

# Christmas in July: A Response to David Fagundes, *Why Less Property Is More*

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Bet you are tired of being upset  
Always wanting something you never can get  
Life's no illusion, love's not a dream  
Now, I know just what it is  
Everybody's happy nowadays.<sup>1</sup>

## I. INTRODUCTION

At least apocryphally, when Salvador Dali first saw Joseph Cornell's iconic collage film *Rose Hobart*, he exclaimed, "He stole it from my subconscious!"<sup>2</sup> I

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1. Buzzcocks, *Everybody's Happy Nowadays*, on SINGLES GOING STEADY (United Artists Records 1979).

2. Robert Leonard, *Joseph Cornell: Blue Movie*, CITY GALLERY WELLINGTON (Nov. 1, 2017) <https://citygallery.org.nz/blog/blue-movie>.

had a similar response when I read Dave Fagundes's amusingly iconoclastic article, *Why Less Property Is More: Inclusion, Dispossession & Subjective Well-Being*.<sup>3</sup> Its premise is shocking, but also seductively familiar.

In a nutshell, Fagundes argues that property is making us miserable, and we should get rid of it.<sup>4</sup> Hedonics or “happiness studies” scholarship suggests that owning property often does not increase happiness and may actually decrease happiness.<sup>5</sup> In a previous article, *Buying Happiness*, Fagundes used hedonics to argue that people should be wary of acquiring too much property, and the government should avoid encouraging property ownership.<sup>6</sup> *Why Less Property Is More* expands on that insight, using hedonics to argue that people should share or give away much of their property, and the government should help them.

I find Fagundes's premise broadly compelling. Community and altruism are associated with happiness, while isolation and selfishness are not. If the purpose of government is to increase net welfare, then governments should encourage community and altruism in order to increase happiness.

But, as always, the devil is in the details. While hedonics provides many helpful insights, I wonder whether it is really capable of doing as much work as it claims. It is one thing to provide a framework for an academic study, and another thing entirely to provide a basis for government action. Maybe hedonics should inform policy, without necessarily driving it? I also wonder whether increasing individual happiness always increases net happiness. Is all happiness made the same, or can happiness be a zero-sum game? Should we worry about the distribution of happiness? And I wonder about some of the policy changes that Fagundes suggests. How can we predict and measure their effectiveness?

## II. LESS IS MORE: A HEDONIC PERSPECTIVE ON PROPERTY

As Fagundes observes, “The twin notions of possession and exclusion lie at the center of our cultural and legal understanding of property.”<sup>7</sup> The law abhors a vacuum. So property law assumes that everything belongs to someone, and that ownership means exclusion. For better or worse, William Blackstone's definition of property as “that . . . despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of any other individual in the universe” remains as canonical today as the day it was uttered.<sup>8</sup>

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3. Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361 (2018).

4. See generally *id.*

5. *Id.* at 1366.

6. David Fagundes, *Buying Happiness: Property, Acquisition, and Subjective Well-Being*, 58 WM. & MARY L. REV. 1851, 1856–57 (2017).

7. Fagundes, *supra* note 3, at 1362.

8. *Id.* at 1364 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*1–2).

But the rights to possess and exclude imply the rights to dispose and include. If you own something, you can give it away, and if you can exclude someone, you can also include them. And yet, property law has largely ignored disposal and inclusion, despite research suggesting that they can generate more individual welfare than ownership and exclusion.<sup>9</sup> It turns out that donating and sharing property often makes people happier than keeping it for themselves.<sup>10</sup> Accordingly, Fagundes argues that the government should encourage people to donate and share property, when it is likely to increase their welfare.<sup>11</sup>

He begins with the “uncontroversial” claim that the government should try to increase net social welfare.<sup>12</sup> Measuring social welfare directly is hard, so economists typically encourage the government to measure it in dollars and cents and try to maximize wealth.<sup>13</sup> While wealth is an imperfect proxy for welfare, it is better than nothing. Money doesn’t always make people happy, but it rarely makes them sad. If the government makes people richer, the odds are good it will make them happier as well.

