

# Epstein on Alienation: A Rejoinder

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### Introduction

Inalienability is the doctrine that there are certain possessions, attributes, characteristics which should not legally be allowed to be sold, or even given away. Instances under contention<sup>1</sup>

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<sup>1</sup> For the mainstream pro or partial inalienability side of this debate, see Barnett, Randy E. (1986) "Contract Remedies and Inalienable Rights" Social Philosophy & Policy Vol. 4, Issue 1, Autumn, pp. 179-202; Barnett, Randy E. (1986) "Contract Remedies and Inalienable Rights" Social Philosophy & Policy Vol. 4, Issue 1, Autumn, pp. 179-202; Brown, Stuart M. Jr., "Inalienable Rights," The Philosophical Review, 64, 1955, pp. 192-211; Calabresi, Guido and Melamed, Douglas "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," Harvard Law Review, Volume 85, April 1972, No. 6); Epstein, Richard, "Why Restrain Alienation," Columbia Law Review, vol. 85 (1985) 970; Feinberg, Joel, "Voluntary Euthanasia and the Inalienable Right to Life," Philosophy and Public Affairs 7 (1978), 117; Hart, Oliver "A Theory of Debt Based on the Inalienability of Human Capital," Quarterly Journal of Economics, Nov 94, Vol. 109 Issue 4, p. 841; Kinsella, N. Stephan, "Inalienability and Punishment: A Reply to George Smith," Journal of Libertarian Studies, Vol. 14, No. 1, Winter, 1998-1999, pp. 79-93; Kuflik, Arthur, "The Inalienability of Autonomy," Philosophy and Public Affairs, Vol. 13, No. 4, 1984, Fall, pp. 271-298; Kuflik, Arthur, "The Utilitarian Logic of Inalienable Rights," Ethics, 97, Oct. 1986, pp. 75-87; McConnell, Terrance, "The Nature and Basis of Inalienable Rights," Law and Philosophy, Vol. 3, 1984; McConnell, Terrance "The Inalienable Right of Conscience: A Madisonian Argument," Social Theory & Practice, Fall 1996, Vol. 22, Issue 3; Meyers, Diana T., "The Rationale for Inalienable Rights in Moral Systems" Social Theory and Practice, Vol.7, No. 2 (summer 1981), 127-143; Radin, Margaret Jane, "Time, Possession and Alienation," 64 Washington University Law Quarterly, 739 (1986b); Radin, Margaret Jane, "Market-Inalienability" Harvard Law Review, Volume 100, No.8, June, 1987, pp. 1849-1937; Richards, B. A., "Inalienable Rights: Recent Criticism and Old Doctrine," Philosophy and Phenomenological Research 29 (1969): 391-404; Rose-Ackerman, Susan (1985) "Inalienability and the Theory of Property Rights," Columbia Law Review, Vol.85:931; Tribe, Laurence H. (1985) "Commentary; The abortion funding conundrum: Inalienable rights, affirmative duties, and the dilemma of dependence," Harvard Law Review: Vol. 99: 330; Van DeVeer, Donald, "Are Human Rights Alienable?," Philosophical Studies 37 (1980): 165-176; Wellman, Carl. "The Inalienable Right to Life and the Durable power of an Attorney" Law & Philosophy, May 95, Vol. 14 Issue 2.

For the minority pro total alienability alternative, see Nozick, Robert, Anarchy, State and Utopia, New York: Basic Books, 1974 (p. 331, ft. 48); Block Walter, "Voluntary Slavery," Libertarian Connection, 1968; Block, Walter, "Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Epstein and Kinsella," Journal of Libertarian Studies, forthcoming A; Block, Walter, "Market-Inalienability Once Again: Reply to Radin," forthcoming B; Block, Walter, "Kuflik on Inalienability: A Rejoinder," forthcoming C

include blood, babies for adoption, and even liberty itself. If these are inalienable, they may not be disposed of by their owner in any way.

Alienability, in contrast, is the notion that the legitimate owner of anything may bestow it on any willing recipient, whether by sale or gift. If the items mentioned above are alienable, there will be markets in human blood, for babies, and people will be allowed to sell themselves into slavery, should they find a willing buyer.

Full alienability of everything is another way of describing the system of laissez faire capitalism. Full inalienability of all things characterizes complete socialism.

What is Epstein's goal? This article "... first seeks to explain why the right of alienation is a normal incident of private ownership. Thereafter it seeks to examine the principled reasons for limiting that right."<sup>2</sup>

This author, in other words, is a moderate in the socialism vs capitalism debate. He occupies a middle position, advocating that while certain objects should perhaps be allowed by law to be fully alienable, e.g., nuts and bolts, ribbon, frisbees and rubber bands, there are others which should not legally be alienable at all. As typical of this perspective, there are still others which should be subject to partial inalienability, and partial alienability.

Epstein announces that he bases his analysis on "the assumption that the core function of the law is to protect all persons and their property against the force and fraud of others."<sup>3</sup>

The thesis of the present paper is that just law is entirely incompatible with inalienability, in any manner, shape or form; no proper legislation would limit or restrict, let alone ban, full

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<sup>2</sup> Epstein, Richard, "Why Restrain Alienation," Columbia Law Review, vol. 85 (1985) p. 970

<sup>3</sup> Epstein, 1985, p. 970

alienability; that if Epstein is serious about what he sees as "the core function of the law," he must of necessity arrive at this same conclusion. Since he does not, I deduce that while he pays lip service to this ideal, his actual analytic framework is incompatible with it.

### I. Why Permit Alienation?

For an article which argues, ultimately, for restraining alienation, Epstein starts off well enough from my perspective:

"As a first approximation it appears that any restraint upon the power of an owner to alienate his own property should be regarded as impermissible.... To the person who thinks of rights as being acquired by first possession, the right of alienation seems to be an inescapable element of the original bundle of property rights. If alienation is not acquired by the person who has obtained ownership by taking possession of the property, then who else can claim it, and by what possible warrant?"<sup>4</sup>

He continues on a similar wavelength:

"To insure that exchanges can go forward, rights of alienation must be vested somewhere, or resources will remain fixed in the hands of those who do not want them. There seems no better place in which to locate exclusive rights of alienation than with the parties already entitled to possession and use."<sup>5</sup>

But even here there are signs of weakness. For one thing, his vision is altogether too pragmatic and utilitarian, as opposed to rights based. Resources not free to flow to those who value them most will certainly reduce overall wealth. But this is rather a superficial and Coasian reason<sup>6</sup> for preferring that they do.

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<sup>4</sup> Epstein, 1985, p. 971

<sup>5</sup> Epstein, 1985, p. 972

<sup>6</sup> For Coase's seminal article, see Coase, Ronald, H., "The Problem of Social Cost," Journal of Law and Economics, October 1960, Vol. 3, pp. 1-44.

For critiques from a free enterprise perspective, see Block, Walter, "Coase and Demsetz on Private Property Rights," The Journal of Libertarian Studies: An Interdisciplinary Review, Vol. I, No. 2, Spring 1977, pp. 111-115; Block, Walter, "Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz," Review of Austrian Economics, Vol. 8, No. 2, 1995, pp.

For another, this statement implies that the law could vest property in the hands of A, and the right to alienate it in the hands of B, and that it does not do so solely as a matter of convenience. But matters are a bit more limited than that. One may go so far as to say that it is a necessary part and parcel of ownership that one can give away, sell or otherwise alienate the property. Indeed, if one is forbidden to alienate something, then, and to that extent, one does not really own it at all. If a man is permitted by law to occupy some land, but not sell it, then he is merely a legal squatter, not the owner of it<sup>7</sup>.

