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I. TIME AND PROPERTY THEORY

"All human interactions," Epstein begins, "and hence all legal rules, have a temporal dimension."[1] But the temporal dimension of human affairs figures differently in different theories of property that might explain or justify legal rules. In this commentary, I want to examine how the varying role of the temporal dimension in different underlying theories of property relates to some of the problems in the law of adverse possession and restraints on alienation. I have selected these from the wide variety of topics Epstein presents because I find them particularly interesting for examining the relationship between legal doctrine and the temporal dimension of theory.

There are three traditional strains in liberal property theory: the Lockean labor-desert theory; the Benthamite utilitarian (and economic) theory; and the Hegelian personality theory. In the Lockean theory, the temporal or dynamic dimension of human affairs seems to be irrelevant, but it plays an important role in the other two.

A. Lockean Entitlement

The reason that the temporal dimension is irrelevant to the Lockean theory of property is that, at least in its classic form, it is only a theory of just acquisition, concerning itself only with the moment in which entitlements come into being. Entitlements come into being through mixing one's labor with an unowned object, or, in Epstein's version, through occupancy or first possession of an unowned object, and thereby are fixed forever.[2] Thus, one moment in time is relevant to entitlement, the mo-

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1. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 65 WASH. U.L.Q. 667, 667 (1986).

2. Locke did not concern himself with why an unowned object should not revert to the commons when the owner dies, thence to be "occupied" again by a new owner, probably because he assumed transmissibility of wealth by inheritance as a matter of natural law. Epstein, however, as a modern theorist who rests some of his conclusions on the rule of first possession, should beware of incautious statements such as "It would not do to allow a free-for-all once land passed out of the hands of its rightful owner, for then the productive value of the land is diminished for all time." Epstein, *supra* note 1, at 675. Clearly the land could instead revert to the common and thence be

ment when non-property becomes property; but the temporal dimension of human affairs, our situation in an ongoing stream of time, is irrelevant.

The term "just acquisition" belongs to the prominent neo-Lockean, Robert Nozick, who theorizes that justice in holdings ideally consists of whatever results from just acquisition and sequences of just transfers.[3] This corresponds to saying that a holding is just if a valid chain of title and a valid root of title (in original acquisition out of the common) can both be shown. Here a temporal element enters in; the chain of title extends in time from original acquisition to today. Thus, in neo-Lockean theory, there is a temporal element connected with just transfer, but not with initial entitlement itself.

In a non-ideal world, there are sometimes rip-offs and frauds instead of just transfers. This makes necessary a third kind of theory in addition to a theory of just acquisition and a theory of just transfer; namely, a corrective justice theory, which Nozick calls a theory of rectification. Because Nozick is engaged mainly in ideal theory, he does not develop a theory of rectification. Whether a neo-Lockean theory of corrective justice would contain temporal elements is therefore unclear, but it seems, at least, that a Nozickian theory of corrective justice would not allow time to diminish the force of old harms.[4] In Neo-Lockean ideal libertarian justice there seems to be no statute of repose. Once the chain is tainted somewhere between original acquisition and today, corrective justice seems to require that titles be redistributed to undo the effect of the oppression or fraud, no matter how long ago. To say less than this would undermine the absolute nature of the Lockean rights of property acquisition and free contract.[5]

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efficiently re-possessed into private ownership. From the passage in which this sentence appears, it is clear that Epstein is talking about the need to substitute earliest probable possession for first possession when attempting to implement first-possession theory in a non-ideal world. That proposition can stand without the incautious statement about diminution of productive value for all time. The proposition is questionable only at a deeper level, when one starts to ask whether attempting to play out these ideal theories in real life is really the best thing to do given the non-ideal nature of our world. I view this question as a philosophical analogue to the problem of second-best. Epstein implicitly admits its importance by resting many of his conclusions on allocation of risk of error in light of imperfect information. *See* Radin, *Risk-of-Error Rules and Non-Ideal Justification*, in JUSTIFICATION: NOMOS XXVIII (J. Pennock & J. Chapman eds. 1986).

3. R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

4. This appears to be Epstein's view also; *see* Epstein, *supra* note 1, at 667-68.

5. For those who consider the bitter historical details of conquests and other oppressions to be the paramount non-ideal factor for ethics and politics, the requirements of such a timeless theory of rectification would no doubt engulf most of Nozick's ideal libertarian non-redistributive conclusions.

B. Utilitarianism

Utilitarian theory is more directly time-bound. In act-utilitarianism the preferred or justified course of action is to maximize welfare (or utility, or whatever is the maximand) right now. But human interactions and our environment are dynamic, so as time moves on the preferred or justified course of action changes. Furthermore, in determining the preferred course of action the future is what governs. To judge an act by its consequences for utility is, from the standpoint of the time of making the decision, to rest rightness on prediction.

In rule-utilitarianism, the preferred or justified course of action is to maximize welfare (or whatever) in "the long run" in contradistinction to right now. Hence, the dynamic nature of human affairs is more directly implicated in the preferred course of action. One consequence of this is that in rule-utilitarianism we are always cognizant of systemic concerns: How will any given choice affect the entire system of entitlements and expectations as it produces and maintains welfare over time? Thus, time is embedded at the heart of rule-utilitarianism. Indeed, its temporal heart harbors its deepest puzzles. How long is the long run? Does it include future generations? If so, how do we attribute utility (or whatever) to them, and how do we compare it with the utility of people alive today? Is the utility of people who are not alive today but were alive yesterday of any relevance? If so, at what point does the utility of the dead cease to count? In order to maximize utility, should we (in light of the principle of decreasing marginal utility) maximize population until everyone is at a bare subsistence level? And so forth.

