The New Economic Freedom

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The evolution from industrial to technological economies has made creativity a complement, not a substitute, for productivity. Thus, creative activity is not only intrinsically valuable as a form of self-expression, but also instrumentally valuable as a tool for enhancing our standard of living. This change requires a reformulation of economic freedom. The new economic freedom embraces the rights that stimulate creativity and innovation in the economy. It therefore embraces some of the positive freedoms emphasized by the political left, such as health, education, and basic security, and some of the negative rights emphasized by the political right, such as property, contract, and enterprise. Both sides of the left-right spectrum should embrace economic freedom as the freedom to create and innovate, while disagreeing about the legal forms it might take.

I. INTRODUCTION: THE NEW ECONOMIC FREEDOM

On December 17, 2010, Mohamed Bouazizi doused himself in petrol in Sidi Bouzid, Tunisia, and set himself on fire. He was twenty-six years old, a man of “simple tastes and pleasures,” with “no obvi-
ous political attachments." He made a living by selling fruit, which required bribing the authorities. Earlier that day, the police had confiscated his goods and scales, ostensibly for selling his wares illegally. Bouazizi’s suicide precipitated a wave of protests and violence that spread across the Arab world.

In 2004 Marc Zuckerberg began working out of a dormitory room at Harvard with a few friends on a program that became Facebook. He started with modest personal wealth and few connections in finance or politics. In 2012 when Facebook officially listed on the Nasdaq, the public invested $16 billion in a service valued by underwriters at $104 billion with over 1.3 billion users. Zuckerberg’s success inspired a generation of young entrepreneurs and a Hollywood movie.

Bouazizi’s tragedy and Zuckerberg’s triumph symbolize a difference between economies that fail and succeed. When law and policy allow public officials or private persons to appropriate the wealth that others create, economies inevitably fail. When law and policy promote wealth-making, especially by assuring that people who create wealth can keep much of it, economies usually succeed.

The most successful economies stay ahead by innovating, not merely producing. In contrast to industrial production, innovation sustains improvements in the standard of living and facilitates self-expression through work. Thus, law should facilitate innovation by providing the foundation for creativity. Doing so, according to this essay, requires reformulating economic freedom. To promote creativity, the new economic freedom should encompass some negative freedoms emphasized by the political right, such as freedom from overly burdensome regulations, as well as secure property and contracts. It should also encompass some positive freedoms emphasized by the political left such as education, health, and a safety net to break economic falls.

Both sides of the political spectrum should embrace the new economic freedom as a human right, while disagreeing about its specific content. The content of economic freedom is bitterly contested. Classical liberals use such phrases as “freedom in economic

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2 As others have observed, “[b]oth conservatives and liberals need to recognize that their long-standing views are a deterrent to success in the twenty-first-century race for global innovation advantage.” Robert D. Atkinson and Stephen J. Ezell, Innovation Economy 298 [Yale 2012].
arrangements,"\textsuperscript{3} "liberties and rights of production, distribution, or consumption of goods and services,"\textsuperscript{4} and "having both a large menu of choices in the marketplace and exclusive power to use what one buys there at will."\textsuperscript{5} Classical liberals thus distinguish between freedom that law determines, and feasibility that ownership of resources determines.\textsuperscript{6} Instead of distinguishing between freedom and feasibility, left-liberals intertwine them. Thus, Philippe van Parijs defines "real freedom" as "the opportunity . . . to do whatever one might want to do,"\textsuperscript{7} concluding that every member of society is entitled to the highest feasible basic income.

The difference between classical liberals and left-liberals relates to a distinction in types of goods. Economists distinguish between public goods that everyone enjoys equally, such as national security, and private goods whose enjoyment by one person precludes enjoyment by another, such as a bite of an apple. For classical liberals, freedom is like a public good in that everyone shares in it equally, regardless of the distribution of wealth. In contrast, left-liberals see freedom as the ability to achieve certain outcomes, which sometimes depends on the distribution of wealth.

This essay makes no attempt to resolve fundamental disputes in political philosophy. Instead, we suggest that economic freedom be defined as the freedoms that sustain a creative economy. This notion of economic freedom is, or should, belong to the overlapping consensus of reasonable political philosophies among left and right.