It is, perhaps, possible for some - certainly not for libertarians of the sort that Epstein is widely characterized as<sup>8</sup> - to suppose that all private landowners are, or can ever be, is squatters.

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61-125; Block, Walter, "O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner," European Journal of Law and Economics, 1996, Vol. 3, pp. 265-286; Cordato, Roy, E., "Knowledge Problems and the Problem of Social Cost," Journal of the History of Economic Thought 14 Fall 1992; Cordato, Roy E., "Subjective Value, Time Passage, and the Economics of Harmful Effects," Hamline Law Review, Vol. 12, No. 2, Spring 1989, pp.229-244; Cordato, Roy E., Welfare Economics and Externalities in an Open-Ended Universe: A Modern Austrian Perspective, Boston: Kluwer, 1992; Krecke, Elisabeth, "Law and the Market Order: An Austrian Critique of the Economic Analysis of Law," paper presented at the Ludwig von Mises Institute's Austrian Scholar's Conference, New York City, October 9-11, 1992; North, Gary, Tools of Dominion: The Case Laws of Exodus, Tyler, TX: Institute for Christian Economics, 1990; North, Gary, The Coase Theorem, Tyler, TX: The Institute for Christian Economics, 1992; Rothbard, Murray N., "Law, Property Rights, and Air Pollution," in Economics and the Environment: A Reconciliation, Walter Block, ed., Vancouver: The Fraser Institute, 1990; Rowley, Charles K., "The Law of Property in Virginia School Perspective," 64 Washington University Law Quarterly, 759 (1986).

<sup>7</sup> Of course, he can be a renter, or the holder of a usufruct, but this is a matter of contract, not law. I owe this point to Stephan Kinsella.

<sup>8</sup> Radin, Margaret Jane, "Market-Inalienability" Harvard Law Review, Volume 100, No.8, June, 1987, p. 1868, ft. 66 interprets Epstein as a libertarian, but this is difficult to reconcile with his actual positions. However, she elsewhere (ibid., 1987, p. 1868) qualifies this claim with the

Property rights to land, in this vision, could properly only belong to the crown, or to the state in more democratic eras<sup>9</sup>. But what of the individual person? It is more difficult to claim that people are really owned by the crown, in that they cannot sell themselves; that they are mere squatters of themselves, so to speak. So we arrive again at the original issue, only this time for people, not land and other property: it is not the case that ownership of the person could vest in himself, or in someone else. It must necessarily be entrenched only in himself. This being the case, the right of alienation, then, must inhere in the individual.

## II. Controlling External Harms

### A. Prevention of the Improper Use of Force

So far, to be fair to Epstein, there are only hints that he rejects the total alienability I have been defending. It is only when he discusses torts vs. injunctions for possibly dangerous activities that his views become pellucid. He states:

"This uncertain inquiry into remedial choices works itself back into the question of alienability. Suppose, for example, it is concluded that no effective remedy is available against the party in possession of the (dangerous) thing because he is insolvent or difficult to locate or both. Tort actions for damages or injunctions quickly become impossible or at least too costly. At this point the protection of third parties need no longer be confined to remedies directed against the party in possession. Protection of third parties could demand that dangerous instrumentalities never get into the hands of those persons whose conduct cannot effectively be policed or monitored. Legal restrictions on alienation thus allow an indirect attack upon improper use of dangerous things" (material in brackets supplied by present author).<sup>10</sup>

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word "purportedly." For a more accurate assessment of Epstein's distance from libertarianism, see Rowley, Charles K., "The Law of Property in Virginia School Perspective," 64 Washington University Law Quarterly, 759 (1986).

<sup>9</sup> For a critique of the Henry George school of economics, see Rothbard (Logic of Action, pp. zz-yy).

<sup>10</sup> Epstein, 1985, pp. 973-974

This is similar to Barnett's<sup>11</sup> "fourth reason" for opposing alienation: it is sometimes cost effective to violate rights. However, just because a man "is insolvent or difficult to locate or both"<sup>12</sup> does not mean his rights may be disregarded.

### 1. Guns

The first illustration of this principle offered by Epstein is gun control<sup>13</sup>. Distinguishing between machine guns, rifles and pistols, he<sup>14</sup> favors the present ban on the sale and use of the former. He is ambivalent about the latter two, since he thinks it an empirical issue, and it is not clear to him whether the benefits outweigh the costs<sup>15</sup>.

But gun control -- of any type, variety or kind, up to an including machine guns, bazookas, tanks, etc. -- is not justified on his own libertarian grounds. Epstein's words are surely worth repeating "... the core function of the law is to protect all persons and their property against the force and fraud of another."<sup>16</sup> But mere gun ownership, or sale, surely cannot count as "force against another." As Epstein himself acknowledges, guns can be used for so many other purposes:

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<sup>11</sup> Barnett, Randy E. (1986) "Contract Remedies and Inalienable Rights" Social Philosophy & Policy Vol. 4, Issue 1, Autumn, p. 193

<sup>12</sup> Epstein, 1985, pp. 973-974

<sup>13</sup> Epstein's analysis is similar to that of Calabresi, Guido and Melamed, Douglas "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," Harvard Law Review, Volume 85, April 1972, No. 6), who place restrictions on the alienation of pollution, but do not advocate banning it entirely.

<sup>14</sup> Epstein, 1985, p. 974

<sup>15</sup> Perhaps Lott (199x) will change his mind. He cites Kates (1979) and is evidently unconvinced by him.

<sup>16</sup> Epstein, 1985, p. 970

target shooting<sup>17</sup>, hunting, contemplation, antiquarianism, etc., but, preeminently, self defense.

In contrast, atom bombs are necessarily offensive. They cannot be targeted to include only the innocent. This implies, however, not only that thermonuclear devices should have their alienation restricted, but even more basically, they should be entirely prohibited. No one should be able to sell an atom bomb, but no one should be able to own one either<sup>18</sup>. We thus need not even consider the issue of alienation of such weapons; the issue never arises if they are prevented from coming into being in the first place.

In any case, our author's consideration of gun control as a case in point for his theories on alienation seems a bit contrived. For the arguments he adduces against this apply not so much to selling them as to possessing them at all.

Epstein reveals a great divergence between his own views and the libertarian philosophy in his remark about products liability:

"The hard question is whether it is possible, when the assailant is penniless, to reach back against the party who sold it in the first instance, either under the rubric of products liability or even ultrahazardous activities."<sup>19</sup>

But this is not at all a "hard question" for the libertarian. It is extremely easy. If a gun is misused, it is not the fault of the manufacturer, but rather of the perpetrator of the crime. If the law allows the victim of a violent offense to sue not only the criminal, but also the gun retailer, this opens up a Pandora's Box of lawsuits. Cutlerers will be held responsible for knifings, and

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<sup>17</sup> Epstein, 1985, p. 975.

<sup>18</sup> For an analysis of H bombs in the off world context, where they need not be offensive weapons, and therefore should not be banned (nor restrictions placed on their alienation), see Block, Walter and Block, Matthew, "Toward a Universal Libertarian Theory of Gun (Weapon) Control: A Geographical Analysis," forthcoming.

