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Toward a Heterodox Property Law and Economics

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ESSAY

TOWARD A HETERODOX PROPERTY LAW AND ECONOMICS

By Lua Kamál Yuille*

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Why should we cherish “objectivity,” as if ideas were innocent, as if they don’t serve one interest or another? Surely, we want to be objective if that means telling the truth as we see it. . . . But we don’t want to be objective if it means pretending that ideas don’t play a part in the social struggles of our time, that we don’t take sides in those struggles. . . . Indeed it is impossible to be neutral.

—Howard Zinn¹

I. PROPERTY LAW AND ITS DISCONTENTS

Property law is profoundly unsatisfying. This statement is not meant to suggest that property is wrong or bad. Nor does it mean to take issue with any particular rule of property law, at least in a way that is not already reflected in the rich property literature. Rather, property law is unsatisfying because, often, its settlements and compromises seem wanting and iniquitous, even while envisioned alternatives seem untenable and unfair. Indeed, the standard first-year Property syllabus reads like a compendium of the Catch-22.²

For example, the common law doctrine of adverse possession is rightly described as paradoxical.³ When successfully invoked, absolute title to property is transferred from the legal owner to a trespasser, squatter, encroacher, or land thief. This is an arguably

* Associate Professor, University of Kansas School of Law. As always, a special thanks to the late, great Frank T. Jansson.

1. HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 4–5 (1990).

2. JOSEPH HELLER, CATCH-22 (1961). Heller’s classic novel, which satirized bureaucratic quagmires through the experience of U.S. airmen during World War II, coined the term now used to refer to concepts also described as “circular dilemmas,” “double binds,” or “no win” situations.

3. See Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 72–75 (2010) (suggesting that the land-thief conception of adverse possession is less persuasive than a revolutionary description in which the acquisition of title via adverse possession is akin to a *coup d’état*).

efficient method for allocating resources⁴ to individuals who either most value those resources or will use them most “productively.”⁵ However, it rewards what—except for the expiration of a statutorily defined prescriptive period⁶—would be civilly and, sometimes, criminally actionable conduct and significantly limits an owner’s security and stability in her right to use her property as she sees fit.

Property is seen and treated like a particularly powerful “trump”⁷ against competing claims.⁸ However, while no amount of compensation is sufficient for the government to, say, impose upon one a particular religious viewpoint, the payment of “just”⁹ compensation authorizes the government to completely destroy a property interest, so long as the destruction is undertaken for “public use.”¹⁰

Patients can assert no proprietary interest in their bodily fluids and tissues once removed on the operating table,¹¹ but doctors and medical researchers may transform those same fluids and tissues into lucrative and patentable property.¹²

4. See, e.g., Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 678 (1986); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1129–30 (1985).

5. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 154 (1988) (“The economic advantage of adverse possession is that it . . . allows property to move to higher-valuing users.”).

6. Indeed, adverse possession is often neutrally described as a special operation of the statute of limitations. See John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 816 (1994) (describing same).

7. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

8. On the tension between this perception and the consistency and propriety of property rights as trumps idea, see Richard A. Epstein, *Life in No Trump: Property and Speech Under the Constitution*, 53 ME. L. REV. 23, 23 (2001); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 52–53 (1992); Laura S. Underkuffler, *When Should Rights “Trump”? An Examination of Speech and Property*, 52 ME. L. REV. 311, 313 (2000).

9. On the “justice” of such compensation, see, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 755 (1999); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1279 (1985); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–83 (1986); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1167 (1967); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 679 (2005).

10. Criticized as “hortatory fluff,” the very deferential and misnamed requirement (public use is definitively not required) ostensibly requires some benefit to the public. See *Kelo v. New London*, 545 U.S. 469, 497 (2005) (O’Connor, J., dissenting).

11. *Moore v. Regents of the University of California*, 793 P.2d 479, 487–97 (Cal. 1990).

12. *Id.* This issue was recently brought into popular conscious with the telling of the backstory of the famed HeLa cell line and its very human biological source, Henrietta Lacks. See REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010).