II. THE INTRINSIC VALUE OF ECONOMIC CREATIVITY

Laying the normative foundations of economic freedom for a technological economy requires connecting economic organization to the intrinsic and instrumental value of creativity. We begin by relating creativity to human flourishing. At least since Aristotle, philosophers regard human flourishing as requiring the exercise of diverse capacities. For Aristotle, the highest good is found by considering

\textsuperscript{3} Milton Friedman, \textit{Capitalism and Freedom} 8 (Chicago 2002).
\textsuperscript{4} Terry Miller and Anthony B. Kim, \textit{Index of Economic Freedom} 80 (Heritage Foundation 2014).
\textsuperscript{5} Elizabeth Anderson, \textit{Value in Ethics and Economics} 144 (Harvard 1995).
"what is peculiar to man." He dismisses "the life of nutrition and growth" because it is "common even to plants." He rejects "the life of perception" because it is shared with "every animal." He finally concludes that the quintessentially human function is "an activity of soul which follows or implies a rational principle." He then sketches the broad range of values and activities that constitute a good life, the life enjoyed by the "great-souled man."

Subsequently, many philosophers emphasize creativity—and self-expression—as an essential activity that contributes to human flourishing. There are some who see "free creative activity" as "the highest function of man." There are others who see it either as the currency of the good or, at least, as one of its constituents. For example, A. Campbell Garnett suggests that the well-being of a person is the most extensive development of "potentialities for activity" and the "the criterion of human good is to take the operation of the creative process as a whole in man as the seat of human value." Martha Nussbaum, on the other hand, lists the ability "to use imagination and thought in connection with experiencing and producing expressive works and events of one's own choice, religious, literary, and so forth" as one of ten central capabilities. Finally, creativity may enhance subjective well-being as a source of satisfaction and well-being for many people. Di Giacinto, Ferrante, and Vistocco,

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9 Matthew Arnold, *Essays in Criticism* 4 [Macmillan 1865] ("men may have the sense of exercising this free creative activity in other ways than in producing great works of literature or art . . . .[they] may have it in well-doing, they may have it in learning, they may have it even in criticizing").


11 Martha C. Nussbaum, *Capabilities and Human Rights* 66 Fordham L Rev 287 [1997]. See also Amartya Sen, *Freedom as Development* [Oxford 1999]. Amartya Sen commends judging economies by the opportunities they give for people to exercise a range of freedoms, instead of wealth or gross domestic product. Although the fasting aesthete and the starving beggar might suffer from a lack of nutrition, only the former is able to give expression to his own considered view of a good life.

12 It is important not to overstate the normative significance of self-reported feelings of pleasure or satisfaction. Robert Nozick asks if we would plug ourselves into an "experience machine" that could generate any experience we want or into a "transformation machine" that could turn us into the kind of person we would like to be. Since the answer is surely "no," we learn that there are other things that matter to us. Perhaps, "what we desire is to live [an active verb] ourselves, in contact with reality." As Garnett seems to suggest, it is not surprising that creativity is related to the question of free will because it is the "creative striving process" that produces authenticity. Similarly, Philip Johnson-Laird asserts that "[t]he problem of free will and the problem of creativity are, in some respects, one and the same." See Robert
analyzing data collected by the Bank of Italy and other researchers, conclude that the presence of a creative environment has a strong influence on happiness, where happiness is defined as “the degree to which a respondent rates positively, on a scale of 1 to 10, the overall quality of his or her present ‘life as a whole.’” Similarly, Rasulzada and Dackert surveyed ninety-five employees working for a high-tech multinational company in Sweden and reported a positive correlation between the perceived environment for creativity and individual well-being, defined as a combination of pleasure and stimulation. In general, people appear to be happiest when they are being challenged by an activity that is done for its own sake.

These distinctions notwithstanding, creativity is not reserved for the extraordinarily gifted or the individual genius capable of monumental achievements. The potential for creativity “arises from ordinary mental processes that are part of the daily cognitive repertoire of normal human beings.” And we exercise it by producing something that is novel and valuable, by finding new solutions to existing problems, and by looking at stale issues in fresh ways. The faculty for creativity belongs to all of us, not just the 1 percent.