<sup>19</sup> Epstein, 1985, p. 975

authors of gory movies, t.v. shows, novels and plays<sup>20</sup> will be found guilty of copy cat crimes committed by their readers or viewers. If guilt by association becomes the order of the day, not only will those who manufacture, wholesale and retail guns be held accountable, but this will apply also to those who make the metal that goes into these weapons, the lead out of which the bullets are fashioned, and those in the transport, insurance and real estate industries who aid in the creation of these implements. And what of the farmers who make the food necessary to feed all of the aforementioned; they cannot be any longer held innocent of drive by shootings, or when a high school student goes "postal."

To solidify his anti libertarian credentials, Epstein delivers himself of the following opinion: "So long as the restrictions on use are imperfect, restrictions upon alienation may make perfectly good sense, and cannot be ruled out of bounds by any per se pronouncement."<sup>21</sup> But restrictions on criminal use are always "imperfect." This means that, according to this author, inalienation is always justified. That is, using force on innocent people (e.g., gun owners who use these weapons appropriately, all those in the industry, the creators of spaghetti westerns, etc.) can never be "ruled out of bounds" as a matter of principle. But the essence of libertarianism is to do just that: make illicit the violation of its non aggression axiom. Epstein is on record as supporting the "the assumption that the core function of the law is to protect all persons and their property against the force ... of others."<sup>22</sup> But here, if his advice is taken, the law will not protect against, but rather engage in the use of force against innocent people.

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<sup>20</sup> Bill Shakespeare, call your lawyer!

<sup>21</sup> Epstein, 1985, pp. 975-976

<sup>22</sup> Epstein, 1985, p. 970

## 2. Liquor

Epstein's second example is liquor. "... the behavior that alcohol induces in drinkers may inflict serious harm upon third persons."<sup>23</sup> This constitutes a reductio against his own position. Given what Epstein says about the "... the core function of the law"<sup>24</sup> and that imbibing alcoholic beverages is not a per se violation of liberty, to ban their sale clearly involves Epstein in a contradiction. Practically anything may "inflict serious harm upon third persons": soap, skates (you can slip on them and hit someone else), nails, knives, glass (they can cut third parties); were he consistent, Epstein would have to urge a ban on the sale or possession of all these household items.

States Epstein: "As an institutional matter... it is possible to introduce direct controls on the sale of liquor: no sale after 2 a.m., or to persons under eighteen, or to person who are known to be intoxicated."<sup>25</sup> Not only is it possible to do so, this has already been widely done. Yet, apart from selling alcohol to children, none of this can be reconciled with the institutions of a free society. Take evening sales, for example. Governments have also mandated store closings for groceries, which are not usually associated with "third party harms"<sup>26</sup>. They have insisted on Sunday closings, and incarcerated grocers for the "crime" of staying open after as early as 6 p.m. Happily, the law has not yet seen fit to ban the sale of groceries to fat people. Such individuals can also create "third party harm" under our system of socialized medicine. For they are more

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<sup>23</sup> Epstein, 1985, p. 976

<sup>24</sup> Epstein, 1985, p. 970

<sup>25</sup> Epstein, 1985, p. 976

<sup>26</sup> Although this terminology is so elastic, it certainly could be. For example, all gunmen and rapists eat groceries. If it were not for food, there would be no murders and sexual batteries.

likely to need medical attention from a host of illnesses and diseases, and the rest of us are forced to pay for this. Were Epstein a fully consistent advocate of his non libertarian principles, he would no doubt advocate just this sort of policy.

Epstein worries about "third party harms such as drunken driving."<sup>27</sup> But the dangers to life and limb are due to the fact that roads are publicly owned and managed, and state bureaucrats are notoriously inefficient<sup>28</sup> in dealing with this challenge. Yes, indeed, "Risks of third

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<sup>27</sup> Epstein, 1985, p. 976

<sup>28</sup> On road socialism see Block, Walter, "Free Market Transportation: Denationalizing the Roads," Journal of Libertarian Studies, Vol. III, No. 2, Summer 1979, pp. 209-238; Block, Walter, "Congestion and Road Pricing," The Journal of Libertarian Studies, Vol. IV, No. 3, Fall 1980, pp. 299-330; Block, Walter, "Public Goods and Externalities: The Case of Roads," The Journal of Libertarian Studies, Vol. VII, No. 1, Spring 1983, pp. 1-34; Block, Walter, "Theories of Highway Safety," Transportation Research Record, #912, 1983b, pp. 7-10; Block, Walter, "Road Socialism," International Journal of Value-Based Management, 1996, Vol. 9, pp. 195-207; Block, Matthew, and Block, Walter, "Roads, Bridges, Sunlight and Private Property Rights: Reply to Gordon Tullock," Journal Des Economistes Et Des Etudes Humaines, Vol. VII, No. 2/3, June-September 1996, pp. 315-326; Cadin, Michelle, and Block, Walter, (1997), "Privatize the Public Highway System," The Freeman, February, Vol. 47, No. 2., pp. 96-97; Gunderson, Gerald, "Privatization and the 19th-Century Turnpike," Cato Journal, Vol. 9, No. 1, Spring/Summer 1989, pp. 191-200; Klein, Dan, "The Voluntary Provision of Public Goods? The Turnpike Companies of Early America," Economic Inquiry, October 1990, pp. 788-812; Klein, Dan, Majewski, J., and Baer, C., "Economy, Community and the Law: The Turnpike Movement in New York, 1797-1845," The Journal of Economic History, March 1993a, pp. 106-122; Klein, Dan, Majewski, J., and Baer, C., "From Trunk to Branch: Toll Roads in New York, 1800-1860," Essays in Economic and Business History, 1993b, pp. 191-209; Klein, Dan and Fielding, G.J., "Private Toll Roads: Learning from the Nineteenth Century," Transportation Quarterly, July 1992, pp. 321-341; Klein, Dan and Fielding, G.J., "How to Franchise Highways," Journal of Transport Economics and Policy, May 1993a, pp. 113-130; Klein, Dan and Fielding, G.J., "High Occupancy/Toll Lanes: Phasing in Congestion Pricing a Lane at a Time," Policy Study, No. 170, Reason Foundation, November 1993; Roth, Gabriel, Paying for Roads: The Economics of Traffic Congestion, Middlesex, England: Penguin, 1967; Roth, Gabriel, A Self-financing Road System, London, England, The Institute of Economic Affairs, 1966; Roth, Gabriel, The Private Provision of Public Services in Developing Countries, Oxford: Oxford University Press, 1987; Rothbard, Murray N., For a New Liberty, Macmillan, New York, 1973; Woolridge, William C., Uncle Sam the Monopoly Man, New Rochelle, N.Y.: Arlington House, 1970.

party harms are again controlled by restrictions on rights of alienation as well as rights of use";<sup>29</sup> the only question is, how can this possibly be reconciled with his own libertarian sentiments? His treatment of this topic suggests he is calling for a reinstatement of alcohol prohibitionism. Can this be a misreading on my part?

