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Buying Happiness: Property, Acquisition, and Subjective Well-Being

David Fagundes

BUYING HAPPINESS: PROPERTY, ACQUISITION, AND SUBJECTIVE WELL-BEING

DAVID FAGUNDES*

ABSTRACT

Acquiring property is a central part of the modern American vision of the good life. The assumption that accruing more land or chattels will make us better off is so central to the contemporary preoccupation with acquisition that it typically goes without saying. Yet an increasing body of evidence from psychologists and economists who study hedonics—the science of happiness—yields the surprising conclusion that getting and having property does not actually increase our subjective well-being. In fact, it might even decrease it. While scholars have integrated the insights of hedonics into other areas of law, no scholarship has yet done so with respect to property.

This Article maps this novel territory in three steps. In Part I, it summarizes recent findings on the highly conflicted effect of the acquisition of both land and chattels on subjective well-being. In Part II, it explores the implications of these findings for four leading normative theories of property law, showing that in different ways the evidence produced by happiness studies undermines the core empirical propositions on which these theories rest. Part II also explores the potential of subjective well-being as a framework for assessing the optimal regulation of ownership. Finally, Part III investigates how

* Professor of Law, University of Houston Law Center; J.D., Harvard Law School; A.B., Harvard College. Thanks to Emily Berman, John Bronsteen, Christopher Buccafusco, Marcilynn Burke, David DePianto, David Kwok, Peter Linzer, Jonathan Masur, James Nelson, Michael Olivas, D. Theodore Rave, Jessica Roberts, W. Keith Robinson, Joe Sanders, Greg Vetter, Kellen Zale, participants in the 2015 Texas Legal Scholars Conference and the 2015 Central States Law School Association Annual Meeting, and faculty workshops at the South Texas College of Law and the University of Houston Law Center for thoughtful suggestions about this project.

looking at property through the lens of happiness can help us see this ancient body of law in a new light. Evidence from happiness studies casts doubt on some policies (state promotion of homeownership), while suggesting the appeal of others (tax incentives and disincentives designed to nudge acquisition in the direction of greater subjective well-being). Happiness analysis also suggests promising new insights about related aspects of property, including law's attempts to prevent dispossession, the proper allocation of public versus private land, and the nascent sharing economy. This Article concludes by showing why these findings actually tell an optimistic, if nonobvious, story about the nature and future of property.

TABLE OF CONTENTS

INTRODUCTION: PROPERTY AS HAPPINESS 1854
I. THE HEDONIC PSYCHOLOGY OF PROPERTY ACQUISITION . . . 1858
A. Hedonics: The New Science of Happiness 1859
B. Happiness, Law, and Property 1868
1. Happiness and Law 1868
2. Property and (Un)happiness 1869
3. Toward Happier Acquisition 1876
II. HAPPINESS AND PROPERTY THEORY 1880
A. A Happiness Critique of Leading Property Theories 1881
1. Utilitarianism 1881
2. Personhood 1890
3. Property and (Negative) Liberty 1894
4. Progressive Property 1898
B. Toward a Happiness Theory of Property 1905
III. HAPPINESS AND PROPERTY LAW 1909
A. Happiness and Homeownership Promotion 1911
B. Nudging Property Toward Happiness 1919
1. Choice-Burdening Strategies 1920
2. Choice-Enhancing Strategies 1925
C. Beyond Acquisition 1927
CONCLUSION: ACQUISITION AND OPTIMISM 1929

INTRODUCTION: PROPERTY AS HAPPINESS

The Declaration of Independence begins with the stirring assertion that among the "unalienable Rights" with which we are all "endowed by [our] Creator" are "Life, Liberty and the pursuit of Happiness."[1] The Due Process Clause of the Fifth Amendment similarly guarantees that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."[2] These two great documents concur on the importance of life and liberty, but while the Declaration of Independence completes the triad with the freedom to pursue "happiness," the Due Process Clause instead privileges "property."

In the present-day United States, though, one might wonder whether there is any daylight between these two formulations. Modern American consumer culture tends to equate the acquisition of real and personal property with happiness itself.[3] As Bo Derek famously quipped, "Whoever said money can't buy happiness simply didn't know where to go shopping."[4] Our vision of the good life is

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. U.S. CONST. amend. V. The overlap is not a coincidence. These two phrases share a common ancestor: John Locke's *Two Treatises of Government*, in which he averred that society existed for the purpose of protecting an individual's "life, liberty, and estate." *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 163 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690) [hereinafter LOCKE, TWO TREATISES OF GOVERNMENT]. Historians have inferred from Thomas Jefferson's emendation that he meant to downplay the state's role in protecting property, though Jefferson may also have gotten the phrase "the pursuit of happiness" from Locke, who used it several times in his 1689 essay *Concerning Human Understanding*. *See* 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 239, 244-45, 252 (15th ed. 1753). James Madison, by contrast, apparently had no such revisionist aspirations and transposed Locke's phrasing wholesale into the Fifth Amendment save for the slight modernization of "estate" into the vernacular "property." *See* U.S. CONST. amend. V.

3. *See* Carol V. Hamilton, *Why Did Jefferson Change "Property" to the "Pursuit of Happiness"?*, HIST. NEWS NETWORK (Jan. 27, 2008), http://historynewsnetwork.org/article/46460 [https://perma.cc/SN2P-YFPV] ("[S]adly, for many Americans, Jefferson might just as well have left 'property' in place. To them the pursuit of happiness means no more than the pursuit of wealth and status as embodied in a McMansion, a Lexus, and membership in a country club.").

4. *See* Brad Tuttle, *The True Meaning of Shopping*, TIME (Dec. 14, 2010), http://business.time.com/2010/12/14/the-true-meaning-of-shopping/ [https://perma.cc/68PY-7NBA] (listing ten "insightful quotes" on "the deeper meaning of shopping"). This sentiment launched a thousand aphorisms, among them Albert Camus's quip, "It's a kind of spiritual snobbery that makes people think they can be happy without money." *See* BARBARA WELTMAN, J.K. LASSER'S GUIDE

punctuated with getting things—from a teenager's first car to a wedding ring to a family home (which is equated ad nauseam with the "American dream"[5]) to our final resting place.[6] The state supports this push towards acquisition in a number of ways,[7] most evidently in its approach to residential housing. State rhetoric equates housing with the American dream and promotes the purchase of family homes with an edifice of incentives ranging from the mortgage interest tax deduction to government-sponsored entities like Fannie Mae and Freddie Mac, which exist primarily to facilitate mortgage origination.

In light of the constant cultural and legal push toward ownership, it would seem that acquiring property makes owners better off. But does it? A growing body of literature at the nexus of social psychology and behavioral economics—"hedonics" for short—suggests that, in at least one very important way, it may not. Work in this field has produced a trove of data that complicates the dominant story of American property triumphalism: acquiring things—including and especially real property—does not appear to enhance owners' subjective sense of well-being, and under many circumstances may actually decrease it. These findings are driven to a large extent by our tendency to hedonically adapt to our circumstances, so that even after purchasing a great new watch or a fancy

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FOR TOUGH TIMES 202 (2009). Modern businesses have picked up on this theme. Consider electronics retailer Best Buy's trademarked slogan for its gift cards: "No fees. No expiration dates. Just happiness." *Best Buy Gift Card*, BEST BUY BUS., http://www.bestbuybusiness.com/bbfb/en/US/adirect/bestbuy?cmd=BBFBStaticContent&id=content/gift-cards/giftcards.html [https://perma.cc/23XX-CRAF]. There are also plenty of counter-aphorisms reflecting the belief that wealth does not result in happiness. *See infra* Part I.B.2.

5. This language of equivalence is intentional. Americans are told that owning a home is not only part of or related to the "American dream," but *is* the "American dream." For example, when the maker of one documentary asked (former) homeowners why they bought homes far larger than they needed with mortgages for which they did not qualify, they almost uniformly replied that owning a home is part of the American dream. *See Frontline: The Card Game* (PBS television broadcast Nov. 24, 2009).

6. In many U.S. jurisdictions, the purchase of a burial plot entails the same formalities as acquisition of any other real property, such as a contract of sale and a deed showing title ownership. *See Cemetery Forms*, USLEGAL, http://www.uslegalforms.com/cemetery-forms.htm [https://perma.cc/3EH6-3U36].

7. Importantly, this Article focuses exclusively on property *acquisition*. The happiness literature suggests a different and more complicated story about the corollary question whether law should prevent the *dispossession* of property once owners possess it. I plan to explore this issue in a future companion piece, *Dispossession, Property, and Happiness*.

car, it soon becomes just a background fact in our life, and the momentary happiness over the acquisition of such things fades away (and may even be replaced by regret at making a foolish purchase). Getting property can also make us more materialistic (which is strongly associated with unhappiness[8]) and less able to savor life's small pleasures.[9] But the lesson of this new research is not that property ownership is unequivocally harmful to owners' subjective well-being. Acquisition can increase happiness when it is thoughtful and motivated by nonmaterialist goals. As Elizabeth Dunn and Michael Norton, two leading scholars in the field, show, "If you think money doesn't buy happiness, then you're just not spending it right."[10]

Surprisingly, while the insights of hedonics generally have been explored in other legal scholarship, these findings remain largely unexplored with respect to property law. This Article teases out two major implications from the empirical evidence about the troubled relationship between property and happiness. First, the proposition that acquiring land and chattels often reduces our subjective well-being complicates, and may even severely undermine, many of the leading normative theories animating property law as well as the substantive law of ownership itself. Scholars have justified the existence of legal protections for ownership on a variety of bases. These justifications include the notion that property enhances social and individual wealth, provides a bulwark against statist oppression (or, contrariwise, that it creates a richer sense of community among neighbors), and supplies a critical outlet for self-expression and an embodiment of essential personhood.[11] But if hedonics

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8. *See* Kirk Warren Brown et al., *Materialism, Spending, and Affect: An Event-Sampling Study of Marketplace Behavior and Its Affective Costs*, 17 J. HAPPINESS STUD. 2277, 2278 (2015) (discussing the strong relationship between materialism and unhappiness).

9. *See* Russell W. Belk, *Materialism: Trait Aspects of Living in the Material World*, 12 J. CONSUMER RES. 265, 274 (1985); Martha C. White, *Here's Proof Buying More Stuff Actually Makes You Miserable*, TIME (Mar. 13, 2014), http://time.com/22257/heres-proof-buying-more-stuff-actually-makes-you-miserable/ [https://perma.cc/6XRM-EPZK] (summarizing happiness studies showing that purchasing consumer goods led to a materialistic mindset and lowered subjective well-being).

10. *See* Dan Gilbert, *Cover* to ELIZABETH DUNN & MICHAEL NORTON, HAPPY MONEY: THE SCIENCE OF HAPPIER SPENDING (2013) (offering five principles for spending "happy money").

11. *See, e.g.*, JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 4 (3d ed. 2015) (viewing property as "an efficient method of allocating valuable resources in order to maximize one particular facet of societal happiness: wealth, typically

scholars are right that property ownership can reduce our subjective well-being, constrain both our sense of freedom and our community ties, and does not make up a necessary condition for self-realization, then the empirical foundations on which each of these accounts are based fall away. By contrast, happiness itself may provide the most coherent framework for how to allocate and incentivize the acquisition of property in order to maximize individual and social welfare. But at the very least, the fact that acquiring and owning land and things may reduce our subjective well-being is an important input into any consequentialist approach to regulating ownership.

Regardless of how exactly happiness cashes out theoretically, the findings of the hedonics literature matter greatly for the positive law of property. These insights supply a novel framework for thinking about the governance of ownership. For example, the push toward buying single-family homes—abetted by both government rhetoric and legal enticements for prospective homeowners—may do more to reduce than enhance subjective well-being. This suggests that the federal government would be better off abandoning undifferentiated tax relief for homeownership, and should instead carefully calibrate incentives to encourage the kinds of acquisition of residential property that are more likely to result in happiness. Hedonics also points toward a bevy of other ways to nudge acquisition in the direction of greater happiness, from burdening purchase decisions that unwittingly threaten our subjective well-being to simply informing people about the nonobvious happiness upsides of getting particular kinds of real or personal property.

The new psychology of hedonics shows that there actually is a big difference between property and the pursuit of happiness, and that the two are often at odds. But, as the Conclusion emphasizes, this Article tells an optimistic story about property. It seeks to provide a promising new way to think about property from a normative perspective that indicates how we might regulate ownership to enhance subjective well-being.

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measured in dollars"); Leopold Kohr, *Property and Freedom*, *in* PROPERTY IN A HUMANE ECONOMY 47, 50-52 (Samuel L. Blumenfeld ed., 1974) (discussing property as a source and safeguard of individual autonomy); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1894 (2005) (discussing property as a source of social bonds and interpersonal connection); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (regarding property as necessary to self-realization).

This Article explores this novel territory in three steps. Part I briefly outlines the new science of hedonic psychology in general terms, and then investigates in detail the particular implications of this new research for the acquisition and ownership of both real and chattel property. Part II analyzes the implications of this research for normative theories of property, showing how it both undermines their foundations and provides a superior alternative for how to think about governing property. Part III both identifies current policies that are likely detracting from owners' happiness and suggests several ways to nudge property law in the opposite direction. Finally, the Conclusion reflects on the hopeful side of thinking about property as a means to enhance our subjective well-being rather than regarding possession as an end in itself.

I. THE HEDONIC PSYCHOLOGY OF PROPERTY ACQUISITION

Why do we acquire property? One simple answer to this question is that we do so because we think, consciously or not, that doing so will make us better off. Whether it is a trivial piece of personal property like a pen or a hamburger, or a costly investment like a car or a single-family home, we get things because we believe that a future in which we own those things will be preferable to one in which we do not.[12] But what does it mean for property ownership to make us better off? One plausible account is that it enhances our subjective sense of well-being—in other words, that we will feel better with than without the things we acquire.[13] Indeed, if someone were to tell a potential purchaser that they would be persistently less happy after purchasing a Big Mac or a McMansion, they would likely (but not, as we will see, certainly) reconsider their choice. And indeed, many studies from the burgeoning field of hedonic psychology reveal that acquiring property—and in particular, luxury goods and residential real estate—does not enhance, and in fact may reduce, owners' subjective well-being. This Part elaborates these

12. *See* Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States*, *in* THE CONSTRUCTION OF PREFERENCE 550, 553 (Sarah Lichtenstein & Paul Slovic eds., 2006).

13. Gilbert and Wilson, for example, argue that what it means to want something is to make a prediction that getting the object of desire will increase your affective state. *Id.* at 555-56, 562.

descriptive points in three steps: it introduces the (relatively) new scientific study of happiness; it then briefly outlines the number of ways that this work has been applied to law (though curiously, not yet property law); and it catalogues research showing the deeply conflicted relationship between property acquisition and subjective well-being.

A. Hedonics: The New Science of Happiness

Until recently, the academic study of happiness was the province of philosophers who debated the nature of well-being or clinical psychologists who sought to help patients out of depressive states of mind.[14] But in the last forty-odd years, social psychologists have begun to study happiness (or, as I will also refer to it throughout this Article, subjective well-being[15]) as an empirical matter. These studies have investigated what individual qualities and external events cause our subjective well-being to increase or decrease, and the extent to which these changes persist over time. The new science of happiness—often termed "hedonics"—has entered popular culture thanks to the universal appeal of the subject and the counterintuitive nature of many of its findings.[16] One of the best-known studies looked at one group of people who had just won the lottery and another group that had just become paralyzed in an accident.[17] The surprising result was that a year after the life-changing event, both the millionaires' and the paraplegics' happiness levels were very close to what they had been before they were hit by strokes of

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14. *See, e.g.*, DANIEL M. HAYBRON, THE PURSUIT OF UNHAPPINESS: THE ELUSIVE PSYCHOLOGY OF WELL-BEING 3, 5-6 (2008).

15. There is much disagreement about this terminology among scholars. Happiness itself is defined in two very different ways. One refers to an individual's affective state—positive, negative, or neutral—at any given moment of their life. *See* JOHN BRONSTEEN, CHRISTOPHER BUCCAFUSCO & JOHNATHAN S. MASUR, HAPPINESS AND THE LAW 134 (2015) (defining happiness as "the sum of positive and negative affective states"). The other approach looks to overall life satisfaction rather than moment-by-moment affect to define happiness. And other scholars resist the equation of happiness and well-being entirely. I discuss these alternative approaches in detail later in this Part.

16. *See* Cass R. Sunstein, *What You Can Learn from the New Science of Smarter Spending*, NEW REPUBLIC (Aug. 2, 2013), https://newrepublic.com/article/114031/money-happiness-and-new-science-smarter-spending [https://perma.cc/4YWP-SKN8].

17. *See generally* Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978).

good or ill fate.[18] Another well-known study surveyed people in the Midwest and found that while they all predicted that they would be happier if they moved to a sunny place like California, similar people who already lived in California reported no greater happiness than their Midwestern counterparts.[19] And a social furor erupted over a series of studies that seemed to show that people who have children are less happy than those who do not.[20]

While the contemporary study of hedonics is a relatively recent branch of social psychology, it has ancient precursors. Ancient Greek and Chinese philosophers downplayed momentary states of happiness in their view of the good life, lionizing instead self-denial and other-regarding behavior in the interest of character-building

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18. *See id.* at 920-21. Despite popular misconceptions to the contrary, the study did not show that paraplegics reverted all the way back to their pre-accident levels of happiness, but only that they adapted substantially. *See id.* Studies of kidney dialysis patients and pediatric amputees, however, showed near-total reversion to previous levels of happiness. *See* Jason Riis et al., *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. EXPERIMENTAL PSYCHOL. 3, 7-8 (2005); Vida L. Tyc, *Psychosocial Adaptation of Children and Adolescents with Limb Deficiencies: A Review*, 12 CLINICAL PSYCHOL. REV. 275, 275, 280 (1992).

19. *See* David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340, 341, 343 (1998). The surprising gap between the prediction and the reality of moving to California may be explained by the tendency to focus excessively on one major feature of living in the Golden State—great weather—and failure to realize that the day-to-day experiences that constitute our subjective experience are about the same whether you live in San Diego or Des Plaines. *See id.* at 345.

20. For an overview of the studies on this subject, see Robin W. Simon, *The Joys of Parenthood, Reconsidered*, CONTEXTS, Spring 2008, at 40, 41-44 (concluding that the clear majority of studies support the proposition that having children reduces happiness). There is, for example, evidence that becoming a parent increases a person's chances of becoming clinically depressed, *see* Ranae J. Evenson & Robin W. Simon, *Clarifying the Relationship Between Parenthood and Depression*, 46 J. HEALTH & SOC. BEHAV. 341, 349-50 (2005), and a longitudinal study showed that people reported much higher levels of subjective well-being before having children than after, *see* Kei M. Nomaguchi & Melissa A. Milkie, *Costs and Rewards of Children: The Effects of Becoming a Parent on Adults' Lives*, 65 J. MARRIAGE & FAM. 356, 356, 363-64 (2003). There is, however, recent work suggesting that parenthood may be associated with certain kinds of increased happiness. *See* S. Katherine Nelson et al., *In Defense of Parenthood: Children Are Associated with More Joy than Misery*, 24 PSYCHOL. SCI. 3, 4 (2013). This is, for obvious reasons, a charged debate that is still ongoing. For a fascinating take on the social reaction to studies indicating that having children reduces parents' subjective well-being, see Jennifer Senior, *All Joy and No Fun: Why Parents Hate Parenting*, N.Y. MAG. (July 4, 2010), http://nymag.com/news/features/67024/ [https://perma.cc/K4MY-4GWK].

and virtuousness.[21] This changed in the 1700s, when John Locke and Jeremy Bentham, among others, began to look to individual feelings of happiness as the touchstone of well-being.[22] Bentham argued that the best (and, indeed, only) measure of welfare was utility, which scholars have since termed "experience utility"—that is, an individual's positive or negative psychological state at any given time.[23] Bentham thus argued that a person's well-being over the course of his or her life was the sum of these momentary subjective feelings of happiness or unhappiness.[24] Happiness-based approaches to human psychology and social policy remained purely theoretical for centuries, though, due to the absence of any means of actually assessing individuals' subjective well-being.[25]

Modern scholars interested in hedonics, however, have now developed a number of methods that have proved effective and

21. *See generally* Rosalind Hursthouse, *Virtue Ethics*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/ [https://perma.cc/7AZD-8WZG]; Richard Kraut, *Aristotle's Ethics*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), http://plato.stanford.edu/archives/spr2016/entries/aristotle-ethics/ [https://perma.cc/Y3D3-TNYZ]. Aristotle, for example, distinguished different kinds of happiness. *See* Richard M. Ryan & Edward L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*, 52 ANN. REV. PSYCHOLOLOGY 141, 145-46 (2001). The momentary affective positive state this Article refers to as "subjective well-being" was something Aristotle would have dismissed as mere pleasure, while encouraging instead cultivation of a kind of higher-order happiness we might call "excellence" or "civic virtue." *See id.* at 143, 145-46. The word he used for this latter form of happiness was "eudaimonia," which modern scholars have adapted into a theory of well-being ("eudaimonics") inspired by Aristotelian virtue ethics. *See id.*; *see also* RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 22 (2005).

22. *See, e.g.*, William Sweet, *Jeremy Bentham (1748-1832)*, *in* INTERNET ENCYCLOPEDIA OF PHILOSOPHY (James Fieser et al. ed.), http://www.iep.utm.edu/bentham/ [https://perma.cc/ZP86-DY79].

23. *See* BRONSTEEN ET AL., *supra* note 15, at 134; Daniel Read, *Experienced Utility: Utility Theory from Jeremy Bentham to Daniel Kahneman*, 13 THINKING & REASONING 45, 46-47, 50-51 (2007).

24. *See* Read, *supra* note 23, at 46-47. Bentham also translated this notion into the "Greatest Happiness" principle for decision-making. *See* LAYARD, *supra* note 21, at 4-5. Pursuant to this principle, the best decision is the one that will maximize aggregate happiness, regardless of its source or type. *See id.* at 5. Bentham famously said that "[p]rejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry." JEREMY BENTHAM, THE RATIONALE OF REWARD 206 (London, Robert Heward 1830).