The view that human flourishing requires exercising diverse capacities, especially creativity, implies a criticism of industrialization. Adam Smith favored wide markets that increase production by dividing labor into specialties. However, he recognized that dividing labor narrows the activities of workers and can stifle them. A worker who spends his “whole life . . . performing a few simple operations, of which the effects are perhaps always the same” has no “occasion to exert his understanding or to exercise his invention in finding out


Mihaly Csikszentmihalyi, Flow: The Psychological of Optimal Experience (Harper 2008) (“the more flow we experience in daily life, the more likely we are to feel happy overall”).


Matthew Kieran, Creativity as a Virtue of Character, in The Philosophy of Creativity, Elliot Samuel Paul and Scott Barry Kaufman, eds (Oxford 2014); see also Ward, Finke, and Smith, Creativity and the Mind [cited in note 15] [giving the criteria as “appropriateness and novelty”].

See also Margaret A. Boden, The Creative Mind: Myths and Mechanisms 43 (Routledge 2004) [distinguishing between H-creativity, that is, that no one has thought of the idea before, and P-creativity, that the person has not thought of the idea before].
expedients for removing difficulties which never occur." As Mill observed of his times,

[the] restraints of Communism would be freedom in comparison with the present condition of the majority of the human race. The generality of labourers in this and most other countries, have as little choice of occupation or freedom of locomotion, are practically dependent on fixed rules and on the will of others, as they could be on any system short of actual slavery. Developing this line of thought, Karl Marx blamed capitalism for transforming work from a "free manifestation of life, hence an enjoyment of life" into an alienating experience where one "work[s] in order to live." According to this line of thought, an industrial economy achieves greater production at the expense of self-fulfillment—a larger market implies a finer division of labor, and a finer division of labor implies more production and but also more stultification. However, the technology economy emerged and "challenge[d] . . . the culture of work . . . inherited from the Industrial Revolution." Today, "creativity and innovation are essential requirements for organizational success" and "the decisive source of comparative advantage." Firms compete by "harness[ing]" the "innovative energy of employees." According to Richard Florida, in 1999, about thirty-eight million people in the United States, or 30 percent of all employees, are "primarily paid to create and have considerably more autonomy and flexibility" than others. In addition, the increasing availability of financing has made it actually possible for someone with an idea to develop it into a marketable product. In 2013, 9.2 percent of the adult population of the United States were starting a new enterprise. These developments

allow people the opportunity to be creative within the capitalist system that Marx condemned. Whereas productivity and creativity were substitutes among workers in the industrial economy, they are complements in the technology economy.

This fact partly explains the transplanting of Japanese manufacturing techniques into American assembly lines. The Japanese often organize production into teams that actively discuss how to improve their activities. Within a team, workers and managers are relatively equal. All have the power to complain and suggest. The team approach increases the job satisfaction of workers and quality of the product. Thus the joint venture between Toyota and General Motors adopted Japanese organization for the assembly line at the NUMMI plant in Fremont, California. When a colleague at the Berkeley Law School interviewed workers, he asked the head of the union whether he would rather work for Toyota or General Motors in the event that the joint venture was discontinued. The answer was an unequivocal "Toyota."\textsuperscript{28}

This is illustrative of the fact that occupation remains "the principal means through which people develop and express their personal identities."\textsuperscript{29} If a job features "clear goals, unambiguous feedback, a sense of control, challenges that match the worker's skills, and few distractions," "the feelings it provides are not that different from what one experiences in a sport or an artistic performance."\textsuperscript{30} In Deidre McCloskey's words, "[w]ork in a capitalist society can fulfill the Greek ideal of happiness"—"the exercise of vital powers along lines of excellence in a life affording them scope."\textsuperscript{31}

Arthur Brooks has also noted an inherent connection between happiness and economic freedom. The phrase "earned success" refers to the "belief that you've created value in your life and value in the lives of other people." According to Brooks, statistical studies demonstrate that happiness does not depend on material prosperity alone, but on earned success. Thus, happiness cannot be achieved by redistributing income. The free enterprise system leaves people free to achieve happiness by pursuing their vision of success, and therefore stands on firm moral ground.\textsuperscript{32}

\textsuperscript{28} The interviewer was Professor Zenichi Shisido, who reported this finding to Professor Cooter.


