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On the Use and Abuse of Blackstone — A Comment on Professor Schorr

A Comment on: "How Blackstone Became a Blackstonian" by David B. Schorr.

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David Schorr's *How Blackstone Became a Blackstonian*[1] is concerned with the career of a phrase masquerading as a definition. "Sole and despotic dominion" is an evocative characterization, and Schorr's discussion bears important fruit, showing how little Blackstone's phrase contributed to Blackstone's own conception of property. For the most part, I would like to ride in the wake of Schorr's analysis to speculate further on the jurisprudential context of the career of sole and despotic dominion. But as a prologue to that inquiry, it seems worthwhile to highlight, ever so briefly, one aspect of the issue that Schorr relegates to the back burner: the question of the inviolability of property as against the state. Schorr briefly notes that there is an "inverse relationship between the extent to which public-law circumscribes property rights on the one hand, and the exclusivity and absoluteness of those rights on the other."[2] But these considerations are set aside in favor of a discussion of the analytical dimensions of property, a choice that lends power, in my view too, to Schorr's discussion. That said, it is worthwhile to consider Blackstone's own words on the topic. And thus, I'd like to preface with a quotation from Blackstone, but not from one of his definitions of property, which are over-quoted. The quotation comes from a closely related section, wherein Blackstone discusses the absolute rights of Englishmen, just before his second and less famous definition. The absolute rights are those that would exist in nature, and human laws should first of all protect these absolute rights. Afterwards, there are relative rights which arise from the complexity of society after its establishment. At any rate, men give up some of their natural liberty in order to enter a state of society, just as in

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1 David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009).

2 Schorr, *supra* note 1, at 106.

Hobbes, and are then governed, and in a situation "infinitely more desirable" than had they had no government. Blackstone writes:

> Political therefore, or civil, liberty, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind. But every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty. Whereas if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state, of society, which alone can secure our independence. Thus the Statute of king Edward IV, which forbad the fine gentlemen of those times to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II, which prescribes a thing seemingly as indifferent, viz. a dress for the dead, who are all ordered to be buried in woolen, is a law consistent with public liberty, for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed) where there is no law, there is no freedom.[3]

Now, not much later on, Blackstone says things that seem opposed to this generous interpretation of what a rational purpose in legislation might be, but that sense of inherent contradiction is perhaps what would make Blackstone genuinely interesting if our goal were really to figure out what property meant in the eighteenth century. But that is not my goal here. This prologue is nonetheless important in filling out the context, especially because the discussion of the analytical dimensions of property might leave

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3 1 WILLIAM BLACKSTONE, COMMENTARIES *125-26.

some onlookers bewildered about the connection between analytical concept, on the one hand, and constitutional argument on the other.

Moving on to the main issue, I intend to speculate about just one of the questions that Schorr puts on the table, though there are actually four: First, why would Blackstone use this phrase when his entire analysis belies it?[4] Second, why is exclusive dominion associated with Blackstone when his entire analysis belies it? Third, why does this particular phrase do the work, i.e., why Blackstone (of all the people who ever propounded the exclusivity view)?[5] And finally, and this is the question I will touch on: why would a phrase of this sort (one describing an imaginary endpoint and not a real option in property) become important to property scholarship?

Schorr does an excellent job of bringing into sharp focus the metamorphosis of what Blackstone might stand for. My intent is to pull away in order to get a bit of perspective, though remaining aware of what happens when we zoom out, which is that the objects in the picture frame threaten to become quite fuzzy. I'll be pulling away from the discussion of Blackstone and from the context of property theory, at least to some extent, and I'll hold the frame at the level of legal reasoning or jurisprudence or legal theory, stopping short of general social theory or an analysis of rhetoric, though these might have been useful here.

I find completely persuasive Schorr's original claim that the site for the reawakening of scholarly attention and awareness of Blackstone's phrase, which had pretty much disappeared from view, was Felix Cohen's *Dialogue on Private Property*, published in 1954.[6] My claim is that Cohen's article (which is not really an article at all but a piece of what would have been a casebook in jurisprudence) marks a specific moment in American legal thought, at which legal realism performs a pragmatic glide into legal process scholarship, and that process scholarship sets up its own collapse into a less successful and quite problematic style of work, in which Blackstone's phrase gains new meaning and new currency.

So, first of all, let's turn to the *Dialogue* and its relationship to legal process scholarship.[7] Legal process scholarship introduced a number of what

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4 Schorr's answer is not conclusive, but seems to lean to the view that we should understand the phrase as a reference to the vulgar understanding of property, against which the serious legal view should be developed. Schorr, *supra* note 1, at 114-17.

5 Schorr's intriguing answer to the second and third questions is that the archaic appeals both to critics and to champions of an absolute vision of property. *Id.* at 124-26.