### 3. Narcotics and drugs

Epstein's third example is narcotics and drugs. "There is always a danger," he avers, "especially with narcotics, that persons under the influence will inflict harms on third parties, as when a gunman under the influence of heroin goes on a rampage."<sup>30</sup>

If there are any harms having to do with such substances, it has to do with their prohibition, not their use. The outlawry increases prices dramatically from what they would be on a free market. This creates crime in several ways: the addicts have to commit crimes if they are to pay for their habits; people using these drugs are criminalized by law; gangs shoot each other, and also innocent by-standers<sup>31</sup>; the police are suborned and co-opted thanks to the gigantic profits which flow from the prohibition in the first place. This is neither the time nor the place to go into a full scale critique of narcotics laws<sup>32</sup>. Suffice it to say that if Epstein were really

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<sup>29</sup> Epstein, 1985, p. 977

<sup>30</sup> Epstein, 1985, p. 977

<sup>31</sup> Epstein's concern with "third parties" seems to have evaporated in this regard.

<sup>32</sup> On this see Doug Bandow, "Once Again, A Drug-War Panic," Chicago Tribune, March 22, 1989; Block, Walter, Defending the Undefendable, New York: Laissez-Faire Books, (1976) 1991; Block, Walter, "Drug Prohibition: A Legal and Economic Analysis," Journal of Business Ethics, Vol. 12, 1993, pp. 107-118; Block, Walter, "Drug Prohibition, Individual Virtue and Positive Economics," Review of Political Economy, October, 1996, Vol. 8, No. 4, pp. 433-436; Boaz, David, ed., The Crisis in Drug Prohibition, Washington D.C.: The Cato Institute, 1990; Cussen, Meaghan, and Block, Walter, "Drug Legalization: A Public Policy Analysis," American Journal of Economics and Sociology, forthcoming; Friedman, Milton, "An Open Letter to Bill Bennett,"

concerned about "third party harms," he would take a tack opposite to that which he in fact took.

Then, too, the Harrison Narcotics Act of 1917 was aimed mainly at the "yellow menace"; a blatantly racist piece of legislation, it was an attempt to close down the opium dens favored by the Chinese. Yet these practices were no more likely to motivate them to "rampages" than Coasianism<sup>33</sup>, the intellectual source of Epstein's analysis. Opiates tend to promote drowsiness, or even sleep, not violence<sup>34</sup>.

#### 4. Speech

Fourth, Epstein advocates a ban on the sale of "a book that describes how to build an atomic bomb."<sup>35</sup> This is similar to the drug that makes you go out and murder. The drug itself should be legal, since the purchase, and even ingestion of it is not per se an act of violence. People who buy it, though, should be carefully monitored by the police.

But what of books written by Marx or his many followers? Based on Epstein's theory of causation, these volumes have killed far more people than those which tell us how to make an atom bomb. Books and articles by scholars masquerading as libertarians, or by feminists,

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Wall Street Journal, September 7, 1989; Hamowy, Ron, ed., Dealing With Drugs Consequences of Government Control, San Francisco, The Pacific Institute, 1987; Szasz, Thomas, Ceremonial Chemistry: The Ritual Persecution of Drugs, Addicts and Pushers, red ed., Holmes Beach FL: Learning Publications, 1985; Thornton, Mark, The Economics of Prohibition, Salt Lake City: The University of Utah Press, 1991

<sup>33</sup> See footnote zx, supra.

<sup>34</sup> For an analysis of addictive drugs positing that they do lead to violence, see Block, Walter, "Drug Prohibition: A Legal and Economic Analysis," Journal of Business Ethics, Vol. 12, 1993, pp. 107-118.

<sup>35</sup> Epstein, 1985, p. 978

multiculturalists and their ilk have undoubtedly been far less harmful than Marxist ones, but they, too have been detrimental. Should they also be banned? Epstein might agree, but this would of course be improper under the libertarian legal code. As well, it would apply to his own writings.

### B. Common Pool Problems

Epstein also opposes alienation for "common pool problems." He tells us that

"The root of the problem lies in the uneven match between benefits and burdens when something of value -- say animals or oil -- is removed from the common pool. The party that removes it receives all the gain from the removal, but only bears a small fraction of the cost."<sup>36</sup>

It cannot be denied that the tragedy of the commons<sup>37</sup> can indeed often be a problem.

There is no doubt that it is responsible for the near extinction of such animals as the buffalo, the tiger, the elephant and the rhinoceros<sup>38</sup>. Nevertheless the real root of the difficulty lies not with

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<sup>36</sup> Epstein, 1985, p. 978

<sup>37</sup> Hardin, Garrett, "Tragedy of the Commons," Science, 1968

<sup>38</sup> Some commentators believe that extinction can be traced to the value of the animal. But cows, sheep, pigs and chickens are also valuable, and not at all endangered. On this see Anderson, Terry L., and Hill, Peter J., "Property Rights as a Common Pool Resource," Bureaucracy vs. Environment: The Environmental Costs of Bureaucratic Governance, John Baden and Richard L. Stroup, eds., Ann Arbor: University of Michigan Press, 1981; Anderson, Terry L., and Leal, Donald R., Free Market Environmentalism, San Francisco: Pacific Research Institute, 1991; Block, Walter, "Ownership will save the environment," New Environment, First Quarter, 1991, 41-43; Block, Walter, "Environmental Problems, Private Property Rights Solutions," in Block, Walter, ed., Economics and the Environment: A Reconciliation, Vancouver: The Fraser Institute, 1990; Block, Walter, "Resource Misallocation, Externalities and Environmentalism in the U.S. and Canada," Proceedings of the 24th Pacific Northwest Regional Economic Conference, 1990, 91-94; Stroup, Richard L., and John C. Goodman, et. al., (1991) Progressive Environmentalism: A Pro-Human, Pro-Science, Pro-Free Enterprise Agenda for Change, Dallas, TX: National Center for Policy Analysis, Task Force Report; Stroup, Richard L., and Baden, John A., "Endowment Areas: A Clearing in the Policy Wilderness," Cato Journal, 2 Winter 1982, pp. 691-708

common ownership, but rather with non ownership, or public property<sup>39</sup>. There are numerous things owned in common, but privately, and they have nothing whatsoever to do with the tragedy of the commons problems which have plagued our environment, and endangered numerous species with the threat of extinction.

Epstein<sup>40</sup> poses the question of "... how can one best regulate the risks associated with the over exploitation of the pool. For that purpose, restraints on the right of alienation are one tool..." That may well indeed be the best way to "regulate"<sup>41</sup> these risks, but in order to eliminate them entirely, surely a preferable solution, one must substitute private property rights for non or public ownership<sup>42</sup>.

### 1. Water rights

Epstein<sup>43</sup> begins his treatment of this issue with a sharp, curt and total dismissal of the institution of private property rights: "Flowing water is a resource for which there is no obvious single owner. Assuming ... that ... the state does not own these rights by assertion alone, then there must be some natural mode of acquisition that matches claims to water with

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<sup>39</sup> Another writer who makes this same mistake is Bethell, Tom, The Noblest Triumph: Property and Prosperity Through the Ages, New York: St. Martin's Press, 1998. For a rejoinder to him, see Block, Review Essay of The Noblest Triumph: Property and Prosperity Through the Ages, by Tom Bethell, forthcoming in the Quarterly Journal of Austrian Economics

<sup>40</sup> Epstein, 1985, p. 978

<sup>41</sup> A counter productive policy if ever there was one.

<sup>42</sup> On this see Block, Walter, "Institutions, Property Rights and Externalities: The Case of Water Quality," Agriculture and Water Quality: Proceedings of an Interdisciplinary Symposium, Murray H. Miller, J. E. FitzGibbon, Glenn C. Fox, R.W. Gillham, and H.R. Whiteley, eds., Guelph Centre for Soil and Water Conservation, University of Guelph Press, 1992, pp. 191-208.