C. Property and Personhood

Time is also at the heart of the personality theory, but in a different way. In the Hegelian theory, ownership is accomplished by placing one's will into an object. A modern extrapolation of this idea suggests that the claim to an owned object grows stronger as, over time, the holder becomes bound up with the object.[6] Conversely, the claim to an object grows weaker as the will (or personhood) is withdrawn. In other words, in personality theory the strength of property claims is itself dynamic because over time the bond between persons and objects can wax and wane.

6. I have given my construal of Hegel's property theory, a contemporary reconstruction, and some practical results for the law, in Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

Because personality theory concerns individual rights and not general welfare, it does not harbor the same temporal puzzles as rule-utilitarianism. Since it places entitlement in the present state of the relationship between person and object and not in some aboriginal appropriation, it also avoids the major problem of the Lockean individual rights theory. Personality theory must struggle instead with how to construe the notion of personhood and the notion of relationships between persons and objects. In coherence and contextualist philosophical views, these central notions themselves are developing through history; that is, they have a temporal dimension.

II. ADVERSE POSSESSION

In this section I shall comment on two aspects of Epstein's treatment of adverse possession, suggesting that his lack of clear focus on the varying role of the temporal element in the different theories of property results in some distortions. First, Epstein sees a tension between Lockean entitlement theory, which he refers to as "principle," and what appears to be a form of rule-utilitarianism, which he refers to as "pragmatic."[7] With respect to this opposition of principle and pragmatics, I suggest that Epstein himself is in tension with regard to the extent of his commitment to Lockean entitlement or rule-utilitarianism as his primary normative theory. Second, Epstein ignores personality theory. This might mean that he finds it wholly implausible as an explanatory/justificatory theory, and if so I differ with him. I think it sheds interesting light on some aspects of the problem of adverse possession.[8]

7. Epstein, *supra* note 1, at 674-76.

8. In addition to the omission of this theoretical point of view, which is no doubt a matter of normative choice on Epstein's party, there are substantive omissions from his treatment of adverse possession that I believe should be included in any general discussion of the common-law treatment of nonconsensual transfer of property rights over time. The most important omission is prescription, by which an adverse user creates a divided title where formerly there was one owner. It is difficult to use the standard rule-utilitarian treatment of adverse possession (i.e., that it clears titles and facilitates transactions) to justify prescription. The most one can say, perhaps, is that where a court has a choice between awarding an easement by prescription or awarding the entire fee interest by adverse possession, it ought to choose the latter. This could explain why those who build encroaching buildings are awarded a fee in the strip they have built upon, rather than an easement to maintain a building upon that portion of their neighbor's land. *See, e.g.*, Belotti v. Bickhardt, 228 N.Y. 296, 127 N.E. 239 (1920).

Another important omission is the problem of nonconsensual transfer between a private party and a governmental entity or the general public by means of adverse use. The problem goes both ways: how should we treat adverse possession against a government title; and how should we treat adverse

A. Entitlement and Utilitarianism: Principle versus Pragmatics?

First, let us consider the tension between Lockeanism and rule-utilitarianism with regard to adverse possession; that is, with regard to awarding title to present possession of sufficient length rather than seeking first possession. "As a matter of high principle," Epstein says, "what comes first is best; as a matter of evidence and proof, however, what comes last is more reliable and certain."[9] But why is it important to be reliable and certain, rather than simply pursuing what is best, letting the chips fall where they may? If entitlement is a matter of natural right, superior to all manipulations of the state in the interest of social welfare, why isn't this a matter of *Fiat justicia, ruat caelum*? For Epstein, at least, it is important to be reliable and certain because that will maximize the general gain.[10] This is implicitly a species of rule-utilitarianism known as transactions-costs economics.

But now we are prompted to ask, if rule-utilitarianism governs entitlements *now*, why doesn't it govern entitlements *then*? That is, why doesn't Epstein simply argue that it is efficiency, suitably construed as "long-run" or dynamic, that governs entitlements? If efficiency governs entitlements, then there is no tension between "high principle" and the merely "pragmatic," there is just the problem of what really is efficient, given the dynamic nature of the system. Certainly the principle of first possession could be reconstrued in rule-utilitarian terms: It makes utilitarian sense to get things out of the common and into the control of a

possession or user by the general public? *See, e.g.*, Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); and CAL. CIV. CODE § 1009 (Deering Supp. 1986).

9. Epstein, *supra* note 1, at 674. Epstein's argument is that the longer the lapse of time between relevant events and a legal decision, the greater the costs to the system. Specifically, the argument seems to run like this: (1) as time passes, it becomes more difficult to ascertain facts, and thus uncertainty increases; (2) the greater the uncertainty the greater the risk of error in any specific decision; (3) the greater the risk of error the higher the costs associated with any specific decision; (4) therefore, the longer the time between relevant events and a legal decision, the higher the costs associated with that decision; and (5) therefore, the longer the time between relevant events and all legal decisions, the higher the costs associated with legal decisions in the aggregate. Perhaps perversely, I wonder whether the argument is as self-evident as Epstein seems to think. Might uncertainty sometimes decrease as time passes? (It might if your normative theory of property tells you to look to productive use, settled expectations, or the bonds of personhood rather than first possession.) Might uncertainty ever decrease risk of error? (It might, if a right normative result does exist and we are steadfastly pursuing the wrong one.)