But what if we could measure welfare itself? Fagundes claims that “recent advances in the nascent field of hedonics” or “happiness studies” may enable us to make policy based on welfare, rather than wealth.<sup>14</sup> Hedonics aims to measure welfare by asking people whether they are happy.<sup>15</sup> Some hedonics scholars measure “affective” or “moment-by-moment” happiness, while others measure “life satisfaction.”<sup>16</sup> While Fagundes prefers the former method, he acknowledges that both have their merits. <sup>17</sup>

In any case, Fagundes argues that hedonics can accurately and reliably tell us when people are happy and when they are not.<sup>18</sup> By extension, hedonics can also tell the government how a policy choice will affect net welfare.<sup>19</sup> It follows that the government should use hedonics to inform policy choices, because it provides a more accurate metric than wealth.<sup>20</sup>

Specifically, Fagundes observes that hedonics research undermines the traditional equation of property and welfare.<sup>21</sup> The law assumes that

9. *See id.* at 1372–73.

10. *Id.* at 1373.

11. *Id.* at 1379–80.

12. *Id.* at 1368 (“Few would disagree with the claim that governments should pass laws that make affected citizens better off.”).

13. *See, e.g.,* Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L., ETHICS & PUB. POL’Y 85, 86–89 (1985).

14. Fagundes, *supra* note 3, at 1368.

15. *Id.* at 1368–69.

16. *Id.* at 1369.

17. *Id.* at 1370 n.42, 1374 n.62.

18. *Id.* at 1370.

19. *Id.* at 1371–72.

20. *Id.*

21. *Id.* at 1372.

ownership makes us happy: “The name’s Mo Rutherford. They call me that ‘cause when people give me money, I always want mo’.”<sup>22</sup> But hedonics says otherwise.<sup>23</sup> Often, ownership and exclusion not only fail to increase individual welfare, but actually decrease it.<sup>24</sup> By contrast, disposal and sharing typically increase individual welfare: “Love is something, if you give it away, you end up having more.”<sup>25</sup>

In other words, the popular saying “greed is good” may have it backward.<sup>26</sup> Hedonics suggests that sharing and caring make us happy, and that selfishness and isolation make us sad.<sup>27</sup>

Okay, so what? Well, if Fagundes is right, it changes everything. If the purpose of government is to increase net social welfare, and the best way to increase individual welfare is the disposal and sharing of property, then maybe we should rethink property law from scratch. Rather than encourage people to get property, the government should encourage them to give it away.

Specifically, hedonics suggests that charity most effectively increases happiness when it is voluntary, personal, and concrete.<sup>28</sup> In other words, charity makes people happy when they want to give, they know the person who receives the gift, and they can see the positive impact it makes.<sup>29</sup> Essentially, charity makes us happy because it increases social connections, which make us happy.

However, Fagundes also observes that “charitable donation can make people feel wealthier even as it reduces their actual wealth” because “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.”<sup>30</sup>

Likewise, sharing makes us happy, because it promotes social bonds.<sup>31</sup> Of course, some sharing is simply a form of altruism. But even non-altruistic, commercial “sharing” of the kind facilitated by the “sharing economy” can increase happiness, by enabling and encouraging people to form social bonds they otherwise might not: “the very act of participation in the sharing economy can generate a sense of connectedness.”<sup>32</sup>

22. THE STUFF (New World Pictures 1985) (statement of David “Mo” Rutherford).

23. Fagundes, *supra* note 3, at 1372–73.

24. *Id.*

25. MALVINA REYNOLDS, *Love Is Something (Magic Penny)*, on MALVINA REYNOLDS SINGS THE TRUTH (Columbia Records) (1967).

26. WALL STREET (American Entertainment Partners 1987).

27. Fagundes, *supra* note 3, at 1372–73.

28. *Id.* at 1402.

29. *Id.* at 1373–75.

30. *Id.* at 1374.

31. *Id.* at 1375.

32. *Id.* at 1387.

## III. HEDONICS IN ACTION

So, how can the government use hedonics to improve policy and make people happier? Fagundes acknowledges that it cannot simply force people to give away or share their property.<sup>33</sup> While voluntary giving increases happiness, involuntary giving does not, and may even decrease happiness.<sup>34</sup> Charity makes people happy, but taxes do not.<sup>35</sup> Likewise, sharing makes people happy, but trespassing and theft do not.<sup>36</sup>

But the government can adopt policies that encourage altruism and community, and thereby increase happiness. Charity law can encourage altruism and shape the social meaning of charitable donations. Property law can encourage the disposal of property, or at least stop encouraging acquisition. And regulatory law can encourage the sharing economy, or at least stop discouraging it.