The integrity and validity of most land titles in the United States rests on the foundation laid by *Johnson v. M'Intosh*¹³ (and its intellectual progeny), which sanctioned the expropriation of Indian lands based on indefensible assumptions about race and culture.¹⁴ Yet, legally redressing any wrong perpetuated by that decision and the acts and policies it enabled would unsustainably strain prevailing and competing justifications for the institution of private property alike.

Such examples abound not only in the introductory syllabus but also throughout the canon of property writ large. As a result, property scholars are particularly adroit at apologetics, offering doctrinal and theoretical narratives that straighten property's myriad circular dilemmas. Nonetheless, it bears repeating: Property law is profoundly unsatisfying.

Part of the problem is property's definitional schizophrenia. Property is a central and the foundational institution of American society. Indeed, it is one of the Trinity of values the promotion of which undergirded the formation of the U.S. government.¹⁵ The appellation denotes a very high level of protection and wide latitude of deference.¹⁶ Nonetheless, not for want of trying, property admits no accepted and comprehensive definition within Anglo-American jurisprudence.¹⁷ Lay conceptions of property-as-things over which individuals exercise "that sole despotic dominion"¹⁸ are indiscriminately deployed as a shield and sword in property rhetoric, leading to psychological understandings of property that bear little relation to the objects of property or its contents. The Hohfeldian "bundle of rights" is disaggregated, reduced, and reconstituted without a stable, inviola-

13. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 *LAW & HIST. REV.* 67, 67 (2001).

14. For a discussion of the modern implications of this expropriation and its juxtaposition with contemporary eminent domain controversies, see Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 *TULSA L. REV.* 51, 59 (2005).

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .").

16. The exact nature, level, and scope of that protection and deference are neither clear nor agreed upon.

17. The definitional debate on property occupies a significant majority of the scholarship in property theory. For a robust exploration of many facets of the contemporary debate, see Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 *CORNELL L. REV.* 531, 531 (2005) (asserting "[n]otwithstanding its importance, property law has eluded both a consistent definition and a unified conceptual framework."). For an interesting comparative account, see generally ANNA DI ROBILANT, *PROPERTY: A BUNDLE OF STICKS OR A TREE?* (2013).

18. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 18 (London, A. Strahan 1825).

ble core, which threatens the “individuation” of property as a field.¹⁹ While the definition of property as a set of relationships among people with respect to things²⁰ seems precise, it conveys little substantive information. All these conceptualizations of property leave something wanting.

Compounding the problems posed by property’s definition is property’s counter-intuitive (and expanding) violability.²¹ Most of property law consists of determinations of the ways and circumstances in which property can be circumscribed. Adverse possession and eminent domain doctrines determine when an individual may lose her property. Nuisance law and the public trust doctrine circumscribe an owner’s use and control of his property. Trespass limits the scope of the right to exclude.

The tensions created by the definition and violability of property mask deeper vectors of discontent. Valued resources, their control, and their distribution merely constitute the terrain on which a conflict is waged. Whatever its precise definition and scope, properly conceived, property, at its core, represents the conflict between individual liberty and interest, on one hand, and community well-being and equality, on the other.²² These equally important values or categories are not just non-fungible, but they are incommensurable and, largely, non-aggregative at the margin. That is, in each individual conflict a gain for one is a loss for the other. Where individual liberty wins, the community or equality loses.

A third vector of disaffection lies in property’s commitment to stability, immobility, and stasis²³—“reflexively resistant to change, preserving as it does the realm of settled expectation.”²⁴ From this stance, property, by and large, serves to maintain the status quo distributions of not just property but other resources, assets, and opportu-

19. *But see* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 66–67 (2013).

20. Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 3, 10 (Charles Geisler & Gail Daneker eds., 2000).

21. Moreover, apart from the definitional question, property law is largely subsumed by other existing legal specialties. That is, the rules governing property are implemented via tort law and contract law, etc. Perhaps due to the persistence of the definitional debate and its dependence on other fields for its implementation, property is often discounted as an important object of independent, coherent analysis.

22. The preceding is an expansion and revision of an idea expressed by Robert Ellickson. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1345 (1993).

23. At the helm of the contemporary discussion of this ideal are Thomas W. Merrill & Henry E. Smith. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000). For an overview of this value’s critics, *see, e.g.*, Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437, 444 (2011).

24. Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1659 (2010).

nities (especially wealth and power) correlated therewith and facilitated thereby. But, an essential justification of property is that it promotes individual freedom—whether defined as autonomy, power, or independence.²⁵ In the context of historical inequities or imbalances in the mechanisms for this distribution of property, freedom justifications for property—at least to the extent of their populist appeal—are less persuasive as the freedom promoted by property is that of historically privileged players.

These deeper cleavages generating property's discontent are often reflected in the methodological influences apparent in property discourse. Economics, as popularly defined in law, is the science of scarce resource allocation.²⁶ Property law creates the strictures and structures within which resources are allocated and controlled. It is not surprising, then, that the economic analysis of law enjoys significant traction in property jurisprudence. However, the dominant school of economic thought, neoclassical,²⁷ outwardly disengages with the deontological tug-of-war at the heart of property's discontents. Instead, the normative position of economically influenced property analysis proclaims that the law should be designed to lead to the efficient allocation of resources.²⁸ It is not surprising that a well-established cadre of voices reject this premise. These latter voices focus not only on the instrumental values of property, which may be served by concepts like efficiency, but also on the underlying ontological, epistemological, and/or transformational significance of property, which may not.²⁹

Oriented as they are towards different sides of the cleavages of discontent these groups (painted in admittedly broad strokes) do not and, more importantly, cannot answer the challenges of the other, rendering property intractably unsatisfactory. The pages that follow contribute to both these traditions, suggesting that *heterodox* economic analyses of property law may offer property law a discourse that satisfies the competing considerations animating the field.

25. See D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36 (2009) (exploring varying claims on property's connection to freedom).

26. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (8th ed. 2011) (“[T]he science of rational choice in a world . . . in which resources are limited in relation to human wants”).

27. This essay generally uses the terms “neoclassical” and “mainstream” to refer to dominant approaches to economics. While not devoid of controversy, *see infra* note 30, there is no better characterization of the body of economic thought to which heterodox economics is oriented.

28. R. H. Coase, *The Federal Communications Commission*, 56 J.L. & ECON. 879, 901 (2013) (reprinted) (“[T]o establish that clear delimitation of rights on the basis of which the transfer and recombination of rights can take place through the market”).

29. Jane Baron's *The Contested Commitments of Property* characterizes these cleavages less generally, but very clearly articulates and analyzes the reflection of property's cleavages in modern discourse. *See generally* Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917 (2010) (contrasting the “informational” approach with “progressive” approaches).

II. HETERODOX ECONOMICS 101

The stories of economics and of law and economics have been told and retold. Out of those stories flow some fairly incontrovertible realities. First, neoclassical economics enjoys a position of dominance within the field of economics.³⁰ Second, that dominance rises to the level of hegemony in law and economics. And, third, in neoclassical economics, “markets are the center of a competitive system that, on the basis of certain assumptions, tend to equilibrium.”³¹ Those assumptions include the idea that participation in that market is voluntary, informed, and rational (i.e., utility maximizing). The implication of this baseline analysis is that markets are self-regulating. This is the take away of the Coase Theorem,³² which is essentially an analytical codification of the core assumptions of neoclassical economics.³³ In the perfect world, the specific content of law does not matter. Individuals will find their way to the efficient outcome through market exchange.

Law and economics, as a positive project, diagnoses and predicts how law incentivizes the behavior of rational actors. As a normative project, it aims to approximate the Coasean outcome—i.e., the market outcome, or “efficiency”—in the real world, where the neoclassical assumptions do not hold. In other words, normative law and economics attempts to achieve the optimal allocation of scarce resources by

30. Among the evidence of this dominance is this insightful excerpt from noted economic theorist, Tony Lawson:

Currently, the term ‘neoclassical’ pervades the discourse of academic economics, being employed to denote a range of substantive theories and policy stances. . . . but the term is invariably employed rather loosely and somewhat inconsistently across different contributors. . . . For many the act of describing an economic contribution as neoclassical is considered a form of criticism, though usually when the term is so used it is so without explanation or elaboration; it mostly signals dissent. In similar fashion those who accept the term for their own output seem very often, and again mostly without definition or explanation, to suppose that any contribution they make is neoclassical in nature.

Tony Lawson, *What is this ‘School’ Called Neoclassical Economics?*, CAMBRIDGE J. L. & ECON. 2013, 1–2.