10. Indeed, "[t]he real questions are not whether a statute of limitations in the round works some Pareto superior move. Instead the harder question is one of fine tuning. What is the best way to structure the rules of adverse possession in order to maximize the general gain?" Epstein, *supra* note 1, at 680.

single decision maker, and the principle of first possession is (the argument would run) cheaper to agree upon than others that might present themselves. The problem for a utilitarian who is trying to be a libertarian at the same time is rather that the thoroughgoing rule-utilitarian approach to entitlement seems not to be absolute; it seems, in fact, to require redistribution of entitlements under certain circumstances.[11]

In other words, under thoroughgoing rule-utilitarianism, rearrangement of entitlements over time through means other than transfer by contract between individuals cannot be confined to adverse possession. Whatever assumptions we choose about the long run and the role of the utility of future generations, etc., it is hard to construct a utilitarian argument concluding that an entitlement gained through first possession is fixed for all time. Utilitarianism is too empirical for such absolutes. For utilitarianism, "pragmatics" *is* "high principle." All we have is some giant balance weighing the welfare gain from certainty of planning and transacting, and from not disturbing the "subjective" value of developed expectations of continued control over resources,[12] against the welfare losses from holdouts against land reform, or implementation of new technology, or the demoralization of the have-nots vis-à-vis the haves, etc. The advantage of Lockean (and Nozickian) natural rights theory is that it seems proof against non-contractual redistribution.[13] The disadvantage is that it cannot account for adverse possession, which it appears the functioning legal system—the enforcer of those "absolute" entitle-

11. *See, e.g.*, J. BUCHANAN, THE LIMITS OF LIBERTY ch. 10 (1975) (arguing that constitutional "renegotiation" would be chosen as preferable to a revolution otherwise predictable in light of ongoing shifts in the underlying power balance among various groups).

12. Jeremy Bentham gives more recognition to this than does Epstein. *See* J. BENTHAM, THE THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE, Part I, ch. 10 (1789):

> "Everything which I possess, or to which I have a title, I consider in my own mind as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me; and I form my plan of life accordingly. Every part of my property may have, in my estimation, besides its intrinsic value, a value of affection—as an inheritance from my ancestors, as the reward of my own labour, or as the future dependence of my children. Everything about it represents to my eye that part of myself which I have put into it—those cares, that industry, that economy which denied itself present pleasures to make provision for the future. Thus our property becomes a part of our being, and cannot be torn from us without rending us to the quick."

Of course, this insight is also at the root of the personality theory of property. The personality theory can be conflated with a welfare theory that pays sufficient attention to "subjective" value, including attention to which subsets of property interests this kind of "subjective" value is likely to attach. In my treatment of personality theory I do not do this because I do not treat this kind of value as "subjective." *See* Radin, *supra* note 6.

13. Although I think this is not so once a theory of rectification is admitted as necessary; *see supra* note 5.

ments—cannot do without.[14] Hence Epstein's tension. Does he intend to defend a pluralist meta-ethic? (Are absolute natural rights somehow involved in a paradoxical coexistence with utility maximization as the sole good?) Or does he intend to abandon natural rights theory and face the difficulties of utilitarian ethics? Epstein has not yet squarely faced this problem.

B. Property Theory and Adverse Possession

Now let me complicate the question by throwing another "ethic" into the hopper. For personality theory, adverse possession is easy, at least if one is envisioning possession by natural persons who successively occupy land. The title follows the will, or investment of personhood. If the old title-holder has withdrawn her will, and the new possessor has entered, a new title follows. Title is temporal because the state of relations between wills and objects changes.[15] The result of this theory is to attach normative force, and not merely practical significance, to the bond developing between adverse possessor and object over time; and to attach normative force, as well, to the "laches" of the title-holder who allows this to happen.

To suggest how the problem of adverse possession might be further illuminated through explicit attention to theories of property, I shall now

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14. Epstein seems to feel that the legal system is now doing without adverse possession, more or less, having developed better methods of dealing with the problem, but the 850 *appellate* opinions since 1966 examined by Helmholz seems to make this an overstatement; *see* Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983). In any case, the better methods of dealing with the problem are modern conveyancing and recording practices, and these are (arguably) "better" only in a utilitarian, not a Lockean sense, because they make title-holders actively pursue the goal of remaining title-holders. Further, I imagine that these better practices deal less well with acquisition of less than a fee interest (i.e., prescription) than they do with acquisition of the fee by adverse possession. Hence, I would hypothesize that the volume of prescription cases has not diminished as much as the volume of adverse possession cases, assuming their volume has in fact diminished. But this problem awaits investigation.

15. As Hegel puts this:

> The form given to a possession and its mark are themselves externalities but for the subjective presence of the will which alone constitutes the meaning and value of externalities. This presence, however, which is use, employment, or some other mode in which the will expresses itself, is an event in time, and what is objective in time is the continuance of this expression of the will. Without this the thing becomes a *res nullius*, because it has been deprived of the actuality of the will and possession. Therefore I gain or lose possession of property through prescription.

HEGEL, PHILOSOPHY OF RIGHT § 64 (T. Knox trans. 1952).

In other words, for Hegel "actual" possession is needed to *keep* title as well as to gain it through adverse possession.

consider how the three "ethics" map onto the problem. In order to talk about this, I would like to introduce two categories that I think are helpful in organizing discussion of adverse possession. One category involves differentiating among three paradigm cases of adverse possession; the other involves the shifting role in legal doctrine and practice of the adverse possessor's state of mind.

