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PROPERTY AND PRECISION

Margaret Jane Radin*

I. INTRODUCTION

When I was a law student in the early 1970s, I needed a perspective on property other than the one I got from my instructor, who, I used to say, would call it a transaction cost if he tripped over a body in the gutter. In the library, I found some of the early writings of Frank Michelman, and I became a lifelong student and fan. When I was a young scholar that nobody had heard of, Frank paid me the highest honor of taking my ideas seriously. I hope I can pass that on with something approaching the generosity that he showed me. Except for a recent casebook on Internet commerce,¹ Frank is the only person, other than students, with whom I have co-authored.² Take a look at the piece we co-wrote, “Pragmatist and Poststructuralist Critical Legal Practice,” and I challenge you to pull apart our contributions, so cohesive was the process, and so serious was Frank about integrating our ideas. So here I am, grateful and admiring, to try to say something worthy of him.

I have chosen to focus on Michelman’s unsung, or at least seriously undersung, piece of property theory, published in the *Nomos* series in 1982, entitled “Ethics, Economics, and the Law of Property.”³ My motives for choosing this piece are as follows. First, I know something about the topic, so maybe I can say something worthwhile in a short space. The piece deserves more careful treatment, though. With more time, I would have focused on its place within Michelman’s more general scholarship and the development of his thought over time. He is the opposite of the kind of professor who has a template and runs various subjects through it; rather, his perspective grows in power the more subjects he tackles. On a still broader scale, it would be worthwhile to explore his remarkable achievement in thinking through Rawls’s theory of justice as it

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1. See Margaret Jane Radin, John A. Rothchild & Gregory M. Silverman, *Internet Commerce: The Emerging Legal Framework* (Found. Press 2002).

2. See Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. Pa. L. Rev. 1019 (1991).

3. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *NOMOS XXIV: Ethics, Economics, and the Law 3* (J. Roland Pennock & John W. Chapman eds., N.Y.U. Press 1982) (reprinted in 39 *Tulsa L. Rev.* 663 (2004)).

implicates law. This is an important achievement, and I wish I had time to explore it. And just for fun, Michelman's distinctive flair for writing could motivate a study of the unmistakable "Michelmanic rhetoric." Here, I will have to settle for quoting examples, allowing the flair to speak for itself.

A second reason for choosing "Ethics, Economics, and the Law of Property" is more personal. I too have published articles in relatively obscure venues that sank beneath the scholarly waves too quickly, so I sympathize with the article's state of being unsung, or at least seriously undersung. Moreover, I too had an early article that was a big "hit" on the charts, with snippets making it into casebooks, which only seemed to forestall anyone's reading later articles.⁴ So I am acutely aware that everyone cites Michelman by reference to his early hit, "Property, Utility, and Fairness,"⁵ to the neglect of equally important later work. In my opinion, we have suffered the most from failing to give due attention to "Ethics, Economics, and the Law of Property," but, alas, there are other works that have also not received the attention they deserve.⁶

My third reason for choosing this piece, and I expect that my audience will find this the important reason, is that I think it's the best piece of property theory of its generation, and maybe the best in the twentieth century, period. If Michelman had the chutzpah of Kant, he could have called his essay "Prolegomenon to all Future Study of Property Theory." In just thirty-four pages (or forty with footnotes) it has the highest idea-to-word ratio of anything I have ever read by a law professor. It is also the most impressive in terms of its consistently precise and terse statement of ideas (at least among law professors). Moreover, it is one of those rare works that can teach us how to think about its topic (as I will try to explain). That is one of the reasons that scholars need to read the work more carefully. Studying this article could save a whole generation from re-inventing the wheel. It could save those of us who have absorbed Michelman from gnashing our teeth when subsequent writers blithely assume a tragic commons everywhere, or that more propertization is always better. In my present field of intellectual property, there is far too much of that. If Michelman were better understood, I think—or at least hope—that there would be much less.

