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***ON THE IMPOSSIBILITY OF ‘JUST COMPENSATION’ WHEN PROPERTY  
IS TAKEN: AN ETHICAL AND EPISTEMIC INQUIRY***

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**Running Head**

**ON THE IMPOSSIBILITY OF ‘JUST COMPENSATION’**

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## ABSTRACT

One is promised 'just compensation' if one's property is taken. But critics charge that takings are 'licensed theft.' Is this charge well-founded or just dyspeptic hyperbole? By definition, just compensation renders the owner 'whole' when property is taken. But can a thoughtful compensation policy actually restore the owner to 'wholeness'? If wholeness is the critical criterion, by what ethical and epistemic standards is compensation 'just'? Clearly payment of 'fair market value' almost always implies an absence of *assent*, which means that the owner is not in any ethical sense made whole. Hence, without *assent*, no ethical criterion exists by which to infer 'justice' in a coerced transfer of property. In essence, compensation for takings cannot be ethically reconciled with justice. Nonetheless, some defenders of takings advocate prescriptive compensation strategies intended to render the owner whole. One proposed strategy involves compensation equivalent to the owner's *reservation value* of his own property. But there are epistemic barriers; no such reservation value pre-exists in the owner's mind until the act of selling. As *assent* is the sole ethical criterion for determining just compensation, it is also the only valid epistemic criterion; no compensation for takings can be defended on either ethical or epistemic grounds.

# ***ON THE IMPOSSIBILITY OF ‘JUST COMPENSATION’ WHEN PROPERTY IS TAKEN: AN ETHICAL AND EPISTEMIC INQUIRY***

**John Brätland<sup>1</sup>**

## **I. INTRODUCTION**

The taking power (or *eminent domain power* as it is known in the United States) has evolved along with growing centralized power of ‘democratic’ governments. It is an act of coerced confiscation undertaken to achieve a *public use of private property*.<sup>2</sup> This evolved taking power has been condemned; for example, George Reisman has asserted that eminent domain “appears to constitute a clear violation of the principle of individual rights and thus have no place in a capitalist society.”<sup>3</sup> In even more searing language, Murray Rothbard has observed: “...when government confers a privilege of eminent domain ... it has virtually granted a license for theft.”<sup>4</sup> Are these statements irresponsible hyperbole? After all, the constitutions of western democracies promise and mandate payment of what is labeled ‘just compensation.’ But in what way can compensation be made ‘just’ if the exercise of the taking power is no more than officially sanctioned thievery? Can the act of compensating dispossessed owners be made ‘just’ in a way that nullifies or negates Rothbard’s charge of theft? This paper explores the ethical and epistemic answers to these questions.<sup>5</sup>

Obviously, just compensation is that level of payment for a taking of property that *renders the property owner whole*. But what is ‘wholeness’ in the context of the principles of ethical ownership? What is the meaning of ‘just compensation’ in the context of property transfer between private parties? What are the principles of property transfer that render justice to the owner relinquishing property in such an exchange? Are these same principles properly reflected in the compensation paid in the context of coercive takings? The way in which contemporary jurisprudence deals with these questions is to ignore the underlying ethical issues and to pursue a

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<sup>2</sup> The provision in the U.S. Constitution that property is to be taken *only for public use* was once thought to be an implicit check on the scope of takings activity by government. Unfortunately, this stipulation has been transmuted into a taking authority for the *public good* regardless of the extent to which ‘public use’ is intended or not.

<sup>3</sup> George Reisman. 1996. *Capitalism: A Treatise on Economics*. Ottawa, Illinois: Jameson Books, p. 422.

<sup>4</sup> Murray N. Rothbard. 2004. *Man, Economy and State with Power and Market*. Auburn Alabama: The Ludwig von Mises Institute, p. 1139.

<sup>5</sup> This author is using the *adjective* ‘epistemic’ as being roughly synonymous with ‘epistemological’. ... “a proposition is epistemic if and only if it has some implication for what, in some circumstances, is rationally worthy of belief.” Ted Honderich. 1995. *Oxford Companion to Philosophy*. New York, NY: Oxford University Press, p. 241. The *noun* ‘epistemics’ will be used as being roughly synonymous with epistemology.

largely ‘pro-forma’ view of due process with respect to just compensation. In essence, just compensation is dealt with as a prescriptive standard to be imposed by judicial decree.

This judicial decree has taken the form of paying *fair market value (estimated market price)* to owners of taken property.<sup>6</sup> Fair market value is briefly described as the price upon which two willing and informed parties agree in an un-coerced transfer of property. Unfortunately, this definition has evolved into a prescriptive standard in decreeing what compensation should be in transactions that have not really taken place. But can payment of fair market value for taken property ever be deemed ‘just’ simply by a judicial decree? Critics of the traditional taking process who defend the need for a governmental taking authority are emphatic in answering ‘no’ to this question. They note that payment of fair market value means that the owner is a damaged party since owners are virtually never willing to sell their property for an estimated market price. The owner is relinquishing property under coercion at a price that he rejects. According to this line of criticism, the property owner can only be treated justly by payment that renders the property owner ‘whole.’

