been enormously influential, including, as Adler's remark suggests, as a tool for legal analysis.[37] Yet what does "happiness" mean in this context? And how can something that ineffable be measured?

Hedonics literature embraces two competing definitions of well-being. The first equates happiness with psychological affect. Per this definition, we are better off when we feel good and less well off when we feel bad. This kind of happiness—"affective" or "moment by moment" happiness—is studied via a technique known as the experience sampling method ("ESM").[38] ESM studies ask subjects to indicate their affect during randomly chosen moments on a Likert scale, where 1 indicates misery, 7 indicates ecstasy, and 4 indicates indifference. These responses are then connected with subjects' reported activities to identify relationships between one's activities and one's affective state.[39] The second widely used approach defines happiness as having a positive overall assessment of one's life upon reflection.[40] Scholars investigate this kind of subjective well-being using surveys that ask respondents to think about their life overall, and then rate how satisfied they feel with it—hence the term used to describe this kind of happiness, "life satisfaction."[41] The difference may be captured by contrasting someone who feels happy in a given moment watching television (high affective happiness), but who upon

36. *See generally* DANIEL GILBERT, STUMBLING ON HAPPINESS (2006) (detailing a fascinating and highly readable general overview on the scholarly study of happiness).

37. For two leading explorations of the connection between happiness and law, see generally BRONSTEEN ET AL., *supra* note 23 (arguing that happiness analysis provides the optimal framework for evaluating public policy), and LAW AND HAPPINESS (Eric A. Posner & Cass R. Sunstein eds., 2010) (collecting essays from leading legal academics on the merits and drawbacks of happiness analysis).

38. *See* Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 MINN. J.L. SCI. & TECH. 755, 761 (2008) (describing ESM as the "gold standard" of measuring affective happiness).

39. Earlier versions of ESM research asked subjects to note down in a journal their level of happiness at random times throughout the day. BRONSTEEN ET AL., *supra* note 23, at 17 (describing how Likert scales work). More recently, cellphone applications have become a leading means of gathering this data. *Id.* at 11–12 (describing ESM technology); *EmotionSense App Measures Smartphone Users' Happiness*, FAST CO. (May 8, 2013), https://www.fastcompany.com/3009456/emotionsense-app-measures-smartphone-users-happiness. For an overview of ESM and an explanation of the method's reliability, see JOEL M. HEKTNER ET AL., EXPERIENCE SAMPLING METHOD: MEASURING THE QUALITY OF EVERYDAY LIFE (2007).

40. *See* Deirdre N. McCloskey, *Happyism*, NEW REPUBLIC (June 7, 2012), https://newrepublic.com/article/103952/happyism-deirdre-mccloskey-economics-happiness ("Pleasure is a brain wave right now. Happiness is a good story of your life.").

41. Numerous leading assessments of aggregate happiness use the life satisfaction measure, such as the Eurobarometer and the Gallup World Poll. It is also prevalent, though far from predominant, in academic studies of hedonics. *See, e.g.*, Wendy Johnson & Robert F. Krueger, *How Money Buys Happiness: Genetic and Environmental Processes Linking Finances and Life Satisfaction*, 90 J. PERSONALITY & SOC. PSYCHOL. 680, 680–81 (2006) (using life satisfaction measures to analyze the relationship between income and happiness).

reflection would report dissatisfaction with their life as a couch potato (low life satisfaction).[42]

The notion of measuring happiness empirically has met with understandable skepticism, given the counterintuitive notion of using empirical methods to measure something so ephemeral. But due to this outsized skepticism, happiness studies have been subjected to, and passed, an inordinate number of tests of both reliability and validity. In terms of reliability, the same subjects are generally tested and re-tested regarding the same subject matter several times, and they tend to report the same results.[43] And in terms of validity, self-reports of happiness tend to correlate with objective indicia of high affect, such as frequent smiling, smiling with the eyes, sleep quality, observations by third parties, and good health.[44] In fact, neuropsychologists have used EEGs to show that self-reports of affective happiness tend to match with the frontal-lobe areas of the brain on which those responses typically register (right side for negative affect, left side for positive ones).[45]

But even if hedonics research bears the indicia of reliable empirical work, what does it have to do with law? The short answer is: just about everything. At least from a utilitarian perspective, the purpose of passing any law is to make those affected by it better off. If we could predict that even the best-intentioned statute was only going to result in making everyone miserable, it would be hard to justify its passage.[46] Without evidence of a given policy's impact on social well-being, however, it is difficult to make this assessment.

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42. The same example could work in reverse: Consider someone who sincerely believes the moral thing to do is serve the poor, but who also hates working in soup kitchens. They would likely report very low affective happiness during the portions of their life spent ladling out chicken noodle to the less fortunate, but would probably indicate high life satisfaction due to a sense of having devoted their life to an important cause. But for the purposes of this Article, this distinction is less important because the research showing that sharing or giving away property makes people happier uses both measures of subjective well-being, and indeed many hedonics scholars have suggested that the best approach is to use both affective and life satisfaction measures to get the richest sense of respondents' happiness. *See* Daniel Kahneman & Jason Riis, *Living, and Thinking About It: Two Perspectives on Life*, *in* THE SCIENCE OF WELL-BEING 285, 287–88 (Felicia A. Huppert et al. eds., 2005).

43. *See* BRONSTEEN ET AL., *supra* note 23, at 13 (discussing reliability of hedonics studies).

44. *Id.* at 13–14 (discussing validity of hedonics studies).

45. *See* Richard J. Davidson, *Affective Style, Psychopatholgy, and Resilience: Brain Mechanisms and Plasticity*, 55 AM. PSYCHOLOGIST 1196, 1202 (2000); Richard J. Davidson et al., *Emotion, Plasticity, Context, and Regulation: Perspectives from Affective Neuroscience*, 126 PSYCHOL. BULL. 890, 899–900 (2000).

46. This is true, at least, from a utilitarian perspective where the goal of any change in law is to cause an aggregate increase in social welfare. Other perspectives that look to deontological or rights-based considerations may not be as susceptible to a happiness analysis. That said, there is evidence about the effect of some distributional policies on happiness, such as the finding that higher taxes correlate with increased happiness. This work suggests that higher-taxation states tend to spend revenue on public goods such as quality transportation, health care, aesthetics and recreational opportunities, all of which make people happier. WORLD HAPPINESS REPORT 2017, (John Helliwell et al. eds, 2017), http://worldhappiness.report/ed/2017.

Jeremy Bentham's original version of utilitarianism used subjective well-being as his standard for welfare in articulating his cornerstone theory of utilitarianism.[47] But while he argued that states should seek to pass laws that led to the "greatest happiness" (i.e., the highest net increase in subjective well-being), Bentham's project was dogged by the lack of any reliable method by which to evaluate the net subjective well-being created by public policy.[48] The emergence of a body of research that empirically measures the effect of policy on well-being has enabled the kind net welfare analysis that Bentham pined for but was unavailable in his day.

Subjective well-being is not growing in influence as a criterion only within the academy. A number of world leaders, including Former French President Nicolas Sarkozy, Former British Prime Minister David Cameron, and Former President Barack Obama have all advocated the use of happiness studies as a criterion for evaluating public policy.[49] The United Nations General Assembly has embraced this approach as well.[50] Bhutan has scrapped gross domestic product in favor of gross national happiness to measure national welfare.[51] Legal scholars have also used empirical insights on happiness to make a number of novel and important points about the law. Bronsteen, Buccafusco and Masur have shown that protracted civil litigation may not be as bad as generally believed, since it may give plaintiffs a chance to adapt to their injuries and accept a settlement that more accurately reflects the actual costs of their injury.[52] These authors have also explored the implications of hedonics to the criminal law setting with the concerning result that short sentences may punish lightweight offenders disproportionately because the subjective costs of imprisonment are felt most keenly at the outset of a sentence, and diminish substantially thereafter.[53] Bagenstos and Schlanger have shown that juries tend to make affective forecasting errors when assessing the damages experienced by disabled plaintiffs, resulting in inflated

47. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, at ccv (1789).

48. *See generally* David Colander, *Edgeworth's Hedonimeter and the Quest to Measure Utility*, 21 J. ECON. PERSP. 215 (2007) (discussing the difficulty of finding an objective metric to measure subjective well-being).

49. *See* Elizabeth Kolbert, *Everybody Have Fun: What Can Policymakers Learn from Happiness Research?*, NEW YORKER (Mar. 22, 2010), https://www.newyorker.com/magazine/2010/03/22/everybody-have-fun. The United Kingdom has begun to regularly monitor and publish statistics related to well-being. *See* OFF. FOR NAT'L STAT., MEASURING NATIONAL WELL-BEING: LIFE IN THE UK (2017), https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/articles/measuringnationalwellbeing/apr2017.

50. *Happiness Should Have Greater Role in Development Policy—UN Member States*, UN NEWS (July 19, 2011), http://www.un.org/apps/news/story.asp?NewsID=39084.

51. Adler, *supra* note 34, at 1516–17 (discussing Bhutan's GDH approach).

52. John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1537–39 (2008).

53. John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1046–49 (2009).

judgments.[54] Griffith argued that the weak relationship between wealth and subjective well-being supplies a convincing argument in favor of progressive tax policy.[55] And Huang suggested that securities regulators can and should take into account investors' and others' affect and happiness when crafting financial regulations.[56] For all these reasons, the emergence of reliable empirical measures of net social subjective well-being has opened up new vistas in evaluating both public policy and legal rules.

B. Inclusion, Dispossession, and Happiness

The area of law in which the new hedonics research has the most salience, though, may be property. An increasing volume of happiness research appears to show that the longstanding assumption that getting and keeping property makes us better off is deeply flawed. One valence of this literature shows that acquisition of property does not necessarily increase subjective well-being. While debate on this point remains fraught, there is at best a weak positive relationship between increased income and one's affective well-being after one reaches a threshold where one's basic necessities are met.[57] With respect to physical property, a number of studies show that buying homes or luxury goods does not lead to appreciably higher subjective well-being whether measured by affect or life satisfaction.[58] There is a growing body of evidence that purchasing opulent homes and fancy cars can reduce

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54. Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 769–73 (2007).

55. Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1365 (2004).

56. Peter H. Huang, *How Do Securities Laws Influence Affect, Happiness, & Trust?*, 3 J. BUS. & TECH. L. 257, 259–61 (2008).

57. This surprising non-relationship is known colloquially as the "Easterlin paradox." *See generally* Richard A. Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, *in* NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ 89 (Paul A. David & Melvin W. Reder eds., 1974). Many scholars have followed it up with other studies looking at the relationship between wealth and subjective well-being. For a summary of this work, see LAYARD, *supra* note 25, at 41–54 (citing numerous studies for the proposition that increased income has a negligible effect on subjective well-being after a subsistence point). The leading contemporary skeptics of the Easterlin paradox are economists Justin Wolfers and Betsey Stevenson. Their findings, though, have at best a small effect size and look only at global, not moment-by-moment happiness. *See* Betsey Stevenson & Justin Wolfers, *Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2008, at 1–4.

58. *See, e.g.*, Norbert Schwarz & Jing Xu, *Why Don't We Learn from Poor Choices? The Consistency of Expectations, Choice, and Memory Clouds the Lessons of Experience*, 21 J. CONSUMER PSYCHOL. 142, 143–44 (2011) (showing that buyers of high-end luxury goods ended up with the same level of subjective well-being as those who bought standard equivalent goods); Grace Wong Bucchianeri, The American Dream or the American Delusion? The Private and External Benefits of Homeownership for Women 18–22 (Apr. 1, 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877163 (using both moment-by-moment and global measures to show that homeowners exhibit about the same level of happiness as similarly situated renters).

happiness. The thrill of a newly acquired good wears off quickly thanks to a process known as "hedonic adaptation," and purchasers are often left with happiness-diminishing debt loads, soul-crushing commutes, and buyer's remorse.[59]

I summarized these findings and explored their implications for law in much more detail in earlier work. This happiness research implied a fairly straightforward recommendation: Individuals should acquire property only sparingly, and the state should not unthinkingly promote acquisition. That work, though, intentionally left aside a distinct line of happiness research about the use of property that raised even harder legal questions for owners and the state alike. If getting more property does not make us happier, then where does that leave those who are already owners? If exercising the right to acquire property does not make us happier, how might exercising the right to use counterbalance this? Here, the answers indicated by research are even more counterintuitive. The short answer appears to be the dead opposite of what law and culture suggest: Property makes us happiest not when we maximize its exclusion and possession for ourselves, but when we share it with others, donate it to help those in need, or even just give it away entirely.

First, consider charity. Multi-billionaires like Bill Gates and Warren Buffett appear proudest not of the work that built their wealth, but of the large-scale charitable donations they have made with their fortunes.[60] Hedonics evidence suggests that this outcome is not limited to the obscenely rich. One of the most robust findings in the study of hedonics is that people who report giving more to charity also report higher subjective well-being (both in terms of affective happiness and life satisfaction).[61] This result is not limited to the West or to the wealthy. Research has found that there is a strong relationship between charitable giving and happiness in countries as different as Canada and Uganda.[62] Even small donations can generate boosts in well-

59. *See* Fagundes, *supra* note 26, at 1869–79 (summarizing research supporting the conclusion that acquisition tends to reduce happiness).

60. Buffett, for example, recently announced that he was giving away 99% of his wealth upon his death, and that he "couldn't be happier with that decision." Warren Buffett, *My Philanthrophic Pledge*, FORTUNE (June 16, 2010, 8:06 AM), http://archive.fortune.com/2010/06/15/news/newsmakers/Warren_Buffett_Pledge_Letter.fortune/index.htm.

61. *See* ELIZABETH DUNN & MICHAEL NORTON, HAPPY MONEY: THE SCIENCE OF HAPPIER SPENDING 113 (2013) ("Across the 136 countries studied . . . donating to charity had a similar relationship to happiness as doubling household income.").

62. The authors of the major cross-cultural study on this topic concluded that their "findings suggest that the reward experienced from helping others may be deeply ingrained in human nature, emerging in diverse cultural and economic contexts." Lara B. Aknin et al., *Prosocial Spending and Well-Being: Cross-Cultural Evidence for a Psychological Universal*, 104 J. PERSONALITY & SOC. PSYCHOL. 635, 635 (2013) [hereinafter Aknin et al., *Prosocial Spending*]. The survey data they observed from 136 countries indicated that prosocial spending is strongly correlated with higher happiness. The authors also conducted their own studies showing that this effect was causal, and that it held true in both wealthy Western countries (Canada) and poorer non-Western ones (South Africa). *Id.* ("This research provides the first support for a possible

being.[63] And while one might reasonably raise a correlation/causation objection to these findings, charitable donation does appear to predict and not just be associated with subjective well-being, as demonstrated by a number of different longitudinal studies.[64] Perhaps most surprising, charitable donation can make people feel wealthier even as it reduces their actual wealth.[65] The reason appears to be that acting magnanimously makes people feel not only charitable, but powerful, and reminds them of their wealth status in the world relative to the more needy.[66]

Not all giving, though, is created equal from a happiness perspective. One requirement is that you have to mean it. That is, the positive relationship between charity and happiness is largely a side effect of sincere generosity; when people are motivated to give because they feel coerced to do so, the hedonic upsides of prosocial giving tend to evaporate.[67] Second, charitable

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psychological universal: Human beings around the world derive emotional benefits from using their financial resources to help others (*prosocial spending*)."); *see* Elizabeth W. Dunn et al., *Prosocial Spending and Happiness: Using Money to Benefit Others Pays Off*, 23 CURRENT DIRECTIONS PSYCHOL. SCI. 41, 43–45 (2014) (summarizing numerous studies showing that the clear consensus of the evidence indicates that spending prosocially is strongly related to increased happiness); *see also* DUNN & NORTON, *supra* note 61, at 106–33 (discussing the relationship between giving and happiness). This effect is cross-cutting not only with respect to geography, culture, and wealth, but even age. A study of children found that toddlers exhibited more external signs of affective happiness when they engaged in "costly giving" (giving that deprived them of something) than when they kept or used things for themselves. Lara B. Aknin et al., *Giving Leads to Happiness in Young Children*, 7 PLOS ONE 1, 3 (2012). Some scholars have argued that the causation is otherwise, and that happiness leads to generosity. Silke Boenigk & Marcel Lee Mayr, *The Happiness of Giving: Evidence from the German Socioeconomic Panel That Happier People Are More Generous*, 17 J. HAPPINESS STUD. 1825, 1830 (2016). But there is no reason that the causation needs to run in only one direction; it could well be the case that happier people are more generous, and also that generous people become happier. It also bears noting that the study that came to this conclusion used life satisfaction as its benchmark for happiness rather than the more meaningful standard of affect. *Id.* at 1827.

63. *See* DUNN & NORTON, *supra* note 61, at 107 ("New research shows that spending even small amounts of money on others can make a difference for our own happiness."); Lalin Anik et al., *Prosocial Bonuses Increase Employee Satisfaction and Team Performance*, 8 PLOS ONE 1, 5 (2013) (showing that enabling workers to give even small prosocial bonuses to other workers increased their happiness more than simply giving those workers self-oriented bonuses).