\textsuperscript{31} Deidre McCloskey, \textit{The Bourgeois Virtues} 477 (Chicago 2006).

\textsuperscript{32} Arthur C. Brooks, \textit{The Road to Freedom: How to Win the Fight for Free Enterprise} (Basic 2012).
We have explained that economic creativity is an aspect of human flourishing and a source of happiness. Against this view, some philosophers have argued that creativity is a form of irrational madness that is unexpressive of self. Thus Plato famously describes the poet as a "light and winged and holy thing and there is no invention in him until he has been inspired and is out of his senses, and the mind is no longer in him."\(^{33}\) In addition, modern scholars cite evidence ostensibly demonstrating "madness" in many prominent artists.\(^{34}\)

While comparing creativity to madness is hyperbole, creativity might still be characterized as coming to a person rather than from him. If ideas occur suddenly and by chance, then, so the argument goes, they are not self-expression.

We reject this claim. Instead, we agree with Meir Dan-Cohen when he wrote that "being carried away by a flow of creativity, far from vitiating our authorship, gives us the strongest and happiest claim to it."\(^{35}\) Archimedes allegedly had his "Eureka!" moment while taking a bath, yet many people took baths before him without having that moment. We suspect that Archimedes thought about the problem long before he got into the tub.\(^{36}\) In any case, it is enough, on some accounts, that most people experience their creative activity as a source of happiness and a form of self-expression, even if they are ultimately mistaken about its origins.\(^{37}\)

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\(^{34}\) See, for example, Berys Gaut, *The Philosophy of Creativity*, 5 Philosophy Compass 1034-46, 1036 (2010). Gaut refers to a study by Arnold Ludwig reporting a strong link between artistic creativity and bipolar disorder: Arnold M. Ludwig, *The Price of Greatness: Resolving the Creativity and Madness Controversy* (Guilford 1995). Nancy Andreasen finds "a substantially higher rate of mental illness" amongst writers as well as "a higher prevalence of affective disorder and creativity in [their] first-degree relatives." Nancy C. Andreasen, *Creativity and Mental Illness*, 144 Am J Psych 1288-92 (1987). However, a meta-study by Charlotte Waddell observes that of 29 studies, only "9 find positive evidence" and in "34 selective reviews, despite mixed evidence, many authors asserted that creativity and mental illness were positively or causally associated." Charlotte Waddell, *Creativity and Mental Illness: Is There a Link?*, 43 Can J Psych 166-72 (1998).

\(^{35}\) In "willingly embracing different aspects of one's life because one finds them meritorious and the life that comprises them to that extent worthwhile," one exercises autonomy. Meir Dan-Cohen, *Conceptions of Choice and Conceptions of Autonomy*, 102 Ethics 221-43 (1992).

\(^{36}\) Garnett sees "free creative activity" as being within human control because it involves an "effort of the self." Garnett, *Freedom and Creativity* at 38 [cited in note 10]. While creative insights might occur fortuitously, they involve a certain exertion, even habit, of the mind.

\(^{37}\) We do not delve into the debate on the nature of well-being here.
III. THE INSTRUMENTAL VALUE OF ECONOMIC CREATIVITY

We have suggested that economic creativity is an aspect of human flourishing, an expression of personality, and a cause of happiness. We make no effort to separate and analyze these related but different claims. Specifically, we take no position on the philosophical debate about whether freedom is an end in itself, as the Kantian tradition asserts, or a means to achieve happiness, pleasure, or satisfaction, as the utilitarian tradition asserts. The point, rather, is that creative activity is both intrinsically valuable and intrinsically valued. Thus, the nature of work itself distinguishes the technological economy from the industrial economy.

But economic creativity is also instrumentally valuable because it is the source of innovations that sustain economic growth. Robert Lucas, the economist who won the Nobel Prize in 1995, famously commented, "Once one starts to think about [economic growth], it is hard to think about anything else." Compared to sustained growth, other sources of national wealth are insignificant. Compounded over a century, 2 percent annual growth (roughly the growth rate of the U.S. economy in the last century) increases wealth by more than seven times, and 10 percent annual growth (roughly the growth rate of the Chinese economy from 1980 to 2010) increases wealth by almost 14,000 times. People systematically underestimate the effects of compound growth, such as thinking that a 5 percent increase in height is the same for a teenager and a toddler.

