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INTRODUCTION

For several decades, scholars in many disciplines have been busy persuading us that we completely misunderstand the nature of words and the world when we think that there are rigid, clear concepts applicable to particular circumstances in a self-evident logical manner. Richard Epstein, however, remains unpersuaded. About property, at least, he is an unabashed conceptualist and formalist.

Epstein is a conceptualist because he thinks there is a concept of property that, in fact, is the right one or the only one. He thinks, that is, that there is *a* conception of property that is *the* concept of property. He is also a formalist (in the sense in which that word is most commonly used in jurisprudence) because he thinks *the* concept of property can be applied formally, i.e., logically and mechanically, to yield results that should be obvious to readers and legal decision-makers. Epstein's tacit acceptance of conceptualism and formalism goes a long way toward explaining why he seems so blithely to believe that the results many readers find breathtakingly wrong are just obvious to rational people. In this comment I shall leave aside his formalism, or mechanical jurisprudence, because I don't suppose I have anything new to say about what's wrong with it. Instead, I shall observe a few things about his conceptualism and its consequences.

I.

The conception of property that Epstein takes for granted, his one-and-only concept of property, is never stated in detail. Perhaps he thinks it is too obvious to require an explicit defense. It can be inferred, however, that the concept consists of general principles—exclusive possession, use, and disposition—and a list of specific rules that delineate the exact extent or application of these principles; that is, how these principles mechanically decide specific cases. Epstein fails to give us this list of specific rules that delineate *the* concept of property—the institution of property as it ought to be.

At some points Epstein seems to state or imply that property *is* whatever it was at common law. This raises numerous unanswerable

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questions. The common law at exactly what date? Could it not be that common law judges were wrong about a few things? Which ones? At other points, particularly in the discussions at this Conference, Epstein argues that what I and other symposiasts recognized as some Humean law of practical reason prepolitically determines what property *is*.[1] In his book, Epstein identifies Lockean natural rights as the source of *the* concept of property (ch. 2), and given his reliance upon the common law, it seems he must have thought that the common law perfectly expressed them. But this Humean move at the Conference makes *the* concept of property prepolitical in only a pragmatic (Hume said "artificial") sense, not in a natural rights sense. In fact, Epstein said that natural rights arguments—like the one in his book, I suppose—are merely the kind of mythology that political theorists were forced to resort to in describing an efficient regime, in the centuries before we learned enough about economics to speak precisely about these matters.[2]

At any rate, whatever its basis or source, Epstein thinks *the* concept of property—consisting of articulated detailed rules—is obvious; and it isn't. None of the proposed sources of *the* concept (Lockean natural rights, Humean prepolitical artifice, or for that matter, pure law-and-economics utilitarianism) generates the rules Epstein takes for granted as implicit in the concept of property. For example, consider the following, taken from a passage arguing against inheritance taxes:

> The conception of property includes the exclusive rights of possession, use, and disposition. The right of disposition includes dispositions during life, by gift or by sale, and it includes dispositions at death, which are limited only by the status claims of family members protected, for example, by rules relating to dower and forced shares. (P. 304).

Does *the* concept of property really include all dispositions by sale? The common law recognized a good many inalienabilities.[3] Does *the*

1. *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 176-78 (1986) [hereinafter *Proceedings, supra* p. __.]. *See* D. HUME, A TREATISE OF HUMAN NATURE pt. II, §§ 1-4 (Selby-Bigge 1978) (1740).

2. *Proceedings, supra* p. 126-27.