Fagundes argues that charity law could increase happiness by limiting or eliminating the charitable contribution deduction and replacing it with a direct subsidy to charitable donations.<sup>37</sup> He bases this seemingly counterintuitive proposal on the observation that the hedonic benefits of altruism are diminished or eliminated by self-interest.<sup>38</sup> Accordingly, while the charitable contribution deduction may encourage donations motivated by self-interest, it may also discourage donations motivated by altruism and reduce the happiness those donations would otherwise generate.<sup>39</sup>

In theory, the “libertarian” approach of eliminating the charitable contribution deduction entirely could increase the happiness generated by altruistic donations, including the many low-income donors who cannot claim the tax deduction anyway.<sup>40</sup> And the effect on overall donations might be small.<sup>41</sup> Many high-income donors are also motivated by altruism, and the charitable contribution deduction might not always be a salient factor.<sup>42</sup>

But Fagundes seems to prefer a “libertarian-paternalist” approach based on “nudging” people to make donations.<sup>43</sup> Specifically, he proposes direct subsidies for charitable donations in the form of a matching grant.<sup>44</sup> This could eliminate the self-interest problem that may reduce or eliminate the hedonic benefits associated with altruism, and it might also enable the

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33. *Id.* at 1375, 1379.

34. *Id.* at 1379.

35. *See id.*

36. *See id.*

37. *Id.* at 1395–97, 1403.

38. *Id.* at 1396–97.

39. *See id.*

40. *Id.* at 1398–99.

41. *See id.*

42. *See id.* at 1399.

43. *See id.* at 1399–403, 1408–10.

44. *Id.* at 1409–10.

government to increase the efficiency of charitable subsidies by calibrating them to maximize return.<sup>45</sup> The government could also limit the charitable contribution deduction to very large charitable contributions, when it is more likely to be salient.<sup>46</sup>

Fagundes also argues that property law could increase happiness by facilitating and encouraging the disposal of property.<sup>47</sup> Currently, property law is designed to encourage people to acquire real and personal property.<sup>48</sup> But hedonics suggests that ownership of property may actually make people unhappy, especially when they go into debt in order to acquire it.<sup>49</sup> In particular, Fagundes highlights the appeal of “minimalism.”<sup>50</sup> People who own “tiny houses” or limit their personal possessions often claim increased happiness, and renters seem to be just as happy as homeowners.<sup>51</sup>

Accordingly, Fagundes argues that the government could increase happiness by discouraging the acquisition of real and personal property, or at least not encouraging it.<sup>52</sup> For example, the government could eliminate policies that encourage people to acquire property and to devote more resources to the acquisition of property than they would otherwise.<sup>53</sup> In particular, Fagundes argues that the government should eliminate the mortgage tax deduction, which creates a tax incentive for people to buy a home, rather than renting, and encourages them to incur additional mortgage debt.<sup>54</sup> The government could further encourage the dispossession of property by directly subsidizing donations of property to charitable organizations.<sup>55</sup> And it could discourage the acquisition of property, especially excessive property, by legitimizing or even subsidizing “minimalist” housing, or imposing a tax on large homes.<sup>56</sup>

In addition, Fagundes argues that regulatory law could increase happiness by facilitating and encouraging sharing of various kinds.<sup>57</sup> Hedonics suggests that sharing property makes people happy because it facilitates the development of social bonds.<sup>58</sup> Non-commercial sharing is a familiar aspect of friendship, but even commercial “sharing” can encourage

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45. *See id.*

46. *Id.* at 1400–01.

47. *See id.* at 1377–78; 1403–08.

48. *See id.* at 1364.

49. *Id.* at 1406–08.

50. *See id.* at 1403–08.

51. *Id.* at 1372 n.58, 1406–07.

52. *See id.* at 1373, 1408–16.

53. *See id.* at 1409–10.

54. *See id.* at 1410.

55. *Id.* at 1409–10.

56. *Id.* at 1410–13.

57. *Id.* at 1390–94.