II. THE ARGUMENT

What Michelman sets out to convince us of in this article is that economic arguments purporting to deduce, merely from the economist's core premise of rational maximizing behavior, that private property is efficient are, and must be, covertly smuggling in other premises; and that these other premises are necessarily value-laden. The critical aim of the article is to get these hidden, value-laden premises recognized and then to use them to critique real-world property regimes.

4. See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982).

5. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* *Law*, 80 *Harv. L. Rev.* 1165 (1967).

6. E.g. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *Iowa L. Rev.* 1319 (1987).

I promised some highlights of Michelmanic rhetoric, so permit me to jump to the conclusion and quote two sentences.

Suppose, for example, you think that the efficiency of private property is rooted in a species-characteristic need or craving for privacy and security of person, or for the experience of self-command over personal labor and product. Then if you observed a society in which measurable numbers of persons were selling rights over their bodies in exchange for the means of subsistence, or could live only by submitting to the productive direction of others, you would have to see that situation as problematic.⁷

The particular Michelmanic touch is getting the entire giant elephant of wage labor wedged in between a couple of commas—“or could live only by submitting to the productive direction of others”⁸—that is the kind of detail worth savoring.

Let me outline the analytical agenda that is accomplished so neatly in those thirty-four pages. At almost every step, Michelman makes a significant contribution to property theory.

A. *Define What It Means to Have a Private Property Regime*

This topic alone captures a significant intellectual achievement. The article sets out an institutional paradigm for private property that is, in my view, the best of a long list in the literature.⁹ It begins with the insight that a private property regime must include coordination rules and principles.¹⁰ In particular, Michelman points out that there must be rules for composition, decomposition, and recomposition of the objects that count as property, and that these rules are subject to limits. He gives us the memorable example of the checkerboard field divided into one-centimeter squares,¹¹ and demonstrates why that would not work as a possible property arrangement. And who could fail to appreciate the non-exclusive Monday-Friday checkerboard skeet shooting easement example?¹² In this stage, the argument explains to us that no matter how enthusiastically private property is embraced, there must be some rational selection of principles about coordination, about how property can be composed and decomposed.

Next, we must consider to what extent the regime will promote units of property that lend themselves to internalization of costs and benefits to an owner, versus units that lend themselves to “non-intervention,” or what I would call full alienability. In the late 1970s and early 1980s, without the benefit of Michelman’s thought on these topics, I was engaged in a prolonged debate with Richard Epstein which, it turned out, was not so much a debate as two ships passing in the

7. Michelman, *supra* n. 3, at 33.

8. *Id.*

9. *See id.* at 4-5.

10. *Id.* at 10.

11. *Id.* at 9.

12. *See* Michelman, *supra* n. 3, at 16-17.

night.¹³ Epstein wanted to force the point that, as a full owner of a piece of property, one could create any kind of complex detailed condition on alienation. If one so desired, he should be able to arrange that, on condition that someone didn't marry so-and-so from the law school, the property would pass to the spouse's third relative, and so on. My point was that if we allowed such unrestrained complexities, we would destroy the freedom of our successors. So I tried to frame the debate as one about freedom now versus freedom later—for example, by accusing Epstein of advocating the “*après moi le deluge*” position. But from the perspective of Michelman, I was talking about the importance of internalization principles, which regulate alienation as time goes on, while Epstein was talking about non-intervention principles, which he saw as necessary to preserve liberty now. Michelman saw the inevitability of tension between these two kinds of principles, and he carefully characterized the possible strategies to reconcile them.¹⁴

Another point to Michelman's credit is that he foresaw the possibility of devolution over time of such principles—a topic that is in fashion today, but with which he was concerned twenty-five years ago. He saw that over time, people living under such principles would likely distort them from their idealized form.¹⁵ Therefore, we face the challenge that if we are to maintain in practice the mix of principles we have chosen, we must develop some way to pre-commit to the pattern chosen, or perhaps to pre-commit to stopping and fixing things at the level of principle from time to time.

