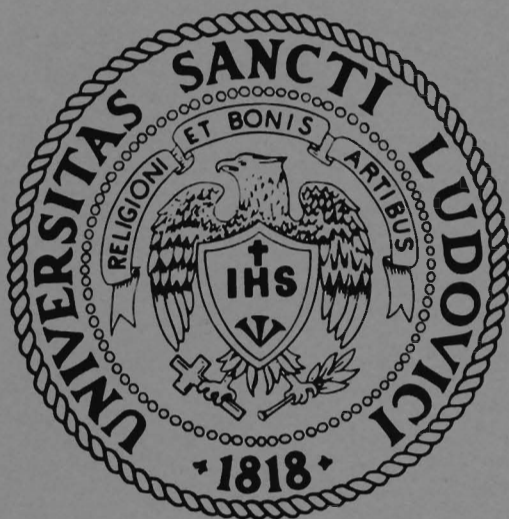


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**WHY PROPERTY AND DEMOCRACY  
ARE NOT ALWAYS ALLIES**

MICHAEL F. BROWN

## WHY PROPERTY AND DEMOCRACY ARE NOT ALWAYS ALLIES

MICHAEL F. BROWN\*

Private property has sparked spirited debate, I suspect, ever since some long-forgotten leader tried to persuade members of his Neolithic community that it was the Next Big Thing. One of property's striking features is that although it probably enjoyed little salience for most of human history, over the last two millennia or so it has managed to elbow its way onto the list of society's prime movers, forces that have shaped everyday life in profound ways.

By the nineteenth century, Western thinkers had recognized that property was an issue of transcendent importance, but they were sharply divided on its moral implications. Property optimists hailed it as the cornerstone of civilized life. Lewis Henry Morgan, an attorney from Rochester, New York, whose curiosity about the roots of civilization led him to write one of anthropology's first great works of historical comparison, *Ancient Society*, observed, "The idea of property was slowly formed in the human mind, remaining nascent and feeble through immense periods of time . . . Its dominance as a passion over all other passions marks the commencement of civilization."<sup>1</sup> Writing at roughly the same time as Morgan, Karl Marx famously denounced private property as a force that alienated people from their work and ultimately from themselves.<sup>2</sup> As such, it was a social pathology destined for extinction.

History has been kinder to Morgan than to Marx, and we find ourselves in an era in which the system of private property has largely triumphed over other ways of organizing human economic affairs. As Professor Carol M. Rose says in the Childress Lecture with her accustomed lucidity, this is primarily because privatization imbues economic matters with the "efficiency, energy and innovation that are thought to accompany decentralized individual initiatives."<sup>3</sup> Professor Rose clearly subscribes to the idea that, on balance, private property

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1. LOUIS HENRY MORGAN, *ANCIENT SOCIETY* 13 (Leslie A. White ed., 1964) (1877).

2. See Jonathan Wolff, *Karl Marx*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta, ed., Fall 2003), <http://plato.stanford.edu/archives/fall2003/entries/marx/> (referring to KARL MARX, *THE ECONOMIC & PHILOSOPHIC MANUSCRIPTS OF 1844* (Dirk J. Struik, ed., International Publishers, 9th ed. 1976) (1932)).

3. Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 692 (2006).

benefits society, largely because the management of property, and the everyday performance of rights associated with it, provides a template for other democratic rights.<sup>4</sup> She allows that certain political conditions are necessary for privatization to produce the desired results.<sup>5</sup> The state should insure broad access to information, for instance, and it must enforce laws with fairness and consistency. To advance democratic principles, property cannot be too unevenly distributed. If these political conditions are met, then property works its magic.

Although Professor Rose's upbeat assessment of property is hardly Panglossian—her lecture offers several examples of how poorly conceived privatization has fostered social conflict and undermined democratic process—it is fair to say that she holds property's glass to be half full. I propose to complement her optimistic portrait by drawing a few examples from the half-empty part of the glass. Such examples show, first, that property often obscures moral dilemmas by reducing them to questions of apparent ownership, and, second, that under some conditions private property can be toxic to democratic values and practices.<sup>6</sup>

It is commonplace to note that technological innovations have created new forms of property or transformed existing property conventions in significant ways. A familiar example from today's legal headlines is the assertion of ownership of life-forms, cell-lines, and body parts.<sup>7</sup> Such cases raise complex questions, not all of which involve property concepts. Still, the overall trajectory of legal decisions in the United States seems headed toward recognition that parts of the human body may be treated as private property under a widening array of circumstances.

