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RECONSTRUCTING RICHARD EPSTEIN

Eduardo M. Peñalver*

A widespread, though often unspoken, fear among law professors is that we spend months writing one-hundred-page law review articles that, we suspect, are all too often read closely by a handful of second-year law review editors and colleagues only to disappear into the library stacks, never to emerge again. One good measure of a scholar's impact, then, apart from the frequency with which her ideas become enshrined in Supreme Court holdings or in legislative enactments, is the extent to which his ideas are read, considered, and debated. It follows from this that one of the greatest compliments a scholar can pay to a colleague is to engage his or her arguments, to take them seriously enough to disagree. By this measure, Richard Epstein's property writings are easily among the most significant bodies of property scholarship produced in the last half century. In any number of areas, from takings law to the law of covenants and nuisance, a work of scholarship is not complete until its author has carefully read and considered what Professor Epstein has to say about the matter.

Before discussing the substance of some of Professor Epstein's views on property, I want to offer him a word of thanks. I am in the habit of sending unsolicited drafts of my articles to people whose work I discuss, a practice recommended to me in my first year of teaching by several of my senior colleagues. I have never met Richard Epstein in person before this conference, but I have on a number of occasions sent him drafts of work in which I engaged his ideas, typically from a perspective that diverged in fairly dramatic ways from his own. In *every* instance, Professor Epstein has responded to me, often (amazingly) within hours, with helpful comments and suggestions for further reading. The more time I spend teaching and the busier my schedule becomes, the more impressed I am by the intellectual generosity reflected in this willingness to engage and assist a junior professor just embarking on an academic career.

It is in this spirit of gratitude that I attempt to repay some of my debt by briefly engaging, and respectfully disagreeing with, some of Professor Epstein's ideas about property. I would like to focus in particular on the most distinctive and, for many, the most problematic aspect of his property thought: his unique mixture of individualistic rights discourse with the aggregative methodology of utilitarian economic analysis. This mixture of perspectives is rooted deeply in Professor Epstein's work. One of his many important articles, for example, is a 1979 piece entitled *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*.¹ In a way, the title of that article puts into relief the broad contours of Professor Epstein's approach to property: he views

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¹ Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

property by and large as a system designed to embody and protect a robust libertarian conception of individual rights but also as a system that is at the same time bounded by utilitarian constraints. In a way, he is the conceptual mirror image of Ronald Dworkin, who views individual rights as constraining what otherwise appears to be a broadly utilitarian understanding of the common good.² For Professor Epstein, under certain circumstances, utilitarian gains “trump” libertarian commitments.³

Professor Epstein’s willingness to limit the reach of individual rights makes his theory of property substantially more plausible and durable than purer libertarian accounts, which are far too brittle to attract serious support among legal scholars. Nowhere is this clearer than in Professor Epstein’s version of the “state of nature” story.⁴ Libertarian contractarians, like Robert Nozick, struggle with the transition from a state of nature characterized by self-interested individuals to a stable state community. The formation of the state is essential to the protection of property rights but its viability depends upon both cooperation and coercion. The former diverges from classical liberal assumptions about human nature.⁵ The latter is in some tension with strictly libertarian commitments to individual autonomy.⁶

Professor Epstein avoids these traditional libertarian puzzles by, for starters, embracing the notion that human beings are typically cooperative, social animals.⁷ His affirmation of our cooperative tendencies comes in the form of a very appealing (though not very classically liberal) anthropology of family and community. In his recent book, *Skepticism and Freedom*, for example, he says that human beings cannot survive in isolation from community and that “human interaction and cooperation count every bit as much as the competition and rivalry that are wrongly said to constitute the full range of self-interested behavior.”⁸

Professor Epstein also correctly understands that, notwithstanding an ingrained human propensity towards cooperative behavior, temptations to free-ride on the cooperation of others will prevent some people from bearing their fair share of the work necessary to bring forth the fruits of cooperation.⁹ Because of such individuals, coercion is an essential ingredient in the creation of a viable state. But, unlike some libertarians, such as Ayn Rand, who argue that the individual must remain completely free from

² RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 277 (1977).

³ RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 7 (2003) [hereinafter EPSTEIN, *SKEPTICISM*].

⁴ See generally *id.*

⁵ Carol Rose has observed that the cooperation required to get a property system off the ground is not predicted by classical liberal assumptions about human nature. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *YALE J.L. & HUMAN.* 37, 51 (1990).