3. For example, the restraints imposed by the tenancy by the entireties, or, for that matter, by the fee tail. Epstein elsewhere takes an ambivalent attitude toward inalienabilities. It seems from his Columbia article, Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985), that no deviations from free-market alienability are permitted unless they are required by efficiency; whereas it seems from his most recent pronouncement that any restraints are fine as long as imposed by individuals and not the government. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. __ (1986). For a diagnosis of the tension in his arguments, see Radin, *Time, Possession, and Alienation*, 64 WASH. U.L.Q. __ (1986).

concept of property really include disposition by will? Then we must at least suppose the common law did not work out *the* concept of property until the Statute of Wills. Why do rules relating, for example, to dower and forced shares limit disposition by will? Forced shares was a 19th century statutory reform prompted by the inequities of the common law when it came to marital property. (Why isn't this reform a taking?) If a particular version of "dower" is part of *the* concept of property, then is "curtesy" also included?[4] And what portions of the common law of intestacy are part of *the* concept of property? (Is primogeniture?) Is the whole common law system of future interests part of *the* concept of property? If so, do we begin before or after the Statute of Uses? Is the common law Rule Against Perpetuities part of *the* concept of property? (If it is, is the "wait-and-see" rule a taking?) Epstein's conceptualism not only supposes a determinateness the concept of property cannot have, it denies that the concept has evolved over time, and that it is still evolving. That is, Epstein denies not just the problem of vagueness, but also the reality of change. His is a timeless conservative conceptualism.

Not only is property vague, and evolving; it is also essentially contested. I don't suppose Epstein means to be ungracious in not telling us what the eternal, formal concept of property, which contains all the rules necessary to solve all our problem cases, actually "is." Rather, I imagine he supposes that all he has to do is refer to it obliquely, and all its detail will become clear to the reader. He must suppose, then, that we are monolithically socialized into one culture of property. But this I find astonishing; not only because it is patently not the case, but also because it is quite contrary to the ideology of liberalism to suppose that it should be so. As liberals, we pride ourselves on being pluralist about these things of fundamental political and moral significance. Property is, and probably always will be, a contested concept. While this doesn't mean, necessarily, that there is no "best" conception, it certainly means that that conception has to be argued for.

II.

"The idea of property embraces the absolute right to exclude" (p. 65). Perhaps the most serious consequence of Epstein's timeless conservative conceptualism is a disquieting inference about discrimination. The common law did not preclude discrimination on the basis of race, sex, religion, or national origin. Are discrimination rights

4. *See* C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 664-70 (2d ed. 1983).

part of the exclusion rights inherent in *the* concept of property? Is the Civil Rights Act[5] a taking?

In his book, Epstein does not face up to this disquieting inference. Would he say that the Civil Rights Act is prima facie a taking, but saved somehow either by implicit in-kind compensation or reliance? Unlike social security and welfare, which he deems saved by reliance (p. 325-27), the Civil Rights Act has not been around for very long. And it is hard to argue that bigots are "really" benefited when they are forced to accept those they seek to exclude. At the very least, it would be hard for Epstein to argue this while also remaining an advocate of the Hobbesian rent seeking model of politics.[6]

The crucial point is that there is no room in Epstein's theory to admit that certain things formerly called property rights—such as the right to discriminate and the right to own human beings—were wrongly so designated, and wrongly held as against the personhood of others. Under Epstein's theory, it seems we must consider the cancellation of these "rights" to be a taking. If Epstein were to admit that some things have been (and still are?) wrongly thought of as property, his theory would need a great deal of amendment; for some things wrongly called property should not be treated as property interests requiring compensation of those who held them wrongly. That is, if exclusion rights against nonwhites were formerly considered to be part of the bundle of rights called property, they were wrongly so considered; and to correct this wrong against human personhood is not a taking.

Epstein deplores positivism because it seems to make property rights too mutable: what the government giveth, the government taketh away. Yet he flirts with the pitfalls of positivism to the extent he embraces a utilitarian approach to solving property problems. Bentham, of course, met the problem head-on and declared: "Property and law are born together, and die together."[7] The "public choice" (rent seeking) model of politics coheres most readily with the positivist, consequentialist model of property.[8] It can be gathered from Epstein's remarks at the Conference that he thinks the Humean

5. Civil Rights Act, 42 U.S.C. § 2000a (1982).

6. *Proceedings, supra* p. 187-97.