58. *Id.* at 1375–76.

the creation of social bonds that increase happiness.<sup>59</sup> Currently, regulatory law typically ignores most non-commercial sharing of property, but governs and sometimes prohibits commercial sharing.<sup>60</sup> In particular, the new “sharing economy” is often controversial, and the subject of regulatory intervention that discourages or even prohibits sharing.<sup>61</sup> Fagundes argues that the government should encourage the kinds of non-commercial sharing that are most likely to increase happiness, and that it should not discriminate against commercial sharing, which may also increase happiness.<sup>62</sup> If inclusion tends to make people happy, the government should avoid imposing regulatory hurdles and, instead, should focus on protecting safety and preventing fraud.<sup>63</sup>

#### IV. A QUALIFIED ENDORSEMENT OF HEDONIC POLICYMAKING

There is a lot to like about Fagundes’s premise. If you believe that utilitarianism is a true moral theory, then the government should try to increase “happiness,” however it is defined. The real question is how best to achieve that goal, and how best to measure success. While wealth is a reasonable proxy for happiness, if hedonics can measure happiness directly, all the better. In any case, Fagundes is right that property is—or should be—only a means of increasing happiness, not an end in itself.<sup>64</sup>

It is surely true that community and altruism contribute to happiness. When property rights discourage or prevent community and altruism, those rights probably reduce net happiness and should be changed. And it may very well be the case that the law could more effectively promote community and altruism. For example, as I have previously observed, the success of altruistic crowdfunding suggests that existing charity law fails to solve many “charity failures” or inefficiencies in charitable giving.<sup>65</sup>

But I am skeptical of Fagundes’s suggestion that the government should start focusing on maximizing happiness, as defined by hedonics, rather than maximizing wealth.<sup>66</sup> To begin with, I am not convinced that “happiness studies” are really ready for primetime.<sup>67</sup> While those studies have produced many interesting and valuable observations and provided many helpful insights, I doubt that they have the degree of certainty and predictability required for effective policy implementation.

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59. *See id.* at 1391–92.

60. *See id.* at 1380–82.

61. *See id.*

62. *See id.* at 1391–92.

63. *See id.* at 1393–94.

64. *See id.* at 1373.

65. *See generally* Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155 (2014) (explaining theory of charity failures and how crowdfunding may solve some of them).

66. *See* Fagundes, *supra* note 3, at 1375.

67. *See id.* at 1368–72.

Traditional cost-benefit analysis has been around for a long time and relies on a limited number of fairly well-defined variables.<sup>68</sup> And yet, its results are often highly variable and disputed.<sup>69</sup> By contrast, hedonics relies on a vast number of poorly defined and difficult to measure variables.<sup>70</sup> Indeed, hedonics does not even provide a non-circular definition of “happiness.”<sup>71</sup> Even if we assume that actual happiness corresponds to self-assessments of happiness, it doesn’t tell us what we are measuring or whether everyone is measuring it the same way. And what if people cannot accurately self-assess their actual happiness? How would we know?

Obviously, people are not actually rational economic actors, and are often not even perfect judges of their own subjective preferences. Behavioral economics has convincingly shown that people often make irrational decisions that are inconsistent with their expressed preferences and decrease their welfare.<sup>72</sup>

But the best should not be the enemy of the good. The “de gustibus” principle that the government should try to help people satisfy their subjective preferences is a truism of neoclassical economics for a good reason.<sup>73</sup> People do not have to be perfect judges of their preferences in order for the principle to work, they only have to be better than the government.

The premise of hedonics is not just that people sometimes make bad choices that reduce their subjective happiness, but that hedonics can enable the government to make better choices on their behalf.<sup>74</sup> But historically, the government has often failed to predict individual preferences as accurately as individuals predict their own preferences.<sup>75</sup> The data is hard to gather, and even harder to process.<sup>76</sup> It seems more than a little premature to assume that hedonics will be more successful. Not to mention that even the ability to identify happiness-maximizing policies does not guarantee their adoption.

In any case, the problem is that hedonics compares a theoretically possible happiness-maximizing policy to actual policies supposedly intended to increase wealth. Of course, a theoretically perfect policy will outperform any actual policy. But we should be comparing like with like, and only consider policies we can actually realize. If our goal is to maximize actual

68. See, e.g., FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* vii (1921) (“There is little that is fundamentally new in this book.”).