The cases in which adverse possession comes up can usefully be divided into three paradigms, which I call "color of title," "boundaries," and "squatters." These are subsets that might well refine Epstein's treatment of the problem. While the lay person may picture adverse possession as applying to the situation where aggressive trespassers take over a plot of ground and treat it as their own, and while some theoretical treatments of adverse possession, pro and con, may seem to have this "squatters" paradigm in mind,[16] most legal cases involve the other two paradigms. In the "color of title" case, the possessor holds an invalid document of title and eventually has to defend against the "true owner" or someone claiming under her. This happens, for example, where a grantor fraudulently grants the same parcel twice and the second grantee takes possession.[17] In the "boundaries" case, the boundary line observed by neighboring property owners in practice does not correspond with what their documents say; eventually one of them litigates to correct the discrepancy.[18]

Second, I think it is useful to take note of the disagreement, both in legal doctrine and in practice,[19] regarding the role of the adverse possessor's state of mind. There are three positions that have existed in legal doctrine: (1) state of mind is irrelevant; (2) the required state of mind is, "I thought I owned it;" (3) the required state of mind is, "I thought I did *not* own it [and intended to take it]."[20] These can roughly be thought of

16. For example, much of Epstein's utilitarian reasoning assumes a knowing adverse possessor moving in on someone else's property. This assumption ignores the more common cases where people are simply mistaken.

17. *See, e.g.*, Lessee of Ewing v. Burnet, 36 U.S. (11 Pet.) 41 (1837).

18. *See, e.g.*, Ennis v. Stanley, 346 Mich. 296, 78 N.W.2d 114 (1956). It is my tentative view, which it would take a Helmholzian endeavor to substantiate (*see* Helmholz, *supra* note 14), that permeation of reasoning appropriate to the "squatters" picture may have caused conflict and confusion in the law surrounding the kinds of cases that actually occur.

19. As Helmholz has shown, *supra* note 14, it appears that the practice of judges is to take into account state of mind more often than the doctrine in their jurisdictions would warrant.

20. This debate is usually put into the "hostile and under claim of right" part of the hornbook doctrine. If we are to understand "claim of right" in any ordinary language sense, then we tend toward position (2) (the "good-faith" standard), and must interpret "hostile" as meaning merely

as the objective standard, the good-faith standard, and the aggressive trespass standard.

1. Utilitarianism

The utilitarian argument is often stated as requiring simply that titles must be cleared to facilitate transactions now (i.e., for the immediate future). In this form, at least, the utilitarian argument seems to favor the objective standard making state of mind evidence irrelevant. State of mind evidence is one more cost of litigation, and presumably will result in fewer titles being cleared.

Utilitarianism can countenance all three paradigms, and does not privilege the "color of title" case over the case of the aggressive, productive trespasser.[21] But the "boundary" case seems unclear. Once the discrepancy between the record books and the lived boundaries is discovered, does it maximize the gain for the system as a whole to change the records to reflect the lived boundaries or to change the lived boundaries to correspond with the records?[22]

The utilitarian argument, at least in its simple form, strongly favors "tacking." On the side of the possessor, it creates a new chain of title in

non-permissive on the part of the "true owner." On the other hand, if we are to understand "hostile" in an ordinary language sense, then we tend toward position (3) (the "aggressive trespasser" standard), and must interpret "claim of right" to mean not claim of ownership, but merely non-subservience to the claim of the title-holder. If we take position (1) (which I call the objective standard), then "hostile and under claim of right" must be taken just to negate permission.

21. Epstein argues that the subset of "bad-faith" adverse possessors, which would presumably include "squatters" and aggressive encroachers in boundary disputes, should be subject to a longer statute of limitations before acquiring title. The asserted utilitarian ground for this argument is that "parties who engage in deliberate wrongs constitute a greater threat than those who make innocent errors or are simply negligent: there is a greater danger that intentional wrongdoers will do it all again." Epstein, *supra* note 1, at 686. But if the "wrongdoers" are productive and the title-holders are passive, are the "wrong-doers" so wrong in the utilitarian sense? And to carve out a subset of "bad-faith" cases makes evidence of "bad faith" relevant in every case. This is a cost to the system and will fail to clear some titles where an accusation of "bad faith" is wrongly made to stick. (I don't mean to suggest that making it harder to acquire property by adverse possession in "bad faith" is necessarily wrong, only that it is probably more readily supported by nonutilitarian than by utilitarian normative arguments.)

22. If we heavily weight the utilitarian concern with notice (ability to structure other transactions based upon foreseeable consequences), it is clear that the double message imparted when the lived boundaries differ from the record books is costly, but unclear which way the correction should go in order to eliminate the double message at least cost. If we heavily weight the utilitarian concern for choosing rules so as to steer behavior into paths creating fewer transactions costs, then perhaps we would think that the recorded boundaries should prevail: make people pay the price of failing to check official boundaries, because then they will more often check them before acting and conform their activities to them.

the adverse possessor. To allow "tacking" on the other side presumably reflects that anyone who buys from a titleholder out of possession is the best cost avoider of losses due to adverse possession. The utilitarian argument also favors clearing title as against future interest holders at the same time the adverse possessor acquires the present estate.[23] In addition, it favors an objective interpretation of the notice requirement ("open and notorious") that does not depend upon whether the titleholder knew of the adverse possession or even reasonably could have known.[24] "Disabilities" on the side of the old titleholder are difficult for utilitarianism, for the losses to titleholders who are children, insane, etc.,[25] and unable to bring suit must be weighed against the costs to the system of having a possible "disability" lurking behind every case where there may be unknown persons on the side of the old titleholder, which greatly prolongs clouds on the title.