6 Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

7 Helpful discussions of what is at stake in legal process scholarship include Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH J.L. REFORM 561 (1988); G.

seemed like important gains or advances over the realism that preceded it: First, it supplied a pragmatic manageability regarding chaotic multiplication of policies under early realism. My favorite example of this reduction is the shift from no fewer than twelve principles of contract in George Gardner's *Inquiry into the Principles of Contracts*[8] down to three substantive policies in Lon Fuller's *Consideration and Form*.[9] In property theory one could think of Hohfeld's expanded and quite unmanageable scheme,[10] or even Tony Honoré's eleven incidents of ownership,[11] as opposed to Felix Cohen's four in the *Dialogue*, to which I will return. Second, legal process scholarship shifted discussion away from value-laden, and therefore political, substance towards procedure, which could be rationally accounted for with the principle of institutional competence, alongside the principle of institutional settlement (thus defusing the perceived threat of judicial creativity that could mean a government of men rather than laws). Finally, by the combination of these two maneuvers it laid the groundwork for rational reconstruction even within the terms of content, or substance.

This raises the question: was Felix Cohen performing what I have called a legal process maneuver in the *Dialogue*? Admittedly, it doesn't seem to start out that way, because the opening of the dialogue goes through a deconstructive series reminiscent of Cohen's *Transcendental Nonsense* of nearly two decades earlier.[12] This series of quips breaks down the student's

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Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000).

8 George K. Gardner, *Inquiry into the Principles of Contracts*, 46 HARV. L. REV. 1 (1932).

9 Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). While Fuller was not listed as an author of the legal process materials (HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)), his intellectual contribution to the legal process school was absolutely central. For examples, see Lon Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). On the comparison of Gardner to Fuller, see Kennedy, *supra* note 7, at 152-67.

10 *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

11 A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961).

12 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Note that as far as critical or disintegrating maneuvers in the

preconceptions about property, disconnecting property from objects in space, from wealth, from value, saying among other things:

> It seems to me that you and [the treatise writers we have been discussing (Aigler, Bigelow and Powell)], are all prisoners of common sense, which is usually the metaphysics of 500 years back. In this case the current common sense is the metaphysical doctrine of Duns Scotus, William of Occam, and other 14th and 15th century scholastics who held that all reality is tangible and exists in space.[13]

So the initial move is high realism, clearing the ground by deconstructing or disintegrating, or even ridiculing, common sense conceptions of property.

But eventually Cohen takes a constructive turn in trying to explain (of all things) the rule that livestock belongs to the owner of its parent, finding a few different policies that the rule serves:

> Could we sum up this situation, then, by saying that this particular rule of property law that the owner of the mare owns the offspring has appealed to many different societies across hundreds of generations because this rule contributes to the economy by attaching a reward to planned production; is simple, certain, and economical to administer; fits in with existing human and animal habits and forces; and appeals to the sense of fairness of human beings in many places and generations?[14]

And then he adds (this time really summing up):

> And would you expect that similar social considerations might lead to the development of other rules of property law, and that where the various considerations of productivity, certainty, enforceability, and fairness point in divergent directions instead of converging on a single solution, we might find more controversial problems of private ownership?[15]

Finally, and most cryptically, Cohen adds something that hasn't been elucidated completely in his simulated in-class discussion: "Any definition of property, to be useful, must reflect the fact that property merges by imperceptible degrees into government, contract, force, and value."[16]

Dialogue are concerned, I am in complete agreement with Schorr that the text is paradigmatically realist. *See* Schorr, *supra* note 1, at 124 n.138.

13 Cohen, *supra* note 6, at 361.

14 *Id.* at 368.

15 *Id.*

16 *Id.* at 374.

It would take only a small effort to turn this into a full-fledged legal process account. All we would have to do is add a bit of detail regarding the form of the norms (which is already hinted at in the discussion of the administrability of the rule, which Cohen touches on in the related issues of certainty and enforceability), and then play the institutional competence card: that card would basically say that the above-mentioned policies are the considerations that legal decision-makers should take into account when deciding on the rules of property, and that the important thing to consider next is which legal decision-makers should make which rules. The upshot of the discussion would be that courts are competent to develop new rules as long as they can articulate their process of reasoned elaboration through neutral principles, but that when serious disagreement over questions of values arises, those should be decided by legislatures. Cohen lays out the conflicting considerations, but only hints at the actual conflicts of values that could arise (the hints come in a telegraphic — excuse the pun — discussion of *International News Service v. Associated Press*,[17] and in what seems like an unfinished discussion of fishery rights in Alaska, a topic on which Cohen himself was willing to expend a great deal of energy smack in the heart of conflict[18]).