69. See, e.g., Kenneth J. Arrow & Robert C. Lind, *Uncertainty and the Evaluation of Public Investment Decisions*, 60 *AM. ECON. REV.* 364, 364 (1970).

70. See *id.*

71. See *id.* at 1369.

72. See *id.* at 1397.

73. But see generally George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 *AM. ECON. REV.* 76 (1977) (arguing that most people have similar preferences).

74. See Fagundes, *supra* note 3, at 1370–72.

75. See, e.g., F. A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 519–20 (1945).

76. See *id.*



happiness, we should ask whether hedonics or wealth will better inform policy right now.

In practice, a hedonic policy is preferable to a wealth policy only if hedonics can actually deliver better results. I am not sure it can, for both technical and political reasons. For one thing, despite the many studies cited by Fagundes, I am not convinced that happiness is sufficiently well-defined or its etiology sufficiently well-understood to enable the government to confidently predict the effect of policy on happiness any more accurately than the effect of wealth on happiness. And for another, I suspect that “unhappiness” itself is often a form of “luxury good.” Hedonics relies on self-reported happiness, either in the moment, or long term.<sup>77</sup> But suppose some people have a preference for unhappiness? Why assume that reported happiness necessarily reflects actual happiness?

Moreover, it seems unlikely that happiness is monocausal. While monks and nuns may report high levels of happiness caused by communality and sharing,<sup>78</sup> there is good reason to believe that others would experience low levels of happiness under the same circumstances. Certainly, few people voluntarily choose an ascetic lifestyle. If doing so would truly produce high levels of happiness in all or most, that is quite the secret hidden in plain sight.

## V. HEDONIC POLICY & ITS DISCONTENTS

Let us assume that hedonics can tell us what is likely to make at least some people happy, at least sometimes. That seems like a plausible claim, and one worthy of consideration. How might we put it to use?

Fagundes suggests some ways that the government could use hedonics to shape policy. Most convincingly, he points to the mortgage interest deduction as a policy that encourages people to take on additional debt to buy larger houses than they actually want, both of which are likely to decrease happiness.<sup>79</sup> He suggests that the government should eliminate the mortgage interest deduction, or even subsidize smaller houses or non-homeownership.<sup>80</sup>

Few scholars would defend the mortgage interest deduction. And hedonics provides an additional reason to question its wisdom. Eliminating the mortgage interest deduction is good policy for any number of reasons, not least because it is expensive, regressive, and inefficient.<sup>81</sup> If eliminating it is likely to increase happiness as well as reduce those problems, all the better.

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77. Fagundes, *supra* note 3, at 1369.

78. *Id.* at 1376.

79. *Id.* at 1408–09.

80. *Id.* At 1409–16.

81. See, e.g., Andrew Chamberlain, *The Case Against the Home Mortgage Interest Deduction*, TAX FOUNDATION (Sept. 24, 2005), <https://taxfoundation.org/case-against-home-mortgage-interest-deduction> (“Despite the political popularity of the tax deduction for home mortgage interest, economists are basically united in their opposition to it.”).

But I wonder whether creating a new subsidy to encourage alternative housing decisions is a good idea or will increase net happiness. For one thing, subsidies targeted at encouraging “sustainable” practices have a dismaying tendency to become subsidies for the lifestyle choices of the wealthy, at the cost of the public fisc.<sup>82</sup> And for another, the happiness associated with owning a small house may not increase net public welfare, but only be a “happiness transfer.”

Yes, the “small house” trend is popular. But why? Would renting or owning a small house make everyone happier? And why do small houses make people happy? Is it only because owning a small house reduces the burden of labor and debt? Or is it also because owning a small house is associated with virtue and generates happiness by increasing the relative social status of the small house owner?

Furthermore, I am skeptical of the happiness research showing that people derive no hedonic benefits from owning a home. A few survey studies are not enough to counter the evidence of the actual choices and policy demands made by actual people. For better or worse, the mortgage interest deduction did not create the desire to own a home but the other way around. If homeownership makes some people happy, then creating a disincentive or subsidizing non-ownership could make people less happy. And what of the landlords? Even if it turns out that everyone really wants to rent, someone still has to own and manage the real estate.