2. Personhood

If one assumes, contrary to Hegel, that placing one's will into an object, in the sense of having it become bound up with personhood, is a process that does not take place overnight, then the personality theory is as follows: the possessor's interest, initially fungible, becomes more and more personal[26] as time passes. At the same time, the titleholder's inter-

23. Epstein discusses this problem in detail *supra* note 1, at 689-91, concluding on utilitarian grounds that there should be a longer statute of limitations for remaindermen than for holders of present possessory estates. Without going into detail here, I believe there is an equally persuasive utilitarian argument for cutting off remaindermen at the same time as the life estate holder (provided that future interest holders have a cause of action against trespassers, by analogy with the law of waste). Nevertheless, the two-tier result here is not as problematic from a utilitarian point of view as is the two-tier result on the issue of "bad faith," because whether or not there is a remainderman somewhere in the wings will not thereby become a submerged issue in every case.

24. For example, in Belotti v. Bickhardt, 228 N.Y. 296, 127 N.E. 239 (1920) it was sufficient to establish "open and notorious" adverse possession that the title holder had seen the physical object (an encroaching building), even though no one knew that the building was over the boundary line because all parties relied on a mistaken map.

25. The common law tradition here is to grant extensions of the statute of limitations to those who are minors, insane, prisoners, or out of the jurisdiction, but only if this "disability" existed on the day the trespasser moved in. Epstein's re-construal of these common law traditions in utilitarian terms leaves out prisoners' rights, and lacks an explanation of why the "disability" does not provide any extra time to sue if it occurs after the trespasser has moved in, but before the statute has run.

26. I introduced the distinction between fungible and personal property in Radin, *supra* note 6. If an object is fungible it is perfectly replaceable with money or other objects of its kind. If it is personal, it has become bound up with the personhood of the holder and is no longer commensurate with money. The distinction—which of course really marks the end points of a continuum of kinds of relationships between persons and objects—may be symbolized as widgets versus wedding rings.

est fades from personal to fungible and finally to nothingness. At what point is the titleholder detached enough and the adverse possessor attached enough to make the switch? This is not a statute of limitations, but a moral judgment. Should this judgment be made case-by-case or approximated by a blanket rule? A blanket rule (such as a number) would be chosen if that choice entailed less risk of moral error against embodied personhood than other choices. If a number is chosen, that number would be based upon the socially acceptable or "right" time it takes to become attached/detached.[27]

Personality theory might seem to favor an explicit "good-faith" standard on the issue of the adverse possessor's state of mind, because it is unclear how one's personhood can become bound up with ownership of something unless she thinks she owns it. This may be its salient applicable intuition to modern law. If one of the things adverse possession does is protect developed expectations, in the sense of bonds between persons and things, it is hard to see how these bonds can be as strong in the case of people who know the object is not theirs. On the other hand, it seems Hegel contemplated that binding yourself to an object you know is not yours in fact will ultimately make it yours. Still, it seems personality theory is more comfortable with the "color of title" case than with "squatters." In the "boundary" case, it would recommend, more clearly than would utilitarianism, that the boundaries as they are lived should after awhile supersede the boundaries on paper.

The personality theory would seem to disfavor tacking on the side of the adverse possessor. If the statute of limitations represents the time it takes for the adverse possessor to become sufficiently bound up with the property, then it appears that adverse possession has to be accomplished by one person. On the other hand, personality theory does not seem to yield an objection to tacking on the side of the old titleholder, since each owner voluntarily severs the bonds.

Personality theory does not have anything to say about adverse possession by corporations. Nor does it address the problem of future interest holders, since they have not yet had a chance to become self-invested in the property. But since we need either voluntary transfers or true "laches" in order to remove the bonds on the side of the old titleholder, I imagine the issue of "disabilities" looms larger than it does in a utilita-

27. Might the long time required in common law England and in the colonies, and the shorter time required in the American West, be related to cultural differences in the time required to become attached to one's land?

rian view. (But there are many problems here: Has an insane person removed herself from involvement with her property?)

3. Lockean Entitlement

As already discussed, the pure Lockean theory does not countenance adverse possession. But perhaps it colors the theory of adverse possession anyway by lending some sympathy to "squatters." After all, if property is acquired from the common by a nonowner simply by taking it and using it, can we not sympathize with someone who does likewise with owned but unused property, especially if she does not know it is owned?

III. RESTRAINTS UPON ALIENATION

The topic of inalienability and restraints upon alienation is a much broader one than the topic of adverse possession, but so far has been insufficiently studied.[28] The legal infrastructure of capitalism, that is, what is necessary in order for a laissez-faire market system to operate, comprises not merely private property, but private-property-plus-free-contract. That is, in order for the exchange system to operate to allocate resources, there must be both private entitlement to resources and permission to transfer entitlements at will to other private owners. One of the ways liberal theory has sometimes reflected this necessity is by claiming that free alienability is inherent in the concept of property.[29] (Liberal theory could equally well claim, of course, and sometimes does, that private entitlement is implicit in the concept of freedom of contract.) The result has been that the ideal picture of property is perfect alienability, perfect fungibility.

Because of its centrality to the market society infrastructure, alienability is one of the most important liberal indicia of property. The whole

28. Epstein and I are both seeking to remedy that situation. In Epstein's view, "the only justification for restraints of private alienation is to prevent the infliction of external harms, either through aggression or the depletion of common-pool resources." Epstein *supra* note 1, at 705; *see also* Epstein, *Why Restrain Alienation?* 85 COLUM. L. REV. 970 (1985). In my view, the explanation/justification of inalienabilities and restraints on alienation depends upon their coherence with developing central values of personhood and community. *See* Radin, *Market-Inalienability* (forthcoming in 100 HARV. L. REV. (1987)).