The normative objective of making the property owner whole raises two issues. The first bears on the ethics of prescribed compensation in the taking of property. Is there any level of compensation that can be truly just if it is imposed upon the property owner? The second issue raises concern over the epistemics of compensation that purports to render the property owner whole. Are there epistemic means by which the taker of the property can ‘objectify’ the standard of wholeness for the property owner? To answer these two questions one must consider the difference between a taking and nature of property transfer between two parties voluntarily engaging in a transaction. One notes that one critical distinction between voluntary transfer of property and coercive transfer of property is that ‘assent’ is missing in the latter but seems to be a central element in the former. In other words, *explicit assent* expressed in voluntary action provides both an *ethical* and *epistemic* standard in establishing the extent to which compensation is ‘just’ and which assures the restoration of ‘wholeness’ to the owner. Since assent is never present in the context of takings no compensation can be considered just.

## II. ETHICS OF OWNERSHIP, PROPERTY TRANSFER AND JUST COMPENSATION

The ethical foundations of property and property transfer are central to this discussion to such an examination of justice as it applies to compensation. This section outlines ethical principles of ownership, property transfer and the extent to which ‘fair market value’ is an ethical metric of just compensation for coercive property transfers undertaken under governmental exercise of eminent domain or forced governmental appropriation. The focus is ‘*justice as applied to the issue of compensation due owners of property being transferred into public possession for ostensible public use.*’ One notes that the act of taking property is inherently confrontational and aggressive; it is a circumstance in which a state of conflict exists between an individual owner and a government over the issue of the owner’s continued use, possession and disposition of his property. In other words, ‘assent’ is virtually never present. But the discussion reveals that assent and just compensation are inextricably linked.

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<sup>6</sup> Jack Knetsch. 1983. *Property Rights and Compensation: Compulsory Acquisitions and Other Losses*. Toronto, Canada: Butterworths, Inc. p. 38.

### A. Ethical definition, origins, acquisition and transfer of property

How does an ethical definition of property relate to issues of just compensation in takings under eminent domain? One's first reaction to this question may be to dismiss it. But the proper definition of property has a direct bearing on the ethics of the taking process and the possibility of just compensation. The term 'property' is used prominently in everyday discourse with the implicit assumption that there is a universal understanding of its meaning. Most people have an intuitive understanding of what the concept of property means without seeing a need to examine the foundations underlying its true nature. But such a definition is useful in helping one to sort out not only the legitimate foundations of property but also the ethical implications of different aspects of property transfer and how just compensation relates to such transfer.

The most thoughtful and convincing definitions of the word 'property' start from its more basic synonyms such as: characteristic, feature, aspect or attribute. As applied here, each of these terms would properly apply to an individual human being. For example, one's arm is clearly a vital attribute of one's being. No great insight is required to recognize the common-sense notion that one's arm is one's property in the sense that it is an attribute or characteristic of the person, as the terms apply to a possessed feature. Also another critical aspect of property is the ability of one to control what one owns.<sup>7</sup> Under normal circumstances, the individual human being is able to control his arm. If one is able to acknowledge that one's arm is one's property, the coherent extension of this argument is that one's body, its abilities and the benefits of its abilities are also one's property.<sup>8</sup> One's body clearly satisfies the requirement that one must be able to control that which is one's property. This inference accords with received rational insights of the natural law. It rests on the idea that every person owns him or her self in an indisputable sense. This idea was given coherent expression by John Locke in his Second Essay on Government.<sup>9</sup>

While defending the utilitarian importance of self-ownership, some critics of Lockean natural

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<sup>7</sup> Jörg Guido Hülsmann. 2004. "The A Priori Foundations of Property Economics." *The Quarterly Journal of Austrian Economics*, 7(4) p. 51. The reality of control means that the individual necessarily possesses the property, uses the property to serve his own ends and is able to dispose of what he possesses and used in whatever manner and for whatever purpose that best serves his ends. Implicit in possession, use and disposition is the ability to enjoy whatever the benefits or proceeds that may accompany ownership.

<sup>8</sup> The Harvard professor of philosophy, John Rawls, rejected any inference of 'justice' in these standards of ownership. For Rawls, endowments of property can only be considered 'just' to the extent that the welfare of the least well endowed and the least advantaged is served. In furtherance of this end, each member of society has a contingent claim on the property of all others in society and a claim on the benefits enjoyed by any member of society as a result of his or her own property or natural talents. Rawls' central claim in advancing this theory of justice was that each person in society would voluntarily choose this standard of justice in distribution if his decisions were made from behind a hypothetical veil of ignorance in which each person would have no information on his particular station in life or his endowments of talents and property. John Rawls. 1971. *A Theory of Justice*. Cambridge, Massachusetts: Harvard University Press, pp. 11-17. The most incisive critique of Rawls' theory is to be found in Hoppe, Hans-Hermann. "Introduction" to Murray N. Rothbard. 1998 [1982]. *The Ethics of Liberty*. New York, NY: New York University Press, pp. xiv-xv.

<sup>9</sup> John Locke. 1948 [1688]. "An Essay Concerning the True Original Extent and End of Civil Government" in J.W. Gough, ed., *The Second Treatise of Civil Government and a Letter Concerning Toleration*. Oxford: Basil Blackwell.

law seem to suggest that self-ownership is a rather arbitrary postulate. For example Richard Epstein has observed “If you