<sup>43</sup> Epstein, 1985, p. 979

individual owners. One possibility is to use the rule of first possession that establishes ownership of wild animals. But the consequences of this regime are simply unacceptable because it spells the end of a river qua river. Flowing water has value for navigation, for fishing, for recreation, for farming, and for irrigation.... (T)here is little appeal to a rule that would convert a 'going concern' into a stagnant pool."

But the case for water socialism<sup>44</sup> is by no means so easy as he makes out. Just because there is no obvious single owner does not mean there is not an obvious group of owners. The latter will do quite well, Epstein's bias in favor of single ownership notwithstanding. There is, after all, the institution of partnerships, corporations, etc. Why must everything be owned on an individual basis? Merely because there is no obvious owner does not obviate the concept of private property. There is no obvious owner of Central Park in New York City either. Does this mean this acreage can never be privatized, and is forever condemned to remain in the public sector?<sup>45</sup> Contrary to Epstein's allegation, there is indeed "some natural mode of acquisition"<sup>46</sup> which can turn over previously unowned (or public) property to private hands. It is called homesteading<sup>47</sup>, and it is responsible, ultimately, for the privatization of most of the land and

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<sup>44</sup> Is it harsh to use so emotionally a charged phrase to describe Epstein's proposal? He is stating that rivers, by their very nature, cannot be owned privately. Were he to have said this about any other liquid (milk, orange juice, soda, wine) there is no doubt that this would have been a fit appellation. Why should water be considered any differently?

<sup>45</sup> And thus be the preserve, at least in the evenings, of muggers and rapists.

<sup>46</sup> Epstein, 1985, p. 979

<sup>47</sup> For a defense and explication of this process, Hoppe, Hans-Hermann, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy, Boston: Kluwer, 1993; Rothbard, Murray N., The Ethics of Liberty, Humanities Press, Atlantic Highlands, N.J., 1982 (1998); Rothbard, Murray N., For a New Liberty, Macmillan, New York, 1973; Block, Walter, "Earning Happiness Through Homesteading Unowned Land: a comment on 'Buying Misery with Federal Land' by Richard Stroup," Journal of Social Political and Economic Studies, Vol. 15, No. 2, Summer 1990, pp. 237-253;

natural resources now in the market sector of the economy. It is not clear that even if capitalism would mean the "end of a river qua river"<sup>48</sup> that this is a fate simply not to be contemplated. Must all rivers forever remain rivers? Cannot at least some of them, even theoretically, serve mankind in some other manifestation? After all, we convert forests into farms, and farmland into housing developments, and sometimes, further, into high rise neighborhoods. Why should water resources be any different? Yes, of course, "Flowing water has value for navigation, for fishing, for recreation, for farming, and for irrigation,"<sup>49</sup> but it is hardly inconceivable that another alternative use or uses might be even more valuable. But these are merely theoretical considerations. It is not at all apparent that any river, let alone all of them, would be converted from a "'going concern' into a stagnant pool."<sup>50</sup> This would only occur, under private enterprise, if profits could be maximized in that manner. But profits, in turn, stem from human desires. The way to earn large gobs of money under free enterprise is by pleasing customers, not the reverse, as is implicitly assumed by our author. Epstein provides no reason to believe that this system would not work for the betterment of mankind on rivers as it has done with regard to other liquids, such as wine, orange juice, milk, soda, etc., nor as pertains to other physical assets, such as mountains, valleys, forests, farms, mines, etc.

Our author delivers himself of this opinion:

"... the idea of fair participation guaranteed that no single person could appropriate all the water in the river to his own use, thus destroying its going concern value. By so providing, the

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<sup>48</sup> Epstein, 1985, p. 979

<sup>49</sup> Epstein, 1985, p. 979

<sup>50</sup> Epstein, 1985, p. 979

law necessarily made the river into a common pool asset owned by a group of individuals..."<sup>51</sup>

There are several problems here. Again we have this bias vis a vis single vs. multiple ownership, but Epstein switches position in mid stream, so to speak, and now champions the latter. This is difficult to understand. Moreover, it is unclear why, if a single ownership entity<sup>52</sup> "could appropriate all the water in the river to his own use," this would "destroy ... its going concern value."<sup>53</sup> There are single owners of large stretches of ranch land, perhaps even more extensive and valuable than a single small river. Far from dissipating the value of these holdings their owners do everything within their power to maximize them. The Disney Company, to take another example, has "appropriated" all of the land in Disney World. And yet, far from "destroying its going concern value,"<sup>54</sup> it has made valiant and so far successful efforts in the very opposite direction. What does Epstein think a single owner, say, of the Hudson River would do with all this water? Drink it all up himself? That is not at all what "appropriate for his own use"<sup>55</sup> would mean in this context. On the contrary, Hudson River Inc.<sup>56</sup> would probably try to clean

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<sup>51</sup> Epstein, 1985, p. 980.

<sup>52</sup> composed of one or several individuals it does not matter

<sup>53</sup> Epstein, 1985, p. 980.

<sup>54</sup> Epstein, 1985, p. 980.

<sup>55</sup> Epstein, 1985, p. 980.

<sup>56</sup> See Epstein, Richard, "Blackmail, Inc.," (1983) 50 University of Chicago Law Review, 553. For a reply: Block, Walter, and Gordon, David, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren," Loyola of Los Angeles Law Review, Vol. 19, No. 1, November 1985, pp. 37-54.

up<sup>57</sup> this cess pool<sup>58</sup>, so that people could use it for swimming, drinking, etc.<sup>59</sup>

Then, too, Epstein is mistaken in his contention that "the law necessarily made the river into a common pool asset owned by a group of individuals..."<sup>60</sup> Most rivers in the U.S. are not at all "owned."<sup>61</sup> Instead, they are unowned. This is why the tragedy of the commons, which Epstein is so anxious to solve, nevertheless occurs in these contexts. That is precisely why they are in such poor shape<sup>62</sup>.

Epstein<sup>63</sup> takes Gaffney<sup>64</sup> to task for objecting to the present system of prorationing during

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<sup>57</sup> It is highly unlikely, but conceivable, that the Hudson river would provide more value to customers, and thus earn more profits, were it used as a sewer for industrial, commercial and residential waste. If so, instead of a clean up, wise entrepreneurship would lean in the very opposite direction. But then the owner of the river would have to pay off the owners of the ocean into which it feeds; he would not be able to charge as much as otherwise to pleasure boats, etc., for the use of his facility. Conceivably, too, Disney world might best be converted into a garbage dump. To contemplate either scenarios is not to consider a logical contradiction.

<sup>58</sup> For the view that socialist countries, and socialistic institutions within our own economy have a far worse environmental record than capitalist ones, see DiLorenzo, Thomas, "Does Capitalism Cause Pollution?," St. Louis, Washington University: Center for the Study of American Business, Contemporary Issues Series 38, 1990

<sup>59</sup> He would of course charge them for this privilege, but which capitalist worthy of his salt would do any less? Dave of Wendy's doesn't give away his burgers for free, and yet no one except an extreme socialist complains of him on this ground.

<sup>60</sup> Epstein, 1985, p. 980

<sup>61</sup> For a counter example regarding the semi privatization of a Scottish river, see Anderson, Terry L., and Leal, Donald R., Free Market Environmentalism, San Francisco: Pacific Research Institute, 1991;

<sup>62</sup> Lake Erie once actually caught on fire due to oil pollution.