Sustained growth causes wealth in one country to overtake another faster than most people can imagine. Assume that country x's national income begins twice as large as country y's, but the former stagnates and the latter grows. To overtake x's national income, y will need thirty-six years if it grows at 2 percent, fifteen years if it grows at 5 percent, and eight years if it grows at 10 percent. To illustrate concretely, most people are surprised to learn that South Korea, Mexico, and Senegal had roughly equal incomes per capita in 1950, yet in 2008 South Korea's income per capita was more than twice as high as Mexico's and ten times higher than Senegal's. Similarly,
in 1870 Argentina’s per capita income was 33 percent higher than Sweden’s, yet by 2004 Argentina’s per capita income had dropped to 43 percent of Sweden’s.40

Angus Maddison heroically estimated changes in wealth over millennia for regions in the world. He concluded that Egypt was the world’s richest region 2,000 years ago with per capita income 50 percent higher than elsewhere in the Roman Empire, China, or India. In the year 1000, Iran and Iraq under the Abbasids were the economically most advanced countries with a per capita income 50 percent higher than in Europe or Asia. By 1500, Italy had the lead with a per capita income 50 percent higher than in the rest of Western Europe, double that of Asia, and three times that of Africa. In 1820, Western Europe and the United States had the highest income per capita, twice as high as in Eastern Europe, Latin America, or Asia, and three times as high as Africa. The rate of growth gradually accelerated in the nineteenth century, and increased further in the twentieth century. However, since economic growth in the world is uneven, the economic gap between fast-growing countries and slow-growing countries is much larger today than ever before in history.

The overtaking principle refers to the proposition that rapid exponential economic growth quickly overtakes the direct effects of static efficiency and redistribution on wealth and welfare. If sustained growth is achievable, static efficiency and income redistribution effects are important for their contribution to growth, and unimportant in themselves. In contrast, the overtaking principle loses much of its normative appeal when growth is fickle and overtaking is slow.

Economic theory ascribes long run growth to three broad factors: physical capital (buildings and machines), human capital (work adjusted for the skills people bring to their jobs), and “innovation”. An increase in these factors increases income and wealth. MIT economist Robert Solow won the Nobel Prize partly for showing that innovation was more important to growth in the 1950s in the United States than increased physical or human capital. Subsequent empirical work by Edward Denison, Robert Barro, and others confirmed this finding for other developed economies. In the last 100 years, innovation has driven more of economic growth than anything else, including using more resources.

When one person uses a scarce resource, others cannot use it. Thus, scarce resources like capital and labor have rival uses. In contrast, when one person uses an idea, just as much remains for someone else to use. From the pyramids to the Burj Khalifa in Dubai,

40 The data with commentary are in Cooter and Schafer, Solomon’s Knot, ch 2 (cited in note 26).
architects have used the Pythagorean Theorem for over two millennia and just as much remains as before. 2,500 years after its proof, generalizations of the Pythagorean Theorem continue to expand geometry's power.41 Similarly, Moore's law observes that the number of transistors that can be placed inexpensively on an integrated circuit has doubled approximately every two years for the past fifty years. Using theorems, principles, natural laws, designs, discoveries, expressions, and compositions does not exhaust them.

The Industrial Revolution improved the standard of living in eighteenth century Europe. It did not, however, guarantee the continual rise in real wages and productivity that has characterized the global economy of the twentieth century. In spite of wars and recessions, the United States and other Western capitalist countries have averaged growth of 2 to 3 percent per year in per capita GDP for more than one hundred years. In 1930, after the stock market's crash triggered the Great Depression, John Maynard Keynes wrote the essay “Economic Possibilities for Our Children,” which argues that the economic problem of the future is how to use abundance.42 Similarly, in 2012, Peter Diamandis and Steven Kotler titled their book “Abundance: The Future Is Better Than You Think.”43

It is the “willingness and capacity to innovate” that has fueled the acceleration in growth.44 With a continuing stream of fertile innovations, growth can continue indefinitely and production can rise like the falcon's gyre. This hypothesis is a reasonable conclusion from the last century of experience. It is also a reasonable conclusion from recent technological and scientific progress, especially developments in computers, nanotechnology, robotics, genetics, and medicine. Creativity is so valuable instrumentally that, after growth is sustained at, say, 2 percent or more, nothing else matters much for wealth and welfare. Growth from innovation overtakes the effects of other policy values like efficiency and redistribution.