64. Aknin et al., *Prosocial Spending*, *supra* note 62, at 646; Elizabeth W. Dunn et al., *Spending Money on Others Promotes Happiness*, 319 SCIENCE 1687, 1687–88 (2008) (illustrating this point by citing several studies, including findings that prosocial spending predicted happiness longitudinally and that participants who were randomly assigned to spend money on others experienced greater affective happiness than those who spent it on themselves).

65. Zoë Chance & Michael I. Norton, I Give, Therefore I Have: Giving and Subjective Wealth 3 (2011) (unpublished manuscript), http://faculty.som.yale.edu/zoechance/documents/zchancepaper1-jcr2ndround-givingandsubjectivewealth.pdf (cataloguing five studies showing that giving money away made people feel subjectively wealthier while also increasing their affective well-being).

66. *Id.* at 5–6.

67. Weinstein & Ryan, *supra* note 32, at 240 ("When individuals volitionally help, they experience greater autonomy, relatedness, and competence; need satisfactions that in turn appear to enhance the helper's sense of well-being. These benefits of volition also appear to

giving increases subjective well-being particularly where it leads to a personal connection with the recipient of the gift. This links two activities that are both strongly related to happiness: giving and social connection.[68] A donation to any identifiable recipient appears to enhance its hedonic impact, but those impacts appear to be somewhat stronger for members of one's local community and/or for those with whom one has strong social ties (e.g., family, close friends). Third, giving generates the most happiness when it produces an identifiable impact, likely because it allows the giver to observe and experience in a concrete way the effect of their good deed.[69] This means that targeted donations to individuals or small groups (such as DonorsChoose.org, which allows people to give specific needed goods to specific classrooms of children in need of them) may do more to enhance donors' subjective well-being than monetary donations to broad-based charities (such as UNICEF, which more diffusely helps with a number of different broad-based initiatives against third-world hunger).

Another method of sharing property is not to give it away entirely to those in need, but to invite others to use it. Here, too, studies indicate that this form of sharing property generates much higher well-being than holding on to our things for ourselves alone. The Law may enable owners to engage in absolute exclusion,[70] and popular culture may embrace a greed-is-good mentality,[71] but evidence appears to show that social connection rather than maximizing wealth is the best strategy for increasing our subjective well-being. If the most robust finding in this literature is that prosocial giving enhances happiness, likely the second most robust is that having and expanding one's network of social connections also does wonders for one's subjective well-being.[72] "We

radiate to the recipients of help . . . ."). Other work on neural responsiveness, though, confirms that even mandatory giving can generate affective well-being, though notably less than voluntary giving does. *See* William T. Harbaugh et al., *Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations*, 316 SCIENCE 1622, 1622 (2007).

68. Aknin et al., *supra* note 29, at 2 (showing that people exhibited more affective happiness when they gave charitable donations in a way that facilitated social connection with the recipient).

69. Lara B. Aknin et al., *Making a Difference Matters: Impact Unlocks the Emotional Benefits of Prosocial Spending*, 88 J. ECON. BEHAV. & ORG. 90, 92 (2013); Melanie Rudd et al., *Getting the Most out of Giving: Concretely Framing a Prosocial Goal Maximizes Happiness*, 54 J. EXPERIMENTAL SOC. PSYCHOL. 11, 14 (2014) (finding that respondents reported more affective happiness after contemplating a specific prosocial goal like increasing local recycling than an abstract one like saving the environment).

70. *See* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1841–42 (2006) (discussing the "hermit's right" as an extreme iteration of the right to exclude).

71. Films like *Wall Street* may purport to be morality tales about the downfalls of avarice, but far more people remember Gordon Gekko's "greed is good" dictum than the film's protagonist eventually being tearfully arrested for insider trading.

72. *See, e.g.*, Alan B. Krueger, *Are We Having More Fun Yet? Categorizing and Evaluating Changes in Time Allocation*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 193 (2007) (finding that of all ranked activities, people reported the highest affective well-being during time spent with family and friends).

need other people, and we need to be needed," happiness scholar Richard Layard observed; "[i]ncreasingly, research confirms the dominating importance of love."[73] And while the relationship between happiness and sociality is strongest with respect to strong ties like family and close friends, research indicates that even weak ties can significantly boost our subjective well-being.[74] The general connection between happiness and rich social connection is also robust across nations and socio-economic strata,[75] having been observed among poorer populations worldwide,[76] and also among traditionally disadvantaged groups.[77] One interesting study found that Benedictine nuns in isolated monasteries reported extremely high levels of life satisfaction, thanks in large part to their living in a close-knit, mutually respectful community.[78]

By contrast, studies have also shown that materialism—the attitude that one's own wealth maximization matters more than anything else, including social connections—tends to reduce one's happiness in large part because of its deleterious effects on one's social networks. One study found that as people were reminded of their own wealth, they tended to emphasize their

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73. LAYARD, *supra* note 25, at 66; *see also* DANIEL M. HAYBRON, THE PURSUIT OF UNHAPPINESS: THE ELUSIVE PSYCHOLOGY OF WELL-BEING (2008) (summarizing research showing that happiness seems to come primarily from good social relationships). *See generally* DUNN & NORTON, *supra* note 61 (assessing the consensus of research and finding that, regardless of whether money is involved, the number one thing that makes people happy is spending time with loved ones).

74. *See* Gillian M. Sandstrom & Elizabeth W. Dunn, *Social Interactions and Well-Being: The Surprising Power of Weak Ties*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 910, 920 (2014) (summarizing research showing that weak ties are positively related to social and economic well-being as well, which in turn "suggest[s] that we should not underestimate the value of our acquaintances—interactions with weak ties are related to our subjective well-being and feelings of belonging").

75. *See generally* Tanya Diaz & Ngoc H. Bui, *Subjective Well-Being in Mexican and Mexican American Women: The Role of Acculturation, Ethnic Identity, Gender Roles, and Perceived Social Support*, 18 J. HAPPINESS STUD. (forthcoming 2018) (finding the same result in populations of Latinas in Mexico and the U.S.); Andrés Rodríguez-Pose & Viola von Berlepsch, *Social Capital and Individual Happiness in Europe*, 15 J. HAPPINESS STUD. 357, 372 (2014) (identifying strong relationship between social connection and happiness in nations across Western Europe); Hiromi Taniguchi, *Interpersonal Mattering in Friendship as a Predictor of Happiness in Japan: The Case of Tokyoites*, 16 J. HAPPINESS STUD. 1475, 1477 (2015) (study of Tokyoites finding that the perception of having a rich social network is strongly associated with happiness).

76. *See* Victoria Reyes-García et al., *Subjective Wellbeing and Income: Empirical Patterns in the Rural Developing World*, 17 J. HAPPINESS STUD. 773, 786–87 (2016) (finding that income is weakly related to happiness while social connection is strongly related to happiness among the rural poor in Asia, Africa, and Latin America).

77. *See* Ann W. Nguyen et al., *Social Support from Family and Friends and Subjective Well-Being of Older African-Americans*, 17 J. HAPPINESS STUD. 959 (2016) (finding family contact highly correlated with life satisfaction among older African-Americans). *See generally* Juan Battle & Alfred DeFreece, *The Impact of Community Involvement, Religion, and Spirituality on Happiness and Health Among a National Sample of Black Lesbians*, 2 WOMEN, GENDER, & FAMILIES COLOR 1 (2014) (finding a strong relationship between social connection and happiness among Black lesbians).

78. Tomáš Janotík, *Empirical Analysis of Life Satisfaction in Female Benedictine Monasteries in Germany*, 67 REVUE ÉCONOMIQUE 143, 162 (2016).

separateness from others, to be less helpful toward others, and to express preferences for solitude.[79] A related study found that invoking materialist mindsets in respondents caused them to think about the world in terms of money, thereby leading them to want to work more and socialize less—a strategy effective for increasing income but costly for increasing happiness.[80] The relationship between sharing and happiness with respect to social connection thus works in two connected ways. Using one's property to enhance social connections tends to increase happiness not only by virtue of increasing one's own sense of connection with strong and weak ties alike, but also because it creates a mindset in which people are more important than money, thereby generating a feedback loop that incentivizes us to use our property in the various kinds of prosocial ways most likely to increase our happiness.

Another simple way to increase happiness is to dispose of property. While law protects possession and society implicitly rewards those who amass and keep stuff (not to mention the growing fascination with "hoarders" who compulsively covet their possessions), this strategy may be toxic to one's happiness. Despite the negative associations with the term "downsizing,"[81] the growing trend toward simplicity reflected in a growing number of tiny houses and micro-housing developments, a proclivity toward sharing, and a minimalist approach to life may represent a more effective path toward higher subjective well-being. A number of studies have found that acquisition of property does not increase—and may even decrease—our subjective well-being. Summarizing research in Germany and the United States, scholars recently observed that "there is almost no evidence that buying a home—or a newer, nicer home—increases happiness."[82] The same holds true for chattel

79. *See generally* Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 SCIENCE 1154, 1156 (2006) (concluding that increased awareness of money tends to foment a mindset of independence in which people want to be independent from others and thereby reject social connectedness).

80. Cassie Mogilner, *The Pursuit of Happiness: Time, Money and Social Connection*, 21 PSYCHOL. SCI. 1348, 1352 (2010) ("Focusing on money motivates one to work more, which . . . (although productive) translate into greater happiness.").

81. "Downsizing" is, after all, often a euphemism for major corporate layoffs. Adrian Wilkinson, *Downsizing, Rightsizing, or Dumbsizing? Quality, Human Resources, and the Management of Sustainability*, 16 TOTAL QUALITY MGMT. & BUS. EXCELLENCE 1079, 1080 (2005) (defining "downsizing" as "the conscious use of permanent personnel reductions" as a means of enhancing corporate performance).

82. DUNN & NORTON, *supra* note 61, at 2. *See* Naoki Nakazato et al., *Effect of Changes in Living Conditions on Well-Being: A Prospective Top–Down Bottom—Up Model*, 100 SOC. INDICATORS RES. 115, 129 (2011) (reporting that German respondents did not indicate any greater overall life satisfaction after purchasing either their first home or a newer, nicer home); Bucchianeri, *supra* note 58, at 11 (using both life satisfaction and affective happiness measures to show that homeowners in Ohio reported no greater subjective well-being than similarly situated renters). In a related study, while college first-year students predicted that the quality of their upper-class housing assignments would have huge impacts on their happiness, studies of those same students

property, particularly luxury goods like fancy cars and oversized TVs. While people predict that they will be happier with such items, post-purchase surveys reveal that buying more expensive high-end goods does not increase subjective well-being any more than acquiring the functional, run-of-the-mill version of the same thing.[83]

Why doesn't getting stuff, and in particular, getting nicer, fancier stuff make us happier? The reasons are several. The leading one is hedonic adaptation. This is the familiar process by which we grow used to possessions, so that while a big new home or a flashy shirt might bring us a spike of subjective well-being, that feeling fades quickly, leaving us conscious mainly of the downsides of our property.[84] These downsides often generate more negative affect than the purchase brought. Chief among these is debt, which haunts people long after they have hedonically adapted to the novelty of the McMansion or Mercedes they went into shock to buy.[85] Large-scale purchases often require more attention and upkeep than their simpler counterparts, so that they reduce owners' free time. This is salient for happiness because research has shown that "time affluence" is a much greater driver of subjective well-being than monetary affluence.[86] Compulsive ownership also risks a vicious cycle researchers have termed the "hedonic treadmill," whereby the fading thrill of one thing leads to a desire to recapture the feeling by acquiring even more possessions with increasingly fleeting effect. This decreasing marginal happiness is further evidenced by studies indicating that increasing wealth tends to make people both more materialistic (which is associated with decreased happiness),[87] as well as a loss of the ability to savor both future purchases and life's many small, free pleasures.[88]

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years later found that their happiness was unrelated to the quality of their housing (and driven much more by the quality of their social relationships). *See* Elizabeth W. Dunn et al., *Location, Location, Location: The Misprediction of Satisfaction in Housing Lotteries*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1421, 1429 (2003).

83. *See* Schwarz & Xu, *supra* note 58, at 143–44.

84. For a good overview of hedonic adaptation, see Shane Frederick & George Loewenstein, *Hedonic Adaptation*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302 (Daniel Kahneman et al. eds., 1999).

85. *See* DUNN & NORTON, *supra* note 61, at 95 (discussing the outsized hedonic costs of debt and observing that "what we owe is a bigger predictor of our happiness than what we make").

86. *Id.* at 54–65 (discussing "time affluence" and its greater effect on subjective well-being than monetary affluence); *see also* Tim Kasser & Kennon M. Sheldon, *Time Affluence as a Path Toward Personal Happiness and Ethical Business Practice: Empirical Evidence from Four Studies*, 84 J. BUS. ETHICS 243, 243–44 (2009) (describing how "time affluence" may benefit employee well-being).

87. SONJA LYUBOMIRSKY, THE MYTHS OF HAPPINESS 144 (2014) (summarizing research indicating that acquiring wealth makes us more conscious of and desirous for additional wealth).

88. Jordi Quoidbach et al., *The Price of Abundance: How a Wealth of Experiences Impoverishes Savoring*, 41 PERSONALITY & SOC. PSYCHOL. BULL. 393, 400–02 (2015); Jordi Quoidbach et al., *Money Giveth, Money Taketh Away: The Dual Effect of Wealth on Happiness*, 21 PSYCHOL. SCI. 759, 761 (2010) ("Thus, wealth may fail to deliver the happiness one might expect because of its detrimental consequences for savoring.").

C. *Toward Inclusion and Dispossession*

A quick glimpse at property in law or culture suggests that what matters is getting and having things. From Blackstone's despotic dominion[89] to Mr. Burns declaring that his solitary domain is "excellent,"[90] selfish and nearly limitless acquisition seems to be what law protects and what culture glorifies. But does this focus on materialism actually make us better off? The emergent field of hedonics has allowed us to measure subjective well-being directly, and the evidence it has produced suggests that the answer is no, and that in fact just the opposite is true. Yet the emerging empirical reality of happiness's relationship with inclusion and dispossession lies in stark tension with the law's staunch policies of protecting and incentivizing the possession of property. Assuming the familiar premise that law seeks to make those it affects better off, radical rethinking of these policies appears in order. But what in particular should the state do if possession does not actually increase societal well-being? One plausible but inadvisable answer is to weaken traditional property crime protections like trespass or theft laws. These laws serve valuable functions in terms of enhancing overall societal well-being. For one thing, security in one's possessions is a great source of psychological health, while a sense that one's property lacks security against unauthorized incursions tends to decrease happiness.[91] Moreover, all the evidence that dispossession of property increases subjective well-being refers to *voluntary* dispossession by owners themselves. These studies have nothing to say about forced dispossession by third parties or the state, and what evidence we have is consistent with the intuition that forced property losses reduce happiness significantly.[92]

This is not to say that law should simply remain indifferent. The challenge becomes to implement strategies that encourage owners to engage in this conduct optimally while preserving the kind of freedom of ownership that is an essential prerequisite for happiness-increasing uses of property. The following three Parts explore different means by which the state may do this:

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89. BLACKSTONE, *supra* note 13, at 1.

90. *See* Kory Grow, *Excellent, Smithers: Harry Shearer's 10 Best 'Simpsons' Characters*, ROLLING STONE (May 14, 2015), https://www.rollingstone.com/tv/lists/excellent-smithers-harry-shearers-10-best-simpsons-characters-20150514/montgomery-burns-20150514.

91. The most famous articulation of the psychic costs of state limitation of property rights is Michelman's work on "demoralization costs." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). Michelman's foundational account focuses on two aspects of demoralization costs. One is the psychic costs inflicted on owners whose own property is divested from them by the state. The other is the "lost future production" resulting from other owners' realization that they, too, might be dispossessed. *Id.*

92. *See, e.g.*, Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, *in* THE URBAN CONDITION: PEOPLE AND POLICY IN THE METROPOLIS 151, 151 (Leonard J. Duhl ed., 1963) (studying forced dislocation in Boston's former West End and concluding that "forced dislocation from an urban slum is a highly disruptive and disturbing experience").

by passing regulations favorable to the nascent sharing economy; by crafting charitable donation incentives to more efficiently encourage prosocial spending; and by facilitating the growing social trend toward reducing ownership of both real and chattel property. In each of these areas, the state can nudge people toward an approach to property that honors ownership while steering clear of possessive materialism, thereby increasing overall social well-being in the process.