29. It seems to me that one of the ways the common law reflected this conceptual tendency was in striking down restraints because they were "repugnant to a fee." In other words, free alienability was inherent in the concept of being a fee simple absolute, and a fee simple with strings attached was something of a contradiction in terms. (Of course, for a utilitarian this conceptualism seems to make a fee some kind of metaphysical entity, when it is really only whatever turns out to be the most socially useful package of rights.)

maze of fees tail, defeasible fees, and future interests, as well as the common law marital property scheme, can be seen as restraints upon alienation in the sense of deviating from the idealized model of the unrestricted fee simple absolute, as can the various servitude doctrines. The holder of a fee tail could never alienate a fee simple. The holder of a defeasible fee cannot transfer it free of the defeasing conditions, just as the modern freeholder cannot transfer free of running covenants and servitudes. Hence the land is in practice inalienable (non-transferrable) to those who would violate the conditions.

The common law developed various doctrines limiting restraints upon alienation imposed by grantors.[30] Fees tail became relatively easy to evade, and now are disallowed by various statutes that reconstrue an attempted fee tail as another (more alienable) interest. Permissible servitudes were (and are) limited by the requirement that they "touch and concern" land, among others. Although the common law did not develop workable limits on future interests remaining in the grantor (possibilities of reverter and rights of entry), there is a trend in modern law to limit them, primarily by Marketable Title Acts.

A. Free Contract and Utilitarianism: Another Case of Principle versus Pragmatics?

Epstein is puzzled by the limits on restraints upon alienation in the common law. In turn, I am puzzled by his puzzlement.[31] He seems to think that utilitarian (and Lockean?) reasoning would lead to total freedom in grantors to create whatever restraints they wish.[32] There is the

30. Epstein's focus upon the rule against perpetuities, which limits only certain kinds of future interests in persons other than the grantor (contingent remainders and executory interests), obscures both the scope of the problem of restraints upon alienation and the range of the common law's responses to it.

31. At least in the case of remainders, Epstein does argue that the restraint is inefficient; he professes puzzlement about why a grantor would want to create them. Epstein, *supra* note 1, at 706-07.

32. Note that Epstein holds at the same time that legally imposed restraints are forbidden, with the exception of necessary prevention of external harm. *See id.* at 705, quoted at *supra*, note 28. Thus his position is that government-imposed structuring of transactions between persons is forbidden, *unless* necessary to prevent externalities, while private (government-authorized) transactions between persons must be protected against government restructuring, *even if* they create restraints resulting in costly externalities. This position may ultimately be incoherent: For a utilitarian, an externality is an externality. At minimum, it places great weight on the problematic "public/private" distinction. From a libertarian point of view, there is no reason to suppose that publicly imposed restraints always represent rent-seeking by special interest groups; sometimes, especially in small local jurisdictions, they may really reflect uncoerced community consensus. There is likewise

same puzzle in the common law limitations on servitudes. Epstein seems to think there is no utilitarian or Lockean reason for limiting the kinds and durations of servitudes that landowners can create. In other words, whatever restrictions the grantor-developer inserts in the deed and manages to sell would be at the same time efficient, an expression of total dominion or liberty with respect to property, and an expression of absolute freedom of contract. I shall argue, however, that rather than finding this harmony, Epstein should find here the same tension between absolute rights and rule-utilitarianism that he finds in the law of adverse possession.

The common law limits on restraints on alienation suggest that there may have to be some limits on market transactions *now* in order to ensure that there will still be a market in the future. This would be perfectly rationalizable in utilitarian terms, as would the common-law rule that "A man cannot create a new kind of inheritance."[33] Assuming that it is efficient to maintain a market with a large scope forever (the long run), then it is efficient to impose enough restraints now to prevent grantors from tying up resources for the future in ways that seriously reduce the scope of the free market. And it seems prima facie cost-effective to disallow endless proliferation of different "bundles of sticks" which would cause a great amount of uncertainty and transactions costs; although, of course, the grantors' welfare in imposing their whims would have to be weighed against this, and whims are hard to weigh.

Epstein is not unaware of the problem of the future market versus the present liberty of contract, of course, but I suggest that it needs deeper treatment than he has so far accorded it.[34] In his paper, it is dismissed in one rather opaque paragraph. The paragraph reads as follows:

> The attack against absolute ownership is not only based upon a concern for dynamics of wealth disposition within the family. In part, the criticism derives from an extensive social concern with intergenerational fairness,

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no reason to suppose that privately imposed restraints always represent uncoerced consensus; sometimes, especially if widely imposed and uniform, they may reflect rent-seeking by those with market power.

33. Johnson v. Whiton, 159 Mass. 424, 34 N.E. 542 (1893) (citing Co. Litt. 27).

34. Frank Michelman has demonstrated theoretically that completely free alienation cannot coexist with complete "propertization" (division of the world of scarce resources into efficient packages of entitlements); *see* ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV (J. Pennock & J. Chapman eds. 1982). Gregory Alexander has examined in detail how this tension was played out in nineteenth-century property law; *see The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

> where it has two dimensions. The first arises from the fact that no future person can own property today. The second derives from a concern with income redistribution, which taken in its extreme form holds that initial financial endowments of any individual should not depend upon the wealth of his parents. Often these concerns are offered as reasons to limit the rights of present owners to dispose of property as they will. But the concern is misplaced. Even if members of the present generation have absolute control over their own material wealth, they cannot deny to members of the next generation their right to their own labor—rights that will be worth more to them in an open and prosperous society. Efforts at confiscation are likely to produce defensive measures that will dissipate the overall stock of wealth, and short of a violent disruption of the family, they cannot reach the wide range of implicit and explicit transfers that take place when children live in the family household. Far from taking coercive steps to promote a set of equal economic endowments for the unborn, the better strategy is to develop institutional arrangements that insure that all members of the next generation will be able to develop their own talents without having to pay (say, in the form of higher taxes) for the extravagances of the previous one, and without being subject to various restrictions (e.g., the minimum wage) that work to entrench the established interests [footnotes omitted].[35]