25. The nineteenth-century economist Francis Edgeworth theorized a machine—the "hedonimeter"—that would accurately assess people's moment-by-moment affect. *See* David Colander, *Retrospectives: Edgeworth's Hedonimeter and the Quest to Measure Utility*, J. ECON. PERSP., Spring 2007, at 215, 215-17.

reliable in measuring an individual's subjective well-being. The leading means of making this assessment is the experience sampling method (ESM).[26] ESM refers to any of a number of different methodologies by which an individual's moment-to-moment affect is assessed in real time.[27] Researchers also use surveys to measure happiness, which typically ask subjects to think back on and report their subjective well-being over the course of a recently concluded day, week, or month.[28] Although such retrospective surveys bring certain advantages,[29] they are also subject to memory failures and cognitive biases that compromise their accuracy as meaningful representations of subjects' experienced well-being.[30] And while it may seem incoherent to quantify an abstraction like happiness, hedonics research generally exhibits numerous hallmarks of sound empirical work. For instance, when the same subjects are tested at different times and under different circumstances, they tend to report the same results.[31] Reports of subjective well-being also correlate with other indicia of happiness, such as frequent smiling, smiling with the eyes, sleep quality, happiness ratings by third parties (such as friends and family), and self-reported health.[32] Researchers have also investigated and dismissed the possibility that the term "happiness" means such different things to different

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26. *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 experienced subjective well-being).

27. *See generally* JOEL M. HEKTNER ET AL., EXPERIENCE SAMPLING METHOD: MEASURING THE QUALITY OF EVERYDAY LIFE (2007) (providing an overview of ESM). This could entail giving respondents journals and asking them to note their affect at either a regular, predetermined time (for example, after dinner) or at random times throughout the day. *See id.* at 35, 40. Cell phone applications are an increasingly popular way to perform ESM-based studies. *See id.* at 37-39 (discussing the use of computers and PDAs to advance ESM research).

28. *See* Peter Henry Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 405, 410 (2010).

29. They may, for example, give a better sense of global happiness than ESM, a possibility I discuss below. *See infra* notes 43-51 and accompanying text; *see also* Huang, *supra* note 28, at 407-08, 410 (discussing the pros and cons of surveys).

30. For example, psychologists have shown that when reporting on a past experience, respondents tend to average the moment of peak intensity with the most recent moment, rather than give an accurate sense of the average affect throughout the experience. *See* Daniel Kahneman et al., Research Report, *When More Pain Is Preferred to Less: Adding a Better End*, 4 PSYCHOL. SCI. 401, 402-04 (1993).

31. *See* BRONSTEEN ET AL., *supra* note 15, at 13-14 (discussing reliability of happiness studies).

32. *See id.*; Sunstein, *supra* note 16.

people (and especially those among different cultures) that any differences in reported well-being are simply artifacts of language.[33] And perhaps most compelling, neuropsychologists have used EEGs to show that self-reports of the quality and intensity of affect (both positive and negative) tend to match up with the areas of the brain in which those responses register.[34]

But even if one assumes that these studies are reliable and valid, what is this thing called "happiness" that they purport to measure? While this notion may mean different things in other contexts, the aforementioned research defines happiness as subjectively experienced positive mental states.[35] According to this approach, happiness is simply net affect—how good (or bad) people feel in particular moments.[36] Our present consciousness consists of a series of consecutive moments, each of which lasts about three seconds.[37] We can describe these moments accurately when we are in them, but we tend to forget what they were like soon after they pass.[38] In light of this reality, this Article embraces the definition of subjective well-being as a person's positive or negative affect during any given moment of his or her life. To be happy, and have well-being, is to be in a mental state that you would choose to continue.[39] By contrast, to be unhappy, and to lack well-being, is to be in a mental state that you would prefer not to continue.[40] This is a graduated rather than

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33. For example, bilingual people in China and Switzerland gave consistent reports in happiness surveys whether given in English, Mandarin, French, German, or Italian. *See* LAYARD, *supra* note 21, at 33-34 (reporting results of two such studies).

34. *See, e.g.*, Richard J. Davidson, *Affective Style, Psychopathology, and Resilience: Brain Mechanisms and Plasticity*, 55 AM. PSYCHOLOGIST 1196, 1202-03 (2000); Richard J. Davidson et al., *Emotion, Plasticity, Context, and Regulation: Perspectives from Affective Neuroscience*, 126 PSYCHOL. BULL. 890, 897-98 (2000). For what it is worth, negative emotions are associated with right frontal brain activity, while positive emotions are associated with left frontal brain activity. *See* LAYARD, *supra* note 21, at 11.

35. *See, e.g.*, BRONSTEEN ET AL., *supra* note 15, at 134 (defining happiness as "the sum of positive and negative affective states").

36. *See* Daniel Kahneman, *Experienced Utility and Objective Happiness: A Moment-Based Approach*, *in* CHOICES, VALUES, AND FRAMES 673, 681 (Daniel Kahneman & Amos Tversky eds., 2000).

37. *See* Daniel Kahneman & Jason Riis, *Living, and Thinking About It: Two Perspectives on Life*, *in* THE SCIENCE OF WELL-BEING 285, 285 (Felicia A. Huppert et al. eds., 2005).

38. *See id.* at 285-86.

39. *See* LAYARD, *supra* note 21, at 12-13 (concluding that there is an essential mental state called "happiness" that amounts to "enjoying life and wanting the feeling to be maintained").

40. *See id.*

a binary notion, so that this kind of subjective well-being can be, and usually is, measured along a spectrum.[41] This understanding of happiness has been termed "experienced well-being" because it seeks to evaluate affect on an immediate, nonintrospective basis.[42]

Critics of this perspective, though, have pointed out that the equation of well-being with fleeting pleasures fails to take account of more important concerns and values—faith, courage, love—that also constitute well-being.[43] Partially in response to these criticisms, social psychologists have developed a different metric for happiness—global well-being rather than experienced well-being—that seeks to evaluate how happy people are with their lives upon reflection, and separately from their sense of well-being in a given moment.[44] So while the assessment of experienced well-being typically uses ESM and asks respondents, "How do you feel now?,"[45] assessing global well-being necessarily entails life satisfaction surveys and asks respondents instead, "Upon reflection, how happy are you with your life (or some aspect of it) overall?"[46] This latter conception constitutes a complementary rather than an exclusive metric for subjective well-being, and a person may have one form of happiness without the other.[47] For example, spending hours watching reruns of your favorite TV show may bring much moment-to-moment

41. Happiness studies thus usually ask respondents to self-report their well-being along a scale of one through seven, with one representing the most unhappiness, seven the most happiness, and four affective neutrality. *See* HEKTNER ET AL., *supra* note 27, at 48-49.

42. *See* Kahneman & Riis, *supra* note 37, at 286-87.

43. *See* Deirdre N. McCloskey, *Happyism*, NEW REPUBLIC (June 8, 2012), https://newrepublic.com/article/103952/happyism-deirdre-mccloskey-economics-happiness [https://perma.cc/5HPV-ARVD] ("Pleasure is a brain wave right now. Happiness is a good story of your life.").

44. *See* Kahneman & Riis, *supra* note 37, at 285-87. For additional discussion of the different methods for measuring happiness, see generally Huang, *supra* note 28, at 407-12.

45. *See, e.g.*, LAYARD, *supra* note 21, at 13-14.

46. Two leading happiness assessments, the Eurobarometer and the Gallup World Poll, use this approach. *See* Peter H. Huang, *Happiness in Business or Law*, TRANSACTIONS, Spring 2011, at 153, 154-55 (describing various surveys, including the Eurobarometer survey and the Gallup World Poll, that are designed to measure "a plethora of multiple possible conceptions of happiness"); *see also, e.g.*, Grace Wong Bucchianeri, The American Dream or the American Delusion? The Private and External Benefits of Homeownership for Women 3, 5-8 (Apr. 1, 2011) (unpublished manuscript), https://ssrn.com/abstract=1877163 [https://perma.cc/7DRW-NRRN] (using both moment-by-moment and global measures to assess the happiness of homeowners versus renters).

47. *See* Kahneman & Riis, *supra* note 37, at 285-91 (explaining that the two conceptions of happiness "are not always in perfect correspondence").

happiness but cause you to report lower global well-being when you look back on the day and regard it as utterly wasted.[48] By contrast, someone working at a soup kitchen may report low experienced well-being during the task itself due to its difficulty but may well report high global happiness afterward by virtue of feeling good about having done something generous for others.[49] Some scholars have suggested that both measures be reported alongside one another to give the richest possible sense of respondents' happiness.[50] Others have rejoined that experienced well-being subsumes global well-being. For example, if spending all day binge-watching *Better Call Saul* makes one feel like her life is a waste or if working at a soup kitchen produces a sense of self-satisfaction, these negative and positive affective states should register somewhere in one's immediate experience and be captured by ESM.[51]

Other critics attack the very notion of measuring happiness, whether defined experientially or globally.[52] While space does not permit a complete engagement with these criticisms, I pause to consider two major objections here. One is that happiness is simply too varied to be reduced to a scale with a single numerical metric.[53] Most people would likely say that the birth of a child, or having your favorite baseball team win the World Series, or finding that sock you thought had been eaten by the dryer are all events that make us "happy." But it is at least plausible to ask—as some critics have—whether the emotional states produced by these experiences are so different that grouping them together as "happiness" and placing them along the same spectrum produces an apples-to-oranges comparison that renders study results using numerical metrics meaningless.[54] But this objection confuses the quality of

48. *See* Cass R. Sunstein, *Who Knows If You're Happy?*, N.Y. REV. BOOKS (Dec. 4, 2014), http://www.nybooks.com/articles/2014/12/04/who-knows-if-youre-happy/ [https://perma.cc/Y3FG-G66Z] (book review).

49. *See id.*

50. *See, e.g.*, Kahneman & Riis, *supra* note 37, at 289.

51. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583, 1597-98 (2010).

52. *See* McCloskey, *supra* note 43.

53. *See id.* ("Happinesses are not fungible. Happinesses are multiple, dappled things, and couple-colored.").

54. *See, e.g.*, *id.* John Stuart Mill, for example, did not believe that all happiness was created equal, and his political philosophy was premised on distinctions between higher and

feeling produced by a positive experience with the intensity of the happiness produced by an experience.[55] Hedonics seeks to assess only the latter.[56] So while eating a burger from L.A. institution Tommy's or dining at Chicago's famed molecular gastronomy restaurant Alinea may be incomparable in many or even most respects,[57] they are comparable to the extent that they produce some degree of positive affect.[58] Studies in a vast number of very different contexts have found broad commensurability in the extent to which respondents can assess how good or bad they feel in a given moment.[59] So while it is certainly true that the notion of "happiness" is capacious, this does not automatically render it impossible to measure, at least not when defined as it is in this Article. Indeed, we commonly use such broad terms to facilitate understanding. We understand that a person with $500,000 in stock owns a very different asset than someone with $50,000 in cash, but no one would dispute that the former possesses greater wealth.[60]

Second, and relatedly, critics of hedonics have argued that even if it is possible to measure an individual's subjective well-being, it is not possible to make meaningful comparisons among different

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lower pleasures. *See, e.g.*, LAYARD, *supra* note 21, at 22-23, 118. He criticized Bentham for failing to take account of the varieties of happiness, saying, "Man, that most complex being, is a very simple one in [Bentham's] eyes." JOHN STUART MILL, BENTHAM (1838), *reprinted in* UTILITARIANISM AND ON LIBERTY 68, 69 (Mary Warnock ed., 2d ed. 2003).

55. *See* LAYARD, *supra* note 21, at 13 ("[T]here are many different sources of enjoyment, but we can compare the intensity of each.").

56. *See* BRONSTEEN ET AL., *supra* note 15, at 13-14.

57. *Cf.* DANIEL M. HAYBRON, HAPPINESS: A VERY SHORT INTRODUCTION 103-05 (2013) (contrasting happiness brought by consumption, such as of junk food, and happiness brought by appreciation, such as of fine cuisine).

58. In other words, instead of saying "Tommy's and Alinea are so different that they cannot be compared," it is possible and indeed more accurate to say "Tommy's makes Joe feel good, but Alinea makes him feel even better."

59. *See* Daniel Kahneman, *Objective Happiness*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 3, 8 (Daniel Kahneman et al. eds., 1999) (summarizing several such studies and concluding on that basis that "it appears that most moments of experience can be adequately characterized by a single summary value on the [Good-Bad] dimension"); *see also* Ingebjørg Kristoffersen, *The Metrics of Subjective Wellbeing: Cardinality, Neutrality and Additivity*, 86 ECON. REC. 98, 99, 103-04, 113-14, 118-20 (2010) (defending the capacity of happiness to be scaled universally and compared meaningfully).

60. We also commensurate different-seeming options all the time in our daily lives. Forced to choose between going to a Judd Apatow movie with one group of friends or the New York Philharmonic with another, we simply compare along some metric or another and pick one.

subjects' reported well-being.[61] After all, they argue, Freud's pleasure principle states that our happiness depends to a large extent on our baseline expectations.[62] It is at least plausible that two people who experience the same actual amount of pleasure may attach a different numeric value to it, and some have argued that this possibility robs hedonics studies of any universal lessons.[63] Studies investigating this possibility have found, however, that even very differently situated people tend to give both cardinal and ordinal rankings to conditions that are very similar, suggesting that the numbers people assign to the affect associated with similar experiences tend to be uniform.[64] There will inevitably be some degree of variance between individuals. Not every person's five on a scale will refer to precisely the same degree of subjective affect as another's five. But in the aggregate, these random variations tend to wash out.[65] Because this Article limits itself to general statements about the impact of property law and policy on subjective well-being, those random variations do not undermine its overall conclusions.

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61. *See, e.g.*, Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use?*, 62 DUKE L.J. 1509, 1552-56 (2013).

62. *See* SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE 1 (Ernest Jones ed., C.J.M. Hubback trans., 1922) ("[T]he course of mental processes is automatically regulated by 'the pleasure-principle': that is to say, we believe that any given process originates in an unpleasant state of tension and thereupon determines for itself such a path that its ultimate issue coincides with a relaxation of this tension.").

63. Deirdre McCloskey, for example, suggests that people in First World countries would consistently report low affect resulting from experiences that would cause people in impoverished parts of the world to report much higher affect. McCloskey, *supra* note 43. Even believers in hedonics have acknowledged difficulty making such cross-cultural comparisons. *See* Kahneman & Riis, *supra* note 37, at 297-98. Because this Article limits its scope only to U.S. property law and policy, though, this criticism is not particularly relevant.

64. *See* Heather P. Lacey et al., *Are They Really That Happy? Exploring Scale Recalibration in Estimates of Well-Being*, 27 HEALTH PSYCHOL. 669, 672-74 (2008) (finding that patients experiencing health problems assigned equivalent cardinal and ordinal numerical rankings to similar possible maladies).

65. *See* BRONSTEEN ET AL., *supra* note 15, at 45-47 (considering concerns about differential use of happiness reporting scales and concluding that such variations "are likely to be random, not biased," and that such "randomness should wash out across large numbers of people").

B. Happiness, Law, and Property

1. Happiness and Law

These new and often surprising insights about what increases and decreases subjective well-being—and how those changes in happiness persist over time—have been applied to law in a number of novel and revealing ways. Some of this work explores specific legal implications of particular findings by hedonics scholars. Bronsteen, Buccafusco, and Masur, for example, have argued that, because accident victims are likely to adapt to their injuries within about a year, the sum that plaintiffs in tort suits are willing to accept as compensation decreases over time, and the chances of settlement increase.[66] These authors have also used the notion of hedonic adaptation to contend that prisoners suffer substantially more during the first year of their sentence, with the troubling implication that a year-long sentence for a relatively smaller offense may inflict relatively greater harm to an inmate's well-being than a ten-year sentence for a much worse crime.[67] Samuel Bagenstos and Margo Schlanger have leveraged the literature on affective forecasting to demonstrate that when assessing damages for disabled tort victims juries of able-bodied people tend to inflate awards due to an inaccurate and normatively undesirable failure to predict the extent to which the disabled adapt to their new circumstances.[68] Thomas Griffith showed that the weak relationship between increased wealth and subjective well-being provides a compelling justification for progressive tax policy.[69] And numerous scholars have explored well-being analysis as an alternative to the familiar use of cost-benefit analysis in regulatory policy.[70]

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66. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, Essay, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1518 (2008).

67. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1038, 1048-49 (2009).

68. *See* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 752 (2007).

69. *See* Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1365, 1398 (2004).

70. *Compare* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1607-08, 1615-16 (2013) (proposing evaluation of public policy in terms of "well-being analysis" rather than the traditionally

The explosion of academic interest in subjective well-being has produced a correlative move in legal scholarship toward accounting for the insights of this new literature.[71] Yet despite the scholarship applying the new hedonic psychology to torts, civil procedure, criminal law, and disability rights, there remains one glaring area in which happiness remains unexplored: property. This absence is especially conspicuous because the notions of property and happiness are culturally and socially intertwined. As the examples catalogued in the introduction illustrate, modern American culture often implicitly equates acquiring property with happiness.[72] At the very least, it seems that people tend to believe that getting more things will make them feel better off.[73] Otherwise, why would there be such a strong social push in the direction of constant material acquisition? And the relevance of the connection (or lack thereof) between property and happiness is intensely relevant to law as a result of the law's aggressive protection and promotion of property ownership and acquisition. But is it true that acquiring and owning property will make us better off? Hedonics allows us to supply an evidence-based answer to this question, with the result being that the relationship between property and happiness is at best deeply conflicted.

2. Property and (Un)happiness

Thousands of years ago, Epicurus argued that it was indifference toward acquisition, rather than the possession of things, that was both a great virtue and a source of true happiness.[74] This insight

preferred cost-benefit analysis), *with* Adler, *supra* note 61, at 1564-65, 1599 (expressing skepticism about well-being analysis as a means of analyzing public policy).

71. *See* Adler, *supra* note 61, at 1511 ("'Happiness' is all the rage.").

72. *See supra* notes 3-6 and accompanying text.

73. *See* Gilbert & Wilson, *supra* note 12, at 550-53 (averring that wanting something is tantamount to making a prediction that it will improve our mental state).

74. *See* Leaf Van Boven, *Experientialism, Materialism, and the Pursuit of Happiness*, 9 REV. GEN. PSYCHOL. 132, 132 (2005) (quoting Epicurus as having written, "[W]e regard independence of outward things as a great good ... so as to be contented with little if we have not much, being honestly persuaded that they have the sweetest enjoyment of luxury who stand least in need of it"). Similarly, Democritus argued that, "By desiring little, a poor man makes himself rich." *See* 1 WILLIAM ENFIELD, THE HISTORY OF PHILOSOPHY 431 (London, J.F. Dove 1819) (quoting the maxims of Democritus). There are countless aphorisms for this proposition and its opposite. *See supra* note 4 and accompanying text.

may not have much cultural purchase in affluenza-crazed modern America,[75] and, in all fairness, it does seem intuitive that wealth would lead to greater subjective well-being. This is not because having money automatically should make us feel happy,[76] but because wealth tends to create the ability to acquire the objects of one's desire, avoid negative experiences, and have security against possible misfortunes. Nevertheless, numerous studies have confirmed Epicurus's take on the matter. For the most part, studies have found at best a weak relationship between wealth and moment-to-moment happiness.[77] Moreover, the most positive correlations between increased income and happiness occur below the threshold where basic living needs are met. So in the United States, for example, the relationship between experienced well-being and household income evaporates once the latter reaches $75,000 per year.[78] And even

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75. For a discussion of "affluenza" and "Gross Domestic Happiness" as an alternative measure of national well-being, see generally JOHN DE GRAAF ET AL., AFFLUENZA: HOW OVER-CONSUMPTION IS KILLING US—AND HOW TO FIGHT BACK (3d ed. 2014).

76. Though it may, at least temporarily; consider the apoplectic joy of Publishers Clearing House Sweepstakes lottery winners when they saw Ed McMahon on their front porch with an oversized novelty check. *See* Larissa Faw, *The Curious Case of Ed McMahon and the Publishers Clearing House*, FORBES (Nov. 21, 2012, 9:42 AM), http://www.forbes.com/sites/larissafaw/2012/11/21/the-curious-case-of-ed-mcmahon-and-the-publishers-clearing-house/ [https://perma.cc/3D48-JX83].

77. This is commonly termed the "Easterlin paradox." *See* Richard A. Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, *in* NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH 89, 118-19 (Paul A. David & Melvin W. Reder eds., 1974). This paradox has spawned many, many studies on the conflicted relationship between happiness and wealth. For one summary of them, see LAYARD, *supra* note 21, at 41-54 (citing numerous studies for the proposition that increased income has a negligible effect on subjective well-being after a subsistence point). For a more equivocal take on the issue, see ED DIENER & ROBERT BISWAS-DIENER, HAPPINESS: UNLOCKING THE MYSTERIES OF PSYCHOLOGICAL WEALTH 110-11 (2008) (concluding that "it is generally good for your happiness to *have* money, but toxic to your happiness to *want* money too much").

Betsey Stevenson and Justin Wolfers have recently claimed to rebut the Easterlin paradox, though their findings are based on evidence that increased wealth does increase 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, 60. Importantly, though, the effect size of these results is limited, so that the most this work shows is that huge increases in wealth lead to only modest increases in (one kind of) happiness. *See id.* at 70-71. And other recent work continues to confirm that increased wealth does not have much impact (beyond a certain threshold) on *moment-by-moment* happiness. *See* Huang, *supra* note 28, at 409-10 (summarizing this research).

78. *See, e.g.*, Belinda Luscombe, *Do We Need $75,000 a Year to Be Happy?*, TIME (Sept. 6, 2010), http://content.time.com/time/magazine/article/0,9171,2019628,00.html [https://perma.

below that threshold, increases in income show much lower impacts on happiness than people predict.[79] Another surprising finding is that longitudinal studies of subjective well-being in the United States show a relatively constant level of well-being from about the end of the Second World War to the present time—despite substantial and constant increases in GDP over this period.[80]

These studies refer to only general increases in income, though they are relevant to this Article because wealthier people obviously tend to purchase more property. But even if simply getting richer in pure monetary terms does not make us happier, it remains possible that acquisition of chattel or real property—and in particular, getting the "American dream" in the form of one's own home—may have different and positive effects on subjective well-being.[81] Yet here too, studies confound cultural expectations. Two scholars recently commented after a survey of the available evidence that "[r]emarkably, there is almost no evidence that buying a home—or

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cc/ZKN6-MNVN]; *cf.* LAYARD, *supra* note 21, at 3 (collecting studies and concluding that "as Western societies have got richer, their people have become no happier"). Wealth may, though, have some positive impact on global well-being. *See* Daniel Kahneman & Angus Deaton, *High Income Improves Evaluation of Life but Not Emotional Well-Being*, 107 PROC. NAT'L ACAD. SCI. U.S. 16,489, 16,490-92 (2010).

79. A study of Americans revealed that while people predicted that their happiness would double if they made $55,000 instead of $25,000, people who earned the former amount were actually only slightly happier than those who earned the latter amount. Lara B. Aknin et al., *From Wealth to Well-Being? Money Matters, but Less Than People Think*, 4 J. POSITIVE PSYCHOL. 523, 524-26 (2009).