B. *Define the Presumptive Efficiency Thesis (PET)*

The next step of Michelman's analytical procedure recognizes that if we are going to have a serious argument over whether private property regimes are presumptively efficient, we had better have a very precise definition of the thesis at issue. So he defines, with great precision, what that thesis must say.¹⁶ Included in his definition is the critical point that the thesis must be a comparative one—if a private property regime is to be called efficient, then it must be called efficient compared to some other regime. Michelman's article goes into the details of how to define something that is not a private property regime for this purpose.¹⁷ While I will not follow this point into the necessary detail, I do think it is underappreciated how important it is to define precisely what should count as an alternative, and hence, what could even be argued to be presumptively (comparatively) less efficient.

13. For an overview of the debate, see Margaret Jane Radin, *Reinterpreting Property* 22-27 (U. Chi. Press 1993).

14. Michelman, *supra* n. 3, at 17-18.

15. *Id.* at 18.

16. *Id.* at 7.

17. *Id.*

C. *Recognize That We Have Distribution Constraints and Rights Constraints That Make Different Systems More or Less Tolerable*

Michelman recognized that even if we try to use economic principles of selection there are concerns about distribution and about rights that make specific systems preferable for independent reasons.¹⁸ The key insight is that these must be considered as prior constraints on utilitarian constructions of justification, rather than just additional preferences to add to the utilitarian hopper. Thus, there is a forced recognition that there are constraints that operate independently of an economic choice between a private property regime and the non-private-property alternative.

D. *Now Ask Whether We Can Deduce That the Chosen Private Property Regime Will Be Efficient Compared to Any Non-Private-Property Regime That Also Satisfies Our Conditions on Distribution and on Rights*

Having set up the question sufficiently to ask it with tolerable precision, the next step is to ask it. Whether we consider the economic postulate that persons are rational maximizers to be a factual premise about behavior or a theoretical principle of reasoning, the question is whether we can deduce, from this postulate alone, that the chosen private property regime will be comparatively efficient. Whether we call it a factual behavior premise, or a theoretical principle of reasoning, the conclusion must be that the chosen private property regime will be comparatively efficient. That conclusion apparently requires additional premises.¹⁹

E. *Conditionally Assert That Additional Premises Are Required*

Of course, it is hard to prove the negative proposition that no additional premises are required in addition to the supposed behavioral fact or supposed theoretical imperative of economic rationality. As far as I know, no one has seriously argued (rather than just tacitly assumed) that there are no necessary additional premises; so, Michelman was right to turn to the question of what those additional premises could be.

F. *Describe the Premises That Are Likely Candidates to Be Smuggled into the Argument*

Michelman provides a list of six additional premises worth considering.²⁰ The identification of these tacit premises is a highly significant achievement. He is gracious in that he doesn't provide examples of the people who have made these assumptions without acknowledging them; rather, he has a point to make about the nature of the claims in these premises. Here is a sample to give the flavor of

18. *Id.*

19. See Michelman, *supra* n. 3, at 21-22.

20. *Id.*

these premises: that people prefer to be unmolested producers rather than grabbers subject to grabbing by others, or recipients of others' sharing who must also share with others; that people prefer the experience of private exchange through markets to that of public decision through politics, and to that of informal, extralegal cooperation; that a potential producer's uncertainty about the extent of product that the producer will retain, after predation and/or forced sharing, will have the result of less production, less valued goods, or wasteful defensive measures; or that failure of coordination, through information failure and strategies of freeloading and bluffing, will be lesser under a market process than under a political process of collective decision or an extralegal process of voluntary cooperation.

G. Show That These Smuggled Premises Are Moral or Value-Laden

The problem Michelman identifies with these claims is that they are either false or what he calls "quasi-empirical."²¹ What Michelman means by this is that their truth or falsity is unknown, and, although they could be factual, they are best understood as propositions expressing the speaker's assumptions about the facts, which assumptions are in turn best understood as moral propositions expressing the speaker's view of how things ought to be.