I shall do no more than sketch several reasons why this is unsatisfactory. First, if the market is absolutely or conceptually necessary for liberty, and liberty is an absolute right, the idea of intergenerational fairness, if it conjures up some balancing between present and future satisfactions, does not adequately capture the absolute necessity, inherent in the notion of liberty, that the market remains available.[36] Second, I do not think the future market in labor alone satisfies this intrinsic necessity of liberal theory, to keep the market available for the future. At minimum, it is clearly not the case, as Epstein suggests, that preserving only the right to sell one's labor would allow for more valuable opportunities (over the alternative of permitting government limits on grantors' free-

35. Epstein, *supra* note 1, at 698-99.

36. For an argument that liberty should not be equated with market liberty, see Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986). *Cf.* J.S. MILL, ON LIBERTY, ch. 5 (1849) stating: "the principle of individual liberty is not involved in the doctrine of Free Trade." This argument may have been problematic for Mill, since he elsewhere seemed to argue that liberty requires total dominion over property, including its alienation; *see* J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, Book II, ch. ii (1848). It is less problematic for me, since I am inclined to reject the purely "negative" view of liberty in favor of some more "positive" view.

dom to restrain alienation of land for the future) for exploitation of one's talents.

To take an extreme hypothetical, suppose that all land and other natural resources used as capital are entailed or otherwise nontransferable. The situation would frustrate laborers because, no matter how "valuable" their labor, they could not acquire these kinds of capital in order to maximize their wealth. Capitalists also would be frustrated because, no matter how "valuable" their capital, they could not invade it to acquire the labor necessary to maximize their wealth. Under these circumstances, it hardly makes sense to say that labor has "value," much less that its "value" is maximized. Unless the worker is creating things for her own consumption, her labor (under a capitalist system, at any rate) has no value in the absence of a buyer. Similarly, unless many classes of widgets (other productive goods and inventions) could be produced without using these tied-up and unreplenishable resources, the market could not exist.[37]

Thus, to "develop institutional arrangements that insure that all members of the next generation will be able to develop their own talents" involves imposing the type of institutional restraints on grantors' freedom that will insure both that the members of the next generation can sell their labor to capitalists who are free to trade for it and that they can acquire capital of their own. Finally, of course, this concern is by no means a concern about "equal economic endowments for the unborn." It is rather a concern about the meaning of the absolute value of liberty and how it should be thought of in respect of the unborn, and a concern about what is required to maximize wealth over time.

Even if the conceptual position that free alienability is inherent in the concept of property accurately characterizes the common law, Epstein misunderstands it. I view the common-law position on the free alienability of property as a position in aid of there being free markets in whatever resources are deemed capable of being property. To argue further in a conceptual vein, as Epstein seems to,[38] that the power to make something inalienable for the future is logically included in the property owner's full alienability at present, does not further free markets as time goes on. Hence it would seem to be in contradiction to the ideal of alienability

37. An insight about this difference between absolute property in widgets and in land seems to be the reason why 19th century theorists like J.S. Mill and T.H. Green argued for limitations on property in land but not widgets.

38. Epstein *supra* note 1, at 704-05.

that Epstein tries to derive it from, once the ideal of alienability is seen in a dynamic dimension. This is true both from a utilitarian and a libertarian point of view. For the utilitarian, open markets for the future are necessary for the long-run maximization of welfare. For the libertarian, market liberty now cannot be construed so as to foreclose significant market liberty for those who will come later. Freedom of contract contains the same temporal tension as does entitlement.

B. Temporality and the Servitude Problem

I would like to consider this temporal tension in slightly more detail with respect to easements, covenants and servitudes, which I refer to generically as servitudes.[39] Although Epstein's view seems to be that a grantor-developer can create whatever servitudes she desires, and, if the lots are sold, make them "run" forever unless all parties subject to them can get together to strike a new bargain, I think both the libertarian and the economic or rule-utilitarian view of servitudes must be much more complicated. In view of the need for alienability in a dynamic sense if there is to be a free market in the long run, I believe more needs to be said than that we should not permit any restraints upon present owners to burden land for the future, because to do so "denies the original parties their contractual freedom by subordinating their desires to the interests of future third parties, who by definition have no proprietary claim to the subject property."[40] Otherwise Epstein's theory of how to deal with the temporal dimension of human affairs when considering liberty (of all "future third parties") boils down to a version of *Aprés moi, la déluge*.

A rule-utilitarian theory of servitudes is likewise a complex problem, especially in light of the fact that whole tracts are covered by packages of servitudes ("residential private governments"). First, as commentators often note,[41] it is hard to end servitudes by bargaining because of familiar

39. Unfortunately, Epstein does not go deeply into this topic in the present paper, although he does affirm his earlier published views. Epstein *supra* note 1, at 713-14; *see also* Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982) [hereinafter cited as *Notice and Freedom*]. I view this as unfortunate because the servitude problem is the most interesting current topic involving the effects of time on property rights; and because I think that if Epstein had juxtaposed the servitude problem with his view of adverse possession he would not have failed to see the same tension at work between absolute rights, which he calls "principle," and utility, which he calls "pragmatics."