<sup>63</sup> Epstein, 1985, p. 981

<sup>64</sup> Gaffney, "Economic Aspects of Water Resource Policy," 28 American Journal of Economics and Sociology 131 (1969)

water shortages<sup>65</sup> on the ground that "Cut back everyone by 25% and some will miss the marginal water very little, others a great deal." Epstein's response is worth repeating:

"But the objection is not decisive, for it is not enough to show that the system is necessarily inefficient or unsound, without taking into account the costs necessary to set things right. With water the administrative costs in individualizing the cutbacks would be enormous and subject to obvious abuse, given the risks of rent seeking that accompany any exercise of discretionary authority. The rule, therefore, like other simple rules of thumb, is largely dictated by the need to make decisions under conditions of imperfect information. The fine points of marginal costs and relative value are too hard to capture in the day to day world."<sup>66</sup>

Epstein is correct in stressing the importance of "simple rules of thumb" to deal with complex situations. But there is a far more simple rule of thumb than statist bureaucratic inspired pro rata proportional rights. It is called private property rights. It works wonders, at least compared to socialistic bureaucratic institutions of the sort supported by our author. Each and every day there are "times of scarcity when the system must ration an amount of (numerous goods and services) that cannot satisfy all uses."<sup>67</sup> Yet, in the market for pork chops and chow mein, bagels and rye bread, wine and beer, orange juice and cigarettes, this occurs automatically, without fuss or fanfare, with no "rent seeking," and certainly in the absence of bureaucracy.

Yes, "The fine points of marginal costs and relative value are too hard to capture in the day to day world"<sup>68</sup> of water resources organized along socialistic principles, but, with the fall of the Berlin Wall and the Soviet Empire, that should not come as any great news. The journalistic "scoop," here, is that we should be applying a system to our rivers and lakes which has proved to

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<sup>65</sup> All members of a given riparian class must cut back their use by the same proportion

<sup>66</sup> Epstein, 1985, p. 981

<sup>67</sup> Epstein, 1985, p. 980, material in brackets supplied by present author

<sup>68</sup> Epstein, 1985, p. 981

be such a dismal failure in Europe and Asia<sup>69</sup>. These "fine points" are "captured" every day under capitalism for a myriad of goods and services. Indeed, that is one of the reasons we enjoy an economic life style which is the envy of most of the world.

As for the costs of converting to markets and private property, they are not all that "enormous." They are not "enormous" compared to the costs of doing nothing, and allowing our water resources to continue being managed under socialistic principles. They would be far less "enormous" if people such as Epstein, presumably an advocate of free enterprise, would shift his "enormous" human capital in the opposite direction on questions of this sort. They are not at all "enormous" compared to the paroxysms suffered by the peoples of the former Soviet bloc in trying to put together their societies along free enterprise lines. Yes, there will be tremendous start up costs: who, exactly, will get to own the rivers, lakes and oceans under a regime of full private enterprise? We have a principle, homesteading, which can provide a direction, but much work needs to be done before we can even approach a specific solution<sup>70</sup>.

On the other hand, the gains will truly be gargantuan. At present, the seas and other bodies of water comprise roughly 75% of the earth's surface, but account for less than 1% of world GDP<sup>71</sup>. There is little doubt that much of the discrepancy is due not to natural resource

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<sup>69</sup> and everywhere else it has been tried

<sup>70</sup> Probably the easiest solution, however, is to incorporate homesteading into the analysis in only a broad and indirect way: to assume, for example, that all people living within 50 miles of the Hudson River are owners of one share of stock in the new company which owns this resource. On the privatization of the British Columbia Resources Corporation along roughly these lines, see Ohashi, T.M., T.P. Roth, Z.A. Spindler, M.L. McMillan, & K.H. Norrie, Privitization Theory & Practice, The Fraser Institute, Vancouver, B.C., 1980.

<sup>71</sup> to be supplied

endowments, but to present institutional arrangements. There are vast riches in, below and under the waters which are not being tapped, or very inefficiently so, due to problems of non ownership. There is every reason to believe that a massive privatization effort would enable the waters of the world to make a more proportional contribution to human betterment<sup>72</sup>.

## 2. Consensual Restraints on Assignment of Contract Rights

This is an anomalous section of Epstein's paper<sup>73</sup>. He actually takes the libertarian position on alienation, but is so wedded to the contrary view he doesn't seem to realize this.

The issue is whether people contractually related to one another, e.g., as business partners, landlord and tenant, etc., can by agreement preclude themselves from alienating their contractual rights. That is, can one partner make it impossible for the other to sell his part of the firm to someone else "where neither side relishes the thought of suddenly being in business with a stranger."<sup>74</sup> It also "occurs whenever a tenant wants to sublet an apartment over the summer vacation."<sup>75</sup> In such cases, Epstein tells us "... both sides often agree that the rights that they have created under contract shall not be assignable without the consent of the other."<sup>76</sup> Epstein does not oppose such contracts. Since I favor the right of owners to do exactly as they wish with their own private property (as long as it is not used to invade the rights of others), his thesis in this

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<sup>72</sup> And while we're at it, we can also consider privatizing another socialist sacred cow: the nation's roads and streets. At present, some 40,000 innocent people die on these facilities, not due to speed, drunk driving, poor weather and other excuses offered by apologists for the present system. Instead, these "enormous" costs stem from highway socialism. On this see footnote zx, supra.

<sup>73</sup> Epstein, 1985, pp. 982-984.

<sup>74</sup> Epstein, 1985, p. 982.

<sup>75</sup> Epstein, 1985, p. 983.

<sup>76</sup> Epstein, 1985, p. 982.

section of his paper does not contradict my own. However, he cannot bring himself to an outright support for such contractual freedom, contenting himself with concluding only that "... the case for restraining alienation in consensual situations has weakened in modern times."<sup>77</sup>

### 3. Voting Rights

#### a. Corporate Voting

Epstein offers another justification for the fact that "the sale of the voting rights apart from their underlying shares is usually prohibited by statute"<sup>78</sup>: the necessity to stop corporate fraud. "... the key risk," he tells us, "is that directors and officers of the corporation will divert corporate property to their private use, suffering only a portion of the corporate loss and reaping all the private gain."<sup>79</sup> The goal, therefore, must be to "prevent key officers from being paid excessive salaries or from padding expenses."<sup>80</sup>

To the extent that corporations "place consensual restrictions upon the alienation of shares"<sup>81</sup> the libertarian can have no objection to this "capitalist act between consenting adults."<sup>82</sup> But when it is a matter of "statute,"<sup>83</sup> this again is an unwarranted attack on the complete and

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<sup>77</sup> Epstein, 1985, p. 984, emphasis added.

<sup>78</sup> Epstein, 1985, p. 984.

<sup>79</sup> Epstein, 1985, p. 984.

<sup>80</sup> Epstein, 1985, p. 985.

<sup>81</sup> Epstein, 1985, p. 984.

<sup>82</sup> Nozick, Robert, Anarchy, State and Utopia, New York: Basic Books, 1974

<sup>83</sup> Epstein, 1985, p. 984

total rights of alienation that people have in their own property.