IV. ECONOMIC FREEDOM AND HUMAN RIGHTS

We have explained the intrinsic and instrumental value of economic creativity. Still, is economic freedom really a matter of human rights?

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41 The theorem states that the square of the hypotenuse of a right triangle is equal to the sum of the squares on the other two sides. The fascinating story of the proof of its generalization in n-dimensions is told in Simon Singh, Fermat's Enigma: The Epic Quest to Solve the World's Greatest Mathematical Problem (Doubleday 1998).


43 Peter H. Diamandis and Steven Kotler, Abundance: The Future Is Better Than You Think [Free Press 2012].

44 Edmund Phelps, Mass Flourishing [Princeton 2013].
If not, we could be guilty of contributing to the wanton "proliferation" of human rights that has diluted the urgency of human rights claims. Raz and John Rawls define human rights to be that subset of moral rights that limit state sovereignty by justifying, _pro tanto_, international intervention.\(^{45}\) Michael Ignatieff contends that to "command universal assent," human rights have to be restricted to "the minimal conditions for any life at all."\(^{46}\) For them, the intrinsic and instrumental values of economic creativity might appear at once too extravagant and too ambiguous to qualify as bases for claiming a human right.

It will suffice for us to register a few points in lieu of a fuller debate that would take us far beyond the scope of this paper. First, it is not clear why the function of human rights should be decided by fiat when our practice has amply illustrated the versatility of the concept. Second, reducing the content of human rights to the "minimal conditions for any life" is in irreconcilable tension with the aspirational tenor of our human rights discourse. Finally, it is not clear why indeterminacy should be a decisive argument against the existence or recognition of a right. It is possible to be a relativist about how moral status is expressed in different cultures without surrendering the idea that there is a "core of inviolability" that is manifested in a right.

There are two main theories of the function of rights. According to the "will theorists," rights affirm the holder's authority to determine how certain things should be.\(^{47}\) They delineate the normative territory in which people are "small scale sovereign[s]"\(^{48}\) and allow people to exercise autonomy in a personal domain, free from external interference. Thus, only entities that exercise autonomy bear rights. Alternatively, instead of emphasizing autonomy, the "interest theorists" hold that rights necessarily protect interests. For example, Raz defends the position that "[a]n individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' [e.g. a corporation]."\(^{49}\) Thus, entities having interests satisfy a threshold condition for having rights.

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\(^{46}\) Michael Ignatieff, _Human Rights as Politics and Idolatry_ 56 (Princeton 2001). But even then, this does not defeat the instrumental justification for economic freedom.


\(^{49}\) Raz, _On the Nature of Rights_, 93 Mind 194, 195 (1984). The interest theory has interesting implications for future generations. It seems wrong to say that future gen-
In sum, philosophers might justify a human right by appealing to autonomy or interests. This essay makes no attempt to elaborate philosophies of rights or to choose among them. Rather, we stress that the new economic freedom shares many of the same characteristics as other human rights. Thomas Nagel acknowledges that on the will theory, "some form of economic freedom" is a "core right" that "concerns the form of independence from external control that people must be allowed to retain when they enter explicitly into relations or transactions with others that give rise to competition and conflict." James Griffin too recognizes that "[o]ne of the most important components of the quality of life is one's accomplishing something in the course of it" and that there is a right, "[s]trictly speaking," to "adequate material provision" and to "options to live one's life in a productive, interesting and enjoyable way." The latter implies that "if there are not enough jobs of the old sort to go around... then a community must discover, for those who cannot discover for themselves, jobs of a new sort." The status of the new economic freedom as a human right should be admitted, even as philosophers might disagree about its content and its contours.

V. LEGALIZING THE NEW ECONOMIC FREEDOM

We distinguish human rights according to their legal status. Some human rights are debated in legal culture but have no standing in formal law. For example, debate over the United Nations' Universal Declaration of Human Rights (1948) is part of American legal culture, but the law of the United States does not recognize many of its rights, such as "the right to work" in Article 23.