31. Damien Cahill & Joy Paton, ‘Thinking Socially’ About Markets, 68 J. AUSTRALIAN POL. ECON. 9 (2011).

32. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

33. See *id.* Reference is made to the Coase Theorem in recognition of the unequivocally foundational, indeed inaugurating, role his work generally, and especially the concepts memorialized in the Coase Theorem, play in law and economics. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (6th ed. 2003) (stating that law and economics began with Coase’s *The Problem of Social Cost*). For an interesting study of this influence, see William M. Landes & Sonia Lahr-Pastor, *Measuring Coase’s Influence*, 54 J.L. & ECON. S383 (2011) (measuring Coase’s influence via citation count). For a compelling historiography of Coase, the Coase Theorem, and the emergence of law and economics, see Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499 (2011).

creating legal structures and legal settlements that put those scarce resources in the hands of those who “value” them most (where the value is measured by willingness to pay).

The neoclassical movement and its normative conclusions have indelibly influenced modern property. A body of justly distinguished property scholarship rests on the foundation that property, as an institution, is aimed at enhancing the neoclassical concept of utility. That is, property is a tool or agent of efficiency, or welfare maximization. Moreover, noted scholars have convincingly made the case for the inextricability of property and economics.³⁴

The hegemony of neoclassical economics within law and economics is hardly surprising, given its dominance within the field of economics. But, it should not be construed as an absence of critique, diversity, or debate. Commitment to the core assumptions of neoclassical economics varies significantly even among those clearly situated within that tradition.³⁵ And, mainstream dissenters have challenged the core assumptions of the school and lamented (or joked about) its inability to accurately predict, reflect, or explain human behavior. Experimental, behavioral, public choice, and new institutional economics—for example—have emerged to challenge, revise, ground, and/or refine the key assumptions and values of neoclassical economics. The insights of these approaches have been deployed by an increasing number of law and economics practitioners.³⁶ Indeed, many of the most sustained contributors to law and economics, particularly the law and economics of property (much to the credit of the field), may be best characterized as proponents of these critical schools of economic thought.³⁷

34. See, e.g., Daniel H. Cole, *The Law and Economics Approach to Property*, 3 PROP. L. REV. 212 (2014); Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

35. Jakob Kapeller & Leonhard Dobusch, *Heterodox United vs. Mainstream City? Sketching a Framework for Interested Pluralism in Economics*, 46 J. ECON. ISSUES 4, 1035, 1036 (2013).

36. See, e.g., SHOSHANA GROSSBARD-SHECHTMAN & CHRISTOPHER CLAGUE, *THE EXPANSION OF ECONOMICS: TOWARD A MORE INCLUSIVE SOCIAL SCIENCE* (2002); ROBIN PAUL MALLOY AND CHRISTOPHER K. BRAUN, *LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES* (1995); NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND* (2d ed. 2006); MARGARET OPPENHEIMER & NICHOLAS MERCURO, *LAW AND ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES* (2005).

37. New Institutionalism is the clearest example. Most significantly, in this respect—founding father of law and economics—Coase himself, is often characterized as a “new institutionalist,” see Hovenkamp, *supra* note 33, and the work of Neil Komesar (also a property scholar) constitutes canon of the self-consciously institutional approach. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 181 (2001). Elinor Ostrom, who was not a lawyer but whose work on the commons forms part of the property law canon, also engaged in analysis from this perspective. See, e.g., ELINOR OSTROM, *THE FUTURE OF THE COMMONS: BEYOND MARKET FAILURE*

Heterodox economics disagrees more fundamentally with neoclassical economics.³⁸ Fredric Lee, a fierce proponent of heterodox economic traditions, described the divide rather opaquely in these terms:

Mainstream economic theory explains “how asocial, ahistorical individuals choose among scarce resources to meet competing ends given unlimited wants” whereas heterodox economics theorizes “human agency in a cultural context and social processes in historical time affecting resources, consumption patterns, production and reproduction, and the meaning (or ideology) of economic activities engaged in social provisioning.