⁶ See, e.g., JAMES M. BUCHANAN, *PROPERTY AS A GUARANTOR OF LIBERTY* 1 (1993).

⁷ See EPSTEIN, *SKEPTICISM*, *supra* note 3, at 24.

⁸ *Id.*

⁹ *Id.* at 7, 24–26.

state coercion,¹⁰ or others, such as Robert Nozick, who simply obscure the coercion and cooperation at work in their own story of the state's emergence,¹¹ Professor Epstein frankly acknowledges that absolute fidelity to libertarian beliefs about the impermissibility of coercion yields the unacceptable conclusion that even the most minimal conception of the state is an impossibility.¹²

He deals with inevitable free-rider problems by permitting group coercion of individuals through a series of "forced exchanges," which are themselves justifiable by virtue of the fact that the organized political life they make possible ensures that the coerced individual is better off than he would be in their absence.¹³ "A fuller theory of political obligation," he observes, "requires that individual consent for political obligation yield to a principle that justifies the state's use of force so long as it both supplies compensation to the individual against whom coercion is used and offers them a fair division of the social surplus that is created by public action."¹⁴

Although these sensible compromises allow Professor Epstein to escape some common libertarian absurdities, such as Rand's attempts to generate a purely voluntary system of taxation,¹⁵ it is not clear that he has kept for himself enough libertarian weaponry to avoid justifying what he calls the "deadly embrace of the welfare state."¹⁶ Indeed, I believe that Professor Epstein's theory of forced exchanges, particularly when combined with his social conception of the state of nature, points powerfully toward the permissibility of a fairly robust version of the welfare state.

Consider the state-of-nature story on which Professor Epstein's contractarian political theory relies.¹⁷ In this story, the pre-state individual is hypothetically asked to "consent" to the coercive constraints of the state, thereby foregoing certain freedoms, in order to submit to a system of legal protection and coercion that itself protects the individual from the dangers inherent in the state of nature and makes possible a broad system of commercial exchange that delivers enormous gains to all.¹⁸ This story is only hypothetical, he argues, and we do not really need the person's consent.¹⁹ We are justified in forcing him to accept the bargain so long as the forced exchange leads to a state of affairs that is Pareto superior to the state of nature.²⁰ At least some coercion is

¹⁰ See AYN RAND, *THE VIRTUE OF SELFISHNESS* 107–20 (1964).

¹¹ Richard A. Epstein, *One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory*, 22 *SOC. PHIL. & POL'Y* 286, 289–96 (2005) [hereinafter Epstein, *Forced Exchanges*].

¹² See EPSTEIN, *SKEPTICISM*, *supra* note 3, at 32–35.

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ RAND, *supra* note 10, at 116–20.

¹⁶ EPSTEIN, *SKEPTICISM*, *supra* note 3, at 8.

¹⁷ *Id.* at 5–6.

¹⁸ *Id.* at 5–8, 24–25.

¹⁹ See *id.* at 6–7.

²⁰ See Epstein, *Forced Exchanges*, *supra* note 11, at 293–95.

justified, Professor Epstein observes, “on the ground that it allows all individuals to achieve a higher state of well-being than they could do by their own efforts”²¹

Bringing the social state of nature Professor Epstein describes in *Skepticism and Freedom* into this calculus, however, substantially expands the scope of the “forced exchanges” that his theory appears to justify. Professor Epstein acknowledges that the person in the state of nature is not really an isolated monad but rather an individual embedded within a family which is itself embedded within a tightly knit community made up of multiple families.²² In the absence of a state, such individuals will experience a certain degree of freedom, but their freedom, including as it relates to their use and enjoyment of property (assuming that property, or at least something like it, can exist without a state), will be hemmed in on all sides by social constraints that will often be redistributive in their intent and effect.²³

Professor Epstein pokes fun at Aristotle’s arguments about the potential evils of commerce and interest-bearing loans.²⁴ He might well find equally unworkable the many biblical injunctions mandating the periodic forgiveness of loans²⁵ and forbidding farmers from fully harvesting their fruits and grains so the poor could share in the bounty of the fields.²⁶ Such ethical limitations on commerce and property rights, pervasive in traditional, face-to-face societies, work as informal analogues of a social safety net that operate in the absence of a robust system of standardized, state-sponsored redistribution.