A prominent example is transplantable human organs, now the locus of conflict between advocates of market-based policies and those who support a non-commodified "gifting" approach in which donor organs are directed to suitable patients according to a protocol of objective needs (an "allocation

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4. *Id.* at 693–94.

5. *Id.* at 693.

6. As a cultural anthropologist, I might have been expected to challenge Professor Rose's analysis on the grounds that it reflects only a Western view of what qualifies as property and how property is linked to the political life of human communities. Such an approach would have merit, but in deference to the readership of a law journal I have chosen to restrict my remarks to the conceptual framework within which most of my readers are working and which currently dominates the global stage. For recent work that explores dramatically different ways of thinking about property, see *TRANSACTIONS AND CREATIONS: PROPERTY DEBATES AND THE STIMULUS OF MELANESIA* (Eric Hirsch & Marilyn Strathern, eds., 2004).

7. These issues were discussed in such decisions as *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), and *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990).

algorithm”) defined by physician-administrators.<sup>8</sup> Market-based approaches would allow individuals to sell body parts either prior to death (in the case of organs such as a kidney, whose donation does not fatally compromise life) or post-mortem, in which case surviving family members would be compensated for their loved-one’s organs.<sup>9</sup>

Arguments for the market approach share much in common with Professor Rose’s case for privatization. Markets are said to work effectively, whereas “command economies” do not—and the current system of allocating organs for transplant is a classic command economy that has consistently failed to meet demand.<sup>10</sup> I can envision Professor Rose supporting at least a limited right to treat body parts as property for the same reasons that she values property relations in other arenas: property’s practical advantages, the relative clarity of process when property transactions occur, and the virtues of allowing property-holding individuals to manage their own affairs as autonomous subjects.

All this sounds plausible until we contemplate the growth of the global traffic in human organs. Those who have investigated the organ business find an arena characterized less by the “propriety of property” than by coercion, misrepresentation, and corruption.<sup>11</sup> Are destitute people in Brazil, China, or South Africa truly free to make a reasoned decision about the sale of their kidneys? Do such bland, reassuring terms as “contract” and “personal choice” mean much to people in this situation? Or is poverty, which puts their own lives and the lives of their children at risk, equivalent to a gun at their heads? In this scenario, the only element of democracy in evidence is the freedom to buy and to sell, the market principle operating with its most brutal efficiency.

Countless social critics have marveled at the ability of property discourse, with its false concreteness and apparent simplicity, to strip away moral complexity.<sup>12</sup> Where organ transplants are concerned, propertization conveniently begs a host of questions. Can poorly educated organ donors be adequately informed about the real risks of sacrificing an organ, especially

8. This brief excursion into questions of ownership of body parts cannot do justice to the nuanced arguments that have been marshaled both for and against commodification of the body. See, e.g., Donald Joralemon & Phil Cox, *Body Values: The Case Against Compensating for Transplant Organs*, HASTINGS CENTER REP., Jan.–Feb. 2003, at 27. For an approach that considers the significance of privacy concepts for transplant policy, see Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000).

9. See generally Joralemon & Cox, *supra* note 8.

10. Julian Sanchez, *Whose Organs Are They, Anyway?*, REASON ONLINE, June 23, 2003, <http://www.reason.com/hod/js062603.shtml>.

11. See Trevor Harrison, *Globalization and the Trade in Human Body Parts*, 36 CANADIAN REV. SOC. & ANTHROPOLOGY 21, 22 (1999); Nancy Scheper-Hughes, *The Global Traffic in Human Organs*, 41 CURRENT ANTHROPOLOGY 191, 191 (2000).