But, comprised of a spectrum of competing, conflicting, and sometimes mutually antipathetic perspectives, heterodox schools resist common definition beyond their opposition to—and often marginalization from—mainstream economics.³⁹

AND GOVERNMENT REGULATION (2012). Within property law disciplines specifically, Daniel H. Cole has advanced this approach, *see, e.g.*, Daniel H. Cole & Peter Z. Grossman, *Institutions Matter! Why the Herder Problem Is Not a Prisoners' Dilemma*, 69 THEORY & DECISION 219 (2010); Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141 (2007). Edward Rubin's analysis of property as an institution provides a good basis for identifying the influence of the institutionalist perspective in property scholarship more generally. Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573.

Other examples include a budding behavioral economics of property law, *see* Daphna Lewinsohn-Zamir, *The Importance of Being Earnest: Two Notions of Internalization*; 65 U. TORONTO L.J. 37 (2015); Daphna Lewinsohn-Zamir, *More Is Not Always Better Than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634 (2008); Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219 (2001) public choice alternatives, *see, e.g.*, Jonathan Remy Nash, *Economic Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673 (2008); Bruce Yandle, *Public Choice at the Intersection of Environmental Law and Economics*, 8 EUR. J.L. & ECON. 5, 5–27 (1999); A. ALLAN SCHMID, PROPERTY, POWER, AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND ECONOMICS (2nd ed. 1987); and, largely in intellectual property, experimental economics, *see, e.g.*, Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921 (2014).

38. The term “heterodox” has occasionally been used to refer to any economic perspectives that are not neoclassical. *See, e.g.*, Alain Marciano & Giovanni B. Ramello, *Consent, Choice, and Guido Calabresi's Heterodox Economic Analysis of Law*, 77 L. & CONTEMP. PROBS. 97, 100 (2014) (defining Calabresi's economic analysis of law as heterodox because it was “not truly neoclassical”); MARGARET OPPENHEIMER & NICHOLAS MERCURO, LAW AND ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES (2005) (describing as heterodox a broad range of mainstream perspectives to economics).

39. Indeed it is defined in the NEW PALGRAVE DICTIONARY OF ECONOMICS (2d ed. 2008) in just such terms:

[H]eterodox economics refers to a body of economic theories that holds an alternative position vis-à-vis mainstream economics; to a community of heterodox economists who identify themselves as such and embrace a pluralistic attitude towards heterodox theories without rejecting contestability and incommensurability among heterodox theories; and to the development of a

For example, so-called Austrian economics—associated with the work of Carl Menger, Ludwig von Mises, Friedrich von Hayek, Murray Rothbard, and Israel Kirzner—with its anarcho-capitalist or extreme libertarian (minarchist) commitments—elevates the market and private property as the agent of the market above their already privileged positions in neoclassical thought.⁴⁰ Nonetheless, Austrian school economists reject the perfection reflected in neoclassical economic assumptions and its framing of equilibrium as an ideal. Instead, Austrian economics is committed to a critical realist and human-centered approach in which fallible human actors interact in an evolutionary and ceaselessly correcting ordering process best structured in the market.⁴¹

In contemporary (old) institutionalism⁴²—associated with Thorstein Veblen and John Kenneth Galbraith—the institutions that create the rules of the game become the focus of economic analysis rather than taken as a given.⁴³ Its defining characteristic is the rejection of neoclassical economics' revealed preferences that are outside the scope of economic analysis in favor of endogenous preference formation—the explication of which is a central task, since institutions impact, influence, and may even determine and constitute the core inputs of neoclassical analysis. For example, social relations constitute identity and, thus, preferences.⁴⁴

Marxist-radical economics might be placed at the other end of the heterodox spectrum. These approaches are founded not on assumptions about human nature (i.e. rationality) and agency (i.e. that human actors choose freely), but on assumptions about social relationships, arrangements, and hierarchies—generally conceived as “class.” Along this reorientation, economics is not about understanding the mechanisms for facilitating market participation but about mitigating and mediating class exploitation.⁴⁵

coherent economic theory that draws upon various theoretical contributions by heterodox approaches which stand in contrast to mainstream theory.

40. For a review of this critique, see Peter J. Boettke, *Where Did Economics Go Wrong? Modern Economics as a Flight from Reality*, 11 *Critical Rev.* 11, 11–64 (1997).

41. See, e.g., Peter Boettke, *Why Are There No Austrian Socialists? Ideology, Science and the Austrian School*, 17 *J. HIS. ECON. THOUGHT*, Spring 1995, at 35–56.