The forced exchanges necessary to generate the impersonal, standardized, modern capitalist economy envisioned by the proponents of the *laissez-faire* involve more sacrifices than merely the imposition on property owners of the coercive taxation and regulation of the minimal state. The move from the state of nature (recast here as a tightly knit social environment not altogether free of coercion) to the modern liberal capitalist state is also built on the sacrifice of the very informal, face-to-face

²¹ EPSTEIN, *SKEPTICISM*, *supra* note 3, at 7 (emphasis omitted).

²² *Id.* at 23–24.

²³ *Id.* at 24–26.

²⁴ *Id.* at 20–21.

²⁵ See *Deuteronomy* 15:1 (New Revised Standard) (“Every seventh year you shall grant a remission of debts.”).

²⁶ See *Deuteronomy* 24:19–22 (New Revised Standard) (“When you reap your harvest in your field and forget a sheaf in the field, you shall not go back to get it; it shall be left for the alien, the orphan, and the widow, so that the LORD your God may bless you in all your undertakings. When you beat your olive trees, do not strip what is left; it shall be for the alien, the orphan, and the widow. When you gather the grapes of your vineyard, do not glean what is left; it shall be for the alien, the orphan, and the widow. Remember that you were a slave in the land of Egypt; therefore I am commanding you to do this.”); *Leviticus* 19:9–10 (New Revised Standard) (“When you reap the harvest of your land, you shall not reap to the very edges of your field, or gather the gleanings of your harvest. You shall not strip your vineyard bare, or gather the fallen grapes of your vineyard; you shall leave them for the poor and the alien: I am the LORD your God.”).

systems of social insurance that—even in the absence of a state—restrain the unfettered exercise of property rights and impose limits on the degree to which individuals can climb or sink in traditional communities.

Professor Epstein plausibly argues that the effectiveness of personal appeals to individual charity (“Joe, the people there are hungry. If you don’t help them, nobody else will.”²⁷) are blunted by the activities of the welfare state. But these appeals are already far less effective in the impersonal community fostered by modern liberal capitalism than they are in the more intimate communities that it supplants. Provision for the poor, accomplished with the help of robust social coercion in these communities, suffers in modern society from the same collective action problems that Professor Epstein correctly identifies as impeding the emergence and operation of the state itself. Without the state, he concedes, the modern capitalist economy is impossible.²⁸ But while he is willing to justify coercion to overcome collective action problems and to facilitate the successful operation of the state in fostering a robust market economy, he is unwilling²⁹ to concede the justice of using coercion to overcome the same collective action problems that make it virtually impossible for private actors—operating within the modern political community made possible by the first batch of coercion—to provide adequate and effective social assistance for the poor.³⁰

It is far from clear, moreover, that the imposition of a system of social welfare funded through redistributive taxation is proscribed by the substantive limitations Epstein imposes on the content of forced exchanges. Indeed, a social welfare system may even be *required* to ensure that no one is made worse off in the transition from the social state of nature. Consider Professor Epstein’s forced exchanges from the point of view of someone on the edge of poverty in the state of nature. In the pre-state community, this individual stands to derive substantial benefits from the security against uncertainty provided by informal systems of redistribution operative within the robust social environment of the (tightly knit, social) state of nature. From the point of view of this individual, the formalization of the property rights of owners unaccompanied by a concomitant formalization of redistributive social insurance qualifying those rights might well leave him worse off.³¹ He would therefore seem to have good grounds for refusing to accede to the forced exchanges leading towards the formalization and legalization of property rights in the absence a corresponding transformation of the pre-state community’s informal system of social insurance into a formalized social safety net.³²

²⁷ EPSTEIN, SKEPTICISM, *supra* note 3, at 60.

²⁸ *See id.* at 1.

²⁹ *See* Richard A. Epstein, *Taking Stock of Takings: An Author’s Retrospective*, 15 WM. & MARY BILL RTS. J. 407, 418–20 (2006).

³⁰ *See* Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. (forthcoming Apr. 2007) (manuscript at 18–19, on file with author) (discussing the collective action problems that push philanthropic impulses towards arguments for forced redistribution).

³¹ *See* AMARTYA SEN, RESOURCES, VALUES AND DEVELOPMENT 336–37 (1984).

³² It is no answer to say that, as a non-owner in the state of nature, this individual need not

It is true that, in narrowly material terms, the benefits of modern capitalism would likely leave most poor people better off than they would have been in the state of nature, even absent a robust system of redistribution. The question whether each and every person in the modern capitalist economy is better off than they would have been in the social state of nature, however, is a more complicated one than Professor Epstein acknowledges. But, setting aside the possible reasons to doubt the benefits of capitalism to the poorest participants in the modern economy, there are several factors that block a simplistic move from a narrowly material gain within *laissez faire* capitalism vis-à-vis the state of nature to a political philosophy that *prohibits* the state from doing more to better the situation of the worst off.