7. J. BENTHAM, THEORY OF LEGISLATION 113 (R. Hildreth trans. ed. 1911) (2d ed. n.d.).

8. In *Time, Possession, and Alienation*, I argue against Epstein's contention that he can coherently be a libertarian rights theorist and a utilitarian consequentialist at the same time. Radin, *supra* note 3.

move[9] can give him both nonpositivist immutability and positivist efficiency. That, of course, is open to much dispute;[10] but it is a topic for another book because he did not raise it in this one.

Epstein's timeless conservative conceptualism is not the only alternative to positivism. I agree with Epstein that to treat property rights as mutable at the whim of the government does, sometimes, fail to respect persons and their liberty or autonomy. But I think one could better respect the deep moral significance of some property by becoming a progressive naturalist. A progressive naturalist would say that there is a best conception of property, but we haven't yet reached it. The history of changing property notions is describable as a history of rejecting bad parts of the institution and substituting better ones—a process that can continue indefinitely. This view would allow us to suppose we have reached a point in history when we can recognize that exclusionary rights countenancing discrimination on the basis of race, etc., are wrong, and have always been wrong. In my view, this would be more satisfactory than a positivist, consequentialist justification of the Civil Rights Act (anti-discrimination laws presently serve efficiency, or whatever), or Richard Epstein's, if he has one.

III.

Allied to Epstein's conceptualism is his rigidity about what the label "property" confers. For him, property is an all-or-nothing concept; there are no gradations. If something is property, a full panoply of moral force and legal protection attaches to it. Property is property is property. Homes and wedding rings are no different from machine tools and parking lots.

Apparently Epstein does recognize gradations in the category of free speech, for he says that "it is better . . . to create responsible subcategories and rebuttable presumptions than it is to pretend that all speech is of equal importance, when it evidently is not" (p. 138). In my view, it is equally evident that not all property is of equal importance. This requires creating "responsible subcategories" in property as well. Once, Epstein alludes to this notion by mentioning the categories of "commercial" and "personal" property in such a

9. Timeless, changeless, and prepolitical practical consequences determine what property "is."

10. It seems entirely implausible that human nature and human society are so essentially fixed in the 18th century market models that they have always and will forever practically arrive at private property and free contract, much less specific detailed institutional manifestations of them.

way as to suggest that "personal" property requires higher compensation when the government takes it (p. 174). Yet he seems quite unaware of the sweeping implication of such a distinction, and it is absent from the rest of his book.

Such subcategories have been part of the discourse about property for a long time, perhaps since Karl Marx[11] distinguished between use value and exchange value, and at least since Morris Cohen[12] distinguished between property for use and property for power. Just as speech directly related to political struggle seems closer to the interests the first amendment clearly recognizes and protects, so only a subcategory of everything we think of as property seems directly connected to the interest in personal autonomy and self-development that forms the core of the ideology of property. Property that is personal in the sense of being justifiably bound up with the self and its individuality deserves, and in our system often receives, a higher level of respect and protection than property that is not.[13]

Fungible property—that which is held merely for investment or exchange and is not justifiably bound up with the person—is fully interchangeable with its market value in money, while personal property is not. This has many ramifications for a theory of eminent domain which are as yet unexplored. For example: Is there some personal property that government may not take at all? Is there some personal property that can be taken, but only if compensation is greater than the market price? Is there some fungible property that can be taken without compensation, either because doing so is equivalent to taxation, or because the property impinges on more important personal interests of others? Just as Epstein's brand of conceptualism prevents him from adequately dealing with the problem that certain traditional property rules have been wrong, so it also prevents him from seeing more than very dimly that property is neither morally nor legally monolithic.

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11. K. MARX, CAPITAL 41-81 (F. Engels ed. 1906).

12. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). The distinction was earlier proposed by the British sociologist L.T. Hobhouse in *The Historical Evolution of Property, in Fact and in Idea*, in PROPERTY: ITS DUTIES AND RIGHTS 3 (2d ed. 1922).

13. *See* Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).