

**Professor Michelman's Unnecessary and Futile
Search for the Philosopher's Touchstone**

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Harold Demsetz

**Department of Economics
UCLA
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The topic to which Professor Michelman applies his considerable talents is much too difficult to execute well with less than a lifetime's effort. More the pity that a successful treatment of it is hardly necessary to Michelman's objective. Indeed, his difficult wanderings in the text of his paper detract from the straightforward statement found in his concluding comments. The conclusion, that private property arrangements are neither necessarily efficient, nor, even if efficient, necessarily based on a universally acceptable ethic, is correct but hardly surprising.

Michleman begins by attempting to define a pure private property system. His complicated wanderings through this topic indicate how difficult he must have found the task, as well he should have. He puts forward three alternative definitions (which I believe hardly exhaust the plausible possibilities), and then argues that none of these definitions, nor the efficiency they may promote, reveals a compelling universal ethic. Hence, the endorsement of private property solutions, or, of efficiency, as practical solutions to legal problems should be smothered in a blanket of enveloping caution by legal scholars.

*Professor of Economics at UCLA.

While it is possible to quarrel with many of the details of Michelman's treatment of property right systems and efficiency, I am quite prepared to accept his conclusion about the absence of a universally appealing ethic. Whether or not special caution should be taken by legal scholars to protect themselves from the allures of private property solutions and the allure of the efficiency criterion depends, of course, on the cost of special caution (back to efficiency!), where, included in that cost is the encouragement of an already strong propensity to endorse non-private property solutions with vague and often mystical alternative criteria.

If Michelman subjects alternative institutional arrangements, whether they be socialism, communism, feudalism, a "state of nature," or any specific mix of these, including mixes with a private property right system, to a similar analysis, he will find that they too fail to supply a universally acceptable ethic or even efficiency. That is why Michelman's discussion is useless insofar as it seeks to guide the thoughts and caution of others. Of all possible social systems, all will fail to meet his test, but that is insufficient to conclude that none is more appealing than the others. Whatever the system, there will be a few (or many) persons who are ethically frustrated or who fare less well than they would in some other system. Such a finding sheds no light on whether it would be (non-universally) "better" to change present institutional arrangements so as to conform more closely with another.

The Presumptive Efficiency Thesis analyzed by Professor Michelman is not quite clear to me. It seems to have three parts.

- (1) There is a habit of thought and argument, widespread and influential enough to warrant refutation ...
- (2) in which private property is supposed to commend itself logically to whomever admits that persons are rational ...
- (3) and that a large part of this commendation is based on the alleged universal acceptability of an efficiency ethic.

It matters little whether all three parts are necessary to Michelman's thesis. A world, especially its intellectuals, still hell-bent on governmental or utopian programs to resolve social and ethical problems is hardly a world experiencing a contagion of desire for private property arrangements. In the much narrower world of economists, the postulated habit of thought is difficult to find. The Presumptive Efficiency Thesis, to my knowledge, not only is non-existent in the mainstream of economic thought but also in its major tributaries. I cannot testify with regard to every rivulet flowing into the rivers Charles or Chicago, but virtually every economist would agree with the following statements:

(A) A judgment that efficiency is good (or that it is bad) is not self-contained in the logic or substance of economics; when such judgments are made, they come from a value scheme outside economics. These external values run the gamut from "efficiency be damned, what we want is equitable redistribution," to "redistribution be damned, what we want is efficiency," although there probably is a tendency among economists to give greater value to efficiency than there is among non-economists.

(B) A proposition that private property commends itself logically to whomever admits that persons are rational may be dismissed in the same

manner. Indeed, economics has been at the forefront of analyzing criminal activity, the antithesis of activity consistent with private property, as an industry based on rational calculation of gains and losses; rational people in economics do not always respect or encourage private property.

(C) Certainly the considerable attention given in economics to externality, free-rider, and monopoly problems belies any simple extrapolation from private property to efficiency.

This is not to deny that there are economists who external values suggest that a broad enlargement in the role played by private property is desirable, or that there are others who feel the reverse. But the notion that these prescriptions are self-contained, logical deductions from rationality, unaided by exogenous value systems, is not descriptive of economics nor of the thinking of the great plurality of economists.

I am not so knowledgeable about how well or how poorly economics and economists are used by legal scholars. My inclinations are to join Michelman in criticizing those who truly hold to the Presumptive Efficiency Thesis, to doubt that there are many who really do, and to criticize Michelman for writing off the usefulness of private property and of efficiency in contributing to a sensible solution to many legal questions, merely because he cannot produce an irrefutable proof of the universal desirability of (some version of) a private property system.

My criticisms of those who really subscribe to Michelman's Presumptive Efficiency Thesis should be clear from my earlier remarks concerning the position of economics on this issue. Clearly, there are people who would be judged to be rational who prefer social arrangements involving more

coercion than would be consistent with a reasonable definition of a private property right system. These include not only those who desire forced redistribution of wealth but also those who derive positive utility from the act of coercing others; the bully and the rapist, for example, would probably not derive as much pleasure from voluntary submission as from coerced taking.