80. *See* SONJA LYUBOMIRSKY, THE MYTHS OF HAPPINESS: WHAT SHOULD MAKE YOU HAPPY, BUT DOESN'T, WHAT SHOULDN'T MAKE YOU HAPPY, BUT DOES 276 (2014). What explains the surprisingly weak relationship between wealth and happiness? Two factors commonly cited are individuals' tendency to hedonically adapt to material possessions and the extent to which well-being is contextual, so that overall increasing wealth (as in the case of rising GDP) does not make people feel relatively better off compared to their friends and neighbors, even though they are wealthier in an absolute sense. *See id.* at 148. Recent work has shown that the effect of any impact of national income growth on happiness is trivial. *Cf.* Edsel L. Beja, Jr., *Income Growth and Happiness: Reassessment of the Easterlin Paradox*, 61 INT'L REV. ECONOMICS 329, 341-42 (2014) (explaining how adaptation to income and social comparison have "very little oomph" in terms of the impact of income growth on happiness).

81. While much of the ensuing discussion is specific to real property, the analysis applies to chattels, especially luxury goods, as well. Buying a trendy subzero refrigerator or a fancy new surround-sound system is likely subject to hedonic adaptation, leading to buyer's remorse, and may reduce your net happiness—especially if you deepen your debt by buying it on credit. *See* White, *supra* note 9 (summarizing happiness studies showing that purchasing consumer goods led to a materialistic mindset and lowered subjective well-being).

a newer, nicer home—increases happiness."[82] One study of contemporary Germans, for example, found no increase in overall life satisfaction among a cohort of people who purchased new homes because they were dissatisfied with their previous residences.[83] Another survey in Ohio similarly reported no increase in happiness among homeowners; it actually found that along certain metrics—such as health—homeowners compared unfavorably to similarly-situated renters.[84] And a study found that first-year Harvard students predicted that they would have much higher happiness levels if they were assigned to desirable rather than undesirable upper-class housing.[85] Yet when the researchers contacted the same students later in their college years, they found no relationship between their actual happiness and their residence in a more or less desirable dorm.[86] Researchers have found the same results with respect to chattel property, and in particular luxury goods. A study of prospective car purchasers found that they overwhelmingly agreed that buying a luxury car would make them better off than getting a standard vehicle.[87] Yet when drivers of luxury cars were surveyed, those who had decided to purchase a high-end auto reported no greater happiness than those who did not.[88]

These results fly in the face of popular wisdom that purchasing a home is an indispensable part of the good life—a view that persists even after the mortgage crisis of 2008.[89] So what can

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82. DUNN & NORTON, *supra* note 10, at 2.

83. *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, 129-31 (2011). The evidence did show that the new homeowners reported increased satisfaction with their new homes; nevertheless, they reported no greater overall life satisfaction. *Id.* at 129.

84. *See* Bucchianeri, *supra* note 46, at 5-6, 16-17, 23 (discussing health differentials in survey subjects).

85. *See* Elizabeth W. Dunn et al., *Location, Location, Location: The Misprediction of Satisfaction in Housing Lotteries*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1421, 1422, 1424-25, 1429 (2003).

86. *See id.* at 1422-25, 1429. This study is especially helpful because first-year students are randomly assigned to different upper-class housing, and there is a widely shared consensus that some of those dorms are more desirable than others. *See id.* at 1422.

87. *See* Norbert Schwarz & Jing Xu, *Why Don't We Learn from Poor Choices? The Consistency of Expectation, Choice, and Memory Clouds the Lessons of Experience*, 21 J. CONSUMER PSYCHOL. 142, 143-44 (2011).

88. *See id.*

89. Even after the devastating housing crash of the last decade, a 2011 study sponsored by Fannie Mae and widely reported by realtors' associations confirmed that nine in every ten

explain this divergence? The answer lies in the many insights generated by recent research on human happiness. Perhaps the leading finding of this literature is the prevalence of "hedonic adaptation." Numerous studies have confirmed that the effect of positive and negative life events is far more limited than we tend to predict, both in terms of the temporary effect that such events have and in terms of our "psychological immune system" that causes us to revert to whatever level of well-being we had before such events.[90] The acquisition of material goods, and especially houses, is one of the classic examples of something to which humans tend to adapt because such goods are static and unchanging.[91] So we tend to imagine that living in more square footage, or having a pool in our own back yard, or using a dual subzero fridge will make our lives permanently and noticeably better. But once we move into that new home, all those fancy features quickly become part of the background of our daily lives, and our well-being tends to migrate back toward whatever it was before the home purchase.[92] Hedonic adaptation also tends to dampen any subjective well-being created by the purchase of chattel property, especially luxury items like fancy cars, expensive jewelry, or the latest electronics. "The things that we get used to most easily and most take for granted," wrote happiness

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people still believed that owning a home remained an essential part of the American dream, even if the value of their own home had fallen dramatically. *See* David Streitfeld & Megan Thee-Brenan, *Despite Fears, Owning Home Retains Allure, Poll Shows*, N.Y. TIMES (June 29, 2011), http://www.nytimes.com/2011/06/30/business/30poll.html [https://perma.cc/X29U-LZFQ].

90. For a good overview of the hedonic adaptation literature, see Shane Frederick & George Loewenstein, *Hedonic Adaptation*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra* note 59, at 302, 311-13.

91. *See* Richard A. Easterlin, *Explaining Happiness*, 100 PROC. NAT'L ACAD. SCI. U.S. 11,176, 11,181-82 (2003) (explaining that once purchasers acquire material goods such as a home, their expectations adjust so that those goods become a mere condition of their life rather than a long-held aspiration, thereby adding no net life happiness); Michelle Higgins, *Homeownership, the Key to Happiness?*, N.Y. TIMES (July 12, 2013), https://www.nytimes.com/2013/07/14/realestate/homeownership-the-key-to-happiness.html [https://perma.cc/XP2D-2BS2] ("Like any possession, [a home's] impact on happiness diminishes over time." (quoting Professor Ravi Dhar, Director of the Center for Customer Insights at Yale School of Management)).

92. *See* Higgins, *supra* note 91 (explaining that "[w]hat matters for our happiness ... is what we do in the minutes and hours of our day," and that "[w]hether you have a maple or a walnut floor" will not have a big impact on your day-to-day experience (quoting Elizabeth Dunn, Associate Professor of Psychology at the University of British Columbia)).

scholar Richard Layard, "are our material possessions—our car, our house."[93]

By unfortunate contrast, though, one negative fact to which humans have not been shown to hedonically adapt is debt, perhaps because debt reminds us of its existence in constant, unpleasantly surprising ways—repeated loan payments, unexpected jumps in the adjustable interest rate, or the realization that certain other acquisitions or experiences are foreclosed due to lack of funds.[94] Mortgage debt in particular tends to be especially suffocating due to its disproportionate size, which tends to be psychologically burdensome and also reduces real income so that homeowners have less financial freedom to engage in the kinds of experiences that are more likely to lead to greater happiness.[95] Finally, the psychological downsides of heavy debt loads threaten to swamp any positive affect derived from the purchased property due to the unfortunate but well-documented fact that negative factors associated with an event tend to depress our well-being more than positive ones enhance it.[96] "[W]hat we owe," caution Dunn and Norton, "is a bigger predictor of our happiness than what we make."[97]

Several other key findings of hedonic psychology also help to explain why acquisition may reduce happiness. One major conclusion of the happiness literature is that acquisition makes us happier when it is parceled out over time. Eating a candy bar slowly and thoughtfully, one bite a day (as per the protagonist in *Charlie and the Chocolate Factory*[98]), will likely generate more happiness than

93. LAYARD, *supra* note 21, at 49.

94. *Cf.* DUNN & NORTON, *supra* note 10, at 96-97 (noting that constant reminders of what we owe can take particularly large tolls on our subjective well-being).

95. *See generally* Leigh Ann Leung & Catherine Lau, *Effect of Mortgage Indebtedness on Health of U.S. Homeowners*, REV. ECON. HOUSEHOLD, May 2014 (reporting results of study showing relationship between high mortgage debt and adverse mental health outcomes, such as depression).

96. *See* LYUBOMIRSKY, *supra* note 80, at 151 ("[T]wo decades of research has demonstrated that we net a much bigger emotional 'hit' from negative experiences ... than we obtain a boost from positive experiences.").

97. DUNN & NORTON, *supra* note 10, at 95 (collecting studies showing that members of households with greater debt levels exhibit lower happiness).

98. Charlie, whose poverty meant that candy bars were a rare treat, would eat each bar by taking just a "*tiny* nibble" at a time. *See id.* at 31-32 (discussing *Charlie and the Chocolate Factory* as an illustration of their forced deprivation strategy for happier consumption).

scarfing the thing down all at once.[99] But large, "lumpy" goods like houses, cars, and jewelry,[100] of course, are impossible to consume pursuant to this kind of forced deprivation strategy.[101] Acquiring "lumpy" goods requires massive, one-time purchases that cannot be parceled out over time, and such big-ticket items are thus less likely to generate happiness bang for the buck.[102] Houses and luxury goods in particular are subject to two features that reduce the happiness produced by material goods: status comparisons and buyer's remorse. Single-family homes (and luxury goods like cars or jewelry) often function as positional goods.[103] That is, the appeal of a home or a high-end good depends not only on its intrinsic qualities, but also on how it compares to the homes or comparable goods of peers. So, for example, if someone buys a house with all the features she desired only to discover that all of her neighbors' homes are even fancier, she may well feel unhappy with the purchase even though the house remains appealing on objective terms.[104] Personal property in particular tends to be vulnerable to a process by which we idealize goods before we possess them, but suddenly see all their flaws once they are officially ours—buyer's remorse, in common parlance.[105] This tendency is especially pronounced with respect to house and car purchases, in which the sales process

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99. *See* Carey K. Morewedge et al., *Mispredicting the Hedonic Benefits of Segregated Gains*, 136 J. EXPERIMENTAL PSYCHOL. 700, 707 (2007) (noting that research subjects predicted larger gains in well-being from experiences parceled out over time rather than consumed all at once).

100. *See* Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1958-62 (2012) (characterizing goods that are valuable only if they are acquired wholesale, rather than incrementally, as "lumpy").

101. *See* DUNN & NORTON, *supra* note 10, at 27-52 (discussing this parceled out consumption strategy).

102. *Cf. id.* (collecting studies supporting this point).

103. This may explain why people rate their predicted happiness from owning luxury goods at high levels only to find that the day-to-day experience of using such goods does not actually generate much more happiness. *Cf.* Schwarz & Xu, *supra* note 87, at 142-44 (explaining how consumers mistakenly believe that their purchasing decisions will increase their happiness).

104. In a truly astonishing illustration of the positional-good phenomenon, half of the subjects in a study reported that they would rather make 50 percent less in real income if their income could be substantially higher in relative terms to coworkers'. *See* Sara J. Solnick & David Hemenway, *Is More Always Better?: A Survey on Positional Concerns*, 37 J. ECON. BEHAV. & ORG. 373, 380-81 (1998).

105. *See* Travis J. Carter & Thomas Gilovich, *The Relative Relativity of Material and Experiential Purchases*, 98 J. PERSONALITY & SOC. PSYCHOL. 146, 153-56 (2010) (discussing the tendency of material goods acquisitions to be diminished by regret).

can be competitive and rushed, so that it is only when a purchaser has finally taken title to her new home or vehicle that she has occasion to contemplate the wisdom and appeal of her acquisition.[106]

Finally, in terms of homeownership in particular, one might wonder whether all the costs that homeownership may impose on subjective well-being may be overborne by the increased wealth that an investment in a single-family home can bring. Of course, this intuition runs up against the numerous studies showing that wealth does not seem to bring more subjective well-being after a subsistence point.[107] And, as the housing crash of the late 2000s illustrated, houses do not guarantee a positive return on investment, and decreases in value can economically devastate homeowners.[108] Even if a house increases in value massively, this does not necessarily guarantee happiness, not only because of the conflicted relationship between wealth and happiness discussed above, but also because being literally surrounded by a reminder of one's wealth may lead to an outsized focus on oneself and one's possessions.[109] This kind of myopic focus on one's material wealth tends to be strongly associated with low subjective well-being.[110]

3. Toward Happier Acquisition

The implication of the foregoing findings may appear to be that acquiring wealth—and in particular real property—does not equal

106. *Cf.* Richard H. Thaler, Feature, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSP. 191, 193-94 (1988) (discussing the tendency to overbid in auction scenarios).

107. *See supra* notes 77-78 and accompanying text.

108. In fact, Yale housing economist Robert Schiller reports that, when adjusted for inflation, home prices in the United States have remained essentially flat since World War II. ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 20 (2d ed. 2005).

109. *See* DUNN & NORTON, *supra* note 10, at 74-75 (explaining that constant reminders of material wealth tend to make us think more about status and wealth acquisition but less about things that tend to make us happy, like socialization); LYUBOMIRSKY, *supra* note 80, at 168-69 (summarizing research showing that acquiring wealth makes us more desirous for and conscious of additional wealth).

110. Materialistic people report less satisfying and meaningful lives, poorer social relationships, and higher incidence of insecurity, and are less liked by others. *See* Belk, *supra* note 9, at 274. One reason for this relationship may be that higher consciousness of one's own wealth tends to be associated with higher cortisol levels, which make individuals feel unhappier and also lead to higher rates of heart disease. *Cf.* Kahneman & Deaton, *supra* note 78, at 16,492 (concluding that high income is more closely related to satisfaction with life than actual improvement in emotional well-being).

happiness. But the story is more complicated than that. There are circumstances under which acquiring property leads to greater happiness. What matters is intention: how and why the acquisition happens.[111] So consider, for example, the finding that while spending money on the acquisition of material things does not generate (and may reduce) subjective well-being, spending money on experiences (traveling, attending concerts, dining out at memorable restaurants with friends) does.[112] Experiences, unlike things, tend to grow more rather than less appealing in retrospect,[113] and have proved to be impervious to positional comparison, buyer's remorse, and other factors that lead purchases of real and chattel property to disappoint us.[114] How might this insight affect the acquisition of real property? One psychologist, aware of these findings, used them as a benchmark when searching for a new home.[115] He and his wife downplayed the physical amenities to which real estate agents constantly draw attention and instead prioritized a house with access to hiking trails.[116] They reported that the home purchase has improved their access to a favorite activity and that they are happier for it.[117]

Another implication of the literature on property and happiness is that we may be better off when we use our money to buy time, not

111. The highly influential book by Dunn and Norton reporting the oft-negative relationship between property acquisition and happiness was titled *Happy Money: The Science of Happier Spending* because it suggests specific acquisition strategies that can enhance rather than degrade subjective well-being. *See generally* DUNN & NORTON, *supra* note 10.

112. *See* Leaf Van Boven & Thomas Gilovich, *To Do or to Have? That Is the Question*, 85 J. PERSONALITY & SOC. PSYCHOL. 1193, 1196 (2003) (finding that when asked to compare relative happiness resulting from experiential versus material purchases, 57 percent of respondents reported that the former made them happier while only 34 percent reported that the latter made them happier). *See generally* DUNN & NORTON, *supra* note 10, at 5-25 (summarizing the results of many studies showing that spending money on experiences tends to make us happier than spending money on things).

113. However, some work suggests that the total effect of memories on our well-being, while positive, is limited. *See* Terence R. Mitchell et al., *Temporal Adjustments in the Evaluation of Events: The "Rosy View,"* 33 J. EXPERIMENTAL SOC. PSYCHOL. 421, 446 (1997).

114. *See* Van Boven & Gilovich, *supra* note 112, at 1199 (observing that while material objects fade in their owners' estimation over time, memory tends to burnish experiences to make them seem even better than they actually were).

115. *See* Stephanie Rosenbloom, *But Will It Make You Happy?*, N.Y. TIMES (Aug. 7, 2010), http://www.nytimes.com/2010/08/08/business/08consume.html [https://perma.cc/A5XW-AH27].

116. *See id.*

117. *See id.*

things.[118] Homes in particular may generate capital appreciation but this can be overborne by their reduction in "time affluence."[119] Owning a home can eat up one's free time in terms of upkeep and commuting. This is a doubly bad tradeoff. Not only is the reduction in free time itself harmful to subjective well-being,[120] but the kinds of activities that typically eat up homeowners' free time—commuting and housework—are among those that have been shown to have the worst effect on individual happiness.[121] These insights, too, translate into smarter real-property acquisition strategies. One happiness scholar reports that she consciously chose to buy a smaller condominium nearer to her university in lieu of a more luxurious home in an outlying area.[122] This move supplanted a happiness-suffocating commute with a quick (and healthy) bicycle trip to work each day.[123]

Property acquisition can generate subjective well-being when it is done in service of furthering the one factor that most hedonics scholars agree is most strongly associated with greater subjective well-being: social relationships.[124] So acquiring a house as a site to facilitate family gatherings is more conducive to happiness than doing so with an eye toward status and wealth.[125] And seeking to

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118. *See generally* DUNN & NORTON, *supra* note 10, at 53-78 (summarizing results of various studies showing strong connection between free time and subjective well-being).

119. *Cf.* 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) (proposing that businesses adopt "time affluence" models to enhance employee well-being).

120. *See id.* at 244 (showing that increases in free time were directly related to reports of greater subjective well-being).

121. *See* Higgins, *supra* note 91; *see also* DUNN & NORTON, *supra* note 10, at 63-65.

122. *See* Higgins, *supra* note 91.

123. *See id.*

124. While commuting and housework are at the bottom of the happiness index, people report their highest psychological affect during time spent with family and friends. *See* Alan B. Krueger, *Are We Having More Fun Yet? Categorizing and Evaluating Changes in Time Allocation*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2007, at 193, 203.

125. Even the admirable aim of buying a fancy home for one's family comes with hidden happiness costs because it may require parents to work longer hours and deal with brutal commutes that make it harder to spend quality time with their family. A 2003 poll of Americans illustrated the irony: 80 percent of those polled said they wished they could spend more time with their families, and that they would take a pay cut to do so. *See Americans Eager to Take Back Their Time*, NEW AM. DREAM (Aug. 2003), http://205.153.117.210/about/polls/timepoll.php [https://perma.cc/23W7-V97F]. But those polled also said they could not afford a pay cut because they needed to make enough money to support their family—citing

live in an area near one's social or familial network is more likely to enhance well-being than scouting for a place in a socially prestigious or aesthetically pleasing neighborhood. Other studies have found that giving away one's property to charities is enormously beneficial to happiness.[126] The twist, though, is that charitable donations have to be made with the sincere intentions of benefiting some cause rather than oneself. If you give away your vacation home or fancy car solely for a tax break, or out of guilt-ridden obligation, such instrumental conduct is unlikely to have the desired effect on happiness.[127]

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For some time, philosophers have cautioned that however much we may desire material acquisition, it will not make us happier. Recent advances in hedonic psychology have allowed us to test this proposition empirically. The result: the ancients had it mostly right. Simply getting more stuff, including and especially real property, does not increase our subjective well-being, and under many circumstances may actually decrease it. The short-term psychological lift from buying real or chattel property quickly fades due to hedonic adaptation, and may be replaced by debt anxiety, maintenance costs, buyer's remorse, and incipient materialism that result in a longer-term reduction in subjective well-being. But this does not mean that property always makes us miserable; acquisition with a mind toward maintaining "time affluence" and enabling memorable experiences can enhance happiness, and sometimes simply giving away what we own can create more subjective well-being. These fascinating findings have, surprisingly, gone almost entirely unremarked in the legal literature on property. The ensuing two Parts

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housing costs as the leading barrier. *Id.*

126. One cross-cultural study has shown that people feel much happier when they use their money to help others than when they keep it for themselves. *See* Lara B. Aknin et al., *Prosocial Spending and Well-Being: Cross-Cultural Evidence for a Psychological Universal*, 104 J. PERSONALITY & SOC. PSYCHOL. 635, 646-47 (2013). Billionaire Warren Buffet recently pledged to give away 99 percent of his wealth to charities and reports that he "couldn't be happier" with the decision. *See* DUNN & NORTON, *supra* note 10, at 106.

127. *See* William T. Harbaugh et al., *Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations*, 316 SCIENCE 1622, 1624 (2007).

explore the implications for the troubled nexus of ownership and happiness for property theory and law, respectively.

II. HAPPINESS AND PROPERTY THEORY

Why do we have property? In particular, why does law facilitate the acquisition of property? Scholars have developed a number of different theories to answer these hard questions, looking to considerations such as wealth maximization, self-expression, autonomy, and community.[128] Despite their stark differences, these frameworks share two common features. First, they are normative;[129] that is, they seek to tell us why we value the social and legal institution of ownership and, ideally, how ownership rights should be allocated. Second, they rely centrally on untested empirical premises about how the acquisition of property affects owners and nonowners alike. One such premise, for example, is that acquiring real or chattel property makes us freer or provides a critical outlet for self-expression. This Part uses the hedonics research outlined in the previous Part to make two contributions to the scholarly dialogue about the ideal normative approach to property. The first is that acquisition's fraught relationship with subjective well-being challenges central factual premises on which leading normative property theories rely, thus seriously complicating the coherence of those theories. Second, it considers how happiness might work as a framework for thinking about how we should govern ownership, concluding that while more evidence is needed, the impact of property

128. For a good, brief overview, see SPRANKLING & COLETTA, *supra* note 11, at 1-8 (collecting and summarizing five normative theories of property).

129. By contrast, many scholars have engaged the separate descriptive question of what property is. For example, Tony Honoré sought to define property in terms of a series of distinctive incidents such as the rights to possess, use, and manage. A.M. Honoré, *Ownership*, *in* READINGS IN THE PHILOSOPHY OF LAW 557, 563-74 (Jules L. Coleman ed., 1999). Thomas Merrill, by contrast, defined property rights solely in terms of the right to exclude. Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (stating that the right to exclude is the "*sine qua non*" of property).

The normative theories of property that are the concern of this Part seek both to "provide a normative justification for allocating [rights to material resources] in a particular way," and "to specify the content of property rights at various levels of generality—for example, the contours of the owner's right to exclude others from various kinds of property." *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 6-7 (2012).

acquisition on subjective well-being should be a critical input into any discussion about allocative theories of property.

A. A Happiness Critique of Leading Property Theories

The surprising insight that property and happiness may lie at odds has troubling implications for the leading theories of property. This Section considers four such theories: utilitarianism, personhood, autonomy, and community. In each case, hedonics has destabilized central factual premises of each of these theories.