Now, this legal process account really sets the stage for the 1970s and 1980s, when legal scholarship would take a reconstructive turn, with rights scholars and legal economists diving straight into the issues of substance in an attempt to settle, once and for all as it were, the proper balance between the conflicting considerations. But an interesting thing happened on the way to 1985, which is that the position that was completely off the map became reintegrated into the discussion. For Cohen, Blackstone's comment on sole and despotic dominion was worse than ridiculous. After noting that it doesn't apply to anything, he returns to it, comparing it to a weak discussion of property as a relation:

> *C*: . . . Property . . . is basically a set of relations among men, which may or may not involve external physical objects. Would you dissent from that conclusion, Mr. Evans?
> *E*: Well, calling property a set of relations among men is such a vague generality that I'd hardly dare dissent from it.

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17 248 U.S. 215 (1918); *see* Cohen, *supra* note 6, at 380-81.

18 Cohen, *supra* note 6, at 382-83. For Cohen's involvement in struggles over Native rights in Alaskan fishery, see DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 205-19, 235-45 (2007).

> *C*: Of course you're right, and yet a generality that is true may be more useful than a more specific idea like Blackstone's that is false.[19]

This position was off the map for two reasons. First, as a definitional idea, it undermined itself, because property cannot exist without society, and society cannot exist without limitations on the uses of property, or, as Cohen would crystallize for his students:

> Private property as we know it is always subject to limitations based on the rights of other individuals in the universe. These limitations make up a large part of the law of taxation, the law of eminent domain, the law of nuisances, the obligations of property owners to use due care in the maintenance and operation of their property, and so on. Property in the Blackstonian sense doesn't actually exist either in communist or in capitalist countries.[20]

Second, and more subtly, it was off the map and ridiculed because it wasn't lawyerly or sophisticated, because it didn't take seriously the fact that property is always a relationship with society through government, or, if you like, the idea that property is always already mediated through the state. Forgetting that would be a primal sin, killing off legal realism; indeed, for Felix Cohen it would be tantamount to parricide, to doing away with his father's *Property and Sovereignty*.[21]

But that is precisely what happened by 1985 in Richard Epstein's *Takings*.[22] Epstein's discussion seems to repress most of his knowledge of the *Commentaries* beyond the contested phrase. He takes Blackstone's opening remark for an actual working definition of what property is,[23] claiming that it seeks "to understand what ordinary words mean":

> Most important for this inquiry, Blackstone's account of private property explains what the term means *in the eminent domain clause*. A constitution that wishes to protect private property must take

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19 Cohen, *supra* note 6, at 363.

20 *Id.* at 362. Recall, of course, that Cohen is discussing the stereotypical image of Blackstonian property derived from the phrase, and not the property elucidated in hundreds of pages of detail, or even the idea of property limited by public purposes discussed in the quotation that prefaces this comment, *supra* text accompanying note 3.

21 Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL. L.Q. 8 (1927).

22 RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

23 *Id.* at 22.

> the meaning of private property from ordinary usage . . . . The greater danger [than vagueness] is an acute attack of lawyers' disease. Marginal cases are the stuff of litigation; they are not the stuff of basic human arrangements. For private property, as for other concepts, the vast range of cases outside litigation is well understood in terms of the basic legal conceptions. The long volumes written on what it means to possess land or chattels reveal the ambiguities in the word possession on which legal rights so often turn . . . . Yet through all the doctrinal murkiness, the settled rules make perfectly clear, more than 99.9 percent of the time, who, if anyone, possesses and owns anything.[24]

It has all become so simple; there is only one real value to be protected (the owner's liberty), and it is conveniently summed up in the very definition of property, a definition that arises principally and directly from the fact that the right of property is pre-political, and that all government activity is an infringement, possibly justifiable, but still an infringement. And so here is the new battleground. In a world where we can feel free to discard lawyers' tools, to cure ourselves of lawyers' disease, even Blackstone's throwaway phrase that was never intended as a serious definition is rehabilitated. Perhaps the legal process school, so wary of politics, actually set itself up for this fall. Perhaps there is something in the strategy of avoidance of direct conflict, or in the too-facile admission that questions of values are beyond the pale of serious reasoned elaboration, that made room for or even called out to an attempt to hijack legal discourse into a shouting match with the "simple rules" propounded by an ascendant and increasingly radical right wing. Reining in legal realism has had its price, particularly for those who believe that a polarized discussion of the meaning of property is less likely than nuanced realist (read: lawyerly) discourse to prod the legal and institutional imagination into innovative solutions for painfully recurring problems. The popularity of the sole and despotic dominion metaphor bodes ill for those who believe that a complex world requires complex thought.

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24 *Id.* at 23-24 (emphasis added). On the implausibility of this account of the relationship between Blackstone and the eminent domain clause, see again the quotation that prefaces this comment.