Fagundes also suggests that the charitable contribution deduction may reduce or eliminate happiness gains from otherwise altruistic donations because donors receive a tax deduction in exchange for their contributions and suggests that this weakness could be eliminated if the government promised to provide a subsidy to accompany every charitable contribution.<sup>83</sup> As a policy matter, this is a strange suggestion. A charitable contribution deduction literally is just an indirect subsidy provided by the government.<sup>84</sup> And, at least according to one theory, taxpayers do not actually receive anything in exchange for charitable contributions, they simply do not pay taxes on income they do not consume.<sup>85</sup> In other words, if a taxpayer’s marginal rate is 25%, a \$100 donation actually costs the taxpayer \$75, and the government provides an indirect subsidy of \$25.<sup>86</sup> Presumably, if there were no charitable contribution deduction, the same taxpayer would

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82. See, e.g., Severin Borenstein & Lucas Davis, *The Distributional Effects of U.S. Clean Energy Tax Credits*, 30 TAX POLY & ECON. 191, 191–92 (2016).

83. Fagundes, *supra* note 3, at 1394–403.

84. See 26 U.S.C. § 170 (2012).

85. See, e.g., ADAM PARACHIN, THE CHARITABLE CONTRIBUTIONS DEDUCTION: A TAX DEBATE OR A QUESTION OF CHARITY VERSUS GOVERNMENT? 7–8 (2013) <https://www.urban.org/sites/default/files/the-charitable-contributions-deduction-a-tax-debate-or-a-question-of-charity-versus-government.pdf>

86. See 26 U.S.C. § 170.

contribute \$75. A \$25 contribution from the government would produce exactly the same result. Fagundes suggests that the government might be able to achieve the same effect with a smaller direct subsidy.<sup>87</sup> While that would be great for the public fisc, it seems irrelevant to the happiness calculation.

Presumably, the point of the proposal is that actual taxpayers have a different hedonic response depending on whether the government characterizes its subsidy of charitable contributions as a tax deduction or a grant to the organization. While that may very well be true, it is not obviously the case. Do taxpayers really derive no hedonic benefit from tithing? Surely taxpayers are well-aware that the deduction does not make their charitable contributions free. Most charities seem to think that the deduction is a significant incentive for individuals to make more and larger donations.<sup>88</sup> And in any case, the government could solve the problem by simply characterizing the deduction as a government subsidy to the charity, rather than a tax rebate. While there is some evidence of hypersalience, the charitable contribution deduction is not available to the majority of taxpayers, who do not itemize, and yet contribute anyway.<sup>89</sup>

Fortuitously, both of Fagundes's hypotheses<sup>90</sup> will soon be tested in a natural experiment, as the recent tax reform comes into effect for the 2018 tax season. With the increase in the standard deduction, the mortgage interest deduction will no longer apply to many taxpayers.<sup>91</sup> Will it affect their decision whether to buy a house and which house to buy? Likewise, to the horror of many charities, the charitable contribution deduction will apply to even fewer taxpayers than before. Will it affect charitable contributions or how much happiness donors derive from those contributions? Only time will tell.

## VI. HEDONIC COPYRIGHT

While Fagundes offers several examples of how hedonics could inform property law,<sup>92</sup> can we apply hedonics to other kinds of property? For example, can hedonics tell us anything about intellectual property, specifically copyright? While scholars offer many different justifications for real and personal property, from a utilitarian perspective property is just a means to an end. Ultimately, property is justified when it increases net social

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87. Fagundes, *supra* note 3, at 1394-403.

88. See Alan Viard, *We Should Allow All Taxpayers to Deduct Charitable Contributions*, HILL (June 19, 2018, 12:00 PM) <http://thehill.com/opinion/finance/392991-we-should-allow-all-taxpayers-to-deduct-charitable-contributions>.

89. See generally Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307 (2012) (explaining hypersalience and its interaction with the charitable deduction).

90. Fagundes, *supra* note 3, at 1395-97, 1403-08.

91. Prashant Gopal & Joe Light, *25 Million Americans Could Find Mortgage Tax Break Useless Under Trump's Plan*, BLOOMBERG (May 16, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-05-16/trump-tax-plan-would-make-mortgage-break-worthless-for-millions>.