1. Utilitarianism

Utilitarianism, according to a leading property coursebook, "is, without doubt, the dominant view of property today, at least among lawyers."[130] And while there are a number of different formulations of utilitarianism,[131] a central and simple proposition on which many property scholars agree is that ownership rights should be allocated in order to maximize net social welfare.[132] This broad notion raises a number of difficult questions about aggregation and distribution, but it also poses an ultimate definitional inquiry: what is the best measure of welfare? As we have seen, Bentham, the father of utilitarianism, defined individual welfare as the sum of pleasure or displeasure that any given person felt at any given time.[133] Yet by the late 1800s, the absence of a direct measure of an individual's positive or negative affect led scholars to focus on measuring an individual's well-being by looking at her behavior instead.[134] Decisional conduct possesses intuitive appeal as a proxy measure of subjective well-being. I may not know if someone actually is made

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130. JESSE DUKEMINIER ET AL., PROPERTY 50 (7th ed. 2010).

131. *See* ALEXANDER & PEÑALVER, *supra* note 129, at 11 ("[T]he term *utilitarian* masks a great deal of intellectual and methodological diversity.").

132. *See id.* at 11 n.2. In this respect, it is possible to speak of utilitarianism as a welfarist theory insofar as it is concerned with the outcomes of social policy on well-being. *See id.* Importantly, though, this does not mean that utilitarianism and welfarism are identical, but rather that utilitarianism is a species of welfarism. *See id.* ("[C]lassical utilitarianism is properly understood as a *species* of welfarism, the broader category.").

133. *See supra* notes 22-24 and accompanying text.

134. *See* Colander, *supra* note 25, at 216 (discussing the rise of behaviorism in terms of the failure of social scientists to identify a more direct measure of well-being).

better off by eating an apple or an orange, but if I present him with one of each and he selects the latter, then it is plausible to assume that he derives more enjoyment from eating oranges than apples. This behaviorist turn in social science became dominant through the early twentieth century, epitomized by B.F. Skinner's experiments modifying the behavior of rats.[135] This was especially true in economics, in which welfare increasingly became defined as the extent to which people could get what they wanted—a vision of welfare that has become known as "preferentism." In addition to the consensus that individual decisions evidenced "revealed preferences," social scientists argued that wealth represented the best available measure of well-being, since it translated directly into the ability to satisfy one's preferences.[136] This standard remains prominent in social science today, exemplified by the use of willingness to pay and willingness to accept certain prices as proxies for individuals' relative levels of utility derived from trade.[137]

The development of the utilitarian approach to property law roughly mirrored this trend. Just as twentieth-century economists tended to conflate wealth and well-being,[138] property law's utilitarians—who were heavily influenced by the law and economics movement—implicitly or explicitly assumed that increased acquisition of property was synonymous with greater welfare.[139] Richard

135. *See* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 198-202 (1971); *see also* LAYARD, *supra* note 21, at 127-28 (discussing the behaviorist turn in social science during the early twentieth century).

136. *See* Kristoffersen, *supra* note 59, at 101.

137. *See, e.g.*, Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 945 (2000) ("In mainstream cost-benefit analysis, the primary work of valuation is done by the use of willingness to pay."). For other perspectives on the historical development of the notion of welfare in economics, see L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 113-18 (1996); *see also* Thomas S. Ulen, *Law and Subjective Well-Being*, 82 U. CHI. L. REV. 1753, 1777-79 (2015) (reviewing BRONSTEEN ET AL., *supra* note 15).

138. A typical example is the emergence of gross domestic product, which has become the dominant measure of national well-being: the wealthier a nation, the more purchasing power its citizens possess, thereby facilitating their ability to acquire the objects of their desire. *But see* Ulen, *supra* note 137, at 1756-57 (noting international efforts to measure "gross national happiness" to supplement the GDP metric).

139. *See, e.g.*, Christine Jolls, *Behavioral Law and Economics*, *in* BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 115, 115 (Peter Diamond & Hannu Vartiainen eds., 2007) ("[W]ork within law and economics ... often (controversially) employs the normative criterion of 'wealth maximization.'" (quoting Richard A. Posner, *Utilitarianism, Economies, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979))); Russell B. Korobkin & Thomas S. Ulen, *Law and*

Epstein, for example, claimed that "[w]hile the standard of wealth is not the be all and end all of social welfare, it works especially well with land use transactions, where market values are useful proxies to social welfare."[140] Harold Demsetz similarly argued that societies trend toward greater private ownership of resources, and that this property-maximizing tendency is normatively attractive.[141] Alexander and Peñalver neatly summed up the elision of wealth-accretion and welfare-maximization in much contemporary property scholarship: "Because of the widespread tendency among property theorists to use wealth as a proxy for utility (or welfare), this often amounts, in effect, to an assertion that property institutions should be shaped so as to maximize society's net wealth."[142]

The use of wealth—and, in the particular context of property, land value—as a measure of welfare in utilitarian analysis is derived from the law and economics model's use of a "rational actor" as its archetypal decision maker.[143] Such an actor, in property acquisitions, was assumed to seek the maximization of the value of her land and chattels above all—a vision that Joe Singer called the "investment" model of owners' behavior.[144] This assumption is particularly evident in legal scholarship about home acquisitions, which often assumes that the dominant driver of residential property purchases is the monetary value of the home.[145] And while the wealth-maximization model may operate solely in a descriptive mode, it tends to be overtly or covertly deployed in a normative manner as well, as scholars frequently argue that rational (wealth-

Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CALIF. L. REV. 1051, 1055 (2000) (discussing the prevalence of wealth-maximizing theories in law and economics).

140. Richard A. Epstein, Essay, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 743 (2007).

141. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967).

142. ALEXANDER & PEÑALVER, *supra* note 129, at 17.

143. *See, e.g.*, Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 315 (2006).

144. *See id.* at 314-16 (contrasting this "investment" conception of property with "castle" and "citizenship" models).

145. *See, e.g.*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 4 (2001) (arguing that homeowners purchase homes primarily as a financial investment).

maximizing) decision makers make preferable (welfare-enhancing) decisions.[146]

And both the positive law of property as well as cultural norms assume that wealth accumulation will make individuals better off. In the context of first possession, for example, extraction from the commons is said to enhance individual welfare because the possessor gains property while no one loses anything.[147] Similarly, rules facilitating exchange of property, such as the rule against restraints on alienation, are often said to generate individual welfare because they produce wealth for both parties, because neither party would have entered into the transaction if it did not improve her well-being.[148] And when private property is taken for public use, the compensation due the landowner under the Just Compensation Clause[149] is based upon the highest and best use of that land—uniformly defined as the "most profitable use" to which the land could be put.[150] Each of these justifications relies on a proposition about welfare that seems so obvious it need not be stated: the acquisition of property makes those who get it better off.

The equation of wealth with well-being finds modern cultural expression as well. Advertisers not-so-subtly equate status and social esteem with the purchase of consumer goods—flossy purses, expensive watches, and showy cars.[151] And even outside the context

146. Harold Demsetz followed his 1967 descriptive account of the emergence of property rights some years later with the normative claim that private owners' wealth-maximizing decisions are the optimal means of property allocation. *See* Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. S653, S659-64 (2002); *see also* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 826-27 (2009) (discussing the tendency of law and economics descriptive accounts of property to morph into normative accounts).

147. So long, of course, as the Lockean proviso that no one is entitled to extract from the commons unless they leave "enough and as good" for others is satisfied. *See* LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 2, at 134.

148. *See* Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth Maximization?*, 1994 BYU L. REV. 499, 506 ("Such private property rules are only efficient because (according to the wealth maximization criterion) voluntary transactions are expected to yield wealth gains to both individuals.").

149. U.S. CONST. amend. V.

150. *See, e.g.*, Olson v. United States, 292 U.S. 246, 255 (1934) ("The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered.").

151. *See, e.g.*, Sabrina Lepine, *Rolex*, CONSUMER CULTURE FASHION (Mar. 20, 2012), https://consumerculturefashion.wordpress.com/2012/03/20/rolex/ [https://perma.cc/7DEN-HFN2] (pro-

of rampant consumerism, an underlying cultural norm equates the good life with certain milestone purchases—a teenager's first car, a couple's wedding rings, and, of course, the single-family home. No one explicitly says, "Get more property and it will improve your life," but the implication is so clear that it need not be spelled out.

The hedonics findings summarized in Part I undermine the foundation of the wealth-maximization approach that animates most utilitarian approaches to property. This normative framework proposes that facilitating maximum acquisition of property is normatively attractive, since as people acquire more wealth (and therefore more welfare), they will be better off. Yet the evidence from studies on subjective well-being shows just the opposite. Many of these findings directly indict the presumption that wealth is a plausible proxy for welfare, because increased wealth brings surprisingly little happiness.[152] And studies on property acquisition specifically suggest that buying residential property—including nicer, more expensive residential property—not only fails to bring a sense of happiness, but may actually reduce it. Finally, a constellation of other studies that target specific aspects of the relationship between wealth accumulation and subjective well-being find that property acquisition tends to reduce happiness by enabling status comparisons, fomenting materialism, and keeping buyers on a hedonic treadmill.

Of course, although wealth has become the primary welfare criterion for economic-utilitarian approaches to property law, even its expositors recognize that wealth is not necessarily the only way to define welfare.[153] Some leading scholars whose work falls squarely within the utilitarian law and economics tradition have explicitly embraced a definition of welfare that captures more than just wealth. Louis Kaplow and Steven Shavell, for example, take a view

viding two examples of such advertisements).

152. For a more detailed discussion of this issue, see *supra* Part I.A. Although there is some evidence that increased income increases life satisfaction, the size of this effect is small, especially at higher levels of income. But much weaker evidence demonstrates that wealth brings higher moment-to-moment happiness, and any effect of increased income on affect levels off once a household's income reaches $75,000. *See supra* note 78 and accompanying text.

153. *See, e.g.*, Epstein, *supra* note 140, at 743 (conceding that "wealth is not the be all and end all of social welfare").

of welfare that recasts concerns such as justice as a relevant factor in a utilitarian calculus to the extent that actors' satisfaction of desires for fair outcomes are related to welfare.[154] This approach is simply preferentism,[155] insofar as it assumes that what will enhance an individual's well-being is determined by what she desires, and that a legal system that enhances the satisfaction of preferences is optimal from a utilitarian standpoint.[156] Yet this broader account of welfare as desire-satisfaction largely ends up in the same place as the dominant wealth-maximization approach to property for two reasons. The first is its reliance on revealed preferences.[157] If, as many scholars in this vein believe, our decisions are the best indicator of what makes us better off, then the fact that people exhibit such a strong desire to acquire property—and have for centuries—must be a meaningful indicator that doing so makes them better off. If buying real and chattel property did not improve our well-being, why on earth would we keep doing it? Second, more property (and more wealth generally) may be regarded as a strong proxy for well-being to the extent that it facilitates our ability to

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154. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 988-89 (2001).

155. *See* ALEXANDER & PEÑALVER, *supra* note 129, at 18 ("[E]conomic analysis generally employs a single metric of value, which is itself defined in terms of individual experience (e.g., preference satisfaction).").

156. *See* Mark C. Murphy, *The Simple Desire-Fulfillment Theory*, 33 NOÛS 247, 247 (1999) (defining the "desire-fulfillment" theory as the notion that "an agent's well-being is constituted by the obtaining of states of affairs that are desired by that agent"). For a leading, detailed defense of preference-satisfaction, see generally MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION (2012).

While preference-satisfaction remains the leading account of welfare, objective approaches have recently attracted an increasing number of adherents. These theories define welfare not according to whether individuals' subjective preferences are realized, but instead by reference to whether certain objective criteria that define the good life have been satisfied. A leading such objective theory is Martha Nussbaum's "capabilities approach," which defines well-being as a state in which people have the ability to realize a threshold level of certain freedoms, such as life, bodily health, practical reason, play, and control over one's environment. *See generally* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 4-11 (2000).

157. The notion of "revealed preferences" optimistically assumes that what people choose indicates the optimal outcome for them. *See* John Beshears et al., *How Are Preferences Revealed?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 13,976, 2008). Daniel Haybron argued that this notion is central to Western liberal thought, which assumes that "people are highly authoritative about their own well-being: while they sometimes make mistakes, they pretty well know what's good for them and how they are doing, and generally make prudent choices in pursuit of their interests." HAYBRON, *supra* note 14, at 13.

satisfy our preferences by acquiring the objects of our desire.[158] Wealthier people are obviously in a better position to get the things—at least the material things—they want. So if one takes the commonly held preferentist position that the best criterion for well-being is honoring and enabling the satisfaction of individual wants, then constructing property law to facilitate as much individual acquisition of land and personalty as possible makes sense as a means of maximizing individual well-being. This is not because wealth accumulation is a good unto itself,[159] but rather because wealth is a primary means of realizing one's preferences, which in turn will generate individual well-being.

Scholars who embrace this view might thus argue that refuting economic-utilitarian approaches to property by invoking hedonics evidence simply misses the point. On this view, preference-satisfaction is a superior criterion of welfare, so that law should respond to people's desire to acquire more property regardless of what evidence shows about the subjective happiness it does (or, more aptly, does not) produce. This response needs to be taken seriously. Preferentism, of which economic-utilitarian theories of property are a variant, remains the leading standard for welfare in the philosophical and social science literature.[160]

Yet subjective measures of well-being provide a much better metric for welfare than desire-satisfaction for a pair of reasons. First, hedonics supplies a direct measure of the very thing for which preference-satisfaction is only an imperfect proxy: subjective well-being itself.[161] Andrew J. Oswald made this point convincingly:

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158. This point is really true of only one form of property: cash money, which (if you have enough of it) immediately lets you buy things that satisfy your preferences. This is not true of real or chattel property, which is not readily convertible into or tradeable for the objects of one's desire.

159. Some scholars have made this claim. Early in his career, Richard Posner took the position (which he has since recanted) that wealth maximization should be law's guiding normative criterion. *See generally* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981). In so doing, he explicitly distinguished Bentham's Greatest Happiness principle and the notion of subjective well-being generally as an indulgent and unproductive standard for welfare. *See id.* at 83 n.62 ("The man who leads a contemplative, withdrawn rural life may be happier than the captain of industry, but he will also produce a smaller surplus for the rest of society to enjoy.").

160. *See* HAYBRON, *supra* note 14, at 34 (observing that in both law and philosophy, preference-satisfaction remains "the theory to beat").

161. Preferentists might respond to this view by arguing that preference-satisfaction, not

> The relevance of economic performance is that it may be a means to an end. That end is not the consumption of beefburgers, nor the accumulation of television sets, nor the vanquishing of some high level of interest rates, but rather the enrichment of mankind's feeling of well-being. Economic things matter only in so far as they make people happier.[162]

So it may be the case that individuals with resources and freedom make welfare-maximizing decisions, but why focus on these distal factors if we can directly answer the question whether individuals' choices actually caused them to have greater or lesser happiness?[163] Of course, if the preferentists are right that people tend to make welfare-maximizing decisions, then the two theories are simply different means of getting to the same outcome. But—and this is the second point—a mountain of economic and psychological research from the past several decades has shown conclusively that getting what we sincerely believe we want does not always actually make

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subjective well-being, *is* well-being itself. *See, e.g.*, Connie S. Rosati, *Persons, Perspectives, and Full Information Accounts of the Good*, 105 ETHICS 296, 296-97 (1995). But this view runs counter to basic intuitions about what it means to be better off. If I choose to eat a burger because I sincerely believe it will be delicious, but in fact it is poisoned with E. coli and makes me terribly sick, then the preferentist view would imply that eating the burger has made me better off even though I am wracked with nausea. Preferentists have countered this objection by arguing that the only preferences that count in a welfare calculus are the ideal preferences that an actor would have if they had full information. *See id.* at 297. This move founders on the practical reality that people lack such information. This laundered-preferences view is entirely academic because it assumes some imaginary version of the self who can accurately predict all future states of being. *See* BRONSTEEN ET AL., *supra* note 15, at 140; David Sobel, *Full Information Accounts of Well-Being*, 104 ETHICS 784, 794 (1994). It is also widely regarded as circular, essentially reducible to the tautology that well-being is constituted of preferences for well-being. *See* SUMNER, *supra* note 137, at 135.

162. Andrew J. Oswald, *Happiness and Economic Performance*, 107 ECON. J. 1815, 1815 (1997).

163. A variation on the preferentist theory avers that even the satisfaction of preferences that do not result in increases in subjective well-being make up our well-being. So, for example, on this view of preferentism, one would argue that it enhances an environmentalist's welfare that an obscure species of squirrel located in Sri Lanka escapes extinction, even if this environmentalist remains unaware of this event. By contrast, scholars who favor happiness as the standard for well-being insist that unless the environmentalist knows of the squirrel's survival—in which case it would translate into subjective well-being—then it cannot be part of the welfare calculus. *Compare* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 34 (2006) (making the preferentist argument on behalf of unknown species extinction), *with* Bronsteen et al., *supra* note 51, at 1619-21 (engaging and rejecting this argument).

us better off.[164] Indeed, a major project of the hedonics literature has been to identify the various cognitive biases that compromise our ability to engage in accurate affective forecasting.[165] Part I provided an extended, property-specific illustration of this point. People tend to want to acquire as much property as possible, but when they do, the happiness they expect from ownership fails to materialize, and in fact their subjective well-being is often reduced (or at least not improved) by getting the thing they so desperately wanted.

Contemporary utilitarian defenses of property, most of which use wealth as their primary criterion for welfare, predominate.[166] Yet expositors of these theories typically fail to articulate just what kind of welfare property should maximize. The foregoing analysis showed that the leading economic-utilitarian accounts of property implicitly adopt a preference-satisfaction approach to welfare. They favor widespread acquisition of property both because it is rooted in owners' own preferences, and because wealth makes it easier for people to get what they want. Research on happiness and property, though, casts doubt on this preferentist model of ownership and welfare. Preference-satisfaction is merely a behavioral proxy for subjective well-being, which studies show ownership does not enhance. Moreover, the hedonics literature undermines the foundational assumption of preferentism that people getting what they want will enhance their subjective well-being by showing that

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164. Gilbert and Wilson call this phenomenon "miswanting." Gilbert & Wilson, *supra* note 12, at 551. The shortfall between what we think we want and the happiness that we actually feel once we get it may be due to misunderstanding the object of our desire; using the wrong theory for determining what we want; or confusing an affective state with our actual desires. *See id.* at 551-54.

In fact, many people may even have self-harming preferences—consider a depressed person who prefers to stay inside and sulk even though going out in the sun will make him feel better—which further undermines the preferentist account of welfare. *See* Richard Kraut, *Desire and the Human Good*, PROC. & ADDRESSES AM. PHIL. ASS'N, Nov. 1994, at 39, 40-41 (discussing the problem of self-harming preferences).

165. *See generally* DANIEL GILBERT, STUMBLING ON HAPPINESS (2006) (cataloguing numerous studies that demonstrate our inability to engage in accurate affective forecasting regarding our own well-being).

166. One qualification is in order before moving on from this discussion. The analysis in this Part—and throughout the Article—largely assumes that the purchasers of property are human individuals, as opposed to corporations or other entities. The hedonics analysis may play out differently with respect to the latter, so I pause here to emphasize that this Article is focused on individual, not corporate, property acquisition. Thanks to Jonathan Masur for pointing out this distinction.

people tend to be terrible predictors of their own future happiness. Finally, even if one takes the preferentist position that achieving desires is the best measure of welfare, subjective well-being still remains relevant, if not entirely constitutive of, the overall welfare calculus. Indeed, preferentists regularly concede as much.[167]

2. Personhood

Next, consider property and personhood. In a pathbreaking article, Margaret Radin argued that "to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."[168] Her claim distinguished property that is closely tied to personal identity (for example, a family home or a precious heirloom) from other purely fungible property (for example, a dollar bill or a share of stock).[169] While contemporary property scholarship most commonly associates this personhood perspective with Radin's work, this notion has deep roots. Georg Hegel crafted a theory of property that reflected the need for the abstract notion of free will to be made tangible in some external object in order to be fully realized.[170] For Hegel, property was the necessary medium through which individuals realized both their personal and social development.[171] Radin, inspired by this classical natural rights tradition,[172] similarly argued that property

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167. *See, e.g.*, BRONSTEEN ET AL., *supra* note 15, at 133 n.1 (citing numerous leading philosophers all conceding that subjective well-being is highly relevant to, if not constitutive of, welfare); Mark Kelman, *Hedonic Psychology and the Ambiguities of "Welfare*,*"* 33 PHIL. & PUB. AFF. 391, 391 (2005) ("Philosophers have disagreed about the place of human welfare in judgments about public policies generally and their distributive outcomes in particular. But virtually all agree that welfare effects should play *some* role.").

168. Radin, *supra* note 11, at 957.

169. *See id.* at 959 ("Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.").

170. *See* GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT para. 41 (T.M. Knox trans., 1952) (1821) ("A person must translate his freedom into an external sphere in order to exist as Idea.").

171. *See id.* paras. 44-46; *see also* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 355 (1988) (commenting on this aspect of Hegel's personality view of property).

172. *See* Radin, *supra* note 11, at 971-78 (discussing Hegelian property theory as the basis for her personhood account).

that belonged to the former category was essential to one's self-definition and self-development and concluded that "the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement."[173]

Radin's personhood account carried several substantive implications for property law. For example, favoring personhood as a value should make the state loath to displace people from their residences, counseling limitation of the eminent domain power[174] or passage of renter-protective doctrines such as the implied warranty of habitability.[175] Radin also suggested that the personhood theory supported welfare rights, albeit only insofar as it would "suggest that government should rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property."[176]

The personhood theory of property has been enormously influential,[177] leading a generation of scholars to develop arguments in favor of ownership rights for things—homes, heirlooms, the body—that are thought to be constitutive of the self.[178] This theory has been embraced as a less calculating approach to property than economic-utilitarian approaches, which tend to elide differences between kinds of property, reducing them to nothing more than their market value.[179] The empirical foundations of these theories—in both Hegel's and Radin's formulation—regarding the psychological importance of certain kinds of property, though, were not accompanied by any empirical evidentiary support. The new research on hedonic psychology tends to cast doubt on several

173. *Id.* at 986.

174. *See id.* at 1005 ("[I]f the personhood perspective is expressed in law, one might expect to find an implied limitation on the eminent domain power.").

175. *See id.* at 995-96.

176. *Id.* at 990.

177. *See* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1095 (2009) ("Personhood theory infused a generation of scholarship, engraining the notion that homes are special objects deeply intertwined with psychological functioning.").

178. *See id.*; *see also* Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 582-94 (2013).