III. HAPPINESS, INCLUSION, AND THE SHARING ECONOMY

A. *PROPERTY, SHARING, AND REGULATION*

While the right to exclude predominates in theoretical debates about property, the most significant development in the actual use of property in the past decade has been an inclusion strategy: the sharing economy.[93] The emergence of application-based, peer-to-peer platforms has allowed consumers to acquire services directly from providers instead of using a commercial intermediary. Need a ride someplace or a room for the night? It is no longer necessary to contact a cab company's central dispatch to send one of their drivers, or to call around to see which hotels have free rooms. Apps like Uber and Lyft connect users directly with drivers immediately available in the area, while Airbnb and VRBO can connect consumers with locals who are eager to rent their place or even just a room. This phenomenon has not only made it easier for consumers to acquire services, but also for providers to enter markets. The people supplying rides or rooms are not professional drivers or hoteliers. Rather, they are often[94] regular folks seeking to take advantage of excess capacity and using the platform-based sharing economy apps to avoid having it go to waste and making a few extra bucks. The sharing economy stretches widely enough that nearly every familiar or obscure service may be acquired on a peer-to-peer basis via dedicated online

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93. Writers refer to this phenomenon in many ways: the platform economy, the gig economy, the access economy, and the person to person ("p2p") economy, among others. This Article will use the term "sharing economy" for a couple of reasons: First, I think the term "sharing economy" is the primary way people refer to it; and second, my argument later is that whether these platforms enable actual sharing (i.e., gratuitous transfers) should matter for how we regulate them. That said, there are a profusion of other terms people have used for this phenomenon that strike me as equally plausible, such as the platform economy, the access economy, the gig economy, the p2p economy, and probably others. *See* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 88–89 (2016) (discussing the profusion of nomenclature for this economic trend).

94. There are some individuals participating in Uber or Airbnb that are professional drivers or hoteliers respectively. Sofia Ranchordás, *On Sharing and Quasi-Sharing: The Tension Between Sharing-Economy Practices, Public Policy and Regulation, in* THE SHARING ECONOMY: POSSIBILITIES, CHALLENGES, AND THE WAY FORWARD 38 (Pia A. Albinsson & B. Yasanthi Perera eds., forthcoming 2018) (distinguishing between "sharing", defined as individuals seeking to sell off excess capacity in their homes or cars, and "quasi-sharing", defined as entities using app-based p2p means of engaging in traditional commerce).

platforms: a gourmet farm-to-table meal,[95] a pet sitter,[96] even someone to wait in line on your behalf for the latest Apple product (or anything else).[97]

The emergence of the sharing economy poses difficult regulatory challenges. Most laws that could apply to the sharing economy—contracts rules, labor regulations, building codes—predate its emergence. Courts and scholars alike have struggled to determine whether sharing can fit into these extant regulatory schemes, or whether this new modality of commerce requires novel laws to govern it.[98] Scholars concerned with the sharing economy debate whether it can and should be subject to traditional taxation,[99] whether longstanding antidiscrimination principles can address the race bias issues that arise in a decentralized economy,[100] and whether well-established takings law invalidates restrictions on short-term rental restrictions proposed for housing-sharing platforms.[101] Courts occupy themselves with similar questions, such as whether longstanding local taxicab regulations apply to ride-share services like Uber and Lyft.[102] As the sharing economy continues to grow into a dominant means of economic exchange,

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95. The Hartman Group, *"Uber" Your Cooking: The Sharing Economy Comes to Your Kitchen*, FORBES (May 13, 2015, 11:12 AM), http://www.forbes.com/sites/thehartmangroup/2015/05/13/uber-your-cooking-the-sharing-economy-comes-to-your-kitchen.

96. Stephanie Miles, *5 Pet Sitting Marketplaces in the 'Sharing Economy'*, STREET FIGHT (Aug. 6, 2014), http://streetfightmag.com/2014/08/06/5-pet-sitting-marketplaces-in-the-sharing-economy.

97. *Wait in Line*, TASKRABBIT, https://www.taskrabbit.com/m/gen-help/waiting-in-line (last visited Mar. 13, 2018).

98. As Kellen Zale put it:

> [A] polarized debate has erupted between those who contend that the activities taking place within the sharing economy are so novel that no laws apply to those engaging in those activities, and those who argue that the sharing economy should be treated no differently than its analog counterparts, such as hotels and taxis.

Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 503 (2016); *see also* Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 149–50 (2016) (reviewing the application of current law to the sharing economy and concluding that sharing is sufficiently different than other forms of economic activity that it warrants a distinct response).

99. *See generally* Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989 (2016) (exploring how goods and services of the sharing economy should be regulated in the context of taxation).

100. *See generally* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017) (examining existing public accommodation laws and arguing that these laws must change to address discrimination in the platform economy).

101. *See* Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557, 560 (2015) (considering whether short-term rental restrictions equate to "unconstitutional takings of private property without just compensation").

102. *See* Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html (recounting the series of lawsuits that raised these issues and describing their varied outcomes).

law must make decisions about how to regulate it, and those choices will dictate the sharing economy's future.[103]

The legal literature that addresses the problem of regulating sharing has propounded a variety of possible solutions.[104] Kellen Zale has highlighted the social costs of widespread activities that are individually costless but collectively harmful.[105] Orly Lobel has argued that the disruptiveness of these new modalities of commerce is a feature, not a bug, of the regulation of novel markets. And Rashmi Dyal-Chand has posited that the sharing economy represents a novel kind of coordinated market that warrants radically different regulation than traditional capitalist systems.[106] These normative takes on the sharing economy, and nearly all others like them, share a single feature in common: They analyze the sharing economy using the traditional tools of social-cost economics, looking primarily to incentive effects, market failures, and the optimal balance between regulation and free commerce.[107]

B. Sharing as Happiness: Four Examples

The approaches discussed in the previous Subpart have produced valuable insights about the sharing economy, and their methodology represents a plausible approach. The tools of traditional economics-inflected cost-benefit analysis indeed seem like a plausible way to think about regulating a new form of commerce. But focusing only on incentives or market failures misses much of what is distinctive about the sharing economy. The sharing economy is more than just a novel and efficient form of commercial exchange. Many who observe and participate in it extol the capacity of the sharing economy to create community, generate creativity, and reshape individuals' relationship with property in ways that are not captured by the traditional paradigms used by contemporary scholarship.[108] This is not merely

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103. Lobel, *supra* note 93, at 90 (observing that we are "at an all-time high in regulatory permitting, licensing, and protection," and that "[t]he battle over law in the platform is, therefore, both fundamentally conceptual and highly practical").

104. This kind of debate is typical when new social trends challenge traditional legal categories. The rise of the internet is a classic example and led to a classic debate between Larry Lessig, who favored novel regulation, and Frank Easterbrook, who regarded the cyber as something law was perfectly capable of regulating using existing schemes. *Compare* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501–03 (1999), *with* Frank H. Easterbrook, *Cyberlaw and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207–08.

105. *See* Kellen Zale, *When Everything Is Small: The Regulatory Challenge of Scale in the Sharing Economy*, 53 SAN DIEGO L. REV. 949, 951–58 (2016).

106. *See* Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 243–50 (2015).

107. There are many variations, such as an emergent interest in the impact of the sharing economy on racial justice. *See* Leong & Belzer, *supra* note 100, at 1275–77.

108. *See, e.g.*, Beth Buczynski, *Sharing Is Good: Building a Sharing Economy & Community*, INNERSELF, http://innerself.com/content/social-a-political/trends/8980-sharing-is-good-building-a-sharing-economy.html (last visited Mar. 13, 2018) (remarking on the capacity of the sharing economy to encourage richer communities and more self-sufficient behavior); Natasha Singer, *In*

a descriptive point. These features of the sharing economy can in turn produce a significant amount of subjective well-being that has to be part of any accurate discussion of the social costs and benefits of this phenomenon. Indeed, one study found that eight in ten respondents reported that participating in the sharing economy made them happier.[109] The ensuing discussion explains the nexus of happiness and sharing in terms of four factors: facilitating non-monetary swapping ("true" sharing); enabling individuals to interact with one another absent a corporate middleman ("disintermediation"); increasing participants' subjective sense of their social network ("community-building"); and shifting from a focus on owning property to accessing it ("access over ownership").

1. True Sharing

Nearly every academic discussion of the sharing economy includes someone's observation that what we typically call "sharing" in this setting is anything but.[110] That person whom you contacted via TaskRabbit to walk your dog, or the lady who offered to let you leave your car in her driveway on JustPark, are not doing these acts out of the goodness of their hearts. On the contrary, these are merely standard exchanges of money for services that happen to take place outside the context of traditional corporate intermediaries. That said, the oft-invoked distinction between "true" sharing and app-based commercial activity does represent a meaningful divide within the sharing economy.[111] Some sites actually do enable what a layperson may think of as sharing.[112] FreeCycle is an international network that allows people within communities to make things they do not need available to those who do need them, with the simultaneous goals of helping those without the

the Sharing Economy, Workers Find Both Freedom and Uncertainty, N.Y. TIMES (Aug. 16, 2014), https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html (illustrating that the sharing economy brings workers a mixed bag of self-determination and unpredictability). In fairness, some of these values may be captured by more recent theoretical approaches, in particular the emergent progressive property school. For a good overview, see generally Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

109. *See* RACHEL GRIFFITHS, CO-OPERATIVES UK, THE GREAT SHARING ECONOMY: A REPORT INTO SHARING ACROSS THE UK 1 (2011), http://library.uniteddiversity.coop/Cooperatives/The_great_sharing_economy.pdf.

110. I have never been to an academic paper presentation about a sharing-economy paper in which someone does not raise the point that much of what comprises the sharing economy is not what we colloquially understand to be sharing.

111. *See* Ranchordás, *supra* note 94, at 38–41 (distinguishing sharing and quasi-sharing to highlight this distinction).

112. *The Master List of the Collaborative Economy: Rent and Trade Everything*, JEREMIAH OWYANG (Feb. 24, 2013), http://www.web-strategist.com/blog/2013/02/24/the-master-list-of-the-collaborative-economy-rent-and-trade-everything (listing sharing economy entities and showing that true-sharing ones are a relative minority).

means to buy necessaries and reducing consumer waste.[113] Gifteng is a similar, app-based program rooted in principles of reciprocity that encourage users to exchange unwanted items with others.[114] France's Zilok provides a platform where members of the same community can list objects they want to make available for others to use for free.[115] Along similar lines, sites like CouchSurfing provide a way for those with a free room or even couch to let travelers in need of a place to crash do so without pay.

These true-sharing projects are typically lumped in with the more well-known commercial sites that represent the majority of sharing-economy sites, but hedonics shows why this distinction makes a major difference in terms of the social welfare generated by true sharing: True-sharing sites epitomize the kind of altruism that has been shown to produce an outsized degree of subjective well-being. As Part I illustrated, prosocial uses of property such as giving one's things away to others appears to have a causal relationship with increased subjective well-being—that is, it actually makes us happier.

Users of true-sharing sites anecdotally report just such a result. FreeCycle users report a "warm glow" from the acts of generosity facilitated by the site, which "wiped out their feelings of cynicism and replac[ed] them with a sense of moral inspiration."[116] Numerous Couchsurfing users report that happiness is a leading reason they participate in free home sharing.[117] These outcomes are not surprising, given that the kind of altruism enabled by true-sharing platforms bears the specific features most likely to make people happier. They enable in-person connections, whether to the individuals to whom you donate things to using an online goods-sharing app or the traveler from abroad who sleeps on your couch and becomes a new friend. They also allow people to make a visible impact on the world. FreeCycle, for example, facilitates targeted acts of giving particular things to specified individuals in one's local community rather than the kind of broad-based prosocial charitable spending that appears less causally related to increased happiness.

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113. FREECYCLE, https://www.freecycle.org (last visited Mar. 13, 2018).

114. GITHUB, https://github.com/Yatko/Gifteng (last visited Mar. 13, 2018); Peter Ha, *Zilok Allows You to Rent Anything from Anyone*, TECHCRUNCH (Nov. 5, 2007), https://techcrunch.com/2007/11/05/zilok-allows-you-to-rent-anything-from-anyone. Ask and Give is an app that similarly allows members of the same local community to offer to give away (and to take from others) unneeded things.

115. *See* J. David Goodman, *Learning to Share, Thanks to the Web*, N.Y. TIMES (Sept. 25, 2010), http://www.nytimes.com/2010/09/26/weekinreview/26goodman.html (discussing Zilok in the context of a number of U.S.-based free-rental sites, such as NeighborGoods and ShareSomeSugar, each of which operated for only about three years).

116. *See generally* ADAM GRANT, GIVE AND TAKE: WHY HELPING OTHERS DRIVES OUR SUCCESS (2013) (discussing the positive psychological effects of the altruism enabled by Freecyle).

117. *See, e.g.*, Adam Hurst, COUCHSURFING, https://www.couchsurfing.com/people/muvytikit (last visited Mar. 13, 2018) (One user declared on his Couchsurfing profile: "Our happiness is greatest when we contribute most to the happiness of others!").

2. Disintermediation

Even the many sharing-economy platforms that have no aspiration to encourage altruism may still enhance subjective well-being more than their traditional counterparts to the extent that they enable interactions without the involvement of corporate intermediaries that characterize standard commercial exchange. Consider an example. A professor is teaching a two-month summer course at a British university in London. One option for accommodations is to stay at corporate housing provided by the university. Another is to find a place to stay on AirBNB or VRBO. The professor would likely look to traditional considerations like cost, location, and amenities in making this choice. But another distinction is that staying in corporate housing, a hotel, or any other traditional accommodation would likely not bring the professor into direct contact with the proprietors in the same way that using a person to person ("p2p") rental platform would. The latter would at least require individualized interactions to negotiate a price and meet with the AirBNB proprietors, and could develop into a useful relationship where the proprietors helped the professor negotiate his way around a foreign country.[118] This is the essence of disintermediation: The kind of p2p commercial exchange enabled by the sharing economy eliminates traditional middlemen and brings people closer together.[119]

Many sharing economy sites have this quality of disintermediation: Thanks to their p2p structure, they enable personal interactions between users and service providers that may be absent in traditional commercial settings. Beyond housing-rental sites like AirBNB and VRBO, examples of sites facilitating disintermediation include JustPark (which allows you to park in someone's residential garage instead of a parking structure), Appetit (which

118. This example is based on, and true to, my own experience. When teaching a summer course in London in 2015, I arranged to rent a flat near Russell Park from a lovely Londoner couple who were very helpful in showing me around the city, answering logistical questions, and otherwise providing a level of personal service that would have been missing at corporate housing or a hotel. Their motivation may not have been purely altruistic, of course. Being a personal point of contact for their renters can be a major selling point for other potential residents. It was certainly something I featured prominently in my very favorable review of my hosts. Not all home sharing experiences are unequivocally positive, of course. Some VRBO users have reported the opposite of my outstanding London 2015 experience. Nightmare stories include subpar accommodations, inconsiderate hosts, and financial scams. *E.g.*, Paulina, *VRBO House Rental Gone Bad*, ELLIOT (Dec. 15, 2014), http://forum.elliott.org/threads/vrbo-house-rental-gone-bad.112 (relating one particularly piquant horror story). Nevertheless, these stories are relatively rare and are held in check by vetting processes and user reviews.

119. *See* Buczynski, *supra* note 108 (describing the sharing economy as "a web of pleasant interdependence that acts as a support system, and cuts out the 'middleman' position usually occupied by business or government"); *cf.* Carol Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 L. & CONTEMP. PROBS. 89, 98 (2003) ("[C]ommerce constitutes the social glue of democratic self-governance—for example, that property and trade are a school for rights-consciousness, that commerce deflects people from ideological enmity, and that commerce teaches us to operate by consent rather than force.").

allows you to have a gourmet dinner cooked at someone's home rather than a restaurant), and WeWork (which allows you to rent office space from someone's home office rather than going to a coffee shop or library). It bears noting that not all sharing platforms increase disintermediation beyond the status quo. Some sharing economy transactions, such as a purchase on Etsy or an Airbnb rental from a remote landlord, may involve no more personal interaction than a few businesslike exchanges online. And some services already typically involve interpersonal interaction, such as getting a ride in a private car or finding someone to walk your dogs. So, sites like Lyft or DogBuddy may make these services more readily available via online, app-based platforms, but do not necessarily increase the relative level of personal interaction that these services entail.

Why, one might ask, is disintermediation relevant to happiness? While Airbnb or Appetit may enable more personal interaction than staying in corporate housing or going to Applebee's, they still generate only fleeting social ties. On one level, this point is right: The folks you run into when using services provided by the sharing economy aren't likely to become your best friends. On the other hand, hedonics research has shown that few things are more productive of happiness generally than positive social interactions. And research has shown in a variety of settings and among people of different personality types (i.e., introverts and extroverts) that even interactions with those with whom we have weak social ties are causally related to greater happiness.[120] These interactions appear to increase our sense of belonging as well as to diversify one's social network, thereby providing a sense of support when stronger social ties are unavailable.[121] The disintermediation produced by many sharing economy platforms thus contributes to happiness in this second, less obvious way: By increasing the kinds of pleasant, if ephemeral, interactions that comprise a part of our social network that complements stronger social ties like those with family and friends.[122] Compared to the impersonal transactions that take place with the typical corporate monoliths, the proliferation of these sites promises a meaningful enhancement in net subjective well-being.