It is worth noting at the outset that the very notion of evaluation and comparing comprehensive “states of affairs” in a way that is consistent with the sort of unitary metric presupposed by Professor Epstein’s Paretian analysis of forced exchanges is problematic. Assuming that the least well-off enjoys nontrivial material gains in moving from the state of nature to a formalized market economy, the transition also likely leaves him worse off in some respects. In addition, as Amartya Sen has suggested, it is possible for people moving from poorer to more affluent societies to gain in material terms while losing in terms of their “capabilities” to function in society.³³ It is not clear how exactly we are to go about weighing a gain in material wealth against, say, a loss in social capabilities or attachments for the purposes of Paretian analysis. This is not a novel point, however, and is sufficiently well known that I will not dwell on it here.

In any event, my argument is that, even reasoning within Professor Epstein’s broad set of assumptions, it is possible to justify a robust welfare state. So I will accept for the purposes of this discussion the possibility of meaningfully engaging in the sort of Pareto analysis on which he relies and will, despite my misgivings, assume that even the poorest citizens of a non-redistributive capitalist society are better off, overall, than they would be in the communal state of nature he describes. Even accepting these assumptions, Professor Epstein’s limits on forced exchanges do not rule out the permissibility of the welfare state.

Before explaining why, it would be helpful to introduce a distinction between what we might call “individual practices” and “regimes.” An individual practice is a specific government policy, such as a tax on a type of good or service, an individual law governing the way in which owners can use their land, or a particular approach to compensating owners for losses incurred as a result of the state’s regulation of their property. In contrast, a regime is an entire complex of interlocking practices that constitute the permissible operations of the state. To put it somewhat crudely, we can consider the

be consulted because he is not coerced by the transition to a formalized system of property and exchange. The formalization of property rights coerces non-owners every bit as much as limitations on property rights coerce owners. See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 106 (2003).

³³ See SEN, *supra* note 31, at 336–37.

state of nature, for example, to be one regime (one characterized by the absence of a state), the regulatory welfare state to be another, and the nightwatchman state of *laissez-faire* capitalism to be a third. (Of course, there are many other possibilities.) Individual practices always exist within some regime, but the same practice might operate in any number of different regimes.

We can use Professor Epstein's system of forced exchanges to justify shifts between entire regimes and not just changes in the mix of individual practices that operate within a particular regime. To determine whether one regime is Pareto superior to another, we would look to see whether, considered over the full range of individual practices that make up the new regime, each individual is made better off within the new regime than she would be under the full range of possible individual practices that constitute the regime that is serving as our baseline for comparison. Interestingly, on this approach, it is perfectly possible that, without violating Professor Epstein's requirement that forced exchanges be Pareto superior, we can shift from one regime (say, the state of nature) into another regime (say, the regulatory welfare state) in which one of the constitutive practices of the regime is to free the state from the limitation that each forced exchange (that is, each individual practice within the regime undertaken without express consent) must yield Pareto superior results. As long as the regime so adopted is—on the whole—superior to the baseline regime of the state of nature, there would seem to be little basis for Professor Epstein to object.³⁴

Although Professor Epstein believes that using his system of forced exchanges will yield a "unique equilibrium no matter what our original baseline,"³⁵ this is not obviously true. Indeed, given the low (material) baseline represented by the state of nature, and limiting ourselves to Pareto superior moves, the regime with which we ultimately end up seems intimately related to the story we tell about the process by which we get there. Imagine that there are just three possible regimes: the state of nature, the welfare state, and the *laissez-faire* capitalist state. If we move directly from the state of nature to the modern regulatory welfare state, it is all too easy to tell a story consistent with Professor Epstein's limitations on forced exchanges. For the person who was doing well in the state of nature, the move from that regime to the modern welfare state would be a Pareto superior move because the vast creation of wealth facilitated by the economic coordination made possible within the modern state more than offsets the limitations the state imposes on the exercise of property rights and the redistribution of wealth in which it engages at the margins.³⁶ Moreover, these welfare state redistributive and regulatory measures do little more than formalize the informal redistribution and restraints that existed in the social version of the state of nature in

³⁴ In a way, there is a somewhat broader version of Darryl Levinson's point about the consequences of "framing" for Professor Epstein's Pareto analysis. See Darryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1341–45 (2002).