The overarching point illuminated by the notion of "quasi-empiricism" is analogous to the well-known utilitarian difficulty with the utility monster—once we count people's preferences for experiences and social states of affairs, we can't assume the utilitarian calculus will come out in the orderly Posnerian fashion.²² For example, it could be that some people really, really like using other people's bodies. Thus, says Michelman:

One cannot just dismiss such preferences as "nonrational" Of course, one *might* discount them as morally unworthy [at the cost of moving the debate explicitly to noneconomic moral grounds]. One can also try admitting that there may be some people with the licentious preferences, but so few that their deviant wants are plainly outweighed by those of the host of normal security-preferrers. Thus would one enter upon quasi empiricism. Surely the crucial countings and "weighings" are not empirically known or verifiable. Surely one's sense of conviction about them arises from intellectual faculties hard to distinguish from those employed in moral intuition and moral reason. Surely their stuff is the stuff of Ought, though their form be the form of Is.²³

I also recommend a similar, and similarly Michelmanic, passage on our supposed inability to organize coordinated behavior if there are large numbers who must agree, because we are naturally untrusting and uncooperative. This is one of the most frequently smuggled premises in economic arguments about property. It begs the question of how the property-protecting state can ever get

21. *Id.* at 21-22.

22. For a much more elaborate explanation, see Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711 (1980).

23. Michelman, *supra* n. 3, at 23-24.

organized in the first place. Other people, starting at least with Hobbes,²⁴ have noticed this move and exposed it, but I think Michelman provides the best statement of it.

What is private property, regarded from the standpoint of economic policy, but a particular form of regulation, a species of those “definite social arrangements . . . that create coercion of some sort,” institution of which is offered as the alternative to tragedy? But then come the questions: Instituted (fashioned, decided upon) by whom? Policed and enforced by whom? Obeyed by whom, and why? Because if (and only if!) I don’t obey, the constable will catch me, the prosecutor try me, the magistrate convict me, the sheriff punish me? Who will make them? Where can the regress end, if not in uncoerced cooperation, the untragic commons of constitutional practice founded on a “rule” that there is no one to enforce but that people on the whole adhere to, though adherence is in the interest of no one who does not trust that (most) others will adhere to it In other words: no trust, no property.²⁵

III. DIRECTIONS FOR FUTURE WORK

Let me now turn from discussion of this article to the paths it paves for future work. While some of this work has begun, there is much that remains.

First, Michelman’s work highlights the phenomenon of feedback from private property regimes into preference formation. The concluding paragraph of the article encourages us to think more critically about regimes of private property even if we come to believe some moral premise about the selfishness of persons:

[S]uppose, finally, that your commitment to private property was rooted in belief that individuals do, as a matter of fact, usually exhibit prisoner rationality in their encounters with one another. It is at least a possibility that you would, on further reflection, think . . . that the relation between the condition of trustlessness and given institutions of private property might be not unidirectional but reciprocal—so that not only is private property a prudent response to a given state of trustlessness, but also particular private property arrangements sanction and reinforce trustlessness.²⁶

The phenomenon of feedback was not Michelman’s primary focus of attention in this article, yet he was clearly aware of its importance. The early Marx said that “[p]rivate property has made us so stupid and one-sided that an object is only *ours* when we have it”²⁷ If private property creates the trustlessness that private property is supposed to cure, then private property has no justification but itself, if we are sticking with economic reasoning. “Hell,” as Michelman himself might say, “private property might have created economic reasoning too!”

24. See Thomas Hobbes, *Leviathan*, pt. 1, ch. XIV (Oxford U. Press 1958).

25. Michelman, *supra* n. 3, at 30-31 (quoting Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1247 (1968)) (footnotes omitted).

26. *Id.* at 34.

27. Karl Marx, *Economic and Philosophical Manuscripts*, in *Early Writings* 279, 351 (Rodney Livingstone & Gregor Benton trans., Penguin Bks. 1975).