3. Community

Commercial exchange over some sharing economy platforms may also enhance happiness because it is more likely to encourage and enrich a sense of community. FreeCycle, for example, works because its users feel knit

120. Sandstrom & Dunn, *supra* note 74, at 920 (concluding that "the current results are consistent with the idea that the more peripheral members of our social network shape our day-to-day happiness," even if not as much as core members of those networks).

121. *Id.* at 918–20.

122. *Id.* at 920 ("So, chat with the coffee barista, work colleague, yoga classmate, and dog owner—these interactions may contribute meaningfully to our happiness, above and beyond the contribution of interactions with our close friends and family.").

together in a community of like-minded individuals who share values of mutual aid and concern for the environment.[123] This community-building effect holds true for commercial sites as well as "true sharing" platforms. Many sharing sites allow users to offer goods or services for a relatively low cost, so that if you need a belt sander or a bread slicer you can rent one cheaply rather than buy an expensive new one.[124] These sites are, of course, limited to the local area in which people live, but this limitation necessarily forces people to interact with those in their local area, thereby enhancing otherwise-weak neighborhood social networks.[125] At the opposite end of the geographical spectrum, travel sites like Couchsurfing create a sense of community among their users, not because they bring together people in the same geographic area, but rather because they forge bonds among citizens of far-flung nations, creating a sense of global togetherness.[126] Finally, the very act of participation in the sharing economy can generate a sense of connectedness—even if that just means chatting with your Uber driver[127]—to the extent that many people regard taking part in the emergence of this new economic form of exchange

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123. *See* GRANT, *supra* note 116, at 286 ("By fostering a common identity and opportunities for unique self-expression, Freecycle was able to mobilize a giving system based on generalized reciprocity: you give to help others in the community, and you know that someone in the community will give to you.").

124. *See, e.g.*, NEIGHBORROW, http://beta.neighborrow.com (last visited Mar. 13, 2018) (neighborhood-based general goods-rental site); RENT MY ITEMS, http://www.rentmyitems.com/how-it-works (last visited Mar. 13, 2018) (another example of a neighborhood-based goods rental site); MY RECYCLE STUFF, http://myrecyclestuff.com (last visited Mar. 13, 2018) (enabling neighbors to barter and swap items they no longer need); SPLINSTER, https://www.spinlister.com/about (last visited Mar. 13, 2018) (rent your bike from a local resident); YARD CLUB, https://www.yardclub.com/about (last visited Mar. 13, 2018) (borrow a neighbor's tools for a fee).

125. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing the decline of the local neighborhood as a unit of social interaction in contemporary America).

126. COUCHSURFING, http://www.couchsurfing.com/about/how-it-works (last visited Mar. 13, 2018) (promising users the opportunity to connect "to a global community of travelers" while they explore the world).

127. Indeed, Uber and Lyft both make efforts to obscure the economic character of the exchange between riders and drivers. Cash does not change hands; Lyft passengers even ride shotgun. The goal is to generate "a sense of trust and social connection." Lobel, *supra* note 93, at 113. This may, of course, be a ruse. Uber drivers are businesspeople just like traditional cabbies. But if users believe that their use of these services makes them part of a countercultural movement and/or connected to others who share their values, it would increase their subjective well-being regardless of whether their belief is actually valid.

as edgy and countercultural on the one hand,[128] or forward-thinking and generous of spirit on the other.[129]

These community-enhancing qualities represent a third way that the sharing economy promises to increase subjective well-being. First, the literature identifying a connection between happiness and sociality has found that one valence of this causal relationship is that a strong sense of group identity serves as a source of subjective well-being.[130] A powerful sense of group identity gives people the notion that they belong to a larger collective of people who share some common belief or quality. Second, having a sense of belonging enhances subjective well-being because it leads people to feel safer and more secure.[131] The notion that one can call on a broad network of individuals for help or support contributes to a subjective sense of security, and in turn, happiness. The sharing economy may generate this sense of community in a pair of ways. Neighborhood ties that grow out of Little Free Libraries ("LFLs") or other contacts resulting from use of sharing platforms that allow neighbors to meet and interact may give people a connection to their local community that they would have otherwise lacked.[132] In terms of security, the sharing economy actually does provide a number of quick and relatively lower-cost ways to address problems that are unavailable through standard means. For example, if your car breaks down and you cannot get in to work, the sharing economy provides a number of neighborhood-based options: taking an Uber, sharing a ride, using someone's home office to work, or tasking someone to get the work and bring it to you. Finally, the personal contacts created through the disintermediated use of the sharing economy may lead to the formation of lasting relationships. For example, there are

128. Much of the sharing economy operates in a legal twilight zone, so that some people are drawn to it by the frisson of possible illegality that it entails, so that at the group level interactions can seem like taking part in a secret underground movement. Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16, 26–32 (2015) (discussing the community-building and rebellious features of pop-up dining and of the sharing economy more generally). Another valence of this point is that participation in the sharing economy simply makes people feel that they and other users are smarter than others by coming up with more efficient means of commerce than standard economic exchange. *See* Lobel, *supra* note 93, at 116 (observing that the sharing economy encourages a spirit "of community, openness, and bottom-up expansion").

129. Many "true sharing" sites trade off this kind of sense that sharing makes us better people, especially "true sharing" sites such as Ask and Give or Couchsurfing.

130. Juliet Ruth Helen Wakefield et al., *The Relationship Between Group Identification and Satisfaction with Life in a Cross-Cultural Community Sample*, J. HAPPINESS STUD. 785, 786 (2016) (identifying positive relationship between group identification and subjective well-being, although measuring the latter in terms of life satisfaction).

131. *See* DANIEL M. HAYBRON, HAPPINESS: A VERY SHORT INTRODUCTION 54–55 (2013) (showing that security is one of the leading threshold criteria for happiness, and that happiness requires that we "feel secure in the possession of what matters").

132. *See supra* notes 77–78 and accompanying text (cataloguing a number of different instances in which close community ties were strongly related to higher subjective well-being).

numerous reports of Couchsurfing users ending up in long-term relationships or even married.[133] This means that the p2p character of the sharing economy can lead not only to the kind of fleeting interpersonal connections discussed above, but also to the stronger social ties that are even more robustly connected to happiness.[134]

4. Access over Ownership

The sharing economy may enhance happiness for a final reason. Some writers have argued that the distinctive feature of the sharing economy is not sharing, but using real and chattel property on an access, not an ownership, basis.[135] The traditional model of property casts use as an incident of ownership: First you buy a home or a car or a pair of shoes, and then you are legally entitled to use it.[136] But the sharing economy creates the promise of disentangling ownership from use entirely. If you have Airbnb and Couchsurfing, you may have sufficient access to housing to eliminate the need to buy a house. In a world where Uber and Lyft are readily available, you can simply access someone else's car without having to own one. The same holds true of property from office space to power tools, and may signal a foundational change in how we perceive property itself.[137] In a world of ready access, it is no longer necessary to regard ownership as a prerequisite to use, reducing the relevance of property title substantially.[138]

Assuming that the sharing economy does represent a paradigm shift toward access and away from ownership, what does this mean for societal well-being? One salient connection is that most of the hedonic downsides associated with property derive from ownership itself and its various economic and psychological burdens. Owning a house or a car entails upkeep and

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133. *See, e.g.*, *Couchsurfing Love Story*, ONCE A TRAVELER (July 15, 2012), http://www.onceatraveler.com/couchsurfing-love-story.

134. *See* Sandstrom & Dunn, *supra* note 74, at 920 (observing that generous interactions with those with whom we have strong social ties increases our happiness more than similar interactions with those with whom we have weak social ties).

135. *See* Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, HARV. BUS. REV. (Jan. 28, 2015), https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all ("[T]he sharing economy isn't really a 'sharing' economy at all; it's an access economy.").

136. A.M. Honoré, *Ownership*, *in* READINGS IN THE PHILOSOPHY OF LAW 557, 563–74 (Jules L. Coleman ed., 1999) (describing a taxonomy of property rights including the right to use).

137. *See* J.J. Colao, *Welcome to the New Millennial Economy: Goodbye Ownership, Hello Access*, FORBES (Oct. 11, 2012, 1:29 PM), http://www.forbes.com/sites/jjcolao/2012/10/11/welcome-to-the-new-millennial-economy-goodbye-ownership-hello-access (arguing that access paradigms are eclipsing traditional property models); Blake Morgan, *NOwnership, No Problem: Why Millennials Value Experiences over Owning Things*, FORBES (June 1, 2015, 12:18 AM), http://www.forbes.com/sites/blakemorgan/2015/06/01/nownershipnoproblem-nowners-millennials-value-experiences-over-ownership (illustrating a change in preferences for access in lieu of ownership following the 2008 economic crisis, especially for younger generations).

138. Title ownership would remain relevant for service providers in an access-oriented economy, but would decrease in relevance for end-user consumers.

maintenance, which cashes out in terms of both money and lost time.[139] Most large-scale purchases also come with outsized debt burdens, which studies have shown to be distinctively psychologically harmful.[140] And ownership—particularly real property ownership—tends to limit mobility and the concomitant sense of personal freedom that is a cornerstone of high subjective well-being.[141] There are short-term psychic upsides to making a big-ticket purchase, of course, but these tend to be swamped in the longer term when hedonic adaptation and buyer's remorse kick in.[142] One might respond, of course, that these are necessary evils to function in modern society: You have to have a home and a car and some quantum of chattel property to live a normal life. But the sharing economy's emergence suggests that this is no longer the case. VRBO, Lyft, and countless other sites have decoupled ownership from access. If you can get all the utility of a house, a car, or another type of property without having the happiness-sapping downsides of formal ownership that may present a way to capture the use needs supplied by property without the well-being costs researchers have shown ownership to create. This move away from formal ownership and toward access thus represents an additional reason that the sharing economy may enhance net social happiness.

C. *TOWARD HAPPIER SHARING*

The sharing economy has the capacity to improve net social welfare in a variety of ways that have been overlooked by the increasingly voluminous legal literature on this topic. This Part explores how these insights may translate into law.[143] As discussed in detail in Part II, this is still a Benthamite utilitarian calculation, relying on a direct measure of welfare (subjective well-being) to measure utility. For example, a typical economics-inflected cost-benefit approach to a hypothetical law requiring Uber to give its drivers health care would primarily look at its upsides—saving employees on insurance costs, better health outcomes—and downsides—costs to employers, possible lost

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139. *See* Fagundes, *supra* note 26, at 24–25 (discussing this and other practical costs of property ownership).

140. To paraphrase Dunn and Norton, what you owe is more important for your psychological well-being than what you own. *See* DUNN & NORTON, *supra* note 61, at 95 (cataloguing studies that members of households with greater debt tend to exhibit lower happiness).

141. *See* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1104–05 (2009) (discussing the psychological downsides of reduced mobility for homeowners).

142. Travis J. Carter & Thomas Gilovich, *The Relative Relativity of Material and Experiential Purchases*, 98 J. PERSONALITY & SOC. PSYCHOL. 146, 153–56 (summarizing evidence for the proposition that the hedonic upsides of material purchases tend to be overwhelmed eventually by a sense of regret).

143. For a good, extended defense of using happiness as the criterion for welfare in cost-benefit analysis, see generally John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603 (2013).

jobs to drivers. A hedonics analysis would look to the next-order impact of all these factors and subjective well-being, considering issues such as the outsized effect of unemployment on happiness, the relatively high hedonic impact of wage savings on the less wealthy, and the connection between health and subjective well-being.[144] As this example illustrates, looking at these new forms of platform-based p2p exchange through the lens of hedonics highlights their capacity to affect and enhance subjective well-being in a way not captured by traditional cost-benefit analysis.

But how would using the lens of hedonics change how law regulates the sharing economy? As we have seen, there are numerous ways that this emergent form of exchange promises to enhance happiness more than traditional commerce. So, for example, this perspective would militate against permitting landlords to bar their tenants from using a site like CouchSurfing, which tends to enhance subjective well-being substantially across various metrics. And the notion that access tends to enhance happiness more than ownership supplies one reason that policymakers should have a thumb on the scales in favor of that form of economic exchange.

But the answer to this question is much more complex than simply equating all sharing economy commerce with greater subjective well-being. For one thing, not all sharing platforms exhibit the same tendency to improve subjective well-being. "True sharing" has the greatest capacity to enhance subjective well-being due to its enablement of altruism and the tendency to knit together closer human connections. Sites like Airbnb or Appetit may lack the altruistic component, but still contribute to greater strong and weak social bonds by bringing providers and users directly into contact with one another and cutting impersonal corporate intermediaries out of the loop. But sites like Uber and Lyft likely have little positive impact on subjective well-being, though there may be some to the extent that certain users regard their participation in the sharing economy to link them with others in a like-minded, countercultural community. So while the kind of activity facilitated by the sharing economy certainly has a larger hedonic upside than traditional commercial exchange, this does not mean that law should categorically favor all phenomena that fall within this broad category.

Moreover, considering the distinctive effect of the sharing economy on subjective well-being does not moot more traditional cost considerations. The hedonics framework this Article adopts remains a welfarist utilitarian one that seeks to favor any policy that increases net happiness.[145] The above analysis focused on the proximal effects of sharing economy activity on subjective well-

144. For a detailed discussion of how well-being analysis would work and why it would be a superior option to cost-benefit analysis, see BRONSTEEN ET AL., *supra* note 23, at 27–58. *See also id.* at 34–35 (providing a specific example of how cost-benefit analysis and well-being analysis would play out in the context of an OSHA regulation).

145. *Id.* at 7 ("The law should improve people's quality of life. For it to do that, law-makers need a way to measure the effect of proposed laws on well-being.").

being, but more distal effects matter too, and hedonics analysis would have a lot to say about this. For example, as the 2015 public demonstrations by cab-driver unions in Europe against Uber suggested,[146] one possible implication of the rise of Uber, Lyft and other drive-sharing companies is that traditional cabbies and car services will be put out of business. While one might generally dismiss this as an inevitable part of the creative destruction that characterizes a healthy capitalist economy, its implications in terms of happiness (at least in the short term) would also bring significant social costs. Of all the potential negative events in one's life, few are as damaging to subjective well-being as unemployment,[147] so a full-scale analysis of the happiness implications of regulations favoring the sharing economy's many rider apps would have to wrestle with these downsides as well as their various hedonic upsides. By the same token, though, Uber and its cohorts (including car-sharing apps like Getaround.com and ride-sharing apps like Via) promise to reduce car ownership, pollution, and traffic congestion.[148] These effects all cash out positively in terms of happiness, since both a cleaner environment and reduced commuting have been shown to be strongly associated with increased subjective well-being.[149]

As the example of car-sharing services illustrates, analyzing the sharing economy through the lens of hedonics thus does not warrant the simplistic conclusion that the state should categorically favor it in all its iterations. Rather, it yields both the general proposition that this approach highlights important welfare effects of the sharing economy that have not been captured by the literature to date, and the more specific proposition that certain kinds of sharing bear particular promise for increasing our subjective well-being and should be favored by the state when regulating this novel form of economic exchange.

The promise of this approach, though, is considerable. In terms of scholarship, it promises to provide a monist criterion of value that can allow

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146. *See* Amar Toor, *French Taxi Drivers Lock Down Paris in Huge Anti-Uber Protest*, VERGE (June 25, 2015, 6:04 AM), http://www.theverge.com/2015/6/25/8844649/french-taxi-driver-protest-uber-pop-paris.

147. *See* Richard E. Lucas et al., *Unemployment Alters the Set Point for Life Satisfaction*, 15 PSYCHOL. SCI. 8, 8–9 (2004). This effect diminishes over time, though, so a full analysis would have to take into account the time-adjusted hedonic impacts, not just the static ones, due to job loss. *See* BRONSTEEN ET AL., *supra* note 23, at 34.

148. Sarah Emerson, *Uber Wants Us to Think It's Environmentally Friendly, But Is It?*, MOTHERBOARD (May 23, 2016, 10:00 AM), https://motherboard.vice.com/en_us/article/78kkj9/is-uber-good-or-bad-for-the-environment (quoting Uber CEO Travis Kalanick as having stated that Uber will reduce pollution, traffic congestion, and the number of cars on the road).