12. See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 113–14 (2005).

under the health conditions in which they live? Given the extent to which even privately funded medical procedures generate infrastructural costs that are borne by all citizens, do individuals experiencing organ failure have an open-ended right to seek transplants regardless of their age and health status? Although trade in human organs can be seen as an expression of the Enlightenment project of reimagining the human body as a morally neutral collection of parts rather than a sacred whole, how far should this desacralization be allowed to go?

Property's problematic power manifests itself in different ways in current concerns about "cultural appropriation," the fear that elements of folklore and traditional knowledge are being privatized by industry through increasingly aggressive application of intellectual property (IP) law.<sup>13</sup> The most familiar instances of this may be the claim—less frequent in actual practice than in the popular imagination—that pharmaceutical giants are routinely rewarded by handsome profits when they market products whose discovery was made possible by tapping the traditional knowledge of indigenous peoples. The patent system protects industry but not the communities who have long harbored knowledge of the plants from which such products are derived.<sup>14</sup> Other instances of cultural appropriation include the commercial use of folkloric art styles, religious symbols, oral traditions, or musical genres, which are frequently exploited without seeking prior permission from source communities, whose knowledge, by definition, lies in the public domain.<sup>15</sup>

Professor Rose acknowledges that IP law poses a significant exception to her sunny portrait of property's role in fostering democracy.<sup>16</sup> It is, in her words, a "disempowering" force.<sup>17</sup> That is certainly how advocates for cultural rights see it. But instead of calling for the attenuation of IP rights, many of them vigorously advocate that IP be adapted and expanded to protect culture itself.<sup>18</sup> At international colloquia it is not unusual to hear calls for the implementation of new forms of "cultural copyright" that would protect folkloric productions much as IP law protects commercial and artistic ones—except that cultural protections would be even more restrictive, abandoning the time limitations and notions of fair use that counterbalance the privatizing

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13. See Shubha Ghosh, *Traditional Knowledge, Patents, and the New Mercantalism (Part I)*, 85 J. PATENT & TRADEMARK OFF. SOC'Y 828, 829–30 (2003).

14. See generally Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection*, J. INT'L ECON. L. 371, 372–73 (2004).

15. See generally BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION (Bruce Ziff & Pratima V. Rao, eds., 1997).

16. Rose, *supra* note 3, at 715–16.

17. *Id.* at 715.

18. See, e.g., Cottier & Panizzon, *supra* note 14.

force of IP law.<sup>19</sup> Admittedly, much of this is occurring at the level of rhetoric rather than real-world legislation. Here and there, however, one sees the emergence of regulations that take small steps in the direction of redefining language and culture as the property of specific groups rather than of humanity as a whole.<sup>20</sup>

Professor Rose proposes that property rights have an educative function that may make them prior to free-speech rights in the experience of most citizens.<sup>21</sup> But what if law defines political or religious speech as private property? A number of legal commentators fear that such a proprietization of expression is already under way in the United States.<sup>22</sup> Courts are grappling with claims that model codes (typically drafted by professional guilds) are copyrighted works, that religious texts are similarly copyrighted and therefore unavailable to apostate groups, and that political speech making use of trademarked language and symbols stands in violation of IP law.<sup>23</sup> These developments suggest that we may be approaching a tipping point beyond which property rights—IP rights in particular—could seriously inhibit the free expression of political and artistic thought, keystone elements of democracy.

A dram of history serves as a bracing tonic when considering the links between property and democracy. Whenever I am told that private property will empower the marginalized and enrich the poor, I think of a much-quoted speech that Merrill E. Gates, sixth president of Amherst College, gave to the Lake Mohonk Conference in 1896.<sup>24</sup> Gates, like many progressive thinkers of his time, fervently believed that American Indians were infantilized by the communitarian economies around which their societies were organized.<sup>25</sup>

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19. See Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 196 (1998) (providing details and specific examples).

20. See Owen Morgan, *Protecting Indigenous Signs and Trade Marks—The New Zealand Experiment*, 1 INTELL. PROP. Q. 58, 76–78 (2004); MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 83–87 (2003) (providing two examples, both taken from trademark practice).

21. Rose, *supra* note 3, at 701.

22. See, e.g., Madhavi Sunder, Note, *Authorization and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996).

23. On copyrighted model codes and religious texts, see generally Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 (2003). On the ways IP law can limit political speech, see generally ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* (1998).

24. ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 172–73 (1978).

25. *Id.* at 173.

What Indians needed, he insisted, was the “immense moral training that comes from the use of property.”<sup>26</sup> He continued:

And the Indian has had all that to learn. Like a little child who learns the true delight of giving away only by first earning and possessing what it gives, the Indian must learn that he has no right to give until he has earned, and that he has no right to eat until he has worked for his bread. . . . We have found it necessary, as one of the first steps in developing a stronger personality in the Indian, to make him responsible for property. Even if he learns its value only by losing it, and going without it until he works for more, the educational process has begun.<sup>27</sup>

Gates’s paean to property’s beneficial impact on American Indians exemplifies a political movement whose signal achievement was the passing of the General Allotment Act of 1887, also known as the Dawes Act, in recognition of its sponsor, Sen. Henry L. Dawes of Massachusetts.<sup>28</sup> The Dawes Act called for the systematic dissolution of Indian reservations, which were to be parceled out as individual holdings that would revert to fee-simple title after a period of trusteeship.<sup>29</sup> Any surplus lands remaining after such allotment were available for redistribution at the government’s discretion, and somewhere between 60 and 90 million acres of Indian land—estimates vary—were eventually transferred to non-Indians.<sup>30</sup>

Members of Indian tribes where the Dawes Act was fully implemented learned the cruelest lessons of private property. Some sold their land for cash to cope with family crises of one sort or another; others saw it confiscated for non-payment of debts.<sup>31</sup> Landless Indian families fell into poverty and despair that surpassed anything seen on communal reservations.<sup>32</sup> By the late 1920s, it came to be recognized that allotment had been a disastrously misguided policy, and it was reversed—at considerable expense to American taxpayers—by the Wheeler–Howard Act of 1934, better known as the Indian Reorganization

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26. *Id.*

27. *Id.*

28. General Allotment Act of 1887, ch. 119, 24 Stat. 388; BERKHOFER, *supra* note 24, at 174–75.

29. General Allotment Act §§ 1, 5.

30. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed*, 80 OR. L. REV. 757, 813 n.199 (2001) (sixty million acres); Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 743 (ninety million acres).

31. See John E. Thorson, et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 374 (2005) (stating that the events following the implementation of the Dawes Act were “harsh” for Indians, many of whom lost their land to state tax foreclosures).

32. See generally BERKHOFER, *supra* note 24, at 175.

Act.<sup>33</sup> To this day, when subjected to homilies about the liberating power of private property, Native Americans are likely to check their pockets nervously to verify that they haven't been picked.

Such cautionary tales suggest that property neither supports nor subverts democracy; it is not an independent variable but one shaped by prevailing power relations. Private property can, as Professor Rose asserts, promote democracy when laws are fairly enforced and the state prudently exerts its redistributive power. Conversely, when governments are corrupt, when redistribution is abandoned in favor of untrammelled *laissez-faire*, when wealthy citizens are allowed to exert disproportionate control over public institutions, then property becomes democracy's enemy.

This should make us uneasy about the future of the United States, which, according to many studies, is registering record increases in economic inequality.<sup>34</sup> As the top one percent of the population piles up wealth on a scale not seen since the Gilded Age, middle- and working-class incomes stagnate or fall.<sup>35</sup> The yawning wealth gap between the super-rich and the rest of us is already challenging the integrity of American democracy.<sup>36</sup> It remains to be seen whether property will lead America to new heights, as Lewis Henry Morgan believed, or instead poison the well that has long sustained our storied republic.

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33. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934); BERKHOFER, *supra* note 24, at 179–85; L. Scott Gould, *December Song: The Waiting Game for Tribal Sovereignty in Maine*, ME. B. J., Winter 2005, at 18, 19.

34. David Cay Johnston, *Corporate Wealth Share Rises for Top-Income Americans*, N.Y. TIMES, Jan. 29, 2006, at A3 (noting trend toward income inequality).

35. *See id.*

36. *See, e.g.*, Christopher Jencks, *Our Unequal Democracy*, AM. PROSPECT, June 2004, <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=7748>.