42. This tradition, which originally emerged as a rejection of classical economic hedonism but continues as a critique of neoclassical economics on much the same grounds, is distinct from new institutional economics which has considerable traction as a mainstream response to neoclassical economics and is very influential—arguably foundational—within law and economics scholarship, including property law and economics. See *supra* note 37.

43. For an overview of this school of economic thought, see Geoffrey M. Hodgson, *What Is the Essence of Institutional Economics?*, 34 *J. ECON. ISSUES* 317, 317–29 (2000).

44. See, e.g., Geoffrey M. Hodgson, *Characterizing Institutional and Heterodox Economics—A Reply to Tony Lawson*, 2 *EVOL. INST. ECON. REV.* 3–5 (2006).

45. See RICHARD D. WOLFF & STEPHEN RESNICK, *ECONOMICS: MARXIAN VERSUS NEOCLASSICAL* (1987).

Feminist economics—a categorization that itself reflects a variety of schools of feminist thought (liberal, radical, Marxist, separatist, intersectional, etc.)—demonstrates a similar reorientation by highlighting the androcentric foundation of mainstream economics.⁴⁶ These approaches suggest that the idea of “objectivity” central to the mathematical approach to economics held sacrosanct within the mainstream is itself the reification of masculinity and denigration of femininity, which is associated with subjectivity.⁴⁷ Feminist heterodox approaches to economics also reject the unstated inputs of concepts like optimality and scarcity, question the market as the principal site of resource ordering, and deny the postulate of both self-interest and choice.

Snapshots of Sraffian, post-Keynesian, evolutionary, ecological, and all the other heterodox schools,⁴⁸ would complete the gradients in the broad heterodox spectrum. Notwithstanding the divergent range of foci, goals, and commitments represented thereby, heterodox economics schools share important commonalities beyond that of a persistent and arguably incommensurable challenge to the foundations of neoclassical economics.

First, they take history, context, power, and structure seriously, to see economics as socially grounded and constituted. Thus, rather than abstract modeling and predicting, “[t]heir intellectual efforts are generally geared to understanding the broader institutional, or social, context, its organization, and impacts on pricing, distribution and, of course, production.”⁴⁹

Second, and more important, liberated from the reductive requirements of abstract modeling—the hallmark of neoclassical economics’ scientific approach—heterodox economics self-consciously and transparently embeds its values and social philosophies into its descriptions and its prescriptions.⁵⁰ Especially in an era in which voices in mainstream economics are paying increasingly sustained attention to heter-

46. The essays in *BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS* (Marianne A. Ferber & Julie A. Nelson eds., 1993) and *FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN* (Ferber & Julie A. Nelson eds., 2003) provide a thorough introduction to the critiques that feminist economic thought raises against mainstream economics.

47. For a chart depicting the masculine/feminine binary (which itself is critiqued by, for example, feminist and queer theorists) as employed in some feminist economics, see JULIE A. NELSON, *FEMINISM, OBJECTIVITY, & ECONOMICS* 7 (2003).

48. For a list of schools, see Marc Pilkington, *Economics as a Polymorphic Discursive Construct: Heterodoxy and Pluralism*, 20 *ON THE HORIZON* 3, 239.

49. Cahill & Paton, *supra* at 31.

50. Fredric S. Lee, *Heterodox Economics and Its Critics*, in *IN DEFENSE OF POST-KEYNESIAN AND HETERODOX ECONOMICS: RESPONSES TO THEIR CRITICS* 108–109 (Fredric S. Lee and Marc Lavoie, eds., 2013) (“[T]he ethos embedded in heterodox economic theory is that the social provisioning process is to be accurately explained so that it can be changed—an accurate explanation is not the same thing as a value neutral explanation, which implies that derivative economic policy is not value qua ethically neutral.”)

odox economic substantive critiques,⁵¹ it is this latter quality that maintains the largely marginalized status of heterodox economics within contemporary economic thought. However, it is this latter quality that makes heterodox economics a viable candidate to relieve property law's discontents.