149. *See* Ian Alcock et al., *Longitudinal Effects on Mental Health of Moving to Greener and Less Green Urban Areas*, 48 ENVTL. SCI. & TECH. 1247, 1250–52 (2014) (cataloguing the mental upsides of living in less polluted environments); Alois Stutzer & Bruno S. Frey, *Stress That Doesn't Pay: The Commuting Paradox*, 110 SCANDANAVIAN J. ECON. 339, 341–44 (2008) (discussing the substantial hedonic downsides of traffic and commuting).

the different costs and benefits generated by the sharing economy—which range from economic efficiency to concerns about racial justice—to scale along a single metric so they can be understood coherently together.[150] And using well-being analysis also helps reframe some of the most vexing practical regulatory problems the sharing economy has posed. For years now, courts have wrestled with how to fit the sharing economy into laws written with only traditional modalities of exchange in mind.[151] This effort has largely been a formalist endeavor, as parties have debated whether or not particular sharing platforms fit into preexisting legal categories. For example, towns have cracked down on use of private homes as Airbnb rentals, arguing that this use renders dwellings more like hotels than homes, and thus requires a commercial permit. Still other courts have rejected the categorization of Airbnb homes as hotels, and therefore rejected localities' attempts to require permits for home-sharing.[152] Similarly, traditional taxi companies have equated cabs and ride-sharing services, and filed legal challenges that would require Uber drivers to obtain livery licenses as a prerequisite to picking up passengers at airports.[153] Hedonics analysis would sweep aside these largely unilluminating formalist debates, and instead reorient these debates around the much more important question of whether the type of sharing at issue would increase subjective well-being. One alternative approach could be to simply craft different regulations for sharing economy enterprises,[154] which could favor or disfavor them based on their hedonic impacts.

And it bears noting that looking at this issue through the lens of hedonics does not warrant carte blanche for any conduct by a sharing economy entity. Consider, for example, traditional taxi companies' claims that Uber has falsely stated that they charge "standard taxi rates" and are affiliated with local cab companies. If true, these allegations amount to simple fraud, with no

150. Scaling different considerations on the same metric by using a well-being approach could, for example, allow standard concerns related to the sharing economy like economic efficiency to be compared and evaluated along with and against different ones like problems of racial injustice. *See* BRONSTEEN et al., *supra* note 23, at 34 (explaining that well-being analysis offers "subjective, hedonic, cardinal, and interpersonally comparable units that indicate the degree of a person's happiness for a given period of time").

151. *See* Zale, *supra* note 98, at 571 (observing the tendency of courts to resolve cases about the sharing economy based solely on formal categorical analysis); *see also supra* Part III.A (reflecting on the dominantly formalist character of legal and academic debates about the sharing economy).

152. *See* Fruchter v. Zoning Bd. of Appeals, 133 A.D.3d 1174, 1176 (N.Y. App. Div. 2015). Taxi lobbyists have succeeded in ending Uber service in some cities, such as Austin, Texas.

153. Christopher Koopman, *Bans on Uber Are About Cronyism—Not Safety*, N.Y. POST (Feb. 16, 2017, 7:57 PM), https://nypost.com/2017/02/16/bans-on-uber-are-about-cronyism-not-safety (decrying this outcome as "simply a pretext for protecting the stranglehold that existing taxi and livery companies have on transportation services across the state").

154. Chicago's solution to this problem was to create separate regulations for ride-sharing companies like Uber and Lyft as a prerequisite to permitting airport service, but exempting them from the livery license required of standard taxicab companies. *See* CHI., ILL. MUN. CODE § 9-104-030 (2017).

meaningful hedonic upside, and should be sanctioned as any other material misrepresentation would.[155] Nor does a hedonics analysis require wholesale deregulation of the sharing economy on the theory that traditional regulations can never apply to the sharing economy. Regulation of housing, transportation, or other services is likely warranted in the interest of maximizing social welfare just as it may sometimes be in the traditional economy. The happiness approach simply urges courts and legislators to take account of the distinctive capacity of sharing economy entities to generate distinctively high subjective well-being when making regulatory decisions and applying relevant laws.[156]

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By using an inclusion strategy with respect to their property—inviting people into their homes and cars rather than excluding them—users and providers have changed how we think about property. While this is a transformational commercial development, it represents far more than just an economic phenomenon. It brings the potential to enhance subjective well-being in countless ways beyond commerce, by bringing people together, enabling other-oriented conduct, and freeing us from the sense of obligation to possess property in order to benefit from its use. Any policy analysis that seeks to capture the range of welfare effects wrought by the sharing economy has to consider these benefits and costs as well. Looking at the sharing economy through the lens of hedonics—as opposed to the standard economics-inflected cost-benefit analysis—promises to reconfigure how we see this new modality of exchange, and in so doing highlight heretofore unappreciated ways that the sharing economy makes us better off.

IV. HAPPINESS AND CHARITABLE GIVING

Sharing illustrates one way that inclusion is a welfare-enhancing property strategy. The same is true of dispossession. It may sound counterintuitive that getting rid of one's property would improve well-being, but consider charitable donation. However corny one may justly regard all the aphorisms like "giving is better than receiving," recent evidence reveals that they're kind of true. One of the most striking findings of hedonics research is that giving generously to others greatly increases subjective well-being.[157] This result

155. *See* Yellow Grp. LLC v. Uber Techs. Inc., No. 12 C 7967, 2014 WL 3396055, at *2 (N.D. Ill. July 10, 2014); *see also* Ehret v. Uber Techs., Inc., 148 F. Supp. 3d 884, 888–89 (N.D. Cal. 2015) (certifying class action against Uber for misrepresenting that the 20% surcharge it imposed on certain rides was entirely a gratuity).

156. Courts were thus right to reject Airbnb's CDA section 230 challenge to several cities' application of land use regulations to owners using that home-sharing service. Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016).

157. *See supra* Part II.B.

spans different cultures and socioeconomic strata, and has been replicated many times with an unusually high number of subjects.[158] Perhaps most surprising, the evidence shows that spending our resources on others brings us even more happiness than keeping those resources for ourselves.[159]

This evidence suggests that if the state wants to help citizens maximize their well-being, its best strategy would be to encourage donations of time and money. While federal and local governments already support this through tax deductions, financial incentives for charitable donation may actually have the perverse effect of dampening the hedonic upsides of prosocial spending. A socially optimal system to maximize the happiness of donors and donees alike requires more attention to the multifaceted dynamic between charitable conduct and subjective well-being. This Part considers this problem in two steps. First, it shows how two behavioral phenomena—framing effects and crowding-out—combine to undermine the hedonic upsides of the charitable-donation deduction. Second, it considers a variety of different choice architectures for how to maximize the happiness generated by charitable donation for givers and recipients alike.

A. *The Hedonic Case Against the Charity Deduction*

One area where the U.S. government initially appears to be succeeding from a hedonics perspective is tax policy,[160] since one of the best-known and most-used tax breaks for individual taxpayers is the IRS deduction for charitable contributions.[161] But does incentivizing prosocial giving with tax deductions actually increase subjective well-being? While this policy would, at first blush, seem to be a straightforward way to encourage happiness-enhancing prosocial spending, the incentives story is not that simple. A growing body of work has cast doubt on the notion that financial incentives are invariably an efficient way to encourage desired conduct.[162] A closer look at the charitable donation deduction reveals that two behavioral phenomena associated with this deduction—framing effects and crowding-out—may reduce, rather than enhance, societal well-being.

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158. For examples of these studies, see *supra* note 62.

159. *See* Dunn et al., *supra* note 64, at 1687.

160. Any happiness upsides to the charitable giving tax deduction are inadvertent, of course, since the state does not articulate an explicitly hedonic case for offering this tax break.

161. 26 U.S.C. § 170(c) (2012). The charitable contributions donation is the second-most used itemized deduction, after only the deduction for state and local taxes. Scott Greenberg, *The Most Popular Itemized Deductions*, TAX FOUNDATION (Feb. 29, 2016), https://taxfoundation.org/most-popular-itemized-deductions.

162. A leading example is CEO pay, where research has shown that giving corporate CEOs huge bonuses may actually decrease their efficiency, creativity, and productivity. *See generally* MICHAEL B. DORFF, INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT (2014) (discussing whether CEO pay encourages desired business conduct).

One of the central reasons for altruism increasing happiness is that it focuses attention on the needs of others.[163] There are other, less noble, reasons for the hedonic upsides of prosocial spending,[164] but they all share this feature in common: Generosity increases subjective well-being only to the extent that it flows from sincere generosity, not from instrumental self-betterment. And on the flip side, studies have shown that once you introduce an element of self-interest into the altruism equation—for example, giving to impress others or trying to fit in with social expectations—the hedonic effects largely evaporate.[165]

The hedonic effects of altruism diminish with tax deductions for charitable donations because of two behavioral phenomena. The first is framing effects. How we understand anything is due as much to how it is presented as its own intrinsic content.[166] Researchers have shown that encouraging subjects to "think like a scientist" versus giving a "gut reaction[ ]" triggered very different responses to identical information.[167] The framing of the charitable-donation deduction thus casts a different, pecuniary light on altruistic acts. Consider, for example, the ubiquitous rider so many charities append to their appeals for generosity: "Give to us, it's a good cause and tax-deductible too!"[168] So regardless of the motivation of or intention behind the charitable-donation deduction, it reads in terms of financial self-interest: If you give money to charity, you'll save yourself money come tax time.

One might respond by rightly pointing out that motives are often mixed, and that one might simultaneously want to help a good cause while also relishing a bit of tax relief. This intuition, though, is undercut by a second

163. *See* DUNN & NORTON, *supra* note 61, at 106–33 (cataloguing research that shares this common theme).

164. For example, giving can make people feel powerful and magnanimous because it emphasizes their relatively higher place in the social hierarchy than donees. *See* Chance & Norton, *supra* note 65, at 4–6.

165. *See* DUNN & NORTON, *supra* note 61, at 116 (observing that if giving is not a choice donors feel no happier as a result); Weinstein & Ryan, *supra* note 32, at 238–40 (showing that only noninstrumental giving measurably enhances happiness).

166. The cornerstone article on the topic is Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

167. Ayanna K. Thomas & Peter R. Millar, *Reducing the Framing Effect in Older and Younger Adults by Encouraging Analytic Processing*, 67B J. GERONTOLOGY, SERIES B: PSYCHOL. SCI. & SOC. SCI. 139, 144 (2012); *see also* Tversky & Kahneman, *supra* note 166, at 453 (showing that presenting an option as saving lives versus avoiding deaths changed how people preferred two identical hypothetical options). Sometimes framing effects seem random, if fascinating, such as the finding that college admissions officers place more weight on academic credentials if they review applications on a cloudy day. Uri Simonsohn, *Clouds Make Nerds Look Good: Field Evidence of the Impact of Incidental Factors on Decision Making*, 20 J. BEHAV. DECISION MAKING 143, 151 (2007).

168. For just one major example, the Red Cross's web page urging giving is titled "Give A Tax–Deductible Donation To The Red Cross." *Give a Tax–Deductible Donation to the Red Cross*, AM. RED CROSS (Dec. 31, 2014), http://www.redcross.org/news/article/Give-A-Tax-Deductible-Donation-To-The-Red-Cross.

behavioral phenomenon: crowding-out. Dan Ariely and others have shown that self-interested and other-regarding motivations are profoundly different, and typically occupy separate, mutually exclusive spaces.[169] Moreover, these motivations operate in a zero-sum game in which either selfishness or generosity prevails. This is why it is considered criminal to skip out of a restaurant without paying the bill, yet entirely rude to give your friend $50 on the way out of the dinner party they invited you to.[170] But while self- and other-oriented motivations compete, they are not created equal. On the contrary, research suggests that when you introduce even a drop of self-regarding, especially financial, motivation it tends to crowd out other-regarding motivations. Studies have found, for example, that merely referring to money when asking people to do a collaborative task reduced participants' altruistic behavior and increased their sense of social distance from one another.[171]

In light of these behavioral phenomena, the simple incentivist case for the charitable-donation deduction appears much more complicated. One may initially think that since prosocial spending tends to strongly increase our subjective well-being, seeking to encourage this behavior with tax relief is likely to enhance happiness. But the precondition for the positive relationship between altruism and subjective well-being is other-orientation; where giving is motivated by self-interest or other instrumentalist aims, it is unlikely to increase happiness. Thus, framing effects become salient. Thanks in large part to charities endlessly emphasizing the tax-deductible nature of gifts, the charitable-contribution deduction causes altruism to be understood as a self-interested economic decision. Moreover, the crowding-out effect exacerbates the tax code's tendency to frame donation in a financial light. While one may think that motivations to give may be an even mix of desire to help and concern for reducing one's tax burden, behavioralists have found that self- and other-regarding operate to the exclusion of one another, and that the presence of the former—especially financial self-interest—tends to squelch altruism entirely. So however well-intentioned it may be, the charitable-donation deduction likely cancels out any hedonic upsides of giving that donors would otherwise experience.

169. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 75–88 (2008) (contrasting "market norms" of self-interested profit motivation with "social norms" of kindness and altruism); James Heyman & Dan Ariely, *Effort for Payment: A Tale of Two Markets*, 15 PSYCHOL. SCI. 787, 793 (2004).

170. *See* ARIELY, *supra* note 169, at 68–72 (citing this and other examples, such as the point that payment converts a consensual sex act into illegal prostitution, or the fact that lawyers refused to work for the AARP for a reduced rate of $30/hour but agreed to do so for free when it was presented as a pro bono gesture).

171. Relatedly, offering money can convert a licit sexual encounter into the crime of prostitution. *See generally* Vohs et al., *supra* note 79 (showing that subjects primed to think about money become more selfish and less willing to help others in tasks).

B. Choice Architecture for Happier Donation

Charitable donations represent a rare area in which the state encourages citizens to get rid of their property. The previous Subpart further showed, however, why tax deductions may cancel out the hedonic upside of widespread altruism. This does not mean that incentivizing prosocial dispossession of property is a lost cause, but only that a simplistic, financial-incentives approach is not the optimal strategy. This Subpart explores how the state might construct alternative schemes that could simultaneously encourage charitable donation while also maximizing the subjective well-being of donors and donees alike. To that end, it explores two types of choice architectures (pure libertarian and libertarian-paternalist) that seek to nudge people in the direction of giving without running headlong into the downsides.[172]

1. Pure Libertarian Approaches

One approach the state could take to capture the hedonic potential of altruism is to get out of the game altogether by eliminating any tax relief for donations. While counterintuitive, this policy has several features that recommend it. First, it does not overtly pressure giving at all, leaving individuals free to decide whether they want to donate.[173] This would counteract the inadvertent but dominant financial framing of the current scheme that casts the act of donation as a means to get a tax break.[174] This clears the way for the happiness upsides that flow from purely voluntary altruism. Another key consideration for this proposal is that very few donors end up getting any tax relief from their donations, since most taxpayers opt for the standard deduction that obviates the need to itemize deductions.[175] Getting rid of the charitable donation deduction would, for most donors, represent a net hedonic gain because it would come with no tax downside while recasting their act as the kind of unadulterated charity that is most likely to significantly improve subjective well-being.[176]

The most plausible counter to removing tax breaks for charitable donation is that while such a move would increase donors' subjective well-

172. *See generally* Richard H. Thaler et al., Choice Architecture (Apr. 2, 2010) (unpublished manuscript), https://ssrn.com/abstract=1583509 (discussing the notions of choice architecture and libertarian paternalism).

173. *See generally* DUNN & NORTON, *supra* note 61 (showing that altruistic acts improve happiness only where they are undertaken freely and sincerely).

174. *See supra* Part IV.A.

175. Kay Bell, *Standard or Itemized Tax Deduction?*, BANKRATE (Jan. 5, 2017), http://bankrate.com/finance/taxes/standard-or-itemized-tax-deduction.aspx (noting that the IRS states that most taxpayers take the standard deduction and do not itemize any deductions, including for charitable donations).

176. *See supra* Part III.B (showing that only sincere, not instrumental, prosocial spending increases donors' happiness).

being, it would reduce donations, causing greater harm to donees that would swamp any welfare gains to donors. This argument proceeds on a plausible premise: Removing the incentive to donate would reduce charitable donations. But is this premise empirically valid? There is some reason to think that removing monetary incentives for charitable giving would increase altruistic behavior. For example, Richard Titmuss' famous study of blood banks found that donors who were not compensated gave blood more frequently (and of a higher quality, i.e., with less impurities) than blood donors who were paid.[177] This line of research raises the surprising implication that people are motivated to give more by altruism than financial motivation. If that conclusion applies in this context, removing the financial framing of the charity deduction may not decrease donations nearly as much as one might expect, and may even *increase* them.[178]

2. Libertarian-Paternalist Approaches

Outright repeal of the charitable-donation deduction is not, of course, the state's only possible response to these concerns. Moderate state intervention short of the current simplistic incentivist approach may also provide a way to maximize the overall subjective well-being generated by altruism for donors and donees alike. This requires what Cass Sunstein and Richard Thaler termed "choice architecture" that can more carefully calibrate

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177. *See generally* RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1970) (reporting results of this pathbreaking study). Subsequent work has confirmed this result. *See, e.g.*, Carl Mellström & Magnus Johannesson, *Crowding out in Blood Donation: Was Titmuss Right?*, 6 J. EUR. ECON. ASS'N 845, 857 (2008) (finding that the crowding-out effect in blood donation applies to women, though not to men, and suggesting that the introduction or mention of monetary reward cancels out altruistic motives). And numerous other studies have found similar results in related contexts. *See, e.g.*, Matthew Chao, *Demotivating Incentives and Motivation Crowding out in Charitable Giving*, 114 PROC. NAT'L ACAD. SCI. U.S. 7301, 7306 (2017) (showing that giving donors thank-you gifts reduced donation rates in a fundraising campaign).