Epstein, to the contrary, interprets this, again, as a "common pool" problem<sup>84</sup>; I see it, instead, as resulting in large part from government intervention in an altogether different realm of the economy, which has negative repercussions in this one.<sup>85</sup> There is a spate of laws which interferes with "corporate raiding": the "hostile" takeover of one company by another. The point is, when corporate officers engage in expense account padding, or nepotism, or act in any other way against the interests of their stockholders, the market has a fail safe mechanism designed to thwart them: a "hostile" takeover; but the law, which should be limited in such cases to punishing fraud, actually attacks the entrepreneur engaged in the takeover of other companies<sup>86</sup>. Michael Milken, in a black day for American jurisprudence, actually went to jail for such "offenses"<sup>87</sup>.

Whenever corporate chicanery of any sort takes place, or even basic incompetence, the value of the shares falls below that which would have otherwise obtained in the absence of such occurrences. This divergence is the potential profit margin for the corporate "raider." He can

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<sup>84</sup> Epstein, 1985, p. 984.

<sup>85</sup> Mises demonstrates that regulation must either be stopped, completely, or it will create problems that seemingly calls for further governmental incursions in the economy, in a never ending cycle. See on this Mises, Ludwig von, Human action, Chicago: Regnery, 1949, 1963, 1966; Mises, Ludwig von, Bureaucracy, New Rochelle, N.Y.: Arlington House, 1969; Mises, Ludwig von, Omnipotent Government, New Rochelle, N.Y.: Arlington House, 1969

<sup>86</sup> Berle, A.A., Jr., and Means, Gardner C., The Modern Corporation and Private Property New York: Commerce, 1932 were concerned that stockholders were being taken advantage of by corporate officers; their recommendation, unfortunately, was not to allow market amelioration, and to limit the law to punishing fraud, but rather governmental dirigisme.

<sup>87</sup> See the movie "Wall Street," with Michael Douglas, zxxz and Daryl Hannah, for the Hollywood take on this aspect of free enterprise.

purchase the shares at market values which incorporate these sins of commission or omission<sup>88</sup>, amass enough voting power to throw out the rascals and put in their place a more honest and/or efficacious management team, and then earn a return as the share prices rise to reflect the new level of probity and competence.

There is another way, of course, to fight corporate theft; the tried, true and traditional American one: sue them. As I write this, I learn<sup>89</sup> that David Duchovny is suing 20th Century Fox Film Corp., claiming that it sold reruns of his "X-Files" t.v. show to a sister company FX Cable Network at an artificially deflated price, which cheated minority profit sharers such as himself. By making this less than arm's length deal, claims the plaintiff, the majority stockholder is in effect diverting resources which belong to him into their own pockets.

What with "hostile takeovers" by corporate "raiders,"<sup>90</sup> the ever present possibility of lawsuits, and, ultimately, a criminal conviction for fraud, there is no need for government to trample on property rights by forbidding entirely innocent businessmen from alienating their shares of stock. That Epstein advocates this incursion into markets in any case only provides further evidence of the yawning gap between his views and those of libertarianism. This author says that "The restriction on the right of alienation ... can operate as the first line of defense against corporate abuse."<sup>91</sup> First of all, it is not needed. Second, why "cure" one abuse by setting up yet another? The goal should be to end abuse, not substitute one for another.

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<sup>88</sup> Actually, slightly higher, to serve as an inducement for shareholders to sell to him

<sup>89</sup> Vancouver Sun, August 14, 1999, p. A8.

<sup>90</sup> Epstein, 1985, p. 986 uses the "raider" word without benefit of quotation marks. Does this mean he buys into the Marxist notion that mere buying and selling can amount to exploitation?

<sup>91</sup> Epstein, 1985, p. 986

These laissez faire capitalist solutions to the problem are not very welcome by those who wish to have the government increase its control over stock markets. Particularly hated is the purchase and sale of shares of ownership in corporations. These are labelled "hostile takeovers" and those who engage in these activities "corporate raiders." But commercial interaction can never be "hostile." On the contrary, given that all sales and purchases are strictly voluntary, they must also be mutually beneficial, at least in the ex ante sense. That is, if I purchase a stock from you for \$100, I must value it at more than this amount, say, at \$115, otherwise I would scarcely agree to buy. At this price, I earn a profit of \$15. And you would never part with your share of a company for this price did you value it this high. Obviously, from your willingness to sell at \$100, you must have regarded as worth a lower amount<sup>92</sup>, say, \$90. If so, you earn \$10. We both gain. Neither exploits the other. From whence emanates the "hostility"? Where is the "raiding"? Even if the value of this stock doubles in the very next day, you might well regret your entrepreneurial error; but you will hardly be "hostile" to me, or regard my purchase from you as an act of "hostility." I didn't "raid" you; I merely bought something you offered for sale. We all understand the risks of buying and selling stocks. If we do not, we have no business on Wall Street<sup>93</sup>.

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<sup>92</sup> Conceivably, you regard this stock's future potential as I do, and agree with my "objective" assessment of \$115. However, you see another opportunity I do not notice, with even greater potentialities. That is why you place such a low subjective evaluation on the stock under consideration. For more on entrepreneurship, and being aware of opportunities unseen by others, see Kirzner, Israel M., Discovery, Capitalism and Distributive Justice, Oxford: Basil Blackwell, 1989; Kirzner, Israel M., Discovery and the Capitalist Process, Chicago: University of Chicago Press, 1985; Kirzner, Israel M., Competition and Entrepreneurship, Chicago: University of Chicago Press, 1973

<sup>93</sup> Not that government should prevent ignorant people from taking a position in the stock market.

What, then, is the source of "hostility"? It comes from the rascal executives, who are kicked out of their positions by the new owners. It is as if a management staff were running a perfectly good hotel into the ground. The present discounted value of the earnings are only \$5 million, so low are its profits. It is sold for \$7 million. The buyer is willing to pay this amount because of the potential he sees in the property; the vendor is willing to accept it because if he puts this money in the bank, he will earn more than he did from the hotel. The purchaser puts in a new more responsible team, and profits rise to a level such that the present discounted value is now \$20 million. Who is "raided"? Who is "hostile"? Not the new or old owner of the hotel. (The latter has only himself to blame for picking poor managers). Both of them have profited. Only the prior inept and/or dishonest administration is aggrieved. And bad cess to them<sup>94</sup>.

Epstein ends this section by citing several other corporate problems, including some shareholders ganging up on others, and some of them obtaining "their interest by inheritance."<sup>95</sup> He becomes exceedingly coy about whether the "restraints on alienation" he advocates, that "have been used as safeguards against the improper use of corporate control"<sup>96</sup> are through contract, in which case they are perfectly acceptable, or by government edict, in which case they are not. Perhaps this distinction is not an important one for him. In any case, we may rest secure in the knowledge that if the stock market is but left free of state intervention, those corporations which act uneconomically will tend to see their share values plummet, other things equal, and be

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<sup>94</sup> If you dating a woman, and I compete with you for her affections, you may well regard my appearance on the scene as "hostile." But to forbid me by law from so doing is a violation of the right of free association.

<sup>95</sup> Epstein, 1985, p. 986.

<sup>96</sup> Epstein, 1985, p. 987

taken over by more efficient owners. Even if Epstein's advocacy of alienation is purely voluntary, there is no real need for it. Adam Smith's invisible hand will tend to ensure this occurs in any case.