In between culture and formal law are legal materials used to interpret national statutes. For example, Chapter 11 of the Constitution of Namibia lists "Principles of State Policy" that "shall not of and by themselves be legally enforceable." We refer to such rights
as "aspirational," because they often reflect lofty ideals that cannot be vindicated through litigation. Aspirational rights have some legal authority without being enforceable in court.

Beyond aspirations, individuals can have statutory or constitutional rights that they can enforce in court, such as property rights. In addition, public officials are sometimes authorized to prosecute infringements of individual rights such as in the case of crimes or racial discrimination. There are constitutions that establish economic freedom as a justiciable right. For example, Japan's 1947 Constitution classifies "freedom of economic activities ... as one of the rights to freedom, such as freedom of mental activities and freedom from bondage. ... [e]very person shall have freedom to ... choose his occupation to the extent that it does not interfere with public welfare."

In *Umehara v Japan*, the Supreme Court of Japan held the zoning of new pharmacies under the Pharmaceutical Business Act to be unconstitutional under "strict-reasonableness" test. It noted that "occupational freedom is closely connected to the value of individual personhood" and encompasses the right to conduct business. The right to occupational freedom in Japan, however, reaches its limit when it interferes with public welfare. In *Japan v Manabe* a law prohibiting antique dealing without a license was held to be constitutional, being "necessary to ... protect victims, to prevent crimes, to aid in the arrest of criminals, and to [preserve] national well-being."

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53 Terence Daintith provides a helpful list of how rights can be embedded in a national constitution. "First, individuals can assert some of their rights in court against anyone who infringes them, such as a property right. Second, individuals may have rights. Next are governmental duties that can be enforced by individuals through the judicial process." Then, there are "[i]mmediately enforceable rights subject to legislative ... control or restriction. It is also possible for there to be constitutional rights that either require further action by the legislature to have legal effect or specify "duties not directly enforceable by individuals." Or there could just be "silence." Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 Intl J Const L 56-90 (2004).


55 The Supreme Court held that the purpose of a statute limiting occupation choice has to be "necessary and reasonable," and it must impose "minimal restrictions on occupational activity." The legislature's contention that "business instability leads to a supply of defective medicine" was found to be "unreasonable" and "merely speculative." *Umehara v Japan*, 29 Minshu 572 [S Ct, GB, Apr 30, 1975]. See Nakamura, 53 L & Contemp Probs at 2 [cited in note 55].

56 *Umehara*, 29 Minshu at 572.

57 *Japan v Manabe*, 7 Keishu 577 [S Ct, GB, Mar 18, 1953]. Nakamura says that occupational choice has often been regarded as a weaker right than most civil rights.
In any nation, the new economic freedom could be a right in legal culture, aspirational law, or justiciable law. We offer no general prescription for locating the new economic freedom in a nation's legal system. We concur with Nagel that "circumstances ranging from economic development to population crowding to racial, religious, and ethnic conflict" may influence the "kind of space for personal autonomy and discretion" to be guaranteed by individual rights.58

VI. THE NEW ECONOMIC FREEDOM IN THE UNITED STATES

The legal implementation of a human right can be cultural, aspirational, or justiciable, depending on legal history. Because legal history is complicated, the best implementation usually involves all of these levels in some way. We will outline our view of the best implementation of the new economic freedom for the United States.

According to James Ely, "the Constitution . . . assigns a high value to property and contractual rights" and "[t]he Framers anticipated a substantially free market resting on private property."59 In this view, the American legal culture has a dominant tradition favoring free markets. The legal implementation of this value responds to changes in modes of production. In the nineteenth century, the shift from agriculture and commerce to industry presented new possibilities for economies of scale, and also new possibilities for monopolization. For example, very large firms produced railroads and steel at lower cost, and these firms also formed trusts to bolster their market power. To balance the advantages of scale economies and the disadvantage of monopoly, the legal system developed utility regulations and anti-trust laws.

