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A Reflection on Epstein and His Critics

ELLEN FRANKEL PAUL*

Richard Epstein's *Takings: Private Property and the Power of Eminent Domain* is a powerful and challenging book. So challenging, that apparently some of its critics would much prefer that the book had never been written and, one suspects, that such thoughts had never been conceived. But more of that in a moment.

My initial afterthought on the Conference proceedings—for our assignment from this *Review's* editors is to reflect on those happenings rather than to reprise our own quibbles with Richard—is directed at a seeming retraction that Richard embraced in the heat of battle, but should on reflection regret. When pressed by several of the participants, myself included, on the theoretical incompatibility of his natural rights underpinning with utilitarianism, Richard offered this rejoinder, one that troubles me greatly and perplexes other of his would-be sympathizers:

So Ellen, I never would invoke natural rights in my own theory of the Constitution, but when its gets to the political dimension, I want allegiance. Natural rights is the language that people understand and relate to; that's the language I think that one has to use to some degree. It is not a case of fraud. It is an effort to show people the congruence between their own beliefs and the system of underlying utilitarian structures.¹

And, again, much later in the discussion, Richard returned to this point:

Do I believe in natural rights? Again, my sense is that if you're doing constitutional interpretation, then natural rights theory simply means that the meaning of key terms found in the Constitution cannot be defined by the legislatures that are bound by them. I continue to remain a natural rights philosopher in that particular sense. And I continue to remain a natural rights philosopher in the sense that I stated in the first chapter; the definition of what counts as property, like the definition of what counts as murder, like the definition of what counts as freedom, is something which has to be settled prior to, and independent of, the state.²

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1. *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 127 (1986) [hereinafter *Proceedings, supra* p. —].

2. *Id.* at p. 203.

The first statement is disconcerting because it seems so remarkably out of spirits with the book and, dare I say it, even slightly disingenuous. What I found refreshing about the book was precisely its repeated reliance on natural rights as providing both the starting point of political discourse and the first principle, i.e., that the state cannot do what individuals could not do prior to the formation of the state. I took this approach—naively as it turned out—to be a modification of Richard's earlier writings, which also embraced natural rights and utilitarianism as a coherent moral position, but with a decided tilt toward the latter. Despite the grand edifice of *Takings*, which is built upon natural rights foundations (although not consistently, as I and others pointed out), nothing has really changed—Richard is still trying to mix oil and water—or has it?

So where does Richard really stand? Is he the neo-Lockean of *Takings*; the Platonic guardian telling necessary lies to deceive the masses into accepting his system (as in the first quote above); or is he a kind of formalistic, definitional rights theorist (as the second statement above indicates)? Let me enter a plea for clarification, Richard.

To turn, now, to Richard's critics, I detected a clear desire on the part of Joseph Sax, Mark Kelman, and Tom Grey to excise completely views such as Richard expressed in *Takings* from academic, and indeed, polite discourse. (The ensuing remarks are in no sense directed at Cass Sunstein, who tried to beat a theory with a theory, and as always was the consummate gentleman, open to disparate ideas and ready to dispute them in an open-minded manner.) A few brief quotations will evince the spirit of their comments.

From Joseph Sax (who later modified this introduction to his paper without, however, laundering the rest of the piece): "Like a scruffy dog, this is a book that will tempt every passerby to give it a kick. Its philosophy is little more than assertion, its approach to constitutional analysis is unrecognizable and its conclusions are stupefying."³

Tom Grey was much perturbed about Richard's moral sensibilities as manifested in his desire to roll back the welfare state. Grey found Richard indifferent to "starving children or freezing derelicts":

What to make of this kind of stuff? In one sense, *Takings* belongs with the output of the constitutional lunatic fringe, the effusions of gold bugs, tax protestors, and gun-toting survivalists. It is a sign of the times that the book is published not under some vanity or right-wing specialty imprint, but by the Harvard University Press. Richard Epstein himself is no semi-literate

3. Sax, Book Review 1 (unpublished manuscript).

pamphleteer, but the James Parker Hall Professor of Law at the University of Chicago. A scholar who earned a considerable reputation as a prolific and interestingly eccentric commentator on private law subjects, Epstein has become a national figure since he began turning his attention to constitutional law in a serious way around the time of the first Reagan election. In 1984, the Heritage Foundation promoted him as a candidate for the Supreme Court. Today he is "the most requested speaker" at the meetings of the Federalist Society, the leading organization of right-wing law students.