179. Along these lines, Radin followed her work on personhood with another highly influential piece that questioned whether certain objects should ever be reduced to the status of objects in trade. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1897-98 (1987).

foundational premises of the property and personhood perspective.[180]

First, in the years since Radin articulated her variation on the personhood account, psychologists have (for unrelated reasons) asked whether property, including even property that individuals highly prize, is a necessary constituent of their sense of identity. The short answer: it is not. A number of studies found that while property, such as a beloved family heirloom or a residential home, may serve as a way for people to express their identity, it is not an exclusive or even important means of doing so.[181] Study subjects who lacked the kind of property Radin claimed was instrumental to personhood reported no worse senses of self than those who possessed such land or goods; they simply reported expressing their personal identities in other ways, such as via personal relationships or life goals.[182] And hedonics scholars have recently shown that goods are only weakly constitutive of people's sense of identity, especially compared to experiences, which individuals are much more likely to associate with their essential selves.[183] As Stephanie Stern argued, the personhood theory wrongly conflates "the notion that certain objects, such as homes, express and even help maintain our identities and the theory that objects actually *construct* our

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180. For a detailed and wide-ranging critique of Radin's personhood theory rooted in empirical research that includes but is not limited to hedonics, see generally Stern, *supra* note 177, at 1134-35.

181. *See, e.g.*, Ernst Prelinger, *Extension and Structure of the Self*, 47 J. PSYCHOLOGY 13, 14-23 (1959) (finding that possessions did not fall particularly high on a list of items that survey subjects were asked to rate as "definitely a part of *your* own self"); Marsha L. Richins, *Valuing Things: The Public and Private Meanings of Possessions*, 21 J. CONSUMER RES. 504, 508-09, 512 (1994) (finding, based on a survey of 500 households, that people regarded homes as necessities rather than symbolic possessions representing the self); *see also* Stern, *supra* note 177, at 1110-15 (citing numerous studies critiquing Radin's property and personhood theory).

182. *Cf.* Shigehiro Oishi et al., *Residential Mobility, Self-Concept, and Positive Affect in Social Interactions*, 93 J. PERSONALITY & SOC. PSYCHOL. 131, 134 (2007).

183. *See generally* Travis J. Carter & Thomas Gilovich, *I Am What I Do, Not What I Have: The Differential Centrality of Experiential and Material Purchases to the Self*, 102 J. PERSONALITY & SOC. PSYCHOL. 1304, 1304, 1313, 1315 (2012) (showing that goods are only weakly constitutive of identity as compared to experiences because (1) when asked about themselves, individuals identified experiences not things as more self-constitutive, (2) study subjects were more likely to mention experiences in telling their life stories, (3) subjects reported that experiential purchases were a more reliable indicator of who someone else is, and (4) subjects seemed to cling more to cherished experiential memories than to memories of things).

identities in a prerequisite sense."[184] Indeed, one of the reasons that happiness scholars have found that experiences produce more subjective well-being than material goods is that people regard experiences they have as part of their true identity, while goods are regarded as external to the self as separate objects that are subject to trade.[185]

These findings about the relationship between property and identity are broadly related to hedonics in that they investigate how, if at all, possessions make us better off. But the more specific findings about property and happiness detailed in Part I further undermine, or at least complicate, the empirical premises of the personhood perspective. One implication of this research is that if property acquisition does generate a sense of self, it is not necessarily a positive or constructive one.[186] Acquisition, especially of positional goods like homes or luxury items, often fosters a sense of competition and materialism that causes one's sense of worth to be wrapped up in the things she owns and tied to constant comparisons to others' possessions.[187] Eastern thinkers have espoused a theory directly contrary to Radin's and especially Hegel's, suggesting that it is only when we divest ourselves of attachments to the outside world—and in particular to possessions—that we can truly know ourselves.[188] Indeed, numerous recent studies show that those who divest themselves of goods—especially through charitable donation—report

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184. Stern, *supra* note 177, at 1112.

185. *See* LYUBOMIRSKY, *supra* note 80, at 152-54 (describing and citing studies indicating "that it is experiences—not things—that make us happy"); Carter & Gilovich, *supra* note 183, at 1312-13 (reporting results of studies confirming this conclusion).

186. Radin does note the possibility that some property relationships may work "to hinder rather than to support healthy self-constitution," and describes unhealthy attachment to things as a form of "fetishism." *See* Radin, *supra* note 11, at 969; *see also id.* at 982 n.86. While Radin acknowledges this concern in the abstract, she does not give any sense of how one might distinguish healthy from unhappy attachment to possessions, and in any event work done since Radin's article has shown that ownership tends to degrade more than to support identity. *See, e.g.*, Monika A. Bauer et al., *Cuing Consumerism: Situational Materialism Undermines Personal and Social Well-Being*, 23 PSYCHOL. SCI. 517, 517 (2012).

187. *See* LAYARD, *supra* note 21, at 46-50 (discussing the tendency of acquisition to foment materialism); Brown et al., *supra* note 8, at 2288-89 (reporting that a materialistic mindset is strongly associated with lower subjective well-being).

188. For example, Thich Nhat Hanh wrote, "Letting go gives us freedom, and freedom is the only condition for happiness. If, in our heart, we still cling to anything—anger, anxiety, or possessions—we cannot be free." THICH NHAT HANH, THE HEART OF THE BUDDHA'S TEACHING 78 (Broadway 1999).

higher incidence of personal well-being.[189] These findings are consistent with other evidence suggesting that purchases of homes or luxury goods may even alienate owners from the kinds of constructive sources of identity that lead to a healthy sense of self.

3. Property and (Negative) Liberty

Consider a second alternative defense of property: the libertarian-influenced claim that ownership uniquely enables individual autonomy.[190] While there are numerous property theories rooted in some notion of freedom,[191] this Subsection will focus on two iterations of property as negative liberty,[192] both of which share a common theme that Eduardo Peñalver has termed "exit."[193] The first is that owning property provides a space for securing the exercise of private freedom that lies in contrast to (and is threatened by) collectivities such as the ever-encroaching welfare state.[194] The second variation regards property as a means of withdrawal from the surrounding community, securing autonomy from private rather than public demands.[195] In both of these views, owning private property is a precondition for freedom insofar as it provides both the literal and figurative walls that allow individuals to cordon themselves off from interference by or interaction with private and public entities.[196] Autonomy-based defenses of property come in welfarist

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189. *See* Aknin et al., *supra* note 126, at 646.

190. *See* Peñalver, *supra* note 11, at 1891.

191. Hegel's personhood account, for example, was ultimately concerned with freedom insofar as he argued that property enabled individuals to develop their free will through its manifestation in external objects. *See* HEGEL, *supra* note 170, para. 30 (calling individual free will manifested in property "the embodiment of ... self-conscious freedom").

192. These accounts lie in contrast to other property theories (including those rooted in virtue and discussed in more detail *infra* Part II.A.4) that express concern for positive liberty—that is, affirmative entitlements. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, The Human Right to Private Property 5-6 (Dec. 18, 2015) (unpublished manuscript), http://ssrn.com/abstract=2624428 [https://perma.cc/6CKC-DP2X] (arguing that a private property regime must "secure[] the possibility of developing [one's] own life-plans" (footnote omitted)).

193. Peñalver, *supra* note 11, at 1890-91.

194. *See* RICHARD PIPES, PROPERTY AND FREEDOM 161 (1999); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 40 (2003).

195. *See* Peñalver, *supra* note 11, at 1891-92 ("[A] person's ability to retreat into his privately owned space enhances and protects his liberty by providing him with the power to disregard the demands of his fellow citizens.").

196. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 133 (1960); JENNIFER NEDELSKY,

and nonwelfarist varieties. Some scholars have argued that the autonomy enabled by private property is a good unto itself;[197] others have stressed that this form of autonomy generates socially desirable outcomes such as wealth creation and self-determination.[198] This theoretical disposition in favor of autonomy as a central organizing principle for property translates into substantive preferences for very strong owners' rights, in particular the right to exclude.[199] An autonomy-inspired theory of property would thus celebrate cases that uphold owners' rights to make private agreements keeping out undesirable residents.[200] By contrast, it would excoriate judicial decisions that limit landowners' rights in favor of providing social services to tenants[201] or enabling access to public property.[202]

Although the two variants of the autonomy account of property each have different explanations for how it does so, both concur on a necessary, central factual proposition: private property increases individual freedom. Yet the research on happiness and property calls this shared empirical presumption into doubt, showing that acquisition—and in particular, homeownership[203]—may do more to reduce than enhance autonomy. In fact, the surprisingly low

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PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 272 (1990).

197. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171 (1974).

198. *See* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY 30-31 (1997) (arguing that private property ownership enables self-determination).

199. *See* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1841-50 (2006) (discussing examples of strong variations on the right to exclude).

200. *See, e.g.*, Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1192 (N.J. Super. Ct. App. Div. 2001) (upholding restrictive covenant barring sex offenders with high likelihood of recidivism from living in residential community).

201. *See, e.g.*, State v. Shack, 277 A.2d 369, 374-75 (N.J. 1971) (rejecting trespass claim brought against aid workers who sought to deliver health care services to the landowner's migrant employees).

202. *See, e.g.*, Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (holding that resident had a right to cross private land to access public beach in the absence of a public access road).

203. The iconic type of property that is said to enhance individual liberty is the residential home, which is cast as a fortress of private autonomy in the law's "castle doctrine," *see, e.g.*, FLA. STAT. § 776.013 (2016) (allowing an occupant of a home to use or threaten "force, including deadly force" without any duty to retreat because the law creates a presumption that entry by a person other than a lawful occupant is "with the intent to commit an unlawful act involving force or violence"), and lauded as a space within which private citizens can retreat from the state and each other by theorists, *see* Peñalver, *supra* note 11, at 1897 (noting that "proponents of property as exit" are concerned about, inter alia, "the freedom of the property owner to do what he wants in the private confines of his own home").

happiness reported by contemporary American property owners can be traced in part to the decreased freedom wrought by acquisition of land and chattels beyond a subsistence threshold.[204] This operates on two levels: first, property may cause owners to have less physical and economic freedom of action; and second, it may also contribute to owners subjectively feeling less free. And to the extent that some scholars argue that autonomy is an instrumental good in that it facilitates other worthy ends,[205] happiness research casts doubt on this welfarist iteration of the theory as well.

To begin, the possession of property may limit physical and economic freedom because it undermines our ability to do, or to afford to do, other things. One of the reasons that purchasing property, especially residential property, has been shown to reduce subjective well-being is that it constrains mobility, thereby limiting one's physical freedom.[206] Homeowners, in contrast to renters, are less free to pick up and move both because they tend to invest more in their homes and because the cumbersome and fickle sales process hampers relocation.[207] This lack of mobility manifests itself in a number of negative ways in the lives of homeowners, from preventing them from taking advantage of the opportunities presented by life in a different area[208] to making it more difficult to exit a neighborhood that has become unsafe.[209] The lack of physical freedom

204. *See* LAYARD, *supra* note 21, at 48-49.

205. *See, e.g.*, ALEXANDER, *supra* note 198, at 30-31.

206. *See* Stern, *supra* note 177, at 1105 (cataloguing the negative effects of homeownership on the freedom to relocate).

207. *See* Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 31 (2009). Indeed, many homeowners during the subprime mortgage crisis found themselves unable to sell because they lacked the liquidity to pay the difference between the amount of their mortgage and the value of their home. *See id.*

208. This reduced mobility may actually decrease states' responsiveness to individual objections to policies. The process of Tiebout sorting assumes that when states pass laws to which people object, voters will move to register their displeasure. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956). An electorate that finds it less easy to move will thus find it harder to show their opinion of state policies through relocation. *See id.*

209. *See* Richard Florida, *Why People Stay Where They Are*, CITYLAB (Sept. 22, 2014), http://www.citylab.com/housing/2014/09/why-people-stay-where-they-are/380583/ [https://perma.cc/G6QT-RKA9]. This lack of mobility tends to work to the detriment of lower-income homeowners, many of whom found themselves unable to escape deteriorating neighborhoods during the fallout from the subprime mortgage crisis because all their capital was invested in their (significantly less valuable) homes.

that may be imposed by a home purchase itself tends to suppress subjective well-being.[210] But large-scale purchases of land or costly chattels that require financing may degrade one's sense of freedom for a different reason: the crushing debt loads that such purchases typically entail tend to substantially reduce happiness. Those who are burdened with jumbo mortgages or other debt are necessarily less free to afford to do much else, including engaging in the kinds of experiential activities that may do far more than possessions to increase subjective well-being.[211]

Second, while scholars have argued that property ownership produces a subjective feeling of liberation from external constraints,[212] the happiness literature suggests that just the opposite is often true. This may be true of any leveraged acquisition, because the mental burdens that come with massive debt likely undermine any such subjective sense of autonomy.[213] Moreover, studies on the happiness effects of materialist mindsets suggest that acquisition often causes us to feel less rather than more free.[214] Purchases of homes and luxury goods in particular tend to draw people into positional comparisons with other consumers, causing them to feel obligated to continue purchasing more and better things both to compete with their peers and to keep the fleeting psychological lift such purchases bring.[215] Beyond a subsistence threshold, then, property may reduce owners' subjective freedom both because it makes them feel internal psychological pressure to continue consuming in order to stay on the "hedonic treadmill" and because it enmeshes them in pernicious social competitions with peers.[216]

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210. *See* Stern, *supra* note 177, at 1105.

211. *See* DUNN & NORTON, *supra* note 10, at 68, 95 (describing the debt/experience tradeoff).

212. *Cf.* Peñalver, *supra* note 11, at 1899 ("Property as exit leans heavily on the beneficial effects for individual liberty of the *mere possibility* of exit.").

213. *See* LYUBOMIRSKY, *supra* note 80, at 151 (discussing the psychological burdens of being "house-poor"). While most of the discussion in the literature relates to mortgage debt, these mental costs logically apply just as well to massive debt incurred to finance the purchase of any costly consumer goods.

214. *Cf.* Brown et al., *supra* note 8, at 2288-89 (showing that materialism tends to make people less happy, especially when they acquire goods).

215. *See* LAYARD, *supra* note 21, at 49; *see also supra* notes 103-04 (discussing positional goods).

216. *See* LAYARD, *supra* note 21, at 48 (explaining that increased material acquisition can lead to a compulsion to keep consuming in order to achieve the diminishing marginal

The foregoing points cast doubt on the central factual assertion underlying the autonomy-based defense of property: that owning more things actually does make us freer. But the happiness literature also undermines an additional aspect of this defense, the consequentialist variant that autonomy is normatively attractive because it leads to welfare-enhancing outcomes. This iteration of the autonomy theory of property asserts that freedom is good because if left to our own devices, we will make decisions that tend to maximize our well-being. Yet as the previous Subsection's critique of economic-utilitarian defenses of property has already elaborated, merely giving people a greater capacity to choose does not always translate into choices that enhance subjective well-being. The surprisingly weak relationship between getting what we want and being happier may be the major contribution of the happiness literature to date. But autonomy may lie in tension with our well-being for another reason. Writers who have espoused the upside of property as a means of exit from neighbors and state actors who constrain our freedom assume that this kind of isolated self-determination will necessarily bring an individual the most well-being.[217] Hedonic psychology has cast doubt on this premise, too, suggesting that we are not at our happiest when we are safely ensconced in our own house among our own possessions, but when we are enmeshed in relationships with others who need and may impose on us, and even—heaven forbid—limit our property rights. Thus, an apartment dweller who enjoys a broad social network with his neighbors may be happier than a magnate like Citizen Kane, who lives in spectacular opulence all alone.

4. Progressive Property

On the opposite end of the spectrum from the libertarian account of property as a shield from the state and social relationships is a relatively new school of thought that can be loosely grouped under the umbrella of progressive approaches to property.[218] While

psychological benefits of consumption).

217. *See* Peñalver, *supra* note 11, at 1891-92 (discussing the notion of property as an exit, whereby "a person's ability to retreat into his privately owned space enhances and protects his liberty by providing him with the power to disregard the demands of his fellow citizens").

218. *See* Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L.

property as exit suggests that the virtue of property is that it allows individuals to defend themselves from public and private obligations, a common thread running through progressive property is the inevitability of community and the necessity of crafting a normative vision of ownership that acknowledges and enhances social relationships. Carol Rose espoused an early version of this perspective in her work noting the capacity of public property—roads, parks, town squares—to bring people together not only for the purpose of wealth-enhancing commerce, but also to foster a richer sense of community and civility.[219] Some decades later, the notion that property inextricably links owners together in a web of shared social context has ripened into a variety of related normative theories. While very different in their particulars, each of these normative theories rejects the proposition that economics-inflected utilitarianism should be the sole guiding criterion for property law, espouses a more limited vision of owners' rights, and argues that property holders bear some obligation to their communities by virtue of their status as owners.[220]

These theories, espoused in subtly different ways by several scholars, stress the extent to which ownership entails obligations to nonowners.[221] Peter Gerhart, for example, regards the essence of property law as "respond[ing] to the question of what we owe each other."[222] One justification for these obligations is simply contractarian. The state extends property owners many privileges, from theft protections to public roads that ensure access to their land, so a

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REV. 743, 743-44 (2009) (enumerating the principles of the progressive approach to property as shared by its main expositors).

219. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 774-81 (1986) (discussing public property as a socializing and civilizing institution that can foster connections among local community members as well as far-flung people).

220. *See, e.g.*, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746-51 (2009); Peñalver, *supra* note 146, at 823-26; Joseph William Singer, Essay, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1061-62 (2009).

221. *See* PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY, at x-xi (2014) (outlining a vision in which property law fosters social networks by creating obligations between individuals); Alexander, *supra* note 220, at 753-60; Dagan & Dorfman, *supra* note 192, at 17-18.

222. GERHART, *supra* note 221, at 5; *see also id.* at 6 ("[T]he responsibility of an individual for the well-being of others is nonetheless the key to understanding the scope of property rights.").

simple notion of equity suggests that owners thus owe the state an obligation to contribute their own fair share to the common good.[223] But another increasingly invoked basis for the substantive commitment to owners' obligations to nonowners lies in the tradition of Aristotelian virtue theory. This theory is welfarist in that it is concerned about the consequences of property law for human welfare, but it is starkly different than the utilitarian approach because it does not determine welfare by reference to sum-ranking of subjective mental states or satisfaction of individual preferences.[224] Rather, it is an objectivist theory that assumes that there is an ideal, virtuous existence that all humans should aspire to live.[225] Increasing the likelihood that we will act virtuously, though, requires that all people have access to resources that give them the capability to live a good life. Aristotelian virtue theory thus favors limiting property owners' rights to the extent that such limits are necessary to enable human flourishing throughout society.[226]

As its expositors have conceded, the notion of virtue does not cleanly translate into normative recommendations for substantive law.[227] As a general matter, though, such an approach would make it incumbent on owners to contribute to the communities to which they belong in order to sustain the social matrices that enable all people to flourish.[228] At a high level of generality, this would mean favoring a more communal approach to the right to use property, a resistance to the fungibility of all land and chattels, and an attitude of cautious humility toward land use decisions. Several of the leading cases in property law illustrate how such an approach would play out. For example, a virtue theorist would embrace judicial

223. *See* Alexander, *supra* note 220, at 758-60.

224. *See* ALEXANDER & PEÑALVER, *supra* note 129, at 87-97 (casting virtue-based theories of property as welfarist).

225. Martha Nussbaum and Amartya Sen have developed a capabilities approach that fleshes out the idea of human flourishing by reference to certain capacities that should be preserved for all people to allow them to increase their well-being. *See* NUSSBAUM, *supra* note 156, at 86-88; *see also* AMARTYA SEN, COMMODITIES AND CAPABILITIES (1999).

226. *See* ALEXANDER & PEÑALVER, *supra* note 129, at 87-97 (discussing how Aristotelian virtue theory translates into a substantive vision of property law); Peñalver, *supra* note 146, at 860-74 (developing a virtue theory of land use).

227. *See* Peñalver, *supra* note 146, at 874-76 (discussing the problem of virtue and indeterminacy in the property context). Peñalver claims, though, that "on the determinacy front ... virtue theory does no worse than utilitarianism and its cousins." *Id.* at 876.

228. *See* ALEXANDER & PEÑALVER, *supra* note 129, at 95.

decisions like *State v. Shack*, which limited landowners' rights to exclude in order to enable renters' access to social services,[229] or *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*, which imposed easements on private land in order to assure access to coastal land dedicated to public use.[230] On the other hand, a virtue theorist may more skeptically regard other decisions, such as *Mulligan v. Panther Valley*, which permitted a homeowners association to bar undesirable residents from their community.[231]

The progressive approach to property is primarily a normative one, but it depends at least in part on certain descriptive claims about how property operates in the world, and in particular how acquisition affects owners themselves. The ensuing discussion highlights two ways that hedonics research on property and subjective well-being casts doubt on two of progressive property's central factual propositions. First, a central theme of this literature is that the acquisition of property tends to facilitate individual development of virtue.[232] This is in one sense an intuitive claim; people who have more resources and own more property have more freedom and capability to live a good life. Aristotle himself made this argument, claiming that the acquisition of property spurred owners to develop virtues like generosity and moderation.[233] But the hedonics literature belies this intuition in a number of ways, suggesting that the relationship between property and individual virtue is not nearly as sunny as virtue theory assumes.

One of the major findings of the hedonics literature, as discussed in Part I, is that property owners may have lower than expected subjective well-being. A major reason for this, borne out by studies of the psychological effects of ownership, is that acquisition does not necessarily lead people to develop other-oriented virtues, but

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229. *See, e.g.*, State v. Shack, 277 A.2d 369, 374-75 (N.J. 1971); *see also* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES LAW 127, 149-54 (2009) (discussing how *Shack* is consistent with a virtue-based theory of property).

230. *See, e.g.*, Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005).

231. *See, e.g.*, Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1192-93 (N.J. Super. Ct. App. Div. 2001) (reversing lower court's judgment upholding the ban, though ultimately resting that decision on the basis of an insufficient record to determine the issue).

232. *See* Peñalver, *supra* note 146, at 876-86 (discussing virtue theory of land use).

233. *See* ARISTOTLE, POLITICS 62-63 (Benjamin Jowett trans., Oxford Univ. Press 1923) (c. 350 B.C.E.).

instead may cause them to focus exclusively on their own household and possessions. For example, the homeowners surveyed in one study reported that they spent less time with friends and neighbors and exhibited more negative affect during those interactions than similarly situated renters.[234] And the hedonic psychology findings on materialism further cast doubt on the relationship between acquisition and individual virtues like generosity and moderation. Contrary to Aristotle, these studies suggest that acquisition may make people more focused on what they own rather than the concerns of other people. Nor is the tension between ownership and high-mindedness limited to homeownership. Buying luxury goods also tends to make people more selfish than virtuous by tempting them to focus on material acquisition and social status, and to regard their neighbors and acquaintances as rivals in positional competitions. This latter point dovetails with the finding that a major reason that property makes people less happy is that people quickly adapt to its presence, leading them to buy more and more of it to create the same buzz of joy, which is pretty much the opposite of the Aristotelian notion of moderation.