178. One global study did find a higher rate of charitable contribution in countries that provided tax incentives for charitable contributions. *See Tax Incentives Worldwide Help Increase Charitable Donations Says New Global Study*, ASS'N FUNDRAISING PROF'LS, http://www.afpnet.org/Audiences/ReportsResearchDetail.cfm?ItemNumber=28295 (last visited Mar. 14, 2018) (reporting results of a study indicating that charitable donation was 12% higher in nations with tax incentives for individual contributions). But this difference could be due to other factors, such as divergent economic conditions or nations' distinct cultural attitudes toward generosity, and it bears noting that the study was undertaken by a lobbying group for fundraising professionals and their legal counsel. In a similar vein, when the federal government first offered a tax break for donating land for conservation easements in the early 1980s, see 26 U.S.C. § 170(h) (2012), the number of such real-property donations increased significantly. *See* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 45–46 (2004). I thank Thomas Mitchell for drawing this fact to my attention.

the incentives of and impacts for donors, donees, and the state in a way that nudges them toward these outcomes.[179]

First, consider a different form of incentive: matching donations in lieu of tax breaks. This would incentivize tax breaks without doing so by engaging the kind of financial framing effects that dampen donors' subjective well-being under the current system. The state could replace the charitable contribution deduction with a state-financed match. This strategy promises to be Pareto optimal[180] insofar as it makes donors, donees, and the state better (or at least no worse) off. In terms of donors, a state-funded match provides a meaningful incentive by supercharging donations. Even a 15% match can mean that a charity would receive, say, $150 more for a $1000 donation. This avoids the framing and crowding-out effects of tax breaks because the incentive is cast in terms of benefits to others, not a financial break for the donor. Better still, it promises to bring donors more happiness by increasing the effective amount of their donation by whatever percentage the state agrees to match it.[181] Donees would also come out better on this approach. Given the Titmuss evidence that financial incentives suppress altruism and other findings that matching programs tend to increase donation,[182] the likelihood is that charities would fare at least as well, if not better, than they do under the present tax-relief regime. Even if the rate of individual giving declined slightly with a matching approach, the net impact on charities would be positive unless the rate of giving declined more than the amount of the match. Finally, the state would be no worse off and might even prefer a move to matching donations. For one thing, the tax deduction is highly costly to the federal government,[183] so the move to a match would shift the state expenditure from a rebate to individual taxpayers to charities themselves. Even better, the state could calibrate the amount of the match to reduce expenditures so that the state pays less but still incentivizes giving.[184]

Another possibility is a tiered-giving approach. Different scales of donations generate different welfare effects. Eliminating the present financial

179. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (describing low-level state interventions as a form of "libertarian paternalism" that can have outsized positive effects on behavior).

180. Sean Ingham, *Pareto-optimality*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Pareto-optimality (last visited Mar. 14, 2018) (defining this term as "a concept of efficiency used in the social sciences, including economics and political sciences").

181. *See supra* notes 86–88.

182. *See supra* note 178 and accompanying text.

183. Kay Bell, *Eight Tax Breaks That Cost Uncle Sam Big Money*, FOX BUS. (Jan. 13, 2012), http://www.foxbusiness.com/features/2011/08/31/eight-tax-breaks-that-cost-uncle-sam-big-money.html (estimating that between 2010 and 2014 the charitable donation tax deduction will cost the federal government $182 billion).

184. For example, if the state now effectively subsidizes charitable donations at an effective rate of 20% via tax deductions, it could match donations at a rate of 15% and save money while providing a more effective incentive.

framing for charitable donations means that a gift of $100 to the World Wildlife Fund is likely to bring the donor a little subjective well-being, and do a marginal bit of good for the donee charity. In this case, the impact on both donor and donee is relatively modest.[185] However, this does not necessarily hold true for large-scale donations. Most donors who give massive gifts of six or more figures to charity do so with explicitly instrumental aims, including tax relief, public recognition, naming rights, or a spot on the charity's board of directors. Such gifts may not bring the donor as much hedonic upside as a purely non-instrumental act of great generosity, but have a massive upside for the donees. This asymmetry between the welfare effects for donors and donees in the case of large-scale donations suggests that abandoning favorable tax treatment for large gifts would not be a wise move, since these donations are already driven by instrumental reasons, and since their welfare effects swamp any hedonic upsides for donors. High-impact donations also do not fit well with a matching approach, since they would prove enormously costly to the state and give disproportionate support to select charities from public coffers.[186]

The hedonic calculus thus changes significantly when one compares the relatively common lower-level donations and the much rarer high-dollar-amount donations. A ready solution for this concern would simply be to create two tiers of donations. Below a threshold level, say $10,000, donations would not be tax deductible but would be met with a government match, encouraging smaller donations while preserving their hedonic upsides. For donations of five figures and above, the favorable tax treatment would remain to reflect the importance of these larger gifts and the likelihood that the good they do swamps concerns about lost happiness for donors due to instrumental motivations. This tiering would thus balance concern for preserving large donations with creating better incentives for smaller ones, and would follow many other tax donations which toggle on and off at certain dollar thresholds.[187]

A final way to think about choice architecture for maximizing the hedonic upside of donation would take account of another way that all altruism is not created equal. The literature on happiness and prosocial acts finds that three conditions are prerequisite for maximizing the positive

185. This does not, of course, mean that it is trivial as a matter of policy. If it were possible to increase the hedonic impact of donation even a small amount but for a large number of donors, the overall positive effect on societal well-being could be tremendous. *Cf.* THALER & SUNSTEIN, *supra* note 179 (discussing the positive impact of small but widely distributed welfare gains).

186. A related concern for publicly matching gifts for large-scale donations is that it would create entanglement between the state and religion in the cases of gifts to churches, raising Establishment Clause concerns. Thanks to Johnny Rex Buckles for pointing out this concern.

187. The mortgage interest tax deduction, for example, begins to phase out for individuals or couples who earn more than $300,000, reflecting the aim of this tax policy to encourage and benefit middle-class homeowners. 26 U.S.C. § 163 (2012).

relationship between the two: charity increases subjective well-being where it is voluntary and sincere; has a clearly identifiable positive effect; and where it facilitates positive social interactions.[188] Another way to construct incentives for donation that would optimize the happiness generated by giving could calibrate the incentive—such as the percentage match discussed above—to the extent to which the donee charity met these criteria.

Consider that the most typical form of giving is simply monetary transfers; giving $50 to the Sierra Club or $200 to the Heritage Foundation. These kinds of donations are less likely to bring hedonic benefits to donors because they involve no in-person interaction and fail to allow the giver to see any particular impact their gift has. By contrast, giving one's time to a local charity or donating to purchase specific items for various organizations are much more likely to increase happiness, because such donations facilitate social connection while at the same time increasing the odds that one will see the benefits of one's efforts in the community. This is not to say that remote donations to a favorite cause are hedonically hopeless. They just have to be crafted well. Contrast the standard "give the Red Cross $20" with the strategy used by giving website DonorsChoose.[189] This site allows teachers in underfunded schools to specify particular items they need, which users can then specifically choose to fund.[190] Recipients typically follow up with updates on the effect of the gift in their classroom so that the donor has a happiness-enhancing reminder of the specific positive impact of her gift.

Tax policy could be effective at encouraging these kinds of altruistic acts by choosing to prioritize them with higher matching gifts. So, for example, while gifts under a given threshold would generally be matched at 10%, those that meet the specified criteria could be matched at 20%. Volunteer services could also be counted as deductible.[191] Giving one's time is particularly productive of subjective well-being since it is more likely to create or enhance social ties and make an identifiable impact. These kinds of gentle nudges would preserve incentives for charity generally while pushing donors to prefer the kinds of charities that are more likely to have hedonic upsides, and also spurring donees to develop the kinds of innovations that could merit bumped-up matching funds.[192]

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188. *See supra* Part III.B (outlining these findings).

189. *See About Us*, DONORSCHOOSE, https://www.donorschoose.org/about (last visited Mar. 13, 2018) (explaining how DonorsChoose works).

190. *Id.*

191. Currently, volunteer time or services are not tax deductible. *See* DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. NO. 526, CHARITABLE CONTRIBUTIONS 6 (2017), https://www.irs.gov/pub/irs-pdf/p526.pdf.

192. *See generally* THALER & SUNSTEIN, *supra* note 179 (discussing the virtue of small interventions that can have big positive impacts).

Tax incentives designed to encourage charitable giving represent a rare instance in which law actively seeks to encourage the voluntary dispossession of property. While this policy seems promising from a hedonic perspective, this simple financial-incentivist approach falls apart upon closer examination. Framing donation as a financially self-serving decision may crowd out the purely generous instincts that lead altruism to increase happiness. This does not mean that the state should simply stop incentivizing charitable donation. Rather, the state needs to create a savvy choice architecture designed to maximize donation while preserving the hedonic upsides of giving. By replacing the present tax break with a series of tiered donation levels and matching incentives calibrated to particularly hedonically positive giving, state and federal governments can optimize subjective well-being through charity for donors and donees alike.

V. HAPPINESS, LAW, AND THE NEW MINIMALISM

Charitable contributions represent one way in which dispossession rather than possession of property can increase owners'—and society's—overall well-being. Another welfare-enhancing dispossession strategy is much simpler: just give it away. Just such an attitude toward possessions animates an approach this Article terms the "new minimalism." This notion encompasses different kinds of property skeptics, from "freegans" and others who seek to reduce their chattel property ownership to dwellers that opt to live in tiny houses or micro-housing units. This Part explores the hedonic upsides of the new minimalism, first exploring how the trend toward owning less can make us happier. It then explores how law intersects with this trend, including both obstacles to voluntary dispossession as well as regulatory strategies that can make it easier to be happier by getting rid of belongings.

A. *THE JOY OF NOTHING: MINIMALISM & HAPPINESS*

Getting and having more things may remain the dominant cultural ideal, but there is a growing counter-trend of individuals who reject the fetishization of ownership and adopt lifestyles that seek to minimize rather than maximize their property. Adherents of the new minimalism seek to reduce, sometimes radically, their possessions, their living space, or both.[193] This is not a new idea; philosophers have long touted the spiritual virtues of living simply and renouncing material possessions.[194] The new minimalism that is on the rise in

193. *See* Kyle Chayka, *The Oppressive Gospel of 'Minimalism,'* N.Y. TIMES MAG. (July 26, 2016), https://www.nytimes.com/2016/07/31/magazine/the-oppressive-gospel-of-minimalism.html ("Despite its connotations of absence, 'minimalism' has been popping up everywhere lately, like a bright algae bloom in the murk of postrecession America.").

194. *See* WESTACOTT, *supra* note 15, at 6–20 (discussing historical proponents of anti-materialism and minimalism).

contemporary America lies within this tradition, but has grown out of the Great Recession as a particular repudiation of capitalist excesses.

One strain of the new minimalism focuses on skepticism about amassing personal possessions—what lawyers call chattel property. Some adherents of this view challenge themselves to own as few possessions as possible, such as outspoken tech multi-millionaire James Altucher, who owns only a bag of clothes, a phone, an iPad, and a laptop.[195] A less extreme approach favors owning only that which is strictly necessary.[196] Numerous others have embraced somewhat different aspects of the new minimalism,[197] but all are linked by a conviction that an orientation toward possessive materialism does more harm than good, and that Americans would generally be better off with fewer things.[198] A minimalist approach to chattels may also entail not just getting rid of possessions, but giving them to others who may enjoy them more. The trend toward "little free libraries"—tiny, private bookshelves typically located in people's front yards that allow them to get rid of excess books by giving them to interested neighbors—illustrates this move.[199]

Minimalism manifests in a preference for less real property as well. Consider, for example, the tiny house. These are micro-residences of no more than 500 square feet (and often fewer), which stand as a stark rejection of the "American dream" of owning as large a house as possible.[200] Tiny houses are often mobile, sited in areas that do not necessarily require purchasing real property (a friend's back yard or a vacant lot, for example),[201] and are much

195. James Altucher, *How Minimalism Brought Me Freedom and Joy*, JAMES ALTUCHER, http://www.jamesaltucher.com/2016/04/minimalism-brought-freedom-joy (last visited Mar. 15, 2018) ("I have one bag of clothes, one backpack with a computer, iPad, and phone.").

196. For instance, Joshua Millburn and Ryan Nicodemus—who have adopted the self-styled moniker "the Minimalists"—have made public personae out of their personal transformation toward lifestyles organized by a more relaxed standard that defines minimalism simply as "a tool to rid yourself of life's excess in favor of focusing on what's important." Joshua Fields Millburn & Ryan Nicodemus, *What Is Minimalism?*, MINIMALISTS, https://www.theminimalists.com/minimalism (last visited Mar. 15, 2018).

197. *Minimalist FAQs*, MNMLIST, http://mnmlist.com/minimalist-faqs (last visited Mar. 15, 2018); Colin Wright, *Minimalism Explained*, EXILE LIFESTYLE (Sept. 15, 2010), http://exile lifestyle.com/minimalism-explained.

198. Minimalist Leo Babauta, for example, characterized minimalism as "a way to escape . . . the excesses of consumerism, material possessions, clutter, having too much to do, too much debt, too many distractions, too much noise. But too little meaning." *Minimalist FAQs*, *supra* note 197.

199. For a good general description of this trend—and local government resistance to it—see David L. Ulin, *Literary Democracy in Action: 'The Little Free Library Book*,*'* L.A. TIMES (Apr. 15, 2015, 11:46 AM), http://www.latimes.com/books/jacketcopy/la-et-jc-literary-democracy-in-action-the-little-free-library-book-20150415-story.html.

200. Chrystal Johnson, *Deconstructing the Trend Towards (Constructing) Tiny Homes*, EARTH911 (Feb. 20, 2015), https://earth911.com/home-garden/deconstructing-the-trend-towards-constructing-tiny-homes (discussing the emergence of the tiny house trend).

201. Wilkinson, *supra* note 21 (describing the general characteristics of tiny houses, and noting that they are "roughly the size of a covered wagon").

less expensive than traditional homes.[202] Their increasing popularity is evident in the fact that both magazines (the aptly named *Tiny House Magazine*) and television shows ("Tiny House Nation" on the A&E Network) have cropped up devoted entirely to the tiny-house lifestyle. And while these visible outlets tout the trendier iterations of tiny homes chosen by individuals who could afford traditional houses but choose to scale down instead, they can also serve an important social need: housing for the economically disadvantaged. Community First Village, a 27-acre development in Austin County, Texas, consists solely of low-square-footage units dedicated for the chronically homeless.[203] Similar developments have cropped up all over the country, inspired by the notion that tiny houses can provide a less expensive and more humane solution to homelessness than shelters.[204]

Another instance of minimalism in real property is the rise of micro-housing.[205] These urban housing developments look like standard apartment complexes, but reverse the usual distribution of private and common space. The individual apartments in micro-housing units are diminutive, containing just enough room for a bed, a bathroom, and sometimes a Spartan kitchen. Micro-apartments compensate for this lack of size with a variety of shared amenities: communal kitchens, common rooms, and co-working spaces.[206] Some micro-housing units provide no space for residents' vehicles but do have access to Zipcars and other ride-sharing services.[207] By reversing the usual ratio of living and common space in an apartment building, micro-housing forces residents to significantly reduce what they own, instead focusing on friends and the local community for both comfort and necessities.[208]

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202. Nina Glinski, *Tiny Houses Big with U.S. Owners Seeking Economic Freedom*, BLOOMBERG (July 9, 2014, 9:10 AM), https://www.bloomberg.com/news/articles/2014-07-09/tiny-houses-big-with-u-s-owners-seeking-economic-freedom (discussing reduced cost and mobility as two major motivations for moving into a tiny home).

203. Cindy Widner, *Tiny Houses in Austin Are Helping the Homeless, but It Still Takes a Village*, CURBED AUSTIN (May 17, 2016, 9:01 AM), https://austin.curbed.com/2016/5/17/11686368/tiny-houses-austin-end-homelessness.

204. Nancy Cook, *A Tiny House Grows in Washington, D.C.*, ATLANTIC (Dec. 2, 2013), https://www.theatlantic.com/business/archive/2013/12/a-tiny-house-grows-in-washington-dc/425733 (suggesting tiny homes provide a solution to urban affordable housing crises); Linda Federico-O'Murchu, *Tiny Houses: A Big Idea to End Homelessness*, NBC NEWS (Feb. 26, 2014, 12:13 AM), https://www.nbcnews.com/business/real-estate/tiny-houses-big-idea-end-homelessness-n39316.

205. *See* John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 61–67 (2014) (detailing the emergence and character of micro-housing).