40. Epstein, *Notice and Freedom, supra* note 39, at 1360.

41. *See, e.g.*, Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978); Sterk,

transactions-costs problems and strategic behavior (holding out against those who attempt to negotiate; freeriding on those who litigate). The common law "changed conditions" doctrine is a kind of "sunset" doctrine which can be construed as recognizing this. Marketable Title Acts, to the extent they apply to servitudes, are even more clearly "sunset laws." Does Epstein oppose Marketable Title Acts? Does he favor them only as a default provision that grantor-developers can disclaim? If so, how will he square this with the imperative he finds in adverse possession, that property as it is treated in real life must periodically be brought into conformity with the record books?

Second, it is not clear that the nature of the land market and the residential housing market is such (or everywhere such) that developers will be forced by competition to create optimal servitude packages. To the extent that market failure is present, optimal results will not be achieved through laissez-faire. If liberty or Lockean dominion nevertheless requires total freedom of servitude creation, with respect to duration as well as form, then Epstein will have to face a trade-off of efficiency for liberty.

Third, in order to decide whether a package of servitudes is welfare-maximizing, we must consider whether we are trying to maximize only the welfare of those in the tract covered by the servitudes, or the welfare of the suburb in which the tract is located, or the welfare of the whole city or region, etc. In other words, in order to know whether a servitude package is optimal, one of the things we have to know is whether it creates significant externalities, and in order to know what are to count as externalities, we have to know the "jurisdiction" over which we are maximizing welfare. If we are maximizing welfare merely within the tract itself, we do not mind that its requirement that all houses be painted sky-blue-pink casts significant costs onto neighboring tracts, whereas if our welfare "jurisdiction" is the entire suburb, sky-blue-pink becomes a cost that must be taken into account.[42] To make matters worse, the optimal jurisdiction is likely to vary over time, and there is no reason to suppose that it will be coextensive with political boundaries, still less with the

Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 IOWA L. REV. 615 (1985).

42. In my view, this "optimal jurisdiction problem" is an interesting way to see the issue the court was wrestling with in Southern Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) ("[T]he general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.").

extent of land owned by any given grantor-developer imposing servitudes. To my knowledge, commentators on the servitude problem, while often pointing to the externality-creating potential, have ignored this problem.

Time creates complexities in the servitude problem from the point of view of personality theory also. I shall conclude by taking note of some of them. A community that, either by local zoning legislation or by "residential private government," excludes certain kinds of people, for example by age, gender, class, or race, or even certain kinds of architecture, is creating a social environment for itself. The community might be desirable to purchasers for the very reason that it is "exclusionary" in this sense. These physical and social characteristics of a community can become bound up over time with the personhood of individual residents and with the group's existence as a community. In other words, these restrictions create long-term status relationships that resist alteration by contract. Since this is so, it is misleading to think of servitudes as only contractual, even though they begin by original buyers voluntarily (or nominally voluntarily) signing on to them.

In my present thinking on this subject, one cannot judge in the abstract whether this kind of status creation is good or bad. It might be bad if those in the main stream of American culture and economic life, who are not having difficulty living out their culture and beliefs, create monolithic exclusions that make it impossible for minorities and dissenters to form communities and live out their alternative visions. It might be good if it instead enables minorities and dissenters to form communities and live out their alternative visions. Be that as it may, unless we are sure that wealth distribution is such, and the housing market is such, that those who live under servitudes can freely go elsewhere if they find them onerous, it does not sit well in liberal ideology for someone to be stuck with a status forever, even if she has "chosen" it originally, and still less does it sit well with liberal ideology for successors in title to be stuck with it forever.[43] The progress from status to contract, from feudalism to the free market, is viewed as progress in freedom to make of oneself what one will, with flexibility to develop and change in the course of one's lifetime.

This whole debate is often couched in terms of trying to breathe life into the common law touch-and-concern requirement.[44] It might be bet-

43. *Cf.* the treatment of "regret" as a moral reason to limit freedom of contract in Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

44. *See, e.g.*, Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978).

ter for us just to say there are moral limitations on servitudes. Allowing people to get stuck in statuses that are anti-personhood is contrary to the liberal ideal of self-development, while allowing them to create enduring statuses that are pro-personhood is an expression of the liberal ideal. For personality theory, the degree of attachment to the servitude would be relevant, as well as whether it creates a status that persons *should* become attached to in expressing personhood or freedom.[45] What counts as a pro-personhood status is in my view also contextual; that is, it evolves through time.

IV. CONCLUSION

The problem of maintaining freedom over time and throughout a legal and political system is not the same problem theoretically as exercising freedom at the moment.[46] This is the central theoretical issue I believe Epstein has not come to grips with in his general treatment of restraints upon alienation. He has focused on the freedom of individual grantors and creators of servitudes, without taking fully into account what role the resulting restraints play in enhancing or inhibiting freedom or personhood systematically and over time. The tension engendered by this issue is analogous to the tension in normative theories of property that Epstein has noticed, but not worked through, in his treatment of adverse possession.

45. Perhaps the list of proscribed servitudes would include things that look like new feudalism, such as requirements that the resident always buy supplies at the grantor's store, serve in the grantor's employ, etc.; and things that look like discrimination by the relatively powerful against the relatively powerless, such as the formerly common servitudes specifying that the resident must be of the Caucasian race; and perhaps things that look like tying essentials of life (like housing) to important and disputed matters of conscience, like religion or political affiliation, etc. This list of moral limitations on servitudes correlates fairly well with Reichman's proposed rereading of the touch-and-concern requirements. *See* Reichman, *supra* note 44.

46. Perhaps this is why J.S. Mill in ON LIBERTY argued against freedom to sell oneself into slavery on the ground that "[t]he principle of freedom cannot require that [one] should be free not to be free. It is not freedom to be allowed to alienate [one's] freedom." J.S. MILL, *supra* note 36.