#### b. Public Elections

Should it be legal for citizens to sell their ballot box votes? If the state is akin to a private corporation<sup>97</sup>, then it follows ineluctably from libertarian principles that they should indeed be allowed to do this. For private corporations are based on volunteerism, and there is nothing more contrary to this philosophy than to prohibit people from interacting on any mutually agreeable basis, for example a free market in public elections. Epstein seems to support this position: "a public office is indeed a public trust, so that elected officials, like corporate officials, have fiduciary duties."<sup>98</sup> If so, then libertarianism certainly supports sales of votes in the political arena as it does in the commercial.

Now we entertain the opposite notion: that there is a crucial difference between the government and a private firm: the former uses force to collect taxes<sup>99</sup>, to rid itself of competitors

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<sup>97</sup> Most economists and political scientists take this position. See for example Buchanan, James M., and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy, Ann Arbor: University of Michigan, 1971. For a critique, see Rothbard, Murray, Logic of Action; Block, Walter and DiLorenzo, Thomas, "The Calculus of Consent Revisited," forthcoming; Block, Walter, and DiLorenzo, Thomas, "Constitutional Economics and the Calculus of Consent," forthcoming; DiLorenzo, Thomas J., and Block, Walter, "Is Voluntary Government Possible? A Critique of Constitutional Economics," forthcoming; and Block, Walter, "Another look at the Calculus of Consent," forthcoming.

<sup>98</sup> Epstein, 1985, p. 987

<sup>99</sup> Rothbard, Murray N., For a New Liberty, Macmillan, New York, 1973; Rothbard, Murray N., The Ethics of Liberty, Humanities Press, Atlantic Highlands, N.J., 1982; Rothbard, Murray N., Power and Market: Government and the Economy, Menlo Park Cal.: Institute for Humane Studies, 1970; Tannehill, Morris and Linda, The Market for Liberty, New York, 1984; Woolridge, William C., Uncle Sam the Monopoly Man, New Rochelle, N.Y.: Arlington House,

within its claimed geographical region<sup>100</sup>, and prohibits secession<sup>101</sup>. That is, the state is in effect illicit, an invading army exploiting innocent people by force, and refusing to allow them to escape. However, perhaps in order to further solidify its rule, it does allow people to vote.

What of a market in the ballot box in this case? Again, the case in favor of such an institutional arrangement is clear: the entire process is a charade; there is no honor lost if the underlying purposes of public elections are traduced. "Public office," far from being a "public trust,"<sup>102</sup> is instead evidence of villainy<sup>103</sup>.

Epstein is having none of this. He defends the "well-nigh universal prohibition against the sale of votes in public elections" in order to protect against "the abuse of factions" and "ruinous taxation"<sup>104</sup>. One might have thought he would therefore favor the limitation of "voting

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1970; Spooner, Lysander, No Treason, Larkspur, Colorado, (1870) 1966; De Jasay, Anthony, The State, Oxford: Basil Blackwell, 1985; Stringham, Edward, "Justice Without Government," Journal of Libertarian Studies; Tinsely, Patrick, "With Liberty and Justice for All: A Case for Private Police," Journal of Libertarian Studies; Hoppe, Hans-Hermann, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy, Boston: Kluwer, 1993; Benson, Bruce L., The Enterprise of Law: Justice Without the State, San Francisco: Pacific Research Institute for Public Policy, 1990

<sup>100</sup> E.g., it allows no other sovereign state to operate within its borders

<sup>101</sup> McGee, Robert, and Lam, Danny, 1992, "Hong Kong's Option to Secede," Harvard International Law Journal, Vol. 33, No. 2, pp. 427-440; McGee, Robert, 1991, "A Theory of Secession for Emerging Democracies," The Asian Economic Review, Vol. 33, No. 2, August, pp. 245-265

<sup>102</sup> Epstein, 1985, p. 987

<sup>103</sup> But only evidence. And evidence only establishes a presumption. The presumption can be overcome by other, even more basic evidence, such as a voting record; e.g., opposing the state at every turn. Those libertarians who argue against politics on principle are thus in error.

<sup>104</sup> Epstein, 1985, p. 987

rights to property holders (as) a response to the fear of confiscation if propertyless individuals should obtain control over the powers to tax and regulate."<sup>105</sup> But no. He rejects this eminently reasonable system on the ground "that persons without property nonetheless had a stake in the community and were bound by its laws."<sup>106</sup> As far as I am concerned, whenever anyone mentions "stake" or "stakeholder" in such a context the best advice is to check your wallet or count your fingers. This is just an excuse for theft. If the corporation has to watch out for, in addition to its owners, employees, suppliers, etc., also its "stakeholders," then private property rights are at an end, the result Epstein (says he) opposes. If the goal of this author were really to stop confiscation of the possessions of the rich by the poor, there is only minor tinkering needed in the law limiting the vote to those who own property: it should be altered to prohibit anyone but the rich from voting, whether or not part of their portfolio is held in the form of real estate<sup>107</sup>. And while we are at it, again based on Epstein's avowed opposition to "the abuse of factions" and "ruinous taxation," we ought to rethink allowing women the right to vote. For it is clear that they are more receptive to welfare, favored proportionately more by the Democratic Party<sup>108</sup>, and thus on net balance contribute to "the abuse of factions" and "ruinous taxation."<sup>109</sup> Epstein is

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<sup>105</sup> Epstein, 1985, p. 987 (material in brackets inserted by present author).

<sup>106</sup> Epstein, 1985, p. 987

<sup>107</sup> That is, the vote should be confined to the wealthy, not to those who own property. Wealthy people with holdings in other arenas are just as much at risk from the sort of theft mentioned by Epstein as are the rich who specialize in acreage and houses.

<sup>108</sup> E.g., the well known "female gap"???

<sup>109</sup> Let me stress this is an attempted reductio of Epstein, not my own policy recommendation. From my perspective, there ought not be the political vote for anyone, male or female. All property ought to be privatized, in which case there would be corporate and dollar votes only by their owners, not by citizens.

(presumably) so concerned to quell the dangers of confiscation of the rich by pressure groups he does not stop to realize we are already suffering from this plight<sup>110</sup>.

Says Epstein "If vote selling were fully legal, there would be no reason to limit sales to ones for hard cash, for individuals could make (secured) promises to make payments from the public treasury after election."<sup>111</sup> This is of course true. But this already occurs, if in not quite so explicit a manner. What else is our present system of interest group politics, where each major party has its own set of clients, and promises to financially support them to keep if elected?

### III. A Note on Distribution

Epstein opposes the limitation of alienation to achieve distribution (e.g., theft, although he does not characterize it in this manner) from rich to poor. He notes the "odd results that occur"<sup>112</sup> when this takes place. I oppose interference with alienation rights in any case, so we do not find ourselves on opposite sides of the issue in this case.

### Conclusion

Epstein states "The purpose of this Article was to explain why restraints upon alienation persist in a world in which a sale of assets is generally a welcome event."<sup>113</sup> In my view, our author does not so much explain this phenomenon as attempt to justify it. He does so on the grounds of "external harm and the common pool."<sup>114</sup> I have found these allegations wanting. I

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<sup>110</sup> Serfs in medieval times worked only 3 days on the manor, and 4 for themselves. There are many U.S. taxpayers who fare far worse than this.

<sup>111</sup> Epstein, 1985, p. 988

<sup>112</sup> Epstein, 1985, p. 988

<sup>113</sup> Epstein, 1985, p. 990

<sup>114</sup> Epstein, 1985, p. 990

therefore propose that all limitations on alienation, e.g., the doctrine of inalienable rights, be dropped, forthwith.