Similarly, computer technology in the late twentieth and early twenty-first centuries, including operating systems and internet protocols, created new possibilities for productivity and market power. The challenges posed by computer technology, however, is not the nineteenth century trade-off between scale economies and monopoly. In economic terms, the industrial problem is static and the technological problem is dynamic. Absent incentives, the creator's

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58 Nagel, 24 Philosophy & Pub Affairs at 94 (cited in note 48).
motivation for creating is sharply curtailed. Furthermore, if “creativity requires traditions” and “whether a product is creative constitutively depends on the judgments of a field of experts using the appropriate standards of the historically conditioned domain of activity,” then entrepreneurs who seek to create economic value learn to be creative by discovering how their ideas fare in the marketplace. If profits are easily dissipated by imitators, some of the epistemic quality of the competitive process is lost. However, each innovator stands on the shoulders of his predecessors; using innovations is essential to making them. The trade-off between owning and using innovations is the legal problem of economic freedom in the technological economy.

The value underlying the new economic freedom is creativity. As innovation is a form of creative activity, it has intrinsic and instrumental value. Consequently, the rate of innovation is a proxy for value in the dynamic economy. To advance the value of creativity, the law should have as one of its objective the maximization of the rate of innovation. To maximize the rate of innovation, the law should balance the innovator’s control and the user’s freedom. By this standard, a patent is too strong if weakening it would increase the rate of innovation, and a patent is too weak if strengthening it would increase the rate of innovation.

The law of intellectual property, however, is just one body of law concerned with innovation. The owner-user problem arises in other areas of law affecting the market power of innovators, such as trade secrets. Instead of registering a patent, innovators sometimes protect their discoveries through secrecy. A device for maintaining secrecy is clauses in contracts that prevent one party from competing with the other. Non-compete clauses are routine in contracts between owners for the sale of a firm. Unlike contracts among owners, however, non-compete clauses in employment contracts are legal in some states and illegal in others. Thus Massachusetts allows non-compete clauses in employment contracts whereas California disallows them. As a consequence, employees and their ideas circulate with fewer contractual restraints in California than

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60 Gaut, Philosophy of Creativity at 1037 [cited in note 34].

61 When one firm buys another firm, the owners of the acquired firm may promise not to compete with the acquiring firm. This promise inhibits the owners of the acquired firm from using industry-specific secrets to compete with the acquiring firm. Similarly, an employee of a firm may promise not to work for a competing firm in the same industry. This promise inhibits an employee from quitting one firm in order to deliver its secrets to another firm.
in Massachusetts. This fact allegedly explains some of the greater success of California's Silicon Valley compared to Route 128 in Massachusetts.62

Generalizing, the problem of economic freedom in dynamic industries is the same for intellectual property law and employment law. For patents and employment, the same principle of economic freedom should apply. To promote economic freedom, employment contracts should maximize the rate of innovation. The law should enforce or invalidate non-compete clauses for employees depending on which legal rule will maximize the rate of innovation. A similar argument applies to other terms in employment contracts, such as minimum wages, overtime pay, and health and retirement benefits. Indeed, the same proposition applies to many areas of law, including antitrust, corporations, and finance.

The solution to the owner-user problem that we have proposed—advancing the intrinsic and instrumental value of creativity by maximizing the rate of innovation—does not fit neatly on a right-left political spectrum. Insofar as patents and copyright are regarded as property, protecting them appears to be right-wing. In so far as patents and copyright are regarded as state regulations, protecting them appears to be left-wing. The same arguments apply to non-competition clauses.63 The new economic freedom will encompass some negative freedoms emphasized by the political right, such as freedom from overly burdensome regulations, as well as secure property and contracts. It will also encompass some positive freedoms emphasized by the political left such as education, health, and a safety net to break economic falls.

VII. CONCLUSION

The evolution from industrial to technological economies has made creativity a complement, not a substitute, for productivity. Thus, creative activity is not only intrinsically valuable as a form of self-expression, but also instrumentally valuable as a tool for enhancing our standard of living. This change requires a reformulation of economic freedom. The new economic freedom embraces the rights that stimulate creativity and innovation in the economy. It therefore

embraces some of the positive freedoms emphasized by the political left, such as health, education, and basic security, and some of the negative rights emphasized by the political right, such as property, contract, and enterprise. Both sides of the left-right spectrum should embrace economic freedom as the freedom to create and innovate, while disagreeing about the legal forms it might take.