Second, much of the progressive scholarship on property relies on the related proposition that ownership of private property builds social bonds in a constructive way—in other words, that property acquisition is constitutive of communities.[235] Eduardo Peñalver, for example, argued that property is not principally "a boundary separating individuals from one another but rather ... a means of joining individuals to each other in community."[236] This notion, too, traces to Aristotle, who claimed that property tended to cause owners to invest more deeply in their communities by incentivizing them to take better care of what they owned, and to give back to others through the virtue of generosity.[237] And while this is an appealing story, empirical work on happiness and property suggests

234. *See* Bucchianeri, *supra* note 46, at 18.

235. *See, e.g.*, Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1019 (2005) (book review) ("Property 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.").

236. Peñalver, *supra* note 11, at 1894.

237. *See* ARISTOTLE, *supra* note 233, at 62.

that the relationship between acquisition and community is much more ambivalent than progressive property theorists have asserted.

As the foregoing discussion indicated, the hedonics studies have found that acquiring property does not necessarily make owners better people and may even make them more selfish and materialistic. This in turn undermines the assumption of the progressive property literature that acquisition produces "virtue" and owners will invest more deeply in their communities. And certain particular findings by hedonics scholars about the happiness effects of property seem to bear this out. For example, Bucchianeri's study showed that owners tend to be more isolated than similarly situated renters.[238] Similarly, research has suggested that social bonds among homeowners, especially in neighborhoods of single-family homes, tend to be weak or even nonexistent—an unsurprising implication of living in much lower-density settings where relocation is increasingly frequent.[239] The very notion of the modern neighborhood as the basis for one's social network is no longer as relevant as it was in the twentieth century now that people tend to look to their workplaces and online settings to create a sense of belonging.[240] Relatedly, a study of voting patterns among owners and renters indicated that homeowners vote at only a somewhat higher rate than renters, further disrupting the myth that holding title leads people to exhibit a sense of civitas for their community.[241] And much the same goes

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238. *See* Bucchianeri, *supra* note 46, at 18-19.

239. *See* Stern, *supra* note 177, at 1121-22. By contrast, social bonds in higher-density settings such as apartment buildings or condominium complexes tend to be stronger, suggesting that the relationship between residence and social network is unrelated to ownership status. *See id.* at 1093, 1121-22.

240. *See id.* at 1122-24, 1122 n.187. Robert Putnam identified this trend away from neighborhood-based communities well over a decade ago. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 25-28 (2000). Critics of Putnam's work have argued that the American community has not declined; instead, it has merely relocated to online settings and nonresidential community groups, which, if true, remains consistent with the proposition that becoming a homeowner does not necessarily produce a sense of community. *See* Stern, *supra* note 177, at 1126 (mentioning the Internet as a way other than homeownership to increase local social capital).

241. *See* Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354, 362, 373-74 (1999) (showing that differentials between owners and renters in terms of civic participation decrease substantially after controlling for length of occupancy); *cf.* Stern, *supra* note 177, at 1125 (noting that the best evidence for the thesis shows that homeowners are only marginally more civically engaged than renters).

for luxury goods like fancy cars and electronics, whose tendency to foment materialism and positional comparison are more likely to drive neighbors apart than instill in them a sense of classical virtue.

Of course, the new progressive property theory does not depend entirely on the descriptive claim that property makes people more social. Rather, it advances the normative claim that property owners have a responsibility to act virtuously toward one another and to nonowners.[242] Although the fraught relationship between property, community, virtue, and subjective well-being does not entirely undermine (or even engage) this prescriptive claim, it does complicate it. It is more plausible to encourage a virtue-centered theory of property if acquisition itself foments virtue. And it is certainly more workable to claim that owners have affirmative, other-oriented obligations if ownership itself fosters richer community relations. Peñalver's embrace of a virtue-based approach to property, for example, is premised in part on the factual assertion that "ownership of property in a particular community creates and reinforces social ties among neighbors, the maintenance of which provides owners with market-independent reasons for acting."[243] But happiness studies on the effect of increased ownership on social relationships suggest that this premise is more complicated.[244] Acquiring property—including, but not limited to, residential homes—may make owners more selfish rather than more other-regarding and weaken rather than strengthen social bonds. This is especially true in an age when property is explicitly equated with happiness and status, and when people form communities online and relocate with increasing frequency.[245] And while this does not fully indict the theoretical appeal of progressive property, it does pose a practical challenge that its defenders will have to address if they want their theories to have practical purchase.

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242. *See, e.g.*, Alexander, *supra* note 220, at 747-48 ("Property rights are inherently relational; because of this characteristic, owners necessarily owe obligations to others." (footnote omitted)). *See generally* GERHART, *supra* note 221 (espousing a view of property under which owners have affirmative obligations of moral conduct toward each other and toward nonowners).

243. Peñalver, *supra* note 146, at 838.

244. That research, of course, relates exclusively to private property, so it does not have anything to say about arguments that public property produces social benefits in the form of a richer or more humane society.

245. *See* Stern, *supra* note 177, at 1121-22.

B. Toward a Happiness Theory of Property

The foregoing Subsection explored the negative proposition that the findings of the hedonics literature undermine central premises of the leading normative theories of property. This Subsection (briefly) considers a corollary question: can happiness supply a superior normative theory of property? The answer this Article sketches below is a carefully qualified yes. To the extent that policymakers are concerned about crafting property law in a way that makes owners and nonowners alike better off, subjective well-being provides a more reliable basis for measuring property law's welfare effects than, say, the wealth-focused approach implicit in the standard economic-utilitarian approach. And since it is uncontroversial that law should seek, at least in large part, to make those it affects better off, that happiness can provide a better way to determine welfare effects is important to policy making. This Article stops short of going full Bentham though. Bentham argued that the best measure of societal welfare was the sum total of citizens' happiness, as this Article does, but went a step farther in arguing that aggregate subjective well-being was the only relevant criterion for policy making.[246] By contrast, this Article takes the position that net happiness is an important, but not solely relevant, consideration in decisions about how to craft property law. Welfare matters greatly, but policymakers may well want to fold in nonwelfare considerations such as distributive fairness or social justice.[247]

With this in mind, what would happiness analysis of property law look like? Such an approach would contrast with deontic theories of property, such as those that take freedom as a value that should be sought regardless of consequences. A subjective well-being framework for regulating ownership would instead be explicitly welfarist in that it would be concerned with the impact of property law on the

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246. *See* BENTHAM, *supra* note 24, at 1; *see also supra* note 24 and accompanying text.

247. Other scholars who advocate net happiness as the best criterion for welfare similarly allow for the possibility that other considerations should be used in policy making. *See, e.g.*, BRONSTEEN ET AL., *supra* note 15, at 36 ("Lastly, we note that like [cost-benefit analysis], [well-being analysis] is a tool for analyzing the welfare effects of policies and not a panacea meant to be the last word on what should be done. Policy analysis often proceeds by analyzing welfare effects and then weighing those effects against whatever other considerations are deemed relevant by regulators, legislators, and the citizenry they serve, including fairness, justice, and human dignity." (footnotes omitted)).

lives of those affected by it. Happiness analysis would also differ from other kinds of welfarist approaches, like progressive property or Radin's personhood theory. While those approaches are welfarist insofar as they are also concerned about consequences (like human flourishing and self-realization), they are not welfare-maximizing in the sense that utilitarian approaches are. Of the various theories discussed in this Subsection, happiness has the most in common with economics-inflected utilitarianism. Yet it differs from this framework too in a crucial respect: although most utilitarian approaches to property explicitly or implicitly use the preferentist wealth-maximization standard for welfare, a happiness approach would instead look to individuals' subjective well-being as the standard of welfare. In other words, a happiness approach to property law would assess the appeal of any change in law in terms of its net effect on the aggregated positive and negative affect of those subject to the policy. It would regard a policy that had a net positive effect on happiness as one that improves well-being.[248]

To see how a happiness framework would play out in the context of property acquisition, especially as compared to the leading alternative of cost-benefit analysis, consider the following hypothetical example.[249] A city is considering two alternative development plans for a vacant acre of land. One option is to sell the land to a private developer to create a luxury condominium development; the other is to pay a different developer to create a public park with green space as well as community tennis courts. Assume that both developments will cost the same amount. From a cost-benefit perspective, the first option likely appears more attractive. The state would gain liquid resources while the development would create jobs, generate numerous housing starts,[250] and contribute to longer-term economic growth. Cost-benefit analysis would have a harder time calculating the benefits of the park, the advantages of which cannot be easily

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248. Still, well-being would not necessarily, for reasons explained above, constitute the sole determinant of the appropriate policy outcome. *See supra* notes 246-47 and accompanying text.

249. For a detailed exploration of how a well-being analysis would compare to cost-benefit analysis of a past EPA regulation, see BRONSTEEN ET AL., *supra* note 15, at 40-44.

250. The U.S. Census Bureau regards each separate dwelling as a housing start, so a single multi-unit development would be statistically recorded as generating numerous housing starts. *See New Residential Construction Definitions*, U.S. CENSUS BUREAU, https://www.census.gov/construction/nrc/definitions/index.html [https://perma.cc/QTW4-M235].

understood in dollar terms.[251] Happiness analysis would tell a different story. The construction of the condominiums would indeed spur more wealth for the developer and nicer housing for the residents. But neither of these would necessarily create more subjective well-being because wealth generates little happiness beyond a subsistence level, and studies of people who move from good to marginally better housing do not demonstrate any increased well-being.[252] By contrast, open green space and shared recreational facilities promise to bring people together in a shared setting, resulting in happiness-producing socializing (not to mention the possible well-being boosts of health and appreciation of nature).[253] A more detailed analysis from both perspectives would be needed to make a conclusive choice between these options.[254] This example serves simply to illustrate that cost-benefit analysis and happiness analysis use very different policy-making criteria and may produce starkly different outcomes.

And while the ambition of this Article is limited to property acquisition, it is worth noting that other ownership controversies

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251. This is not to say that cost-benefit analysis could not estimate the park's value by, for example, looking to revealed preferences such as home values near parks as a way to identify people's willingness to pay for proximity to such amenities. That said, cost-benefit analysis is well-known and much criticized for overvaluing direct monetary benefits or costs in relation to those plusses or minuses that are more difficult to quantify. *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1563 (2002) (discussing the failings of cost-benefit analysis in the environmental protection context).

252. *See supra* Part I.B.2. The increased employment generated by the project would, in contrast, likely provide positive subjective well-being because there is substantial (though not uncontroverted) evidence that unemployment makes people very unhappy. *See, e.g.*, Richard E. Lucas et al., *Unemployment Alters the Set Point for Life Satisfaction*, 15 PSYCHOL. SCI. 8, 10-11 (2004).

253. Numerous studies detail the positive impact of urban green spaces on residents' happiness. *See, e.g.*, Mathew P. White et al., *Would You Be Happier Living in a Greener Urban Area? A Fixed-Effects Analysis of Panel Data*, 24 PSYCHOL. SCI. 920, 926 (2013) (indicating that people living near green areas reported less mental distress and higher well-being). There is also evidence that parks lead to better mental and physical health. *See* Ian Alcock et al., *Longitudinal Effects on Mental Health of Moving to Greener and Less Green Urban Areas*, 48 ENVTL. SCI. & TECH. 1247, 1253-54 (2014) (showing the positive effects such moves have on mental health); USDA Forest Serv., *Urban Trees Remove Fine Particulate Air Pollution, Save Lives*, SCIENCEDAILY (June 19, 2013), https://www.sciencedaily.com/releases/2013/06/130619164708.htm [https://perma.cc/9W6T-E4A9] (showing the same for physical health).

254. For instance, if the funds the city used to develop the park traded off with food aid or health social services, the park's net well-being impact could be negative.

could be refracted through the prism of subjective well-being. Happiness would likely positively regard cases that limit owners' property rights in favor of broader social interests. *Shack*'s limitation on one owner's rights so that social services could be provided to migrant workers placed only a slight, temporary, and adaptable restriction on the owner's subjective well-being and assures for many others basic health, which is strongly associated with happiness.[255] The same is likely true of *Raleigh Avenue Beach Ass'n*, in which a judicially imposed easement over one owner's private property likely increased social happiness by enabling access to a state beach where numerous people could recreate and socialize.[256] These two examples should not be taken to mean that happiness tends to favor a limited version of owners' rights in all instances, though. *Panther Valley*, in which a judge permitted a private homeowners association to exclude a category three sex offender from living in their community,[257] was probably rightly decided from a happiness perspective. The hedonic costs of denying one individual space in a given residential community are likely lower than the reduction in well-being to the other residents, who would otherwise experience ongoing uncertainty and discomfort of knowing that a registered sex offender lived near them.[258]

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Scholars have articulated a multiplicity of normative theories to make sense of the institution of property. And while all of these

255. *See* State v. Shack, 277 A.2d 369, 374-75 (N.J. 1971).

256. *See* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005); *see also* Amanda L. Chan, *Exercise Makes Us Happy—It's Science*, HUFFINGTON POST (Feb. 9, 2012, 7:27 AM), http://www.huffingtonpost.com/2012/02/09/exercise-happy-enthusiasm-excitement_n_1263345.html [https://perma.cc/3WH4-W589] (describing results of a study showing that physically active people reported significantly higher levels of happiness).

257. *See* Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1192 (N.J. Super. Ct. App. Div. 2001).

258. Of course, one might argue that regardless of the net hedonic effects in this case, fairness considerations oblige people to allow ex-criminals to live in their midst. After all, we would not tolerate a community's distaste at permitting minority group members as a valid basis for their imposing race- or religion-based exclusions. But this simply illustrates a point developed above: this Article's claim is only that happiness provides the best metric for assessing whether a given property rule is welfare-enhancing, not whether it is the best policy decision when nonwelfarist considerations are taken into account.

accounts differ in foundational ways, one thing they do have in common is that they rely on certain factual premises about property: that it makes us freer, produces more virtuous owners and richer communities, provides an outlet for identity, or just plain makes us wealthier. Yet as the foregoing Part illustrates, recent findings on the relationship between property and subjective well-being throw shade on all of the empirical propositions underlying these theories. Acquiring more property does not necessarily enhance our sense of autonomy, provide a means of self-expression, enrich our local community, or make us better-off overall. But beyond destabilizing some of the major normative theories of property, can hedonics provide a coherent framework of its own? The answer outlined briefly above is a qualified affirmative one. To the extent that any given property theory invokes some feature or value as important for welfare reasons, that feature or value is likely to be subsumed by a happiness analysis. But it may be appropriate for judges and policymakers to consider the deontic relevance of considerations like personhood, autonomy, or community in decisions regarding property, as this Article takes the position only that happiness is the best criterion for welfare, and not that welfare is the sole relevant consideration for policymakers.

III. HAPPINESS AND PROPERTY LAW

The previous Part used hedonics to expose empirical weaknesses in leading normative property theories and to sketch briefly how happiness may serve as a superior framework for—or at least a major input into—decisions about how we should regulate ownership. Part III will discuss how these theoretical ideas translate into specific changes in property law that may increase overall societal well-being. At first blush, the notion of basing public policy on (or even allowing it to be influenced by) something as abstract as happiness may seem peculiar. But after decades of research showing the reliability and validity of hedonics studies, world leaders such as British Prime Minister David Cameron and French President Nicolas Sarkozy have urged that happiness and well-being be considered in guiding public policy.[259] The tiny nation of Bhutan has

259. *See* Elizabeth Kolbert, *Everybody Have Fun: What Can Policymakers Learn from*

even scorned the traditional metric of national well-being—gross domestic product—in favor of a "gross national happiness" index.[260] And scholars both within the legal academy and from other disciplines have endorsed the use of subjective well-being studies as a potential means of determining optimal social policy.[261] As these examples illustrate, the emergence of happiness as a factor in major public policy debates is hardly strange at all. In fact, it follows a very simple intuition: we pass laws to make people better off, so evidence about what makes people actually happier is necessarily relevant to discussions about what law should do.

Before discussing the implications that happiness research about property acquisition has for positive law, some qualifications are in order. The idea developed in the previous Part is big: despite the general American aspiration to constantly acquire more property, doing so may not make us better off in the elemental sense of increasing our well-being. One might plausibly think that the nonrelationship between property and happiness warrants foundationally rethinking, or even abandoning, the legal institution of ownership. Yet the ambition of this Part is more modest for a pair of reasons. First, this Article aims only at laws related to the acquisition of property, not to securing its possession or allocating it to the public. This is because the evidence discussed in Part I indicates only that acquiring property may reduce, or simply not affect, our subjective well-being. It does not address the impact on happiness of losing property one already owns or having access to public land like parks or beaches.[262] Second, the evidence outlined in Part I reveals a complex relationship between property and acquisition that demands a similarly nuanced approach to discussing its policy

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Happiness Research?, NEW YORKER (Mar. 22, 2010), http://www.newyorker.com/magazine/2010/03/22/everybody-have-fun [https://perma.cc/8V6P-ESKZ] (book review); *see also* Allegra Stratton, *David Cameron Aims to Make Happiness the New GDP*, GUARDIAN (Nov. 14, 2010, 4:41 PM), https://www.theguardian.com/politics/2010/nov/14/david-cameron-wellbeing-inquiry [https://perma.cc/UZ4X-KU3A] (discussing David Cameron's support for promoting happiness through public policy).

260. *See* Adler, *supra* note 61, at 1516-17 (discussing Bhutan's approach).

261. *See generally, e.g.*, DEREK BOK, THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING (2010).

262. Indeed, there are a number of reasons to think that weakening trespass or theft laws would be costly in terms of net subjective well-being. Scholars agree that security in one's possessions is a leading factor contributing to one's happiness. *See, e.g.*, HAYBRON, *supra* note 14, at 55.

implications. The hedonics studies about the effects of getting property do not simply show that all owners become miserable, but rather identify a conflicted relationship between acquisition and subjective well-being that clashes with the dominant social narrative that buying more land and chattels is the ticket to happiness.[263] Perhaps the most important implication of these studies is that it is the intention animating acquisition, not the act of acquisition itself, that determines whether property will make us happier.[264] With these limits in mind, this Part proceeds to explore how happiness would make us look at property law differently in three steps: first, by identifying extant property laws and policies that may reduce our subjective well-being; second, by suggesting novel policies that may enhance it; and, third, by indicating other ways to enhance our happiness via property beyond the law and policy of acquisition.

A. Happiness and Homeownership Promotion

As Part I detailed, we are told by public and private sources ad nauseam that homeownership represents the American dream, yet a growing body of work suggests that buying houses does not improve owners' lives.[265] What should law do about this? The purchase of a private home or any other big-ticket item is a product of the sort of private market exchange that the state is rightly loath to ban. However, the residential housing market is far from purely free. On the contrary, it is heavily regulated, especially in the form of numerous incentives that embody the U.S. government's long-standing policy of encouraging homeownership.[266] These market interventions take several forms. The most familiar is the mortgage interest deduction on federal tax, which has been celebrated by

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263. *See* Higgins, *supra* note 91 (discussing various studies that analyze the correlation between homeownership and happiness).

264. *See id.*

265. *See generally supra* notes 5-10 and accompanying text. The title of Grace Wong Bucchianeri's empirical study of the hedonic impact of homeownership, *The American Dream or the American Delusion?*, epitomizes the point. *See generally* Bucchianeri, *supra* note 46.

266. Beyond the pro-homeownership policies discussed in this Part, the real estate market is regulated by the Truth in Lending Act and the Home Ownership and Equity Protection Act, both of which require disclosures and restrict certain practices in the mortgage industry. *See, e.g.*, 15 U.S.C. §§ 1639, 1667(f) (2012). In addition, commercial banks and lending institutions are subject to both federal and state regulations to assure minimum capital requirements and diverse loan portfolios. *See* 12 U.S.C. § 1828 (2012).

politicians and real estate industry associations alike as the major means by which the state encourages homeownership over renting.[267] The deduction allows owners to deduct from as many as two homes both mortgage interest and property taxes and includes numerous other homeowner-friendly, tax-reducing provisions.[268] The federal government also promotes homeownership through a variety of administrative guises. Most familiarly, the government-sponsored enterprises colloquially known as Fannie Mae and Freddie Mac have historically guaranteed many home mortgages and have acquired lenders' housing portfolios to facilitate mortgage origination.[269] And the Federal Housing Administration both makes loans to lower-income buyers and insures qualified mortgages, all in an attempt to increase homeownership by facilitating home financing.[270] Finally, the federal government has sounded a constant drumbeat of rhetoric framing home purchase as an essential part of citizenship, from the 1918 "Own Your Own Home" program[271] to the state's constant assertion that homeownership is the "American dream."[272] This rhetorical posture has had real-world consequences

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267. For a good historical overview of government pro-homeownership policies, which actually date to the early part of the twentieth century, see generally Michael S. Carliner, *Development of Federal Homeownership "Policy*,*"* 9 HOUSING POL'Y DEBATE 299 (1998).

268. For example, owners may roll over the proceeds from the sale of one home into the purchase of another without being taxed on those profits. *See* INTERNAL REVENUE SERV., PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION (2015).

269. Both Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation) went into receivership during the financial crisis of 2008 due largely to their own exposure to subprime mortgage-backed securities, not to the default on mortgages they had purchased. *See* W. SCOTT FRAME ET AL., FED. RESERVE BANK OF N.Y., STAFF REPORT NO. 719, THE RESCUE OF FANNIE MAE AND FREDDIE MAC 5, 18 (2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr719.pdf [https://perma.cc/RSY7-RHGN]. Although they formally remain in receivership, they both continue to buy mortgages and sell mortgage-backed securities, and profit handsomely from doing so. *See id.* at 5.

270. *See The Federal Housing Administration (FHA)*, U.S. DEP'T OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory [https://perma.cc/9D6R-UMGW].

271. *See* Carliner, *supra* note 267, at 301 (discussing this policy and the history of federal efforts to promote homeownership generally).