92. Fagundes, *supra* note 3, at 1382-90.

welfare and unjustified when it does not. Conveniently, copyright is explicitly utilitarian.<sup>93</sup> At least in theory, the government grants copyright protection to authors not because they have a natural right to it or morally deserve it, but because granting copyright increases net social welfare.<sup>94</sup>

At first glance, copyright seems inconsistent with Fagundes' argument that property makes us happiest when we share it or give it away. Most authors get quite incensed by copyright infringement and analogous uses of their works, including plagiarism.<sup>95</sup> This should be surprising given that works of authorship are almost costless to share and give away. Unlike real and personal property, which by definition are scarce and therefore rivalrous, works of authorship are non-rivalrous. If someone uses or takes your real or personal property without permission, they have deprived you of the use of that property. But it is impossible to "take" a work of authorship, and the use of a work of authorship does not diminish the supply of that work. Why aren't authors indifferent or even happy when people use their works of authorship?

Maybe the problem is consent. As Fagundes observes, sharing and altruism only increase happiness when they are voluntary.<sup>96</sup> So, maybe authors object to copyright infringement and plagiarism primarily or exclusively because they amount to involuntary sharing. After all, infringers and plagiarists rarely ask for permission.

Notably, most authors are happy to license their works, at least under some circumstances, and many are even willing to license their works for less than the market-clearing price, at least for uses they approve.<sup>97</sup> Indeed, Creative Commons, the open access movement, and "copyleft" are essentially altruistic efforts to share or "give away" copyrighted works.<sup>98</sup>

At least anecdotally, authors even seem more willing to license their works than their heirs, who do not necessarily derive much actual happiness from hoarding their inherited copyrights.<sup>99</sup> And corporate owners are often

93. *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

94. *See id.*

95. *See, e.g.*, Jonathan Bailey, *The Emotional Toll of Plagiarism*, ITHENTICATE (Apr. 6, 2016, 11:30:41 AM) <http://www.ithenticate.com/plagiarism-detection-blog/the-emotional-toll-of-plagiarism>.

96. *Id.* at 1379.

97. *See, e.g.*, RESEARCHGATE <https://www.researchgate.net> (last visited Aug. 5, 2018) (allowing users to request articles that normally require subscriptions directly from authors).

98. *See* Drew Cullen, *Copyleft Puts the Open Source into Geek Chic*, REGISTER (Jan. 10, 2000) [https://www.theregister.co.uk/2000/01/10/copyleft\\_puts\\_the\\_open\\_source](https://www.theregister.co.uk/2000/01/10/copyleft_puts_the_open_source); *Creative Commons and Open Access*, CREATIVE COMMONS [https://wiki.creativecommons.org/wiki/Creative\\_Commons\\_and\\_Open\\_Access](https://wiki.creativecommons.org/wiki/Creative_Commons_and_Open_Access) (last visited July 29, 2018).

99. *See, e.g.*, Andrew Gilden, *IP, R.I.P.*, 95 WASH. U.L. REV. 639, 651–52 (2017) (describing the way in which Stephen Joyce hoards his grandfather James Joyce's intellectual property).

most willing to license their copyrighted works, albeit rarely at below-market rates.<sup>100</sup>

However, there is one aspect of copyright ownership that most authors demand. And ironically, it is a form of ownership that the Copyright Act does not actually give most of them: attribution.<sup>101</sup> While many authors are happy to countenance the use of their works of authorship, vanishingly few are willing to forego attribution.<sup>102</sup>

Indeed, creative communities almost inevitably develop robust plagiarism norms intended to create and enforce attribution rights not granted by the Copyright Act.<sup>103</sup> In other words, artists collectively create a property right they value, but that the government doesn't provide. And the vigor with which they police and enforce that right is remarkable.<sup>104</sup>

Perhaps plagiarism norms are aggressively enforced precisely because copyright does not include an attribution right. Property rights enforced in the shadow of the law are often especially brutish, precisely because they lack the authority of the state.<sup>105</sup>

But an alternative, arguably uglier, explanation presents itself. Perhaps creative communities function as cartels and use plagiarism norms to maximize the happiness of their members by punishing outsiders and defectors. Or, to put it another way, perhaps authorial ownership generates happiness not only via altruism, but also—perhaps primarily?—via status.