III. A HETERODOX LAW AND ECONOMICS OF PROPERTY

Economics can be defined, more inclusively than its prevalent legal framing, as the science of the social provisioning process. That is, it is the study of those social-economic activities that generate the resources that sustain social individuals, their social relationships, and society as a whole.⁵² But, what is left unstated is that this study is mediated by a "specific and often implicit worldview."⁵³ Mainstream approaches to that science trace their origins to the nineteenth-century recalibration of the soft science of "political economy" via the precision, the certainty, and most important, the purportedly objective, value-neutrality of mathematics into today's hard economic science.⁵⁴

In the context of increasing differentiation and diversity, in academic and socio-political thought, the idea of objective and value-neutral analysis is, arguably, alluring and, undeniably, uninhibiting. This is a further attraction of the use of economics in property analysis. However, that commitment obscures the existence and denies the subjectivity of the values embedded in the analysis. That erasure, in turn, disaggregates those values from the consequences and implications of both descriptive and prescriptive economic pronouncements. And, that disaggregation leaves the sides of the property cleavages described here arguing at cross-purposes.⁵⁵ From the dominant perspective, where the values property pursues (at least operationally) are uncontroversial and contested values are political questions outside the scope of economic analysis, it is unclear what critiques have to offer by way of concrete legal proposals. Critics, on the other hand, primarily aim at changing the values animating the calculus, even if individual settlements would not drastically change. This leaves the question: What is gained by the specious objectivity and neutrality?

A heterodox law and economics of property itself will not resolve this disconnect. But, in liberating property from the methods, ques-

51. See Tony Lawson, *The Nature of Heterodox Economics*, 30 *CAMBRIDGE J. ECON.* 483, 497 (2006) (suggesting that heterodox critiques may be addressed within critical mainstream economic analyses).

52. FREDERIC LEE, *THE MAKING OF HETERODOX MICROECONOMICS* 3–6 (2011).

53. Ken Wilbur, *Forward to CHRISTIAN ARNSPERGER, FULL-SPECTRUM ECONOMICS: TOWARD AN INCLUSIVE AND EMANCIPATORY SOCIAL SCIENCE* xvii (2010).

54. Cahill & Patton, *supra* note 31, at 9.

55. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 *CORNELL L. REV.* 821, 842–44 (2009).

tions, and values presupposed by mainstream economics, it offers new horizons for the reconceptualization and reconciliation of property's circular dilemmas. Consider some examples presented above. The *language* with which adverse possession is understood would have to be fundamentally revised if the doctrine were framed as a mediator of social and class interaction. In the same vein, eminent domain would necessarily be re-envisioned under an Austrian approach, and prevailing productive priorities in the commodification of bodily substances will be altered by feminist economics. In each case, both the central questions and the calculus are different. The recasting of property law through heterodox approaches also offers new horizons for existing critiques of the law and economics of property law. For example, the progressive property theorists struggle to reconcile their recognition of the inextricable connection between property and economics with their particularized critiques of *mainstream* economics and alternative values they want incorporated into robust property discourse. The diverse values and commitments they argue should be part of economics—heterodox economics reveals—are part of economics. In this way, a heterodox law and economics of property could also begin to revolutionize property discourse. Are the ultimate outcomes always different? That is hardly clear, but that is not the point. The point is to open the door to a value-centric economic discourse of property. A heterodox law and economics of property engages that fact property law is not neutral, and embracing heterodox economic theories forces property scholars to engage hard questions and uncomfortable realities—not as limited avenues of critical inquiry, but as central to the task of studying property.

IV. CONCLUSION

This Essay has defended both economics as valuable tools for the analysis, description, and prescription of property law and its detractors, who recognize the refusal of economics to respond to property's communitarian and egalitarian mandates. To advance that defense, it suggests that the pluralist application of heterodox economics theories to property jurisprudence could bridge the divides between these camps. In so doing, the preceding discussion has painted in broad strokes that do not reflect the richness of debates, variety of literature, scope of commentary, or ambiguity and permeability of categories. But, the essence is captured and the message conveyed is accurate. The institution of property and the law that structures and governs that institution—with only (maybe) the slightest hint of hyperbole—are the pillars of much of the legal system. Property's deontological questions are and can be economic questions, as well. The addition of a heterodox economic analysis of property law can only serve to enrich and complete debates by synthesizing and responding to that institution's diverging and polarizing commitments.