272. Embrace of the "American dream" metaphor transcends party lines. *Compare* Shaun Donovan, *Promoting the American Dream of Homeownership*, WHITE HOUSE (Aug. 6, 2013, 5:50 PM), https://www.obamawhitehouse.archives.gov/blog/2013/08/06/promoting-american-dream-homeownership [https://perma.cc/FTS5-3M5U] (praising President Obama's policies protecting and promoting homeownership as furthering the "American dream"), *with* Remarks on Signing the American Dream Downpayment Act, 2 PUB. PAPERS 1733 (Dec. 16, 2003)

in the form of pushing the less wealthy toward homeownership, which in turn was part of the impetus for the increase in subprime mortgages that precipitated the financial crisis of 2008.[273]

Yet hedonic psychology casts substantial doubt on the wisdom of this large-scale state intervention in the housing market. Despite the federal government's full-court press in favor of buying residential property, studies have repeatedly shown that acquisition of a desired residence does not enhance owners' well-being. Moreover, the very means by which the federal government seeks to encourage homeownership could be part of the problem. One factor that can make the acquisition of property, and in particular residential housing, harmful to happiness is regarding it primarily as a lucrative investment rather than as a home that will facilitate memorable experiences and foster rich social connections. All the available incentives for home acquisition, however, come in the form of financial advantages. Tax breaks and lower-cost mortgages tend to cause home purchasers to regard their house as an investment or even an ATM,[274] a framing more likely to encourage materialism and thereby reduce subjective well-being. So if the U.S. government were to cease encouraging homeownership via financial inducements, the remaining participants in the market would, to a greater extent, consist of those who are encouraged by the kind of nonmonetary incentives that are likely to result in happier purchases.[275]

(quoting President George W. Bush speaking about the importance of protecting the "American dream" by providing down-payment assistance to homeowners).

273. *See supra* note 270. The U.S. government encouraged the acquisition of homes to subprime (that is, lower-income) borrowers throughout the 1990s and 2000s by, inter alia, repealing the Glass-Steagall Act of 1933 and thereby eradicating the wall between investment and consumer banks, creating a robust secondary market for mortgages at the Federal National Mortgage Association, taking a hands-off regulatory approach to mortgage lenders' increasingly low standards for borrowers, and rhetorically pushing the idea of homeownership among lower-income and historically disadvantaged groups. *See generally* Cyrus Sanati, *10 Years Later, Looking at Repeal of Glass-Steagall*, N.Y. TIMES (Nov. 12, 2009, 2:24 PM), http://dealbook.nytimes.com/2009/11/12/10-years-later-looking-at-repeal-of-glass-steagall/ [https://perma.cc/LYE7-CMEE].

274. *See Field Guide to Mortgage Interest Deduction*, NAT'L ASS'N OF REALTORS, http://www.realtor.org/field-guides/field-guide-to-mortgage-interest-deduction [https://perma.cc/NJ72-LSQK] (last updated Jan. 2016) (discussing houses as tax shelters); *see also Frontline: The Card Game*, *supra* note 5 (reporting that owners increasingly use home equity lines of credit to liquidate the equity in their homes for extra spending money).

275. In Canada, for example, homeowners receive no tax breaks for mortgage interest or property tax, and regulators require mortgage originators to research borrowers' history

How to dismantle the state pro-homeownership apparatus poses a difficult challenge, though, for at least two reasons. First, not all home purchases reduce subjective well-being. Purchasing a home to show off one's wealth or to meet some external expectation of success is likely to make the buyer less happy, but a home purchase designed solely to provide a secure domestic space may have positive effects on happiness, especially since time spent socializing with loved ones tends to make us much happier.[276] Second, there are other advantages to encouraging homeownership short of conspicuous consumption, such as the familiar argument that owners are more invested in their neighborhoods than renters, resulting in better upkeep of property and higher rates of civic participation.[277] Even in light of these caveats, though, the mortgage tax deduction fares poorly.[278] The deduction mostly facilitates wealthy people's ability to buy houses larger than they could otherwise afford (the kind of conspicuous consumerism that tends to reduce happiness), while it has relatively little impact on securing basic homes for lower-income Americans (the kind of modest, family-driven property

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extensively before lending them money. *See* Michael Hiltzik, *How Canada Is Not Like the United States: Home Mortgage Edition*, L.A. TIMES (Jan. 16, 2014), http://articles.latimes.com/2014/jan/16/business/la-fi-mh-canada-20140116 [https://perma.cc/4TFC-BDG7]. Yet the homeownership rate in Canada remains high. *Cf. id.* (noting that Canada's housing market is doing well despite the absence of government-sponsored financial incentives to encourage homeownership). The interesting question for happiness and property, then, is whether Canadian homeowners exhibit higher subjective well-being than their American counterparts. So far, no one has done such a study.

276. *See* Matthew Kassel, *The Psychology of Buying and Selling a House*, WALL STREET J. (June 12, 2016, 10:09 PM), http://www.wsj.com/articles/the-psychology-of-buying-and-selling-a-house-1465783741 [https://perma.cc/E2TR-396Q] (discussing multiple studies showing more expensive homes or residences farther from friends and family negatively impact well-being); Rosenbloom, *supra* note 115 (describing the positive correlation between strong relationships and happiness, and explaining that purchasing luxury goods may interfere with happiness).

277. *See* William M. Rohe & Leslie S. Stewart, *Homeownership and Neighborhood Stability*, 7 HOUSING POL'Y DEBATE 37, 45, 70-72 (1996) (finding a positive relationship between homeownership and property maintenance, reduced mobility, and property values). A great deal of evidence, however, suggests that there is no such relationship. *See* Stern, *supra* note 177, at 1122-23 (citing numerous studies casting doubt on the proposition that homeowners are more civically engaged or better at keeping up their property).

278. *See* Paul Sullivan, *Despite Critics, Mortgage Deduction Resists Change*, N.Y. TIMES (Nov. 8, 2011), http://www.nytimes.com/2011/11/09/your-money/despite-critics-mortgage-interest-deduction-persists.html [https://perma.cc/BHF9-QUVW] (explaining that the mortgage tax deduction has not helped expand homeownership but that it has expanded the purchase of larger homes).

acquisition most likely to increase happiness).[279] Along similar lines, the Federal Housing Administration's provision of mortgage insurance may reassure lenders who make risky home loans,[280] but may not make buyers any happier.[281] Taking on excessive debt loads is a leading reason that homeownership does not make people feel any better, and the constant risk of falling behind on excessive payments (let alone actual default and foreclosure) exacerbates this happiness-diminishing dynamic.[282]

In light of these concerns, one option would be to simply repeal all of these homeownership-promotion policies.[283] The mortgage interest deduction in particular has long been the target of bipartisan criticism, though proposals to phase it out have always been stymied by the real estate lobby.[284] Another possible approach would be to modify federal housing incentives in ways designed to optimize happiness. Capping the home mortgage deduction at some

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279. *See* Roger Lowenstein, *Who Needs the Mortgage-Interest Deduction?*, N.Y. TIMES MAG. (Mar. 5, 2006), http://www.nytimes.com/2006/03/05/magazine/who-needs-the-mortgage interest-deduction.html [https://perma.cc/72TS-TEG6]; Gerald Prante, *Who Benefits from the Home Mortgage Interest Deduction?*, TAX FOUND. (Feb. 3, 2006), http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff49.pdf [https://perma.cc/XM9Z-6T63]; *see also supra* notes 91-92 (discussing the positive impact of home purchases focused on social relationships and the negative impact of home purchases focused on the physical characteristics of the home).

280. *See The Federal Housing Administration (FHA)*, *supra* note 270.

281. *See What Is Mortgage Insurance and How Does It Work?*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/askcfpb/1953/what-is-mortgage-insurance-and-how-does-it-work.html [https://perma.cc/7FQX-TTZW] (explaining the risks a borrower takes on even with mortgage insurance).

282. *See supra* note 95 and accompanying text. For example, the home ownership subsidies created by President Johnson as part of the Great Society reforms have been regarded as unmitigated disasters because they led lower-income borrowers to make unwise financing choices, leading to widespread mortgage default. *See Evaluating the Success of the Great Society*, WASH. POST (May 17, 2014), http://www.washingtonpost.com/wp-srv/special/national/great-society-at-50/ [https://perma.cc/333D-WXU5] (describing President Johnson's Great Society programs, including those related to housing); *cf.* James Surowiecki, *The Mortgage Mistake*, NEW YORKER (Jan. 12, 2015), http://www.newyorker.com/magazine/2015/01/12/mortgage-mistake [https://perma.cc/BP2S-6DQX] (describing the increase in mortgage defaults by people who have purchased more expensive homes because of mortgage deductions).

283. *See* Lowenstein, *supra* note 279 ("A .... salable approach would be to kill the deduction in stages .... Over time, it would simply disappear. Congress could do that; it should do it.").

284. *See* Jennifer Liberto, *Fiscal Battle Over Mortgage Deduction*, CNN MONEY (Nov. 27, 2012, 11:23 AM), http://money.cnn.com/2012/11/27/real_estate/housing-mortgage-interest-tax/ [https://perma.cc/6WKP-3556] (describing failed congressional attempts to repeal the deduction in 2012); Lowenstein, *supra* note 279 (describing bipartisan efforts during the 2000s to repeal the deduction).

level—say, 50 percent of the average value of homes in the local area—could encourage the acquisition of the kinds of relatively modest homes that have more potential to increase owners' well-being while ceasing to incentivize the kind of extravagance that tends to be toxic for happiness.[285] Another approach would be lowering the availability of the mortgage tax deduction to the $75,000 household income threshold at which additional acquisition ceases to correlate with increased happiness.[286] Although not directly keyed to home value, this strategy would likely have a similar effect because below a given income level, buyers are much more likely to be able to purchase only a modest home that meets their family's basic needs.[287] It would also cease to function as an incentive for the wealthy to buy the kinds of larger trophy homes that tend not to increase subjective well-being.[288]

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285. *See* Lowenstein, *supra* note 279 (discussing a tax reform proposal capping the tax interest deduction); Rosenbloom, *supra* note 115 (describing findings that wealth and purchasing luxury goods lead to a sense of one-upmanship that interferes with a person's happiness).

286. *See* Kahneman & Deaton, *supra* note 78, at 16,489, 16,492. The state already places some caps on the ability of homeowners to enjoy tax relief. *See, e.g.*, *Property Tax Relief Credit*, N.Y. ST. DEP'T OF TAX'N & FIN., https://www.tax.ny.gov/pit/property/property-tax-relief.htm [https://perma.cc/K7FX-PYX9] (last updated March 3, 2017) (describing New York State's tax relief credit, which caps at an income of $275,000). For example, owners can claim a mortgage interest and property tax deduction for nonresident properties, but only if they make less than $150,000 per year. *See Tax Planning for Owning a Second Home*, KIPLINGER, http://www.kiplinger.com/article/taxes/T010-C000-S001-tax-rules-for-second-homes.html [https://perma.cc/3D2R-TT3X] (last updated Jan. 2015). And the $5000 tax credits the federal government offered first-time home buyers as part of the housing reforms following the mortgage crisis of 2008 were unavailable to those whose income exceeded $75,000 per year. *See First-Time Homebuyer Credit Questions and Answers: Basic Information*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/first-time-homebuyer-credit-questions-and-answers-basic-information [https://perma.cc/R8RU-Q3BE] (last updated Nov. 6, 2009).

287. *See* Bob Sullivan, *For 1 in 8 Americans, a $100K Income Is Required to Buy a Median-Priced Home*, MSN MONEY (Oct. 3, 2014), http://www.msn.com/en-us/money/other/for-1-in-8-americans-a-dollar100k-income-is-required-to-buy-a-median-priced-home/ar-BB7ee1c [https://perma.cc/Z8NN-HSRL] (describing the difficulty most Americans face when purchasing even average homes if they make less than $100,000); *see also* Jonnelle Marte, *5 Reasons Someone Making $75,000 Would Live Paycheck to Paycheck*, WASH. POST (Apr. 22, 2015), https://www.washingtonpost.com/news/get-there/wp/2015/04/22/5-reasons-someone-making-75000-would-live-paycheck-to-paycheck/ [https://perma.cc/CJ6P-XMJC] (explaining most families making $75,000 do not have money for excess expenditures).

288. *See* Jonathan Clements, *Money Can Also Buy You Unhappiness*, WALL STREET J. (Nov. 29, 2014, 8:17 PM), http://www.wsj.com/articles/money-can-also-buy-you-unhappiness-1417310263 [https://perma.cc/JGG3-JEBF] (describing the ways purchasing a larger house can make a person unhappy); Surowiecki, *supra* note 282 (explaining that current tax deductions incentivize people to buy bigger houses).

These potential reforms of property public policy have private analogues as well. Residential real estate transactions have long come under scholarly fire for being needlessly protracted and complex, complicating the process of acquisition and making it less likely that potential homeowners will buy a given house.[289] Authors have floated various proposals for simplifying the process of buying residential property, all animated by the plausible notion that streamlining the home-buying process would be a boon to would-be acquirers.[290] These suggestions dovetail with the state's policy of supporting potential buyers by providing easier credit and subsidizing down payments.[291] Hedonics, though, suggests a pair of reasons that this approach may be welfare-reducing. First, buyers tend to enjoy more those things they have to wait for before purchasing.[292] This is due not only to the fact that the anticipation makes them appreciate the object of their desire all the more when they finally achieve it, but also because the experience of anticipatory waiting

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289. *See* Alice M. Noble-Allgire, *Attorney Approval Clauses in Residential Real Estate Contracts—Is Half a Loaf Better Than None?*, 48 U. KAN. L. REV. 339, 339 (2000) ("Buying or selling a home is often the most significant transaction that the average American will encounter and is fraught with legal pitfalls."). The standard residential real estate transaction entails a detailed sales contract, option period, transfer of earnest money, inspection and required disclosures (both federal and state), closing and carrying costs, and typically lasts about a month. In many states, buyers and sellers are typically represented by counsel (as well as, in most cases, a professional real estate agent) to navigate this sclerotic process. For a detailed look at this enterprise, see generally GRANT S. NELSON ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT (9th ed. 2015).

290. *See, e.g.*, Noble-Allgire, *supra* note 289, at 383-84. Consider, for example, the debate about whether lawyers should represent the parties to a residential real estate transaction. Some have argued that the involvement of counsel only makes an already complicated process more contentious and difficult, while others contend that the very complexity of the process shows that laypeople should not be left to negotiate it on their own. *Compare* Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!,"* 31 CONN. L. REV. 423, 439-40 (1999) (describing both realtors' and homebuyers' hesitation to involve lawyers in home purchases), *with* Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 933-36 (1996) (arguing that lawyers should be required to represent parties to residential real estate transactions).

291. *See* Danny Gardner, *The Truth About Down Payments and Down Payment Assistance*, FREDDIE MAC (June 29, 2015), http://www.freddiemac.com/news/blog/danny_gardner/20150629_down_payments.html [https://perma.cc/UES6-66M3] (describing the assistance state, county, and city governments provide to homeowners).

292. *See* DUNN & NORTON, *supra* note 10, at 91 ("In short, delaying consumption can enhance pleasure.").

itself can be a distinct and intense source of happiness.[293] Protracted real estate acquisition epitomizes this notion both by creating pleasurable anticipation during the long escrow period and then enhancing the enjoyment of real property once title finally transfers.[294] Second, and relatedly, people tend to appreciate more those purchases for which they have worked hard and saved, rather than those that came with little struggle.[295] This highlights at least one welfare downside of state policies that ease credit and support down payments: government-assisted acquisition means getting a home faster, but because it also means less work to achieve that end, it may make aided buyers less happy with the real property they acquire.[296]

Finally, happiness promises to enhance local property regulation as well. Housing is a positional good.[297] That is, the subjective well-being that owners derive from the value of their homes comes as much (if not more) from comparisons with nearby homes as it does from the actual price the house would fetch on the open market.[298] Thus, the owner of the biggest shack on one street may well feel better about his living situation than the owner of the smallest mansion on another street.[299] Zoning law therefore has an under-appreciated capacity to affect owners' subjective well-being by

293. *See id.* at 87-89 (detailing the hedonic upsides of waiting for an object of desire).

294. *Cf. id.* at 88-89 (noting that the pleasure of delayed acquisition is particularly acute when people can see or viscerally experience the thing that is not quite theirs yet). Visiting and walking through a sale-pending house during a real estate transaction may enhance the happiness derived from eventual ownership. *See id.*

295. *See id.* at 92-103 (explaining how the instinct to delay payment tends to reduce happiness, so that we would likely be better off saving money and paying upon purchase rather than relying on get now, pay later credit transactions).

296. *Cf. id.* at 92 (explaining that delays caused by work on a consumer's behalf before a purchase can increase the consumer's satisfaction).

297. *See* FRED HIRSCH, SOCIAL LIMITS TO GROWTH 11, 27 (1976) (coining this phrase); Michael Schneider, *The Nature, History and Significance of the Concept of Positional Goods*, 45 HIST. ECON. REV. 60, 60-64 (2007) (outlining a taxonomy of positional goods).

298. *See* Thomas Aronsson & Andrea Mannberg, Positional Preferences for Housing: Income Taxation as a Second-Best Policy? 2 (July 2014) (unpublished manuscript), https://www.diva-portal.org/smash/get/diva2:739555/FULLTEXT01.pdf [https://perma.cc/JW6D-RFQR] (explaining the relationship between subjective well-being and relative consumption of highly positional goods such as housing).

299. *See* Susane J. Leguizamon & Justin M. Ross, *Revealed Preference for Relative Status: Evidence from the Housing Market*, 21 J. HOUSING ECON. 55, 56 (2012) (suggesting that people prefer to have a smaller house if it achieves an increase in their relative status by putting them next to even smaller neighbors).

determining the degree of housing homogeneity in residential areas.[300] A locality that zoned housing to permit very little variation in size or amenities would result in an even distribution of subjective well-being among property owners, while one that permitted wide differentials in home construction would allow much more variation.[301] Because positional goods are zero-sum,[302] zoning law could not increase net social welfare in this way. Rather, this example illustrates a different way that property law can impact subjective well-being—in this case through its distributional consequences.

B. Nudging Property Toward Happiness

In light of the lack of any evidence that acquiring residential property actually benefits owners' subjective well-being, pulling back on market interventions designed to increase home purchases represents a straightforward kind of happiness-enhancing reform. A harder question is how law might actively seek to ameliorate the inverse relationship between buying property and subjective well-being. Here, too, caution is warranted for several reasons. For one thing, a lot of happiness research has been done, but returns are still coming in.[303] While many scholars have explored the promise of this work to craft public policy, others have urged caution until the evidence is more conclusive.[304] Paternalistic laws may be welfare-enhancing,[305] but only when people do not make optimal decisions

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300. *Cf. id.* (describing potential implications of the relative status effect on zoning regulations).

301. *Cf. id.* (explaining that an individual's knowledge of having a lower relative status than another person negatively impacts the individual's subjective well-being).

302. *See* Schneider, *supra* note 297, at 63.

303. *See* Huang, *supra* note 28, at 424 ("Happiness measures clearly offer policy makers information that supplements more traditional nonhappiness measures. But many open and fascinating questions remain in the social science study of happiness.").

304. Cass Sunstein, for example, has expressed optimism about the potential of happiness to serve as a basis for public policy, but has also cautioned that much of the research remains too general to provide clear directions for policy generally. *See* Cass R. Sunstein, *Cost-Benefit Analysis, Who's Your Daddy?*, 7 J. BENEFIT-COST ANALYSIS 107, 114-18 (2016); *see also* Huang, *supra* note 28, at 424 ("Ultimately, happiness studies offer not only many possibilities, but also many pitfalls in developing legal policies.").

305. For a great discussion of the potential upsides of paternalist policies, see generally Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998).

for themselves[306] and when a given law will improve their decision-making processes.[307] The hedonics literature meets the first criterion by showing that our tendency to acquire more property does not necessarily make us any happier.[308] But whether the state should pass laws designed to improve our property decision-making remains a hard question that hedonics studies cannot answer. Governments could simply outlaw conduct that appears self-harming, but the challenges of implementation and public or judicial opposition can counteract any welfare gains such laws would otherwise generate.[309] In light of these concerns, this Part takes a more modest approach, engaging in a thought experiment about what kinds of property-related policy moves may increase happiness. This discussion considers two possible kinds of such laws: those that seek to burden (though not preclude) happiness-diminishing choices, and those that seek to enhance (while still influencing) such choices.

1. Choice-Burdening Strategies

Property law may help enhance overall subjective well-being to the extent that it can serve as a lever to nudge people in the direction of happier choices, at least when happiness relates to acquisition in some way.[310] Consider, for example, the commuting paradox. Home buyers typically focus on physical features of attractive homes (which are especially subject to hedonic adaptation) in outlying areas, underestimating the psychological costs of

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306. *See id.* at 268-71 (listing factors that negatively impact an individual's ability to make optimal choices).

307. *See id.* at 276.

308. *See* Higgins, *supra* note 91 (explaining that hedonic adaptation causes people to find less joy in home purchases over time).

309. A classic example is New York City's controversial "Big Gulp Ban," which sought to prevent the sale of any soda over sixteen ounces in certain businesses. *See* Joseph Ax, *Bloomberg's Ban on Big Sodas Is Unconstitutional*, REUTERS (July 30, 2013, 6:58 PM), http://www.reuters.com/article/us-sodaban-lawsuit-idUSBRE96T0UT20130730 [https://perma.cc/TTE7-GEFQ]. Ironically, the law did not actually ban Big Gulps, since it did not apply to convenience stores. *See id.* This and other inconsistencies between the law's application and its purpose led to its being held unconstitutional by a New York state appeals court. *See id.*

310. *See* Huang, *supra* note 26, at 783 (encouraging the enhancement of subjective well-being by "providing individuals financial incentives and support required to comprehend, act upon, and apply [positive psychology research] insights").

a long commute (which are not).[311] Commuting reduces social well-being in ways that consumers do not predict, resulting in systemic error in predictions about the effect of home purchase on subjective well-being.[312] In light of this, the state could tweak property law to nudge people in the direction of shorter commutes. Consider, for example, a tax break for those who purchase a home within close proximity to their workplace.[313]

There is already some movement on this front. The City of Baltimore, for example, has a "Live Near Your Work" program that gives home purchasers grants toward the cost of a down payment if they live and work within the city limits.[314] A federal program along these lines would leave purchasers free to buy wherever they wanted, though it would gently push them in the direction of the kinds of home purchases that are more likely to create time affluence and its attendant subjective well-being.[315] Some critics of this approach have pointed out that it entails certain implementation challenges: many families consist of more than one member with a job,[316] and people change workplaces much more than they did in past years.[317] Administering the program would have to take account of these challenging realities. Despite these concerns, such a program would be no more difficult to implement than any other tax provisions. The mortgage tax deduction, for example, functions well even though it

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311. *See* Higgins, *supra* note 91; *see also* Kassel, *supra* note 276 (explaining that prospective homeowners may not focus on social relationships during the purchase process, as they mainly pay attention to the physical characteristics of the home).

312. *See* Alois Stutzer & Bruno S. Frey, *Stress That Doesn't Pay: The Commuting Paradox*, 110 SCANDANAVIAN J. ECONOMICS 339, 341-61 (2008) (presenting data supporting this commuting paradox).