³⁵ Epstein, *Forced Exchanges*, *supra* note 11, at 299.

³⁶ See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 16–17 (2002).

the first place. This is not to say that the most well off in the modern welfare state would not be *even better off* under some other regime (e.g., the *laissez-faire*), but since the relevant baseline is the state of nature, that need not concern us at this point. Once this redistributive system is put into place, however, at least some of the poorest members of the social welfare state could rightly block an attempt to shift to the *laissez-faire* regime as a move that would clearly leave them worse off.

If, however, we add to this story an intermediate stopping point in which only property rights are formalized but not the state of nature's informal system of redistribution, a system like the *laissez-faire*, the calculus changes. Assuming that the poorest members of the state of nature are better off overall within the *laissez-faire* regime than they were in the state of nature, the establishment of the *laissez-faire* regime will constitute a Pareto superior move permitted by Professor Epstein's rules governing forced exchanges. Once it is in place, however, the immense benefits enjoyed by the richest members of society will mean that they can arguably block a move to the regime of the welfare state by arguing that the redistribution introduced by such a move would make them worse off.³⁷ So with three possible regimes, we have two possible end points consistent with Professor Epstein's system of forced exchanges, and no way to move between those two end points. (It seems that the number of possible unique end-points would become even more numerous once we acknowledge the multitude of possible states of affairs that would qualify as Pareto superior to the state of nature.)

To recap, the move directly to the social welfare state from the state of nature satisfies the requirements of Professor Epstein's Paretian limitations on forced exchanges, but it no longer does if the *laissez-faire* intervenes. Similarly, shifting to the *laissez-faire* is (we are assuming) a Pareto superior move from the state of nature, but it is not a permissible move once the social welfare state has taken hold. It is not clear that, as a matter of political theory, the sheer fact that—in our particular legal tradition—a state of affairs resembling the *laissez-faire* happened to precede the emergence of the welfare state should play a decisive role in determining the limits on the modern state's power to act. As long as our normative baseline is the state of nature, and not the nightwatchman state, Professor Epstein does not seem to be able

³⁷ A caveat would be required here by the observation that the welfare state arguably makes even the richest citizens better off by ensuring a degree of civic peace. Professor Epstein has indicated in the past that this argument would not justify very much redistribution. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 315–16 (1985). But exactly how much welfare this argument can justify will be a complex empirical question. See, e.g., FRANCES FOX PIVENS & RICHARD A. CLOWARD, REGULATING THE POOR 8–32 (2d ed. 1993) (describing the social welfare state as a mechanism for controlling disorder that arises from economic dislocation). Moreover, there may be multiple low-crime equilibria, some with little redistribution and an extremely coercive system of crime prevention and others with more redistribution and less coercive crime control. It is hardly self-evident whether the wealthy are better off with the former strategy or the latter.

to decisively rule out the permissibility of the welfare state. And within the welfare state—at least the version I am positing—the state will itself be freed from Professor Epstein’s restriction of permissible forced exchanges to Pareto superior moves.

Perhaps sensing this problem, Professor Epstein’s more recent writings seem to soften earlier assertions he has made against the *constitutionality* of state redistribution. His arguments about redistribution and regulation seem to have taken on a far more pragmatic and measured tone. “[R]edistribution,” he concedes, “should not be condemned as a simple form of theft given the level of social deliberation and ratification that accompanies it.”³⁸ Regulation and economic redistribution are to be avoided, not because they unjustifiedly trample on individual property rights, but because they are ineffective and prone to political abuse.³⁹ Such arguments, whatever their merits, move questions about regulation and redistribution out of the realm of constitutional property rights and the permissible ends of government and into the realm of policy means, precisely where traditional libertarians and most classical liberals have steadfastly refused to place them. In other words, the question is not whether the state *can* do these things but whether the state *is wise* to do them. Although I disagree with the answer that Professor Epstein provides to this question, I heartily agree with him that this is a better question to be asking.

In sum, I applaud Professor Epstein for parting company with some of the more unworkable principles of libertarian hard-liners. His willingness to accept a more social version of the state of nature and to embrace sensible deviations from voluntarist limits on community formation make his property theory flexible in ways that his critics do not often acknowledge. Indeed, Professor Epstein’s departure from libertarian pre-suppositions appears to leave room for a welfare state that is far more robust than the one he ultimately endorses.

³⁸ EPSTEIN, SKEPTICISM, *supra* note 3, at 62.

³⁹ *Id.* at 57–64.