It is even possible to conjure up a scenario in which most rational persons would choose to act coercively in violation of private property precepts. Let there be a religious sect, homo legalis, the first persons to protect and nurture through great personal labor (thus satisfying even Murray Rothbard's principle of private property right entitlements), the world's only supply of trees yielding Pure Ethicacious Tar. They worship their PET trees; never would they let them be tampered with in any way. It is discovered that PET is a sure cure for cancer, but the homo legalis refuse, for any compensation, to let these trees be tampered with. Now, I am not quite sure as to the moral course of action for non-homo legalis, but I am sure as to how most would act -- to violate the property rights of the islanders and take the PET. So much for the inviolability of private property by thinking, rational persons, and so much for my agreement with Michelman. Now back to disagreeing.

The standard set by Michelman is too high to be satisfied by any social system. He seeks an a priori linkage of property with rationality and efficiency, a linkage independent of the content of the wants and the social proclivities of their bearers. The standard is, of course, impossible to satisfy, because it is always possible to imagine a cost so great

associated with maintenance of the system that it seems best to violate the system. The impossibility of its satisfaction is in fact implied by economics which envisages rational man as seeking many goals, all substitutable at the margin. On the margin, economic man is prepared to trade off some freedom for some security, some privacy for some wealth, some freedom for some paternalism, and vice versa; since no single, simple, pure social organization can deliver maximum quantities of all such goals, some mixture of systems is implied. Hence, the defender of a private property right system may accept government enforcement of private rights and even government provision that collective good called national defense. The impossibly high standard set by Michelman, however useful it may be for attacking his view of the Presumptive Efficiency Thesis, is of little if any use in delivering practical guidance to legal decisions about social organization. For example, it would seem to me incredible to refuse to endorse a private property right solution because some rational people delight in coercing others. Behind the endorsement of any real solution is some implicit acceptable pattern of preferences. These preferences might give some scope to income redistribution, to paternalism, to externality or monopoly problems, and because of these considerations, the role played by purely private property rights in social organization may be more truncated than when such preferences are not accredited.

But the prima facie case for private property solutions is great, for these solutions more than others tend to confront persons with (a measure of) the cost (to others) of their actions, and perhaps with the only truly practical and generalizable measure. Private property allows the market to weigh and compare the beneficial and harmful effects, measured by the

money that people are willing to pay, and to filter out situations that would yield a net loss in this metric. The free market does not prohibit harmful effects. Indeed, a system that did, such as one based on the unanimity principle, would be so intolerably impractical (inefficient!) that it would soon give way to other arrangements.

That harmful effects are borne through the operation of free markets can be illustrated clearly when a competition reduced the price of his product. However beneficial the price cut is to consumers, it imposes harmful effects on other producers of this product. The price will succeed only if the harm done to rivals has a lower value attached to it by these rivals than is the gain to the price cutter and buyers, for otherwise his rivals would be willing to offset his price cut with one of their own that is large enough to keep their buyers.

It is this aspect of the private property rights system that is one of its great strengths. It is difficult to know, in the absence of individualized voluntarily given consent to a transfer of resources, whether a reallocation of resources yields a net gain since such transfers also impose harmful effects. The net gain so measured, it is worth repeating, is an index based on willingness to pay, not on some global utility maximization. The market, or indeed, any practical social system, must tolerate activities that impose costs on some individuals; hence social systems cannot be rejected because some actions consistent with these systems are objected to by those who would suffer. It is important to realize that scarcity implies cost, and it is impossible to reallocate resources without some bearing, by some persons, of this cost. It is highly desirable, therefore, to have some index of whether gains exceed cost. Private property

markets provide a highly workable index, but it is not the only index that may be applied to a specific situation, nor is its value always determinative. But it is always useful information. Information impossible to secure through coercive techniques. It is amazing how tolerant we are of such costs when they are embedded in a private property rights system in which willingness to pay is the index. Perhaps one of the more redeeming features of such a system is its apparent ability to attenuate the degree of group conflict that seems to infect those socialistic systems in which collective decisions on resource allocation and wealth distribution are made through democratic political institutions.

The utilization of private right solutions, which, in a practical sense, precede market negotiations, introduces this useful metric into the calculus of scarcity. Situations may arise for which the advantage of having this metric is offset by distributional considerations, or in which, as in the case of externalities, the efficacy of the metric is reduced. Well, then, perhaps some attenuation of private rights is in order. But in these issues, as lawyers well know, it is important where the burden of proof lies. The desirability of possessing an operable cost-benefit metric, especially one that is consistent with a goal that many value highly -- individual freedom -- argues strongly for a prima facie solution based on private property rights, but a solution to which reasoned rebuttal is possible.

Michelman's rejection of the claim that a private property system is logically derivable as the appropriate ethic of rational people in no way undermines the day-to-day practical solutions it offers to many legal problems. This is especially the case when blindfolded courtroom justice

must avoid looking to the income of the litigants, to their color, sex, or to other dimensions extraneous to the facts. What then are the facts to which the law looks? One set of facts determines the applicable precedent. But if we are starting anew, reconsidering all precedents and creating new ones, then to what facts should the court look? Surely, the private costs and benefits, measured by the implicit market values that accrue to alternative solutions, constitute an important, definable and non-personal set of relevant facts.