What he has to say in *Takings* is likely to find a wide and receptive audience in today's political climate. Many of those who object to paying taxes to support the poor are eager to hear that their sentiments rest not on prejudice or selfishness but on high principle.⁴

Not to be outdone, Mark Kelman offered up this concluding remark, having already condemned the book as embracing a "morally abominable libertarian position":

That we've all gathered here to discuss *Takings* is compelling evidence of the perverting effects of money [the foundation that organized the conference awarded the participants a generous honorarium]; it should serve as a reminder of the perils of allocation through markets. The book's only useful contribution may be to expose more fully the moral venality and intellectual vacuity of *formal*, legalized libertarianism.⁵

When chided by Epstein on the incivility of his written comments,⁶ Kelman replied in a tone of wounded innocence: It was not his paper that was "snide," as Richard charged, but rather the book itself manifested a "smug and insulting" tone. What was going on here, I wondered? Surely Richard's book exemplified the finest of scholarly traditions; no tone problems there, I thought (and being an editor of a journal, I should know). So what's going on? It seems that Epstein's three critics would prefer that such ideas—the rollback of the welfare state, the asserted unconstitutionality of the National Labor Relations Act,⁷ and the constitutional enshrinement of free-market principles, particularly of property—be considered anathema. They would like to banish such ideas from the realm of scholarly discourse. For many decades, liberals just did not have to confront many free-market advocates during their normal, scholarly routines. They could go about

4. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 23-24 (1986).

5. Kelman, *Searching for the Libertarian Core of Legalism: Comments on Richard Epstein's Takings* 34 (unpublished manuscript).

6. *Proceedings*, *supra* p. 171.

7. 29 U.S.C. § 151 (1982).

unperturbed, all nodding in acquiescence to the same set of canards inherited from the New Deal. Undoubtedly, many preferred it that way, and they now wish that the ever increasing phalanx of conservative intellectuals would simply disappear—would that they could only wish them away with a sneer.

Undoubtedly, as Grey bemoaned, Richard cannot be dismissed so peremptorily. Richard's critics would like him back in the closet. What has gotten them so agitated? Richard's ideas harken back to the Founding Fathers, who, like Richard, understood that personal liberty and liberty of property must go hand-in-hand or the former will evaporate as government encroaches ever more swiftly on the individual's freedom to choose. Why are these ideas so repulsive that they ought not be mentioned in polite society, let alone in a book from Harvard University Press? These gentlemen were hardly asked to a conference to discuss the political philosophy of Goebbels or Pol Pot, were they?

If liberalism, either in its classical or much transmuted modern form, stands for anything, it stands for pluralism. Was it not John Stuart Mill who argued that the best ideas will win out in the end as long as everyone is allowed to say his piece? Do certain liberals no longer believe in pluralism, in the free exchange of ideas?

Epstein's political philosophy emanates from the tradition of our Founders; thus, it should be incumbent upon his critics to demonstrate why that tradition is so abhorrent that individuals of advanced training and sensibilities should shun it. It is curious, indeed, that many denizens of our leading law schools have in recent years become devotees of a continental tradition that shares nothing in common with the ideology of our Founders. I refer, of course, to the Critical Legal Theorists (the "Crits" as they like to call themselves) with whom Mark Kelman strongly identifies. This alien growth is Marxist in inspiration, thus totally at odds with the Lockean, property rights system that our Founders instituted. But being a devout liberal (whether in the old or new sense is immaterial), I find nothing intrinsically abhorrent about discussing Kelman's thoughts. That he, along with Epstein's two other hostile critics, finds it difficult to reciprocate seems to indicate a failure of nerve on their part. Or was Mill wrong, and Richard's "bad" ideas will somehow drive out the good ones?

I would like to see civility return to academic discourse, meaning that ideas such as Richard's and Robert Nozick's can be freely discussed and taught alongside those of Marx, Marcuse, and Horkheimer. In a democratic, pluralistic, and liberal society we should expect no less.