206. *See* Tomio Geron, *Collaborative Housing Aims to Build Housing for the Sharing Economy*, FORBES (Sept. 24, 2013, 4:55 PM), https://www.forbes.com/sites/tomiogeron/2013/09/24/collaborative-housing-aims-to-build-housing-for-the-sharing-economy (summarizing and describing this trend).

207. *Id.*

208. *Id.* ("If you look at the square footage of the private units [we] have, it will be more expensive per square foot of private space . . . . But there will be common space that's spread

These trends fly in the face of cultural expectations about both real and chattel property. People are expected to guard their possessions and homes, not intentionally discard them or opt for more modest living quarters. Yet the minimalist rejection of possession may well make sense as an optimal strategy for maximizing one's subjective well-being.[209] Much of the evidence amassed by scholars of hedonics predicts just such a result,[210] and minimalists' own description of their experience with fewer possessions matches up with these predictions. While minimalists extol the virtues of discarding possessions for a number of reasons, there is a remarkable consistency to the leading reason for this choice: It made them happier. The very point of minimalism, according to Millburn and Nicodemus, is happiness:

> By incorporating minimalism into our lives, we've finally been able to find lasting happiness—and that's what we're all looking for, isn't it? We all want to be happy. Minimalists search for happiness not through things, but through life itself . . . .[211]

Having fewer possessions, report minimalists, led them to feel freer both physically and from monetary debt.[212] One particularly salient positive change reported by adherents was the ability to get rid of storage units full of unused belongings that created both psychological dead weight and steep monthly rental fees.[213] They reported that less concern with possessions led to a greater focus on their social ties and families.[214] This effect is particularly pronounced in cases where owners gave up possessions with a prosocial aim in mind. One man reported that his Little Free Library brought him in touch with

across for everyone. That's one of the main ways to achieve affordability while achieving access to more amenities." (alteration in original)).

209. Not everyone is a fan of minimalism. Some deride it as a bastion of elite privilege that ignores the experiences of those whose less fortunate lives have made it much more difficult to simply abandon their possessions. For one thoughtful criticism, see Arielle Bernstein, *Marie Kondo and the Privilege of Clutter*, ATLANTIC (Mar. 25, 2016), https://www.theatlantic.com/entertainment/archive/2016/03/marie-kondo-and-the-privilege-of-clutter/475266 (noting that Syrian refugees cling on to the few things that give them a sense of permanence and hope, whether a crutch or a photo of family or a pet).

210. *See supra* Part III.B (cataloguing the results of studies about the fraught relationship between happiness and possession of real and chattel property).

211. Millburn & Nicodemus, *supra* note 196; *see also Minimalist FAQs*, *supra* note 197 ("As a result [of adopting a minimalist lifestyle], there is more happiness, peace, and joy, because we've made room for these things."); Wright, *supra* note 197 ("The number of possessions you have doesn't matter, but being able to live a happy life does.").

212. Joshua Becker, *Don't Just De-clutter, De-own*, BECOMING MINIMALIST, http://www.becomingminimalist.com/dont-just-declutter-de-own (last visited Mar. 15, 2018) (advocating the upsides of debt reduction as part of a minimalist lifestyle).

213. For an unflinching look at the burgeoning self-storage industry as emblematic of "the great American propensity toward accumulating stuff," see Jon Mooallem, *The Self-Storage Self*, N.Y. TIMES MAG. (Sept. 2, 2009), http://www.nytimes.com/2009/09/06/magazine/06self-storage-t.html.

214. *See Minimalist FAQs*, *supra* note 197 ("There's more room for creating, for loved ones, for peace, for doing the things that give you joy.").

neighbors, who expressed their appreciation for his generosity and found common ground in their shared literary interests.[215] And voluntary dispossession generally countered the kind of materialist mindset that many minimalists cited as the main reason for their preexisting unhappiness.

Owners of tiny houses also describe their experiences in terms of increased happiness. One tiny homeowner in Rhode Island reported that his simpler, mortgage-free lifestyle left him "infinitely happier" and brought him "complete peace of mind."[216] Other owners agreed that while their large home and mortgage made them feel "trapped," their tiny homes freed them from having to "waste their time or be a slave to a house they don't fully use."[217] The mobility of these units also affords their owners a degree of freedom unavailable for traditional homeowners.[218]

Residents of micro-housing units cite greater subjective well-being too,[219] due in large part to the fact that the shared events and spaces within their complexes provide a sense of community in cities where social ties are typically hard to come by.[220] Occupants of much smaller living spaces also report greater affinity for getting out of their dwellings and outdoors, leading to happiness-enhancing behavior like exercising, interacting with neighbors, and contemplating nature.[221] There is also a necessary relationship between smaller dwellings and reduction of chattel property, since downsizing one's real property requires one to limit one's moveable possessions only to the truly necessary ones—thereby getting rid of the unnecessary possessions that tend to weigh us down and reduce subjective well-being. Jay Shafer, an early

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215. Conor Friedersdorf, *The Danger of Being Neighborly Without a Permit*, ATLANTIC (Feb. 20, 2015), https://www.theatlantic.com/national/archive/2015/02/little-free-library-crackdown/385531 (reporting that one provider of a Little Free Library "knew he was onto something 'when a 9-year-old boy knocked on his door one morning to say how much he liked the little library'"). And one leading website referred to Little Free Libraries as "tiny vestibule[s] of literary happiness." *Buy a Street Library*, STREET LIBRARY, https://streetlibrary.org.au/what-is-a-street-library (last visited Mar. 15, 2018).

216. *See* Glinski, *supra* note 202.

217. *Id.*

218. *See* Cook, *supra* note 204 (noting that if people want to move tiny homes, "they can simply bring their homes along" rather than having to sell them).

219. *See Microhousing: An Overview*, MICRO SHOWCASE, http://microshowcase.com/microdwell/microhousing-an-overview (last visited Mar. 15, 2018) ("Many in the micro house movement come to it with a realization that happiness in their lives has never correlated with the size of the spaces they have inhabited. Some search for a simplicity of existence, the elegant economy of form of a well designed small structure, an added freedom when unshackled from unneeded rooms and unwelcome mortgages.").

220. Kaysen, *supra* note 21 (cataloguing a real sense of community in micro-living arrangements, and observing that for one resident, "[t]he real perks [were] the people he . . . met along the way").

221. *See Microhousing: An Overview*, *supra* note 219 (observing that many microhousing dwellers prefer "to spend more precious life energy than needed dedicated to the designing, building, financing, cleaning, furnishing, decorating, maintaining, and repairing, when we might better be loving, discovering, creating, traveling").

creator of tiny homes, observed that living in smaller units "shows people how little some need to be happy, and how simply they can live if they choose."[222]

B. Minimizing Property Through Law

Evidence shows that downscaling both real and chattel property tends to improve our subjective well-being. But what, if anything, should the state do about this? This Subpart considers four overlapping strategies the law might take to nudge Americans to acquire less property, and thereby lead possibly happier lives.

1. Libertarian Non-Intervention

One approach law could take toward the trend toward minimalism is to do nothing. Skepticism about possession has been growing in the United States since the Great Recession, and the best approach may be to simply allow it to continue without interference. The problem with this strategy is that law has already staked out a strong position in favor of incentivizing and lowering the costs of possessing property. This is most conspicuous in the context of residential housing. Evidence suggests that people are happier when they downscale to a smaller home than when they move to a larger one.[223] Yet the federal government encourages people to do just the opposite in a number of ways. The Internal Revenue Code extends homeowners tax breaks for mortgage interest and property taxes,[224] both of which result in larger tax breaks for larger houses. And the two leading government-sponsored entities, Fannie Mae and Freddie Mac, both insure mortgages against default and purchase mortgages on the secondary market.[225] These policies are overtly designed to further mortgage origination and spur homeownership.[226]

In light of all this, one simple way the state could encourage movement toward smaller housing (tiny or otherwise) would be to get rid of the current fleet of home-purchase incentives that scale up in proportion to the size of

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222. Glinski, *supra* note 202.

223. *See* Fagundes, *supra* note 26, at 1871–76.

224. I.R.C. §§ 163(h)(2)(D), 163(h)(3), 164(a)(1) (2012). The new tax bill passed in late 2017 cut back on these tax deductions, but only somewhat. Now, state and local taxes (the latter of which includes property tax) will be capped at $10,000, while new homeowners will be allowed to deduct mortgage interest only on the first $750,000 of mortgage debt. Kathryn Vasel, *Homeowners: Here's What's in the Tax Bill for You*, CNN MONEY (Dec. 17, 2017, 12:17 PM), http://money.cnn.com/2017/12/17/real_estate/tax-bill-mortgage-property-tax-deductions/index.html.

225. *Let FHA Loans Help You*, U.S. DEP'T HOUSING & URB. DEV., https://portal.hud.gov/hudportal/HUD?src=/buying/loans (last visited Mar. 15, 2018) (providing an overview of this policy).

226. *See* Rob Alford, *What Are the Origins of Freddie Mac and Fannie Mae?*, HIST. NEWS NETWORK (Sept. 18, 2008), http://historynewsnetwork.org/article/1849 (tracing the origins of both GSEs directly to the federal government's intention of supporting and expanding homeownership).

one's mortgage and/or home.[227] The incentive effect of repealing the homeowner tax breaks and dialing back federal mortgage support would render tiny homes a more attractive option. Few, if any, tiny homes are supported by mortgages, since a major reason for opting for one is to live debt-free.[228] And many tiny homes exist off the grid, on land they do not own, and/or are mobile,[229] so owners may not pay any traditional property taxes.[230] Perhaps more important, though, widespread state subsidies for housing do much to support the still-widespread notion that owning a home—particularly a large home—is the American dream,[231] since these policies express strong state endorsement of debt-supported homeownership.[232] Rolling these policies back would render the state neutral on private citizens' housing decisions, and leave them free to opt in favor of whatever housing would maximize their well-being considering state market distortion in their purchase decision calculus.[233]

2. Nudges

Alternatively, the state could take an active approach encouraging minimalism in property. The challenge with traditional financial incentives is that, as we have seen with charitable contributions,[234] they risk crowding out the kinds of motivations that are likely to result in greater subjective well-being.[235] A better incentive could map the strategy discussed in the previous Part: Rather than giving people a financial reward for offloading their

227. There are numerous other social welfare gains from rolling back federal mortgage subsidies, not the least of which is that it would eliminate the federal government's third largest tax expenditure and save the federal government $7.1 billion per year. I discuss this and other critiques of federal housing subsidies in Fagundes, *supra* note 26. Given the limited scope of this Article, though, I limit the discussion to the implications of these policies for the housing minimalism movement.

228. *See* Glinski, *supra* note 202 (quoting numerous owners of tiny homes who explain their decision largely in terms of freedom from mortgage debt).

229. *See* Wilkinson, *supra* note 21 (discussing mobility as one of the major upsides of living in a tiny home).

230. For one thing, a tiny home that is mobile may be classified as a vehicle, not real property. And tiny home owners often do not own the land they occupy, which means they are not on the hook for property taxes at all.

231. Suzy Khimm, *Buying a Home: The American Dream that Won't Die*, MSNBC (July 10, 2014, 12:48 PM), http://www.msnbc.com/msnbc/homeownership-credit-access-minority-low-income-mortgages (citing survey results and quoting words from President Obama reflecting the centrality of homeownership in American identity, even after the subprime mortgage crisis).

232. Debt itself is deadly to happiness, both because of the permanent sense of worry it causes in debtors and because of the nontrivial risk of default, which leads to a cascade effect of events (job loss, poor health, homelessness) that can drive down subjective well-being. *See supra* Part III.B.

233. It would, moreover, mitigate the chances of another subprime mortgage crisis taking place. That event was a perfect storm of happiness-reducing events: home dislocations, job losses, health costs, and a generalized sense of uncertainty and loss.

234. *See supra* Part IV.

235. *See supra* notes 169–71 and accompanying text.

unwanted goods to charities, the state could give an additional percentage of the value of the donation to the charity. So, if you donate your old refrigerator to the Salvation Army, the state could pitch in 10% of its market value to that organization. This strategy would incentivize downsizing while increasing a donor's happiness by framing the gift as a prosocial act of generosity rather than a self-interested financial decision.[236]

The crowding-out concern is less salient in the context of minimalist real property. The reason that smaller housing results in higher subjective well-being has nothing to do with altruistic motivations. It is instead a product of freeing oneself of the burdens of excessive ownership.[237] Standard financial incentives thus may work well in this instance. For example, states could give tax incentives for people eliminating their mortgage debt rather than taking on burdensome new loans, pushing people to embrace low- or no-mortgage living options (like tiny houses), and toward less debt generally. A more radical move would be to penalize people for living in excessive quarters, such as property taxes that scale progressively with each additional thousand feet of square footage of an owner's home. In contrast to the current tax code, this approach would penalize rather than reward possession of opulent houses. Another possibility would be giving tax credits for the construction of minimalist housing. This could apply to either individuals who construct their own tiny homes, or businesses that invest in the construction of tiny homes or micro-housing complexes. For construction companies skeptical of these novel forms of housing, economic incentives could tip the scales, increasing the availability of tiny homes and micro-housing while also lowering prices due to greater supply.

3. Legal Status

A third strategy would seek to normalize tiny houses and micro-housing units as a matter of law. Both of these minimalist forms of real property now exist in legal limbo under most municipal codes. For example, tiny houses may not count as houses at all. If they are on wheels, they fall within the ambit of vehicle codes,[238] and are classified as either a semi-trailer, recreational vehicle, or mobile home.[239] Each of these creates its own legal problems: trucks may not be used as residences; RVs can be lived in for only about 30 days at a time; and mobile homes can be sited only in designated trailer parks, whose rules may not permit nonconforming structures. Stationary tiny houses also typically fail building codes' threshold requirement of minimum square

236. *See supra* Part III.A (discussing framing, crowding-out, and their effect on altruism).

237. *See supra* Part V.A (discussing the various ways that downscaling property can lead to higher subjective well-being).

238. Rachel Keyser, *A Government's Guide to Tiny House Regulation*, VIEWPOINT (Mar. 6, 2017), http://www.viewpointcloud.com/blog/local-government-resources/governments-guide-tiny-house-regulation.

239. *See, e.g.*, CAL. VEH. CODE §§ 550, 465, 396 (outlining these categories).

footage. Micro-housing developments raise different concerns. Urban zoning laws typically impose maximum-unit requirements to avoid overcrowding and assure minimum quality living conditions. Micro-housing buildings that eliminate resident parking would also violate local regulations requiring buildings have a minimum amount of parking.

The peculiar legal status of minimalist housing is more than just a technical legal issue; it has real impacts on the capacity of these forms of housing to become an option for many. While interest in tiny homes grows, a dominant question about these residences is whether they are legal—and the universally given answer is that they are not.[240] This uncertain status likely deters many individuals who would transition to a tiny home. The social costs are only part of the hedonic story, though. Current tiny-home dwellers may report higher happiness, but it remains dampened by the uncertainty created by their home's liminal legal status. Much evidence confirms that insecurity about one's property exacts major psychological costs,[241] so the notion that city officials could fine or even destroy tiny homes for being non-conforming significantly reduces the happiness that owners experience.[242] Related problems dog micro-housing. Many proposed developments have foundered on the shoals of unfriendly zoning boards unwilling to permit variances. In turn, developers interested in micro-housing are understandably loath to invest in these projects given their unique legal hurdles. On both of these fronts, the uncertain legal status of minimalist housing prevents it from reaching its happiness-maximizing potential.

These challenges invite two tiers of solutions. In the longer term, the easy answer is to clarify the status of both tiny homes and micro-housing by revising local housing (and possibly also vehicle) codes to legalize minimalist housing. Building codes could craft rules for micro dwellings, while zoning regulations could establish and enforce distinctive standards for micro-housing. This would eliminate the uncertainty that currently deters some individuals from investing in micro housing. Dedicated building codes for tiny houses could also create appropriate safety standards, as standard codes make no sense as applied to tiny homes.[243] Additionally, reforms could address concerns that

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240. *E.g.*, Ryan Mitchell, *How to Get Started: A Practical Guide Part 6*, TINY LIFE (June 30, 2011), http://thetinylife.com/how-to-get-started-a-practical-guide-part-6 ("The legality of Tiny Houses is really the skeleton in the closet of Tiny Houses; in most instances, it isn't legal, there is no other way of putting it.").

241. Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 455–61 (2011) (discussing psychological harms of property dispossession); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (discussing the "demoralization costs" of lost property) .

242. *See* Mitchell, *supra* note 240 (identifying these possible penalties, as well as cutoff of local services, as possible threats tiny-home dwellers constantly live with).