Thus, we are faced with the question of whether our private property regimes have made us too stupid and one-sided to prefer anything better. Or, does there remain a stubborn impulse to non-commodification that will not give up so easily? Although I have tried to address that question, I have so far not been able to figure out whether it should be understood as an empirical question, or if not, what kind of question it is. I think that critical theorists should still be concerned with it. Commodification in the arena of information propertization is a particularly salient current issue. For example, if semiotic theory shows the permeation of all of our social world with the power of words and texts, should that serve to extend the propertization scheme of trademark ownership?²⁸

Another path for future work lies in the interplay of rights reasoning and maximization reasoning that we see in this article. The article, even though it is facially about economic rationales, does insist on the role of distribution-oriented and rights-oriented commitments in constraining possible economic theories.²⁹ Following this lead, one might well consider whether there are predictable differences in the devolution rates of distribution principles and rights under different regimes. I don't think there has been enough exploration down that path. It is a species of non-ideal theory, and our political theorists have not been as interested in non-ideal theory as I believe they should be.

In more general terms, a proper appreciation for the dynamic (and also non-ideal) aspects of property is one of the strengths of the article that I advocate here. Michelman's points about the phenomena of devolution of principles over time and of feedback from the status quo regime into preference formation are examples of the dynamic perspective. The current discussion of the possibility of pre-commitment is one example where the dynamic perspective has been influential, but surely there are many more paths to be taken.

Technological developments will continue to motivate the reconsideration of how to arrange property schemes at a basic level, and attention to Michelman's work on the characterization of a property regime should be most helpful in this task. Here again, information propertization is an urgent item on the theoretical agenda. I have in mind the likelihood that the Internet will require us to think in new ways about the ease of spillover in property arrangements—about the “permeability” or “adjacency” of property that, thanks to technology, is now possible in cyberspace.

Moreover, we need to address the very important question about the optimal scale of propertization; Michelman would consider this to be a part of the general issue of internalization.³⁰ Questions about optimal “package size” and the limits of decomposition are latent within the example of the checkerboard ownership of the field. In that example, if the field as a whole is taken as the resource, the warning is that property could, in principle, be defined in packages that are of the

28. See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621 (2004).

29. Michelman, *supra* n. 3, at 7.

30. See *id.* at 12.

wrong size for anyone to use the resource efficiently.³¹ In a way, this is also a question about defining what the resource is. To use one of my favorite examples from a former student, Kevin E. Collins, it used to be unproblematic to assign ownership of the airspace over a farm to the owner, but the advent of airplane travel caused us to rethink the scale at which we defined ownership. This kind of change continues to be forced on us as technology changes our use of resources such as air and water. The Internet will surely provide us with more examples, as we try to define the scale at which we should think of parts of the Internet as resources or property—the individual computer, the local network, the backbone.

Finally, we need to investigate the dividing line between reasonable and pathological commitments to private property. Consider what is now called “system on a chip”—a semi-conductor chip with enough circuitry embedded in it to run complex programs, such as the operating system for a hand-held device. There are many patents and other forms of intellectual property protections covering the features that one might want to put into a system on a chip. Should we demand that the manufacturer of the chip obtain licenses from each of the hundreds of different owners in order to create the product? The exclusive rights of each of these owners will likely lead to unproductive fragmentation. Does that mean that we are in need of a basic reconsideration of the present rules of internalization, intervention, and recomposition? Doesn't the thicket of rights lead to exactly the same problem as Michelman identified with collectivization—that everyone's permission is needed as a condition of doing anything? If the situation can be characterized partly as collectivization and partly as private property, what respect is due to the “non-intervention” claims of the owners?

These questions straddle the divide between theory and practice. They are good questions, and Michelman's work helps us to think about them clearly and productively.

IV. CONCLUSION

Michelman urges us to be critical. He urges us to question whether our premises, once recognized as value-based, fit the institutions on the ground. This is a wonderful pragmatist marriage of theory and practice, a much-needed focus on non-ideal analysis of concepts and institutions. Far be it from me to point out a nifty deconstruction, but it is, of course, also a dissolution of the fact/value dichotomy.

There is a simpler lesson to learn as well: we should stop thinking that private property regimes are always the best alternative to pursue, and that more private property is always better. Even from within the narrow perspective of economics these statements are false, due to administrative costs and deadweight losses associated with monopolization. Michelman's work shows us how to examine real world examples where the consequences of uncritical private

31. *See id.* at 8-17.

property are not so mathematically obvious and to expose the value choices behind the rationales used to support them.