## VII. ZERO-SUM HEDONICS?

Happiness has many different mothers. Sometimes, happiness is caused by feelings of altruism.<sup>106</sup> But other times, happiness is caused by feelings of superiority.<sup>107</sup>

100. See, e.g., *Spectacular Images. Flexible Pricing.*, GETTY IMAGES, <https://www.gettyimages.com> (providing pricing plans allowing consumers to purchase stock photos) (last visited Aug. 5, 2018).

101. David Klufft, *Authorship Credit for Scholarly and Creative Works: The Elusive American Attribution Right*, TRADEMARK & COPYRIGHT LAW (Nov. 11, 2015), <http://www.trademarkandcopyrightlawblog.com/2015/11/authorship-credit-for-scholarly-and-creative-works-the-elusive-american-attribution-right>. The Visual Artists Rights Act gave a limited attribution right to some authors of “works of visual art.” 17 U.S.C. § 106A (2012).

102. See *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON INT'L COM. L. 1, 89 (2016) (symposium transcript) (“For us, attribution—that is our currency. I don't exist if people don't know who I am.” (statement of Melvin Gibbs)).

103. Cf. Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQUESNE L. REV. 133, 137–38 (2016).

104. Cf. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. (forthcoming 2019) (manuscript at 39–41).

105. See Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59, 101 (2015).

106. Amanda Macmillan, *Being Generous Really Does Make You Happier*, TIME (July 14, 2017), <http://time.com/4857777/generosity-happiness-brain>.

107. *Personality Type and the Satisfaction of Feeling Superior*, 16 PERSONALITIES <https://www.16personalities.com/articles/personality-type-and-the-satisfaction-of-feeling-superior> (last visited July 19, 2018). But see Raj Raghunathan, *Why Pursuit of Superiority Lowers*

Of course, from the subjective perspective of the individual, happiness is happiness! If altruism makes one person happy and superiority makes another person happy, they are both happy. But do both forms of happiness have the same social value? Should the government encourage both forms of happiness? Happiness caused by altruistic acts seems to have a strong potential of being mutually beneficial. But happiness caused by a sense of superiority seems more likely to be a form of zero-sum exchange. If the happiness of one person comes at the expense of another, is that really a form of happiness we want to encourage? Indeed, if it causes a net reduction in happiness, might it be a form of happiness we wish to discourage?

For example, people experience happiness as a result of consuming branded goods, but they may experience less happiness if they perceive the possibility of consuming other similar, competing, but less desirable goods.<sup>108</sup> This is probably true. But is it a form of happiness we should encourage? In particular, is it a kind of happiness that we should encourage at the expense of those who might prefer to consume a less expensive competitor of a branded product?

These observations obviously invoke Thorstein Veblen's hoary critique of "conspicuous consumption," the idea that people compete for social status—and presumably individual happiness!—by publicly demonstrating their wealth and ability to consume vast quantities of expensive goods.<sup>109</sup> Veblen and his progeny have long scolded this behavior, ostensibly on the ground that it is wasteful, but more truthfully, because it is unseemly.<sup>110</sup> We disapprove of this form of vanity as improper—or at least claim as much!

But is the converse also true? Might "minimalism" be a form of "conspicuous nonconsumption"? And if it is, should it be the kind of behavior that we encourage or discourage? I do not think I am alone in detecting a hint of smugness in the virtuous proclamations of the apostles of minimalism.

#### VIII. CONCLUSION

In sum, I found Fagundes's article illuminating and provocative. His core insight, that hedonics can and should inform property policy is both novel and almost certainly true. Unsurprisingly, the details of how to actually accomplish that goal may still need some finessing. I look forward to reading future articles expanding on these valuable ideas.

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*Happiness (and Success)*, PSYCHOL. TODAY (June 2, 2015), <https://www.psychologytoday.com/us/blog/sapient-nature/201506/why-pursuit-superiority-lowers-happiness-and-success>.

108. See Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 244 (2013).

109. See THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* 60–74 (1899).

110. *What Is Conspicuous Consumption*, WHAT IS CONSPICUOUS CONSUMPTION?, <http://www.conspicuousconsumption.org> (last visited July 29, 2018).