243. One simplifying option would be to adopt the standards of the International Residential Code ("IRC"), which is continually updated to reflect modern housing trends, including the

micro-housing does not meet the same quality control standards of typical apartment buildings.[244]

Given the difficulty of substantial revisions of local law, shorter-term and lower-cost strategies also merit consideration. One approach would be to simply tweak present laws to facilitate usage of minimalist housing. For example, one North Carolina county altered its vehicle code to permit residents to occupy RVs without any time limit, thereby legalizing at least mobile tiny homes.[245] Localities could also lower their minimum square footage requirement so that tiny houses are not categorically rendered illegal.[246] In terms of micro-housing developments, similar solutions are available. For instance, building codes could permit individual units of a smaller size in buildings that also offered a minimum amount of shared common space.[247] Zoning boards could also adopt policies of presumptively extending variances to micro-housing developments for features like parking requirements that fail to reflect the distinctive populations of these buildings.

Finally, while zoning and building codes related mostly to the nexus of minimalism and real property, they also offer at least one interesting application to chattel property minimalism. For example, Little Free Libraries have garnered local support and enhanced the subjective well-being of owners and recipients, but they have also run afoul of various local laws. Officials in Los Angeles, Shreveport, and St. Paul have ordered owners to remove their little free libraries for violating city codes.[248] While some cities have relented,[249] others continue to block the Little Free Libraries. Some of these stories have happy endings: After public outrage at the threatened citations,

move toward tiny houses. INT'L RES. CODE §§ R304–06 (2015) (establishing safety standard that accounts for smaller housing units).

244. Claire Thompson, *A (Very Small) Room with a View*, HIGH COUNTRY NEWS (Jan. 28, 2014), http://www.hcn.org/issues/46.1/a-very-small-room-with-a-view (reporting plans of Seattle Department of Planning and Development to revise its regulations to require micro-housing to undergo the same).

245. Keyser, *supra* note 238 (discussing changing local laws).

246. For example, the International Residential Code requires a minimum of only 88 square feet (a 70 square foot room and an 18 square foot bathroom). INT'L RES. CODE § R304.1 ("Habitable rooms shall have a floor area of not less than 70 square feet."); *id.* § R306.1 ("Every dwelling unit shall be provided with a water closet, lavatory, and a bathtub or shower."); *id.* § R307.1 (establishing the minimum space for bathroom fixtures).

247. The city of Seattle proposed a law in 2013 to define and systematize micro-housing in a major urban area. *See* SEATTLE, WA., DPD MICRO-HOUSING AND CONGREGATE RESIDENCES SEPA DRAFT (Sept. 25, 2013), http://www.seattle.gov/dpd/vault/cs/groups/pan/@pan/documents/web_informational/s010441.pdf.

248. Michael Schaub, *Little Free Libraries on the Wrong Side of the Law*, L.A. TIMES (Feb. 4, 2015, 11:30 AM), http://beta.latimes.com/books/jacketcopy/la-et-jc-little-free-libraries-on-the-wrong-side-of-the-law-20150204-story.html.

249. *See, e.g.*, Alexandria Burris, *Little Free Libraries Now Legal*, SHREVEPORT TIMES (Oct. 27, 2015, 11:01 PM), http://www.shreveporttimes.com/story/news/local/2015/10/27/little-free-libraries-ordinance-vote/74689970.

Shreveport revised its local law to permit Little Free Libraries that met certain safety conditions.[250] Los Angeles, though, remains ambivalent about them, and Dallas continues to take a hard line on Little Free Libraries despite the unpopularity of this stance.[251] Here, the legal intervention seems obvious from a welfarist perspective. Since there is no indication that Little Free Libraries impose social costs and hedonics studies and anecdotes indicate that they are highly beneficial, scrapping regulatory limits seems like not only a welfare enhancing but a Pareto-optimal move.[252]

4. Targeted Abandonment

Finally, if getting rid of excess possessions makes us happier, perhaps law should smooth owners' paths to doing so via the doctrine of abandonment. Common law generally permits the abandonment of most chattel property[253] by voluntary relinquishment of title;[254] though it bars owners from abandoning their real property.[255] Some scholars have disputed whether law's formally permissive approach toward chattel abandonment translates into practical freedom to get rid of one's property. Eduardo Peñalver has argued that while owners of personalty may have a theoretical right to abandon it, actually doing so is much harder than it seems. This is for several reasons: regulations limit the abandonment of the most noxious objects, like trash; acts of abandonment are unappealing on one's own real property but amount to trespass against others' land;[256] and ambiguity about the intent to abandon goods often leads to their being returned to their previous owners.[257]

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250. *Id.*

251. Dan Solomon, *Dallas Is Regulating "Little Free Libraries" for Some Reason*, TEXAS MONTHLY (Sept. 14, 2016), https://www.texasmonthly.com/the-daily-post/dallas-regulating-little-free-libraries-reason.

252. *See* Friedersdorf, *supra* note 215 ("Those exploiting overly broad laws to urge that [little free libraries] be torn down are a national disgrace.").

253. *See* Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010) ("[T]he standard hornbook rule is deceptively simple: chattels may be freely abandoned.").

254. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 4.03[B][1] (4th ed. 2017) (explaining that abandonment of property occurs "when the owner . . . intends to relinquish all right, title, and interest in it"). While most U.S. jurisdictions permit abandonment of chattels as a background principle, others vary their regulatory strategies or except certain subject matter (e.g., pets) from this principle. For a fascinating overview of legal strategies relating to abandonment, see Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 390–405 (2010) (outlining a taxonomy of abandonment regimes); *see also* UNIF. UNCLAIMED PROP. ACT §§ 2(a), 4 (UNIF. LAW COMM'N 1995) (allocating unclaimed property to state after specified time).

255. This asymmetry dates to the Middle Ages, when both freeholders and leaseholders were prevented from abandoning their land in order to secure the constant payment of feudal incidents to the Crown. Strahilevitz, *supra* note 254, at 399. Modernly, the rationale is similar: Bars on the abandonment of real property assure, among other things, that the state will continue to receive property taxes for private land. *Id.* at 399–400.

256. *See* Peñalver, *supra* note 253, at 204.

257. *Id.* at 202–08 (discussing these and other practical constraints on the right to abandon).

At first blush, the hedonic downsides of possession may suggest that the law's best strategy would be to reverse the common law antipathy toward abandoning land and to remove practical obstacles in the way of abandoning chattel property. While this may improve the well-being of owners, other concerns counsel caution legalizing all abandonment. For one thing, while owners may benefit from this change, free and easy abandonment may inflict societal costs—pollution, clutter, pricey cleanup services, as well as costly and possibly violent races to become the new owner.[258] Moreover, one may plausibly ask what would incentivize an owner to abandon property even if the practice were widely legal. The only property that we should want owners to abandon would be that with some social value, in which case an owner will be unlikely to part with it.[259]

Lior Strahilevitz has sought to solve this dilemma by arguing that law should permit abandonment only when the property has positive market value.[260] This proposal has the appealing upside of avoiding the socially costly offloading of useless or harmful property. But this scheme could be challenging to administer, which Strahilevitz acknowledges.[261] On the other hand, this concern assumes that this doctrine can lead to only "generalized altruism," and that the best benchmark of value to check suboptimal abandonment is objective market value.[262] But what makes an act of abandonment welfare-enhancing from a hedonics perspective is not its fair market value, but rather whether the recipient derives subjective well-being from it.[263]

This concern suggests a novel administrative solution to operationalizing Strahilevitz' abandonment proposal. Consider a hypothetical "Up for Grabs" registry, a state-run exchange on which needy people below some income

258. *See* Strahilevitz, *supra* note 254, at 372–75 (discussing social costs of abandonment, such as races to possess, cleanup costs, and causing goods and land to fall into disrepair).

259. *But cf. id.* at 362 fig.1 (cataloguing forms of abandoned property and illustrating that even property valued by its owner may be abandoned, as with "major league baseballs" and the practice of "making it rain").

260. *Id.* at 407.

261. *Id.* at 408–12.

262. *Id.* at 419. Strahilevitz explains further that "[p]ositive-market-value properties present the most compelling case for a permissive rule regarding abandonment." *Id.* at 407.

263. For example, an out-of-date refrigerator could have virtually no market value because people are willing to buy only new or fairly new refrigerators. But for someone without much income, even an out-of-date, less stylish fridge could be hugely useful. So, while the fair market value of the fridge measured by aggregate preferences could be zero or even negative (if, for example, the owner would have to pay to have it hauled off), as long as the fridge goes to someone who will value it, that is clearly a welfare-maximizing transfer. The goal of abandonment should thus not be to require that people abandon positive market-value property, but rather, that they abandon property that brings subjective value to someone who will soon acquire it. The former may be a decent proxy for the latter, but it is not the same.

threshold[264] could indicate things they needed, or even wanted, but could not afford.[265] On the other side of the registry, those above the income threshold could list things they had but did not need and were willing to give away. People in each category could search and respond to the listings for potential matches, and takers would be able to acquire the "up for grabs" property if they retrieved it in a reasonable time window.[266] This approach solves the market-price evaluation problem through revealed preferences. If an owner seeks to abandon Good A and someone takes it in a week, we can reasonably assume that it had positive subjective value that ratifies the former owner's dispossession as a legal act of abandonment. If no one wants Good A after a given time, say three months, then that allows an inference that Good A does not bring anyone enough subjective value to render the abandonment valid, and the former owner would be obliged to maintain possession of it.

The Up for Grabs registry could be changed in a couple ways to optimize its generation of subjective well-being. First, it could operate locally, so that abandoners would be more likely to see or know the person in their community who benefited from their former property.[267] Second, it would provide the abandoner with information about the recipient of the good, so that the former owner would experience the distinctive happiness of giving to a particular individual, not just an anonymous person.[268] And there could be an option for in-person handovers of the goods, further amplifying the "warm glow" to the abandoner and producing at least some weak social ties in the process.[269] While the upside of shifting property to higher-value uses may alone justify this kind of targeted abandonment,[270] hedonics evidence adds

264. A very rough cutoff point could be a household income below $75,000, which studies have suggested is the threshold for U.S. families at which additional possessions appear to bring no additional subjective well-being. *See generally* Daniel Kahneman & Angus Deaton, *High Income Improves Evaluation of Life but Not Emotional Well-being*, 107 PROC. NAT'L ACAD. SCI. U.S. 16489 (2010) (reporting results of study that income beyond $75,000 did not improve affective well-being).

265. There are already private registries of unclaimed property, but they exist mostly to help those who are entitled to funds recover them. *See The Unclaimed Property Clearinghouse ("UPCH")*, UNCLAIMED PROP. CLEARINGHOUSE, http://www.acsupch.com (last visited Mar. 16, 2018).

266. How is this abandonment rather than donative transfer? The answer lies in the "up for grabs" character of the registry. Owners cede their rights the moment they place something on the registry and cannot pick who takes the property or deny someone who calls dibs on it.

267. *See* Aknin et al., *supra* note 29, at 15 (reporting results of study indicating that giving with local ties enhances well-being more than other charitable activity).

268. *See id.* at 2 (showing that prosocial giving creates more subjective well-being when the recipient is a clearly identifiable individual, not just a general cause). For a great example of a charity that specifically identifies recipients of donation, and also just a great cause generally, see DONORSCHOOSE.ORG, https://www.donorschoose.org (last visited Feb. 4, 2018).

269. *See* Anik et al., *supra* note 63, at 5–6 (reporting study results showing that prosocial spending results in greater affective happiness when it entails some direct social contact with recipient).

270. Strahilevitz, *supra* note 254, at 414 ("[A]bandonment of such resources often facilitates their reuse or recycling by a high-value user.").

the insight that such a program may do as much or more for those who gave than for those who received, true to the old Biblical aphorism.[271]

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Another simple dispossession strategy is to reduce what property people already have, whether that means discarding unnecessary possessions or downscaling to radically more modest living quarters. The evidence that these dispossessive approaches to property is strong, which raises the corollary question what if anything law can do to nudge owners in this direction. This Part discussed several forms of choice architecture—understated incentives, revisiting legal status, and targeted abandonment—that would nudge people in the direction of minimalism in the interest of enhancing owners' and others' happiness.

VI. CONCLUSION: IN [QUALIFIED] DEFENSE OF EXCLUSION & POSSESSION

This Article has sought to show that while exclusion and possession dominate our legal and cultural understanding of property, inclusion and dispossession strategies are actually superior ways to maximize overall social welfare. The evidence from the new science of happiness—hedonics—shows that sharing property, giving it to charity, or just getting rid of it tend to increase overall well-being to a greater extent than amassing and guarding fortunes or land. In concluding, this Article briefly reflects on what these findings mean for property theory more generally.

The major fault line in property currently pits exclusion theorists against enthusiasts of a progressive approach.[272] Working with the toolkit of neoclassical law and economics, exclusion theorists typically stress the welfare-enhancing potential of strong owners' rights. Clearly delineating property entitlements, the argument goes, lowers information costs about who owns what, thereby maximizing efficient transfers and in turn overall social welfare.[273] Progressives, by contrast, question the coherence of law and economics as the sole way to think about property, critiquing its value monism and preferring instead to regard property through a pluralist lens.[274] This

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271. Owners are, of course, always free to donate to charities. The relative advantage of the Up for Grabs registry would be that it channels the act of dispossession in ways designed to maximize the happiness of the former and new owners of the chattel.

272. For a good overview of this debate, see generally Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013).

273. Henry Smith's information-cost defense of owners' rights is one example of this argument. *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S453–57 (2002).

274. *See generally* Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) (outlining and advocating the progressive approach while critiquing the law and economics approach).

pluralist approach considers values beyond market calculations to include nonmarket value, individual dignity, and distributive justice. In so doing, the progressive-property approach tends to deemphasize exclusion rights and attend more closely to the interests of non-owners in property law.[275]

These fault lines trace at least to the middle of the last century, forming the latest part of a dialogue that can be located in Demsetz's views of the normative appeal of the emergence of private property on one hand and the distributive-justice and anti-commodification critics on the other.[276] New or old, though, the basic opposition remains the same. One side of this debate extols the private rights of owners as socially beneficial ways to maximize well-being through wealth accumulation, while the other looks askance at the right to exclude as a shortsighted way of thinking about ownership that leaves out critical human values and considerations.

This Article's exploration of inclusion and dispossession may initially seem like a shot across the bow at property itself, since it is rhetorically arrayed in opposition to core ownership notions of exclusion and possession. But such a view profoundly misunderstands this Article's central claim. The argument is not that the rights to exclude or possess are inherently problematic. Rather, strategies of inclusion and dispossession are most likely to enhance overall social welfare. This in turn illustrates that the current debate over the right to exclude represents a false opposition. A strong right to exclude may be socially optimal, but this is not dominantly because owners' rights enable private wealth maximization. Rather, rights of exclusion and possession are necessary as prerequisites to enable the kinds of inclusive and dispossessive acts that are most likely to increase owners' well-being, and society's net welfare. To be able to share one's property, or donate it, or give it away, presupposes that you possess the freedom to do what you want with what you own. The voluntary other-oriented conduct that maximizes the well-being of owners and society depends on strong rights of exclusion and possession.[277]

The rights to exclude and possess thus seem to present a paradox. They are conceptually opposed to the kind of inclusion and dispossession that increase overall social welfare, but they are required to enable owners to engage in welfare-enhancing conduct. As writers from Aristotle[278] to Carol

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275. *See supra* note 31.

276. *Compare* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. ASS'N 347, 350–54 (1967) (making the descriptive and normative case for the spontaneous development of property rights), *with* Emily Marden, *The Neem Tree Patent: International Conflict over the Commodification of Life*, 22 B.C. INT'L & COMP. L. REV. 279, 292–93 (1999) (discussing distributive justice concerns related to propertization of traditional remedies by pharmaceutical companies), *and* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1874 (1987).

277. Progressive property theorists have made just this point with respect to their own work. *See, e.g.*, Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 884 n.251 (2009).

278. *See* ARISTOTLE, *supra* note 16, at 89 (defending property rights as a means to enable the virtue of generosity in owners).

Rose[279] have suggested, the answer to this apparent puzzle is that property is a deeply humane institution because of, not despite, its being structured around owners' rights. Exclusion and possession do not allow owners to exit from society and protect their belongings, but leave them free to voluntarily engage in altruistic conduct and build bridges with their local and broader communities.[280] The lesson is that ownership entitlements leave people free to engage in the kinds of prosocial conduct that are generative of individual and social welfare.[281] The role of the law in this dynamic is necessarily limited, since this kind of conduct generates subjective well-being only when it is unfettered by state coercion. With this limitation in mind, this Article has sought to explore a variety of ways that law might move owners toward sharing, donating, and getting rid of their property. Developing choice architecture in the interest of promoting inclusion and dispossession holds the promise of leveraging the institution of property, not by cabining owners' rights, but by prompting them to exercise those rights to be their best, other-regarding selves.

279. *See* Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1019 (2005) (reviewing MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003), and KAREN R. MERRILL, PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM (2002)) (arguing that "[p]roperty is one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others").

280. Rose, *supra* note 119, at 98–99 (discussing property's capacity to create sociality, commerce, and community).

281. As Rosser observed, "where is the virtue if the law gives you no choice but to be virtuous?" Rosser, *supra* note 272, at 118.