313. A more nuanced version of this approach could be to give home purchasers graduated tax relief within a certain limit—for example, a rule might allow homeowners to deduct their mortgage interest and property tax by some multiplier inversely related to the distance they live from their workplace.

314. *See Baltimore City Live Near Your Work Program*, HOUSING AUTHORITY OF BALT. CITY, http://www.baltimorehousing.org/homeownership_livenear [https://perma.cc/DGV5-ZUPW].

315. *See* Higgins, *supra* note 91 (explaining that home purchases allowing owners to enjoy more free time increases homeowners' happiness).

316. *See Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RES. CTR. (Nov. 4, 2015), http://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/ [https://perma.cc/MVH3-NY6A].

317. *See* Penelope Trunk, *Why Job Hoppers Make the Best Employees*, CBS MONEYWATCH (July 29, 2010, 3:13 PM), http://www.cbsnews.com/news/why-job-hoppers-make-the-best-employees/ [https://perma.cc/32P7-MJB9] (stating that people in their twenties and thirties frequently change jobs).

turns on the definitions of slippery terms like "principal residence" and "acquisition indebtedness."[318]

Incentivizing shorter commutes exemplifies the kind of housing market intervention that may encourage happiness-enhancing property acquisition.[319] But one could imagine the reverse approach: policies that seek to discourage the purchase of goods that have been shown to decrease subjective well-being.[320] This approach first requires us to consider what kinds of consumer goods create enough unhappiness to warrant deterring their acquisition via taxation. As just one illustration, consider the television.[321] Having a huge TV in the living room may be more American than apple pie, and the United States is just one of many countries in which people spend about as much time watching TV as they do working.[322] Despite what revealed preferences suggest, though, mounting evidence shows that however much one may find the purchase of a brand-new, fifty-two-inch flat screen intoxicating, fancy new televisions are sinkholes for happiness.[323] For one thing, TVs represent the classic kind of luxury item subject to positional comparison—because

318. *See* 26 U.S.C. § 163(h) (2012).

319. *See* Stutzer & Frey, *supra* note 312, at 363 (finding "a large negative effect of commuting time on people's satisfaction with life" and suggesting that this finding should influence individuals' decisions about where to live).

320. This strategy is familiar from the multitude of "sin taxes" that the state imposes on activities like smoking and drinking alcohol, though these taxes are usually articulated in terms of the third-party costs of such activities. *See* Megan McArdle, *Why States Like Sin Taxes*, BLOOMBERG VIEW (Jan. 23, 2015, 9:32 AM), https://www.bloomberg.com/view/articles/2015-01-23/what-states-get-out-of-sin-taxes [https://perma.cc/ZEC9-KM7J] (explaining how sin taxes benefit consumers by reducing or deterring consumption of unhealthy substances). One might think that taxes in themselves may make people unhappy enough to undermine any second-order improvements in subjective well-being, but studies have cast doubt on the proposition that taxation reduces happiness. *See, e.g.*, David Cay Johnston, *Taxes, Happiness, and Heliocentrism*, 123 TAX NOTES 1041, 1041 (2009) (showing that some of the most heavily taxed societies are also the happiest).

321. For another example, research has shown that despite their higher prices, luxury cars bring their owners no greater happiness than standard vehicles. *See* Schwarz & Xu, *supra* note 87, at 144.

322. *See* Giacomo Corneo, *Work and Television*, 21 EUR. J. POL. ECON. 99, 110 (2005). This factor alone may do much to explain why televisions appear to make us unhappier: while people today spend less of their nonwork time doing chores, they often fill this time with watching TV instead of engaging in activities more likely to enhance happiness, such as socializing with friends or family. *See* DUNN & NORTON, *supra* note 10, at 66-67.

323. *See* DUNN & NORTON, *supra* note 10, at 66 ("More than any other activity, television appears responsible for the failure of the U-index [, a leading universal measure of happiness,] to budge over the past four decades.").

they are sold in size increments that allow a direct comparison—and status competitions—because they are large and visible in friends' and neighbors' homes.[324] In light of all this, televisions are susceptible to hedonic adaptation that often begins the moment people return home with them. They are fixed and unchanging, and viewers quickly treat increased picture quality as their expected baseline, forgetting the improvement over the previous version.[325] Perhaps worse, televisions have been shown to erode the quantity and quality of family and social relationships,[326] two of the factors most strongly associated with moment-to-moment happiness.[327]

But even if some consumer goods tend to reduce our subjective well-being, what ought the state do about it? An outright ban on these goods would be unwise, considering the other social costs it would impose (damaging the entertainment and advertising industries), not to mention the Orwellian nature of such a law.[328] A disincentive, such as a federal excise tax on happiness-reducing consumer goods, may be more plausible. An across-the-board price increase would reduce acquisition,[329] and, all other things being equal, this price increase would prevent at least some consumers

324. *See* PHILIP C. WATKINS, POSITIVE PSYCHOLOGY 101, at 109 (2016) ("If I buy a 48-inch television but you show me your newly purchased 62-inch screen, this will likely pour cold water on the joy of my material purchase.").

325. *Cf.* James Surowiecki, *Technology and Happiness*, MIT TECH. REV. (Jan. 1, 2005), https://www.technologyreview.com/s/403558/technology-and-happiness/ [https://perma.cc/QHH4-DALZ] (discussing how technology advancements do not increase happiness over time).

326. *Cf.* LAYARD, *supra* note 21, at 86-88 (showing that when television was introduced into Bhutan and remote parts of Canada in the 1980s and 1990s, the immediate result was a decline in the amount of time people spent with their families as well as upticks in aggression).

327. *See* LYUBOMIRSKY, *supra* note 80, at 205-06 (detailing the positive impact of close social relationships on health and happiness). There was a time when families typically owned only a single television, so at least they tended to watch it together. *See* LAYARD, *supra* note 21, at 86. But increasingly, homes feature numerous televisions that allow each family member to watch their own shows, all alone. *See id.*

328. And the likelihood that banning television would risk the violent overthrow of the government. I am indebted to John Bronsteen for pointing out this apocalyptic probability.

329. Such an excise tax would operate much like a traditional Pigouvian tax, except it would be aimed at a second-party rather than third-party externalities. *See generally* ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (Transaction Publishers 2002) (1952). Economists sometimes felicitously refer to the former as "internalities." *See, e.g.*, R.J. Herrnstein et al., *Utility Maximization and Melioration: Internalities in Individual Choice*, 6 J. BEHAV. DECISION MAKING 149, 151-52, 177-80 (1993) (coining this phrase and expressing skepticism about government strategies aimed at it).

from purchasing a good that would unwittingly sap their happiness. But this story too is complex. Sellers may internalize part of the tax increase by lowering prices. Independently, excise taxes are blunt instruments that price out certain consumers only on the basis of their unwillingness or inability to pay a higher price.[330] So simply increasing taxes on luxury goods could backfire if it deters only consumers who are more price-sensitive because they are more careful about thinking through the effect of their purchase decisions on their happiness. Thus, the kind of consumers who such price increases are least likely to deter may be the ones who are in a materialist mania of acquisition and most likely to be making a happiness-diminishing decision.[331] Fortunately, the evidence does not appear to support this critique. Rather, it indicates that the reason buying certain consumer goods decreases our well-being is that they inflict second-order costs (such as trading off with activities like socialization) that are beyond the ability of even the most thoughtful consumer to predict.[332] And state-imposed burdens on consuming harmful goods can have positive as well as negative second-order effects. Policies aimed at reducing the purchase and consumption of television, for example, may not only succeed in these aims, but may also have the side effect of causing consumers to enjoy those activities even more, although (and perhaps because) they engage in them less frequently.[333]

330. *See, e.g.*, *infra* note 333 (explaining how higher cigarette taxes reduce smoking).

331. Moreover, people who will tend to be more immune to the effects of price increases on televisions—or any other consumer good—will be wealthier, and thus already in the class of persons for whom additional increments of possession are unlikely to generate much happiness. *See supra* notes 78-79.

332. *See generally* Gerhard Scherhorn, *Implications of the Theory of Consumer Behavior for Consumer Policy Research*, 7 ADVANCES CONSUMER RES. 52 (1980) ("Products reveal unexpected costs, e.g., repairs, and negative second order effects such as damages to health. In general consumer dissatisfaction with goods and services means unforeseen buying risks or uncovered opportunity costs.").

333. For example, increasing taxes on cigarettes has been shown not only to reduce smoking but also to increase the happiness of smokers when they do light up—perhaps because the increased cost of the cigarettes leads smokers to savor their time in Flavor Country even more than usual. *See* Jonathan Gruber & Sendhil Mullainathan, *Do Cigarette Taxes Make Smokers Happier?* 3, 18-19 (Nat'l Bureau of Econ. Research, Working Paper No. 8872, 2002).

2. Choice-Enhancing Strategies

The preceding Subsection explored the appeal of burdening choices that appear to reduce subjective well-being. A very different strategy would take the opposite tack: simply give people information about the nonobvious threats that certain kinds of property acquisition pose to subjective well-being and trust them to make wiser decisions. Such a strategy seeks to enhance rather than burden choice and could take several forms. The most obvious is a simple informational campaign via public service announcements. Such a campaign would seek to inform buyers about the results of the studies showing that buying a larger house or a fancier car does little for happiness.[334] A variation on this approach would be to frame the ads in terms of property-related decisions one's social peers have made that have affected (or failed to affect) their happiness. Consider an ad that could pop up on AutoTrader.com reading: "People who chose to buy a standard vehicle report identical happiness to those who bought a luxury car." Or Realtor.com could feature a banner ad telling readers: "People who bought a smaller home nearer their work instead of a bigger home that requires a longer commute reported that they are much happier for it!"

There is a charged debate on the capacity of information to change or counteract even self-harming behavior. Some scholars, including Daniel Kahneman, have argued that our uninformed intuitions are so fatally flawed that we should never rely on them, so that any information that leads us away from our instincts can only help.[335] But other scholars have argued that people are so overloaded with information that adding more of it into their decision calculus results in worse, not better, decisions.[336]

334. *See* Justin Wolfers, *A Better Government, One Tweak at a Time*, N.Y. TIMES: UPSHOT (Sept. 25, 2015), http://www.nytimes.com/2015/09/27/upshot/a-better-government-one-tweak-at-a-time.html [https://perma.cc/RS7H-M5MM] (discussing how information dissemination may help increase consumer choices).

335. *See* Daniel Kahneman & Gary Klein, *Conditions for Intuitive Expertise: A Failure to Disagree*, 64 AM. PSYCHOLOGIST 515, 515, 517 (2009).

336. *Cf.* Joseph A. Mikels et al., *Should I Go with My Gut? Investigating the Benefits of Emotion-Focused Decision Making*, 11 EMOTION 743, 751-52 (2011) (demonstrating in several experiments that emotions-focused decision-making produced superior results relative to consciously deliberative decision-making).

There are several reasons to think that happiness public relations strategies may succeed in worthwhile behavioral change.[337] One way to think about our tendency to buy property that makes us less happy is that it is a simple information problem: we are not aware of the many nonobvious ways that property acquisition can reduce our subjective well-being. If we had this information, we would presumably make improved acquisition decisions.[338] There is some evidence that this kind of behavioral change is possible, especially when it is framed as a general community practice. Studies of social norms, for example, have shown that people respond better to descriptions of others' experiences than to bare reports of information about the benefits of changes.[339] There is even some evidence that information, if presented subtly, can counteract the kinds of unconscious biases that can lead to socially undesirable beliefs.[340] And a choice-enhancing approach may even appeal to those concerned about paternalism, since simply giving people information about recent research on happiness represents the lowest-pressure form of state interference with private markets. People are free to take such information into account in their decisions to buy homes or big-ticket chattels, or to ignore it completely. Ultimately, though, these

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337. Information about the hedonic effects of certain purchases could also be disseminated at points of sale through required disclosures. I decline to explore this strategy for a pair of reasons. First, such sales typically take place after consumer decisions have been made, so disclosures are unlikely to impact the decision-making process. And even so, numerous studies of required disclosures have indicated that they have little impact on consumer attitudes and beliefs. *See, e.g.*, George Loewenstein et al., *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECONOMICS 391, 393-95, 398-99, 413 (2014) (concluding that psychological factors including limited attention, motivated attention, and biased assessments of probability on the part of consumers can significantly diminish, or even reverse, the intended effects of disclosure requirements).

338. *See* Huang, *supra* note 26, at 783 ("The least intrusive and most fundamental way in which legal policy might be able to most effectively and positively affect society is by broadly disseminating information based upon positive psychology research.").

339. *See* Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1250-52 (2001) (suggesting that informational campaigns are more likely to be effective if they "make clear that others in the relevant community engage in, and care about, widespread compliance"). Hence the phrasing of the examples in this Part, which are framed in terms of others' experiences instead of as outright admonitions about what or how to buy.

340. *Cf.* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1105-08 (2006) (summarizing studies showing that repeated exposure to information contradicting beliefs about the inferiority of ethnic groups can diminish implicit racial bias).

kinds of small-scale moves will simply require case-by-case analysis to evaluate their efficacy.[341]

C. Beyond Acquisition

This Part has thus far considered the ways that law might regulate and deregulate property acquisition to improve owners' subjective well-being. Acquisition, though, represents only one facet of law's interface with property. This Subsection thus briefly outlines the various other ways in which hedonics research can generate new insights about law's interaction with ownership, each of which I hope to explore in future work. First, federal and state laws each have numerous provisions designed to prevent dispossession—rather than push acquisition—of property. Supercompensation for state confiscation of residential property,[342] "Homestead Act" tax shelters,[343] and rights of redemption for foreclosed homes[344] all seek to prevent owners from losing their homes. These laws seek to help owners keep property they already own, rather than helping people become owners in the first instance. These antidispossession laws may thus operate differently from a hedonic perspective, to the extent that losing property one already owns may have different psychological effects than simply not acquiring that property in the first place. The impact of these kinds of antidispossession laws thus raises different happiness concerns and invites separate consideration.[345]

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341. *See* Wolfers, *supra* note 334 ("It's not about knowing how to do better, it's about testing what works. Experiment relentlessly, keep what works, and discard what doesn't.").

342. *See* Jonathan Levy, *Against Supercompensation: A Proposed Limitation on the Land Buyer's Right to Elect Between Damages and Specific Performance as a Remedy for Breach of Contract*, 35 LOY. U. CHI. L.J. 555, 559 (2004) (explaining that inefficient "supercompensation" results when a plaintiff can choose between monetary damages and specific performance when either remedy standing alone would compensate for lost expectations).

343. Different jurisdictions provide different degrees of protection under homestead exemption laws. Some protect property from creditors only up to a certain value or acreage and, if homesteads exceed these limits, creditors may still force the sale, though the homesteader may keep a certain amount of the proceeds of the sale. *See, e.g.*, TEX. PROP. CODE ANN. § 41.005 (West 2000) (providing that, while Texas's homestead exemption has no dollar-value limit, the exemption limits urban homesteads to ten acres and rural homesteads to one hundred acres, which doubles to two hundred acres for married couples).

344. Many states also provide mortgagors with foreclosed homes to retain ownership through right of redemption statutes. *See, e.g.*, TENN. CODE ANN. § 66-8-101 (2016).

345. Some early work has been done on this issue from the perspective of using hedonic

Happiness studies have implications beyond the context of getting (or losing) private property as well. Start with the debate over the allocation of public versus private property. An increasing body of work investigating the hedonic implications of green spaces in urban areas has shown that municipal parks can have positive impacts on residents' happiness to the extent that they encourage socialization,[346] facilitate health and recreation, and increase civic pride and aesthetic pleasure.[347] These findings could reorient the debate about allocating public and private property both by providing an objective metric to illustrate the value of reserving common land, and by suggesting ways to use that land in order to maximize users' happiness.[348] Finally, hedonics can shed new light on emergent debates about novel conceptual ways to think about property. Consider, for example, the sharing economy. The present debate about sharing as an alternative to traditional ownership focuses on the many economic implications of the nascent trend toward sharing, such as the pros and cons of widely distributed entrepreneurship and the extent to which it should be taxed and regulated.[349] But hedonics has the potential to shed an entirely new light on the sharing economy by highlighting heretofore unappreciated welfare

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psychology to more accurately value property in eminent domain proceedings. *See* Maria M. Maciá, Comment, *Pinning Down Subjective Valuations: A Well-Being-Analysis Approach to Eminent Domain*, 83 U. CHI. L. REV. 945, 949 (2016) (arguing that a well-being analysis could provide courts with an estimate of the hedonic costs of the owner's displacement, which could be added to the fair market value of the taken property to more accurately calculate just compensation).

346. *See* DUNN & NORTON, *supra* note 10, at 144 ("It's easier for people to seek out experiences, from picnics in the park to nights on the town, when the local environment provides appropriate settings.").

347. *See* SOMERVILLE, MA: A REPORT ON WELLBEING 4 (2011), http://www.archive.somervillema.gov/sites/default/files/documents/Somerville_Well_Being_Report.pdf [https://perma.cc/G9FZ-GHU9] (finding that the two major publicly funded features that contributed most to residents' happiness were the "beauty and maintenance of parks" as well as the "beauty and physical setting of [the city]"); *see also supra* note 253.

348. E.O. Wilson coined the idea of "biophilia" as a way to embody the psychological importance of nature to human well-being. *See generally* EDWARD O. WILSON, BIOPHILIA (1984) (defining "biophilia" as "the innate tendency to focus on life and lifelike processes"). This notion has been influential in urban design. Google, for example, is currently experimenting with biophilic design as a way to improve employee retention and performance. *See* Sharon Begley, *Do We Really Need Nature?*, MINDFUL (Aug. 12, 2015), http://www.mindful.org/do-we-really-need-nature/ [https://perma.cc/9A43-JNH7].

349. For a great overview of the sharing economy and its property implications, see generally Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501 (2016).

effects. The very act of sharing, for example, may increase subjective well-being to the extent that it encourages social interaction[350] and allows people to engage in altruism—one of the human activities most highly correlated with happiness.[351]

CONCLUSION: ACQUISITION AND OPTIMISM

It may seem that this Article should have been called "Buying Unhappiness." A reader could be forgiven for regarding this Article's discussion of acquisition and subjective well-being as a pessimistic one. Part I showed that the overwhelming consensus of studies agrees that getting more property does not make owners any happier. Part II followed up by showing how these findings destabilized empirical assumptions underlying major property theories, questioning the causal relationship between ownership and wealth maximization, autonomy, personhood, and community. And Part III parlayed these theoretical points into ideas about how to think differently about property law, proposing reforms such as the full-court press in favor of homeownership.

For several reasons, though, I want to conclude by showing that this Article actually reveals an optimistic story about property's effect on subjective well-being. First, this Article is not an undifferentiated critique of acquisition; rather, it provides a roadmap for how and why acquisition can reduce subjective well-being in order that law may avoid those pitfalls. The consensus of studies shows that property tends to reduce subjective well-being primarily when owners expect the fact of acquisition in and of itself to generate happiness. This false expectation is understandable given the general climate of American hyperconsumerism, and in particular the

350. Creating human bonds and cross-cultural conversations is one of the leading selling points for users of the popular sharing site CouchSurfing.com. *See About Us*, COUCH SURFING, http://www.couchsurfing.com/about/about-us/ [https://perma.cc/5LU7-73SB] ("Give back and open your home to travelers. Learn about a new culture first-hand or practice a language. Make the world a little smaller; a little friendlier.").

351. *See* DUNN & NORTON, *supra* note 10, at 108-14 (summarizing studies showing strong positive relationship between charitable giving and individual happiness). *See generally* Lara B. Aknin et al., *Does Social Connection Turn Good Deeds into Good Feelings?: On the Value of Putting the "Social" in Prosocial Spending*, 1 INT'L J. HAPPINESS & DEV. 155 (2013) (reporting results of a study showing that altruism increases happiness, especially when it results in face-to-face giving).

U.S. government's long history of home boosterism. But this means only that acquisition does not automatically generate happiness, not that it cannot facilitate happiness in other ways. Property may provide a means to happiness when it furthers the kinds of memorable experiences or social connections that have been shown to enhance subjective well-being. This Article's suggestion is thus not that we should simply discourage acquisition wholesale, but that we should encourage those who do purchase property to do so with the kind of aims that will more likely foster a happier outcome. To frame home purchases as a means to quick and easy riches risks materialism, status competition, and a quick return to the hedonic treadmill. By contrast, encouraging people to purchase homes in order to facilitate their favorite activities and experiences or to create a space for socializing with friends and family may well cause people to buy happier property.

Second, this Article provides an empirical foundation for delinking the idea of being American with the fact of material possession. The constant rhetorical equation of homeownership with the "American dream" is just the most familiar and explicit equation of informal citizenship with acquiring property. But this equation of possession and national belonging comes with downsides that are revealed in the studies showing that buying a home—or other property—is not especially likely to increase one's happiness. Worse, the ever-present idealization of acquisition may compel people to make purchases that mire them in debt and leave them less free to relocate or enjoy the kinds of experiences that do tend to enhance subjective well-being. Moreover, the equation of high-end property acquisition with complete citizenship invariably marginalizes the nontrivial portion of the population which cannot, or chooses not to, buy a home. Acknowledging the ambivalent effects of acquisition on happiness may force abandonment of property as the determining criterion for achieving the "American dream." In so doing, though, it may open the door to a richer discussion about what national identity means, looking not to things and status, but instead to values that are available to all people and operate independently of wealth.

This Article thus comes not to bury property, but to praise it—by properly understanding acquisition as a possible means to, not a necessary source of, subjective well-being. This finding flows from the numerous studies cited in Part I. While they evidence a conflicted relationship between getting things and getting happier, they do not show that acquisition is necessarily poisonous to subjective well-being. Rather, they caution that ownership—especially of luxury goods and houses—does not automatically make us feel better off, while acknowledging property's capacity to facilitate the kinds of things—namely experiences and relationships—that do make us happier. While rooted in recent findings, this insight is one that philosophers have long invoked in their treatments of property. Aquinas, for example, regarded property as an institution designed to serve the common good and make owners more virtuous, rather than simply a vehicle for accumulating wealth.[352] And Eastern thinkers often regarded the accumulation of material goods and wealth as a threat to individuals' well-being. The notion that acquisition is an end in itself is thus a more recent, and perhaps distinctively American (or at least Western), phenomenon attributable to the rise of neoclassical economics and the enormous rate of global growth in the last half-century. Hedonics thus provides empirical support for a point that the ancients have long emphasized: we would do well to regard property as an institution that can help us serve other values, not as a value that we should serve above all things.

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352. *See* 2 SAINT THOMAS AQUINAS, SUMMA THEOLOGICA 1967-69, 1973-74 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947) (1485).