A Personal Postscript

Let me add a final personal note. If it seems odd that a Jew should offer his thoughts on how Palestinians can be successful in their struggle for statehood, I should state my conviction that the struggle for an independent Palestinian state is also the struggle for a humane and safe Israel, and that there can be no Judaism without a commitment to justice.

— Jerome M. Segal

Jerome Segal's working paper, "How to Create a Palestinian State and Bring Peace to the Middle East" (170 pp.), is available from the Institute for Philosophy and Public Policy for $10.00.

Property Rights and Environmental Law

It is a commonplace that people are or ought to be free, in general, to use their property as they wish, as long as they do no harm to — and respect the rights of — others. Yet environmental laws and regulations apparently impose further duties on landowners, obliging them, for example, to maintain the integrity of landmarks and scenic areas, to refrain from filling wetlands, to preserve open space, to restore mined land to its original contours, to maintain habitat for endangered species, to allow public access to waterways and beaches, to leave minerals in place to support surface structures, and so on. State and local governments, in general, impose these duties on landowners by regulation rather than by exercising eminent domain. States prefer regulation to condemnation so that they do not have to compensate landowners for the substantial losses in market value that often accompany statutory duties and restrictions. Governments may dedicate property to public use, then, not by taking property rights through eminent domain, but by regulating those rights away and, therefore, without compensating owners for the market value of those rights.

Courts are then called upon to decide whether a statute that imposes public-spirited duties on property owners complies with the Fifth Amendment of the Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." When courts sustain these statutes and ordinances, as they frequently do, local governments gain an important legal weapon for protecting the aesthetic, cultural, historical, and ecological values that often attract people and, therefore, subdividers and developers to a region. If the courts sheathed this legal weapon, however, society may have to kiss these values goodbye, since it cannot afford to exercise eminent domain to purchase the property in question, nor can it depend, except in a quite limited way, on private action in common law courts to protect these values.

When should a regulatory "taking" of property require the state to pay compensation, when not? I shall argue that compensation need not attend a regulation that takes property rights unless it also burdens some individuals unfairly to benefit other individuals. The "takings" question, in other words, may not depend simply on an analysis of property rights. Rather, it may also depend on a conception of justice.

Takings and the Police Power

In *Just* v. *Marinette County,* the Wisconsin Supreme Court sustained a local statute that prevented owners from using landfill and from building structures on coastal wetlands. The court held that the takings clause of the Constitution does not protect an interest, however profitable, in "destroying the natural character of a swamp or a wetland so as to make that location available for human habitation." Citizens have no claim for compensation, the court reasoned, when an ordinance restricts their use of property, "not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property."

The power to zone arises under the police power of the state, for which there is no precise definition, but which is often associated with the power to protect the health, safety, welfare, and morals of the community. The Wisconsin court argued that "it is not an unreasonable exercise of [police] power to prevent harm to public rights by limiting the use of private property to its natural uses."

In a remarkable book, *Takings: Private Property and the Power of Eminent Domain,* Richard Epstein castigates the *Just* court for its decision. Epstein observes that "the normal bundle of property rights contains no priority for land in its natural condition; it regards use, including development, as one of the standard incidents of ownership." Epstein concludes: "Stripped of its rhetoric, *Just* is a condemnation of those property rights, and compensation is thus required."

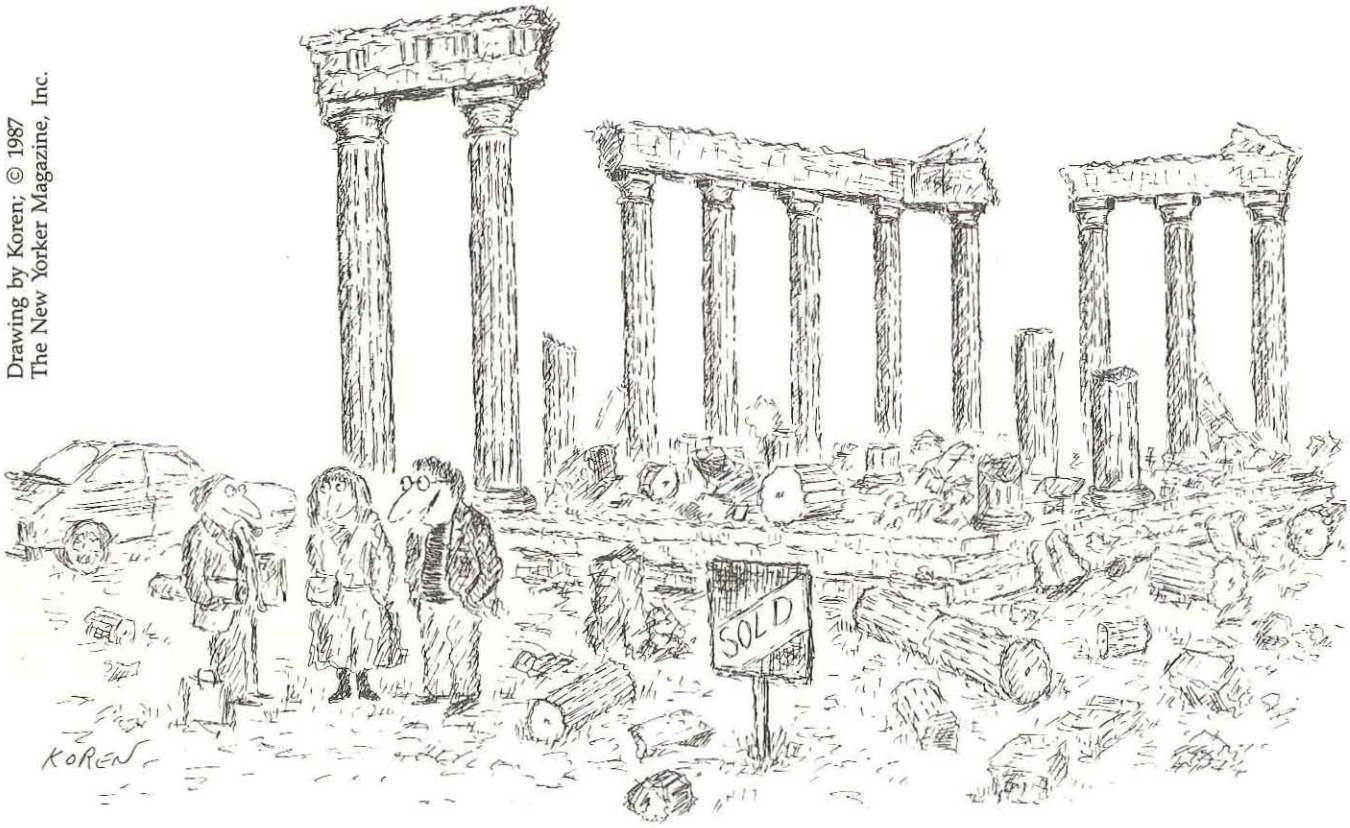
The argument Epstein presents has the form of a dilemma. First, Epstein argues that the government relies on a narrow conception of the police power to regulate private activities in order to prevent or to redress various wrongs and harms, including trespass, invasion, and injury. This use of the police power does not *take* but *protects* property; hence it does not require compensation.

Second, under a broader conception of the police power, the government may force the transfer of property rights to secure efficiency gains and increase social wealth. Transactions of this sort, Epstein reasons, diminish the property rights of some to benefit others; these forced transactions may be legitimate, he argues, but only if they are accompanied by just compensation.

In Epstein's view, coastal zone, critical area, landmark, and similar statutes typically do not prevent harm to individuals or to the public in any sense that is remotely cognizable in common law. Ronald Just, the plaintiff in the Wisconsin case, for example, might point out that by filling his wetland, he pollutes his own property, not that of others; no one would have an action against him in tort. The narrow conception of the police power, then, would not apply to him. The government might act under the broader conception of the police power, to be sure, to preserve the last vestiges of scenic and ecological amenity in the coastal region. When the government uses its broad powers in this way, however, it burdens people like Just, while it benefits those who have built houses and commercial establishments in the area and whose property will go up in market value as a result of regulations prohibiting further development. Regulations of this sort may be necessary, but the Constitution, on Epstein's view, insists that they be accompanied by just compensation.

If the state acts early enough, that is, while all landowners possess natural and aesthetic resources of which they may be made equally the trustees, then a zoning ordinance, which restricts uniformly the ways they may develop their property, may provide them implicit in-kind compensation, since it secures reciprocal advantage to all interested parties. Thus, an ordinance prohibiting *every* landowner in the District of Columbia from building a structure higher than the dome of the Capitol, for example, not only promotes the public good, but also benefits those it burdens, and thus implicitly compensates them.

The problem involved in most environmental zoning, however, is that it comes late in the day, when it makes winners of the many who have already subdivided and developed and losers of the few who have maintained the natural condition of their land. The Fifth Amendment, however, "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that . . .exacted from other members of the public,



"Our goal is to modernize it but retain the historical flavor."

a full and just equivalent shall be returned to him" (*Monongahela Navigation Co.* v. *United States*).

Suppose this argument were sound; what would result if the courts accepted it? They may overturn statutes and ordinances that are the last hope of localities seeking to protect the character, ecology, amenity, and, one might say, the sanity of the social environment. What will replace these values? Mondo Condo. High Rise Heaven. Bungalow Bonanza. Move fast, 'cause they won't last. Let the courts adopt this vision of the Constitution — and the blitz is on.

Does the Right to Develop Imply a Right to Destroy?

The central incidents of property, however — the right to use, to exclude, and to alienate — do not include the right to destroy. The right to use a car one has borrowed or hired, for example, does not involve a right to destroy it; likewise, the right to use by consuming, for example, food does not entail a right to waste or spoil it. John Locke, to whom Epstein traces his theory of property rights, points out that spoiling or wasting is not an incident of use or possession. Locke reasons that a person can "heap up" as many resources as he can use or cause to be used economically — "the exceeding of the bounds of his just property not lying in the largeness of his possession, but in the perishing of anything uselessly in it."

To be sure, if an item is worthless, the possessor may have a right to toss it out. But the right to destroy does not attach to property that is valuable. For this reason, courts sometimes impose a "law of waste" to prevent property owners from destroying scarce resources that are of great value to others.

Mr. Just has no valid claim to compensation, according to this argument, because he is not entitled to destroy resources that have become scarce and are of great importance to society. The decision in *Just* is correct, on this view, because a regulation that prevents a landowner from destroying resources by filling a marsh does not take a right from him. He had no right to destroy those resources.

This result seems entirely consistent with a Lockean theory of property rights, which limits property not only to that which can be possessed without waste, but also to that which may be acquired from a commons without creating scarcity. As Locke put this thought, a person can rightfully acquire an unowned resource from the commons only if there be "enough and as good left in common for others."

One might argue that this famous Lockean Proviso covers aesthetic and ecological resources that belong as organic parts to larger systems and are destroyed when land is removed from its natural condition. Those who come to the commons early may legitimately appropriate these resources by consuming or destroying them; but when a common resource, such as natural beauty, becomes critically scarce, society may rule against further appropriations, because they significantly worsen the social situation from that which would obtain if the proposed "improvements" were not made.

We are now in a position to define a conception of harm to the public and, with it, a conception of the police power that lies between the horns of Epstein's dilemma. The *Just* court argued that a property owner may not validly claim compensation when he or she is prevented from "destroying the natural character of a swamp or a wetland. . .when the new use. . .causes a harm to the general public." The contention may be that the prohibited development would destroy resources that the public owns in common, owing to "the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty." In the past, an individual may have been free to appropriate these resources without depleting the commons unduly, but those times are gone. Mr. Just has come too late to the commons; there is no longer as much and as good for others. To destroy the ecological, aesthetic, cultural, and historical commons, on this view, is to cause a harm to the public that may justify statutes that restrict the ways property may be developed.

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Not Property Rights But Justice

This argument, while relevant, is not decisive. Statutes that protect an ecological or an environmental commons may nevertheless restrict the use of property in ways that require compensation. The question whether compensation must accompany a regulation, as we shall see, need not turn on the relation between property and the police power. It may depend on whether the statute forces individuals to bear burdens that "in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*).

If Just were one of a very few landowners in the coastal area who had not yet developed their property, for example, he might reasonably argue that not he but his neighbors damage the ecological commons. The statute simply takes his land to buffer their pollution. Likewise, he may argue that he and other affected landowners constitute a minority too small to represent its interests fairly in the political process. He might argue the statute is unfair, moreover, if its primary effect is to promote the economic interests of those who have already developed their land.

Courts, in fact, generally will not uphold a land use restriction if its primary effect is to limit competition in an area or otherwise to benefit a few individuals at the expense of others. Regulations that restrict property

to its "natural" uses may always be justified on ecological grounds, and in that same sense, on the basis of protecting the public. But these statutes should not be sustained if their economic effects are grossly unfair to individuals.

How do courts determine whether these effects are unjust? They rely generally on rules of thumb, that is, they look out for particularly common injustices. They ask: is the economic loss imposed by the challenged statute terribly severe? Can the aggrieved property owner still make reasonable and profitable use of his land? Is the benefit to the public sufficient to warrant the burden the statute imposes on individuals? Are the restrictions reasonably appropriate and necessary to obtain the desired results? Does the regulation burden relatively few landowners — too few, perhaps, to represent their interests in the majoritarian political process?

Courts typically raise questions of these kinds — not theoretical questions about the nature and extent of property rights — in settling takings cases. The courts thus try to determine whether the plaintiff's interests have been treated equitably. This requires that the courts have a working concept of justice and fair play. It does not require that they apply a sophisticated theory about property rights and the police power. The Fifth Amendment bears upon environmental policy, then, not by grounding a theory of property rights, but by assuring that the laws that protect the environment do not do so at the expense of justice.

— Mark Sagoff

Quoted in this article are: *Just* v. *Marinette County*, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972); Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985); *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325 (1893); John Locke, *Second Treatise of Government*, chapter 5; and *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

Learning Morality

The "ethics crisis" is box-office boffo these days. Political corruption, insider trading, racial bigotry, Abscam, Watergate, Contragate, street crime, vandalism, divorce, teenage pregnancies, Ivan Boesky, Gary Hart, selfishness, greed, pornography, Joseph Biden's plagiarism, Jim and Tammy's fall from grace — these and countless related subjects fill our headlines and dominate our airwaves. And, as usual with a crisis in our society, our first instinct is to look to education. President Reagan and his Secretary of Education are only the most visible of the many who urge renewed teaching of morality in the schools. Derek Bok, President of Harvard University, is in the vanguard of those who urge the colleges and universities likewise to attend to the moral growth of their students. So we might ask: what is moral judgment, how does it develop, and how can the schools assist or retard it?

Moral Learning

Start with a simple analogy: learning morality is like learning how to write. It is not like learning geography or mathematics. Learning how to write consists in learning a few elementary concepts — noun, verb — and a few simple pieces of grammar — subject and predicate should agree in number — and then *doing it*, that is, writing over and over and over, with the advice, recommendations, and corrections of those who already do it well.

Moral education is the same. The child in his earliest experiences and interactions on the playground and at home picks up rudimentary concepts such as taking turns and simple rules such as don't hit people and don't call them names. In his interactions within this simple framework and under the tutelage of adults, the child will come to attach feelings of shame and regret to bad behavior, experience the pleasures of sharing and giving, and feel appreciative and grateful for benefits and resentful at wrongs. With this elementary foundation, moral learning is set in motion: it is simply, as Aristotle says, learning by doing. There is not a science of moral judgment any more than there is a science of writing. Instead, in both cases, we get better through increased experience and practice, which enables us to make finer and sharper discriminations. We develop the capacity to *see* a sentence or a paragraph as clumsy, graceless, plain, clear, or needed, and to *see* a moral action as ungrateful, cowardly, generous, or obligatory.

Rules and directives play a part in this development, just as "rules of good composition" aid learning to write. The young moral learner is told not to lie and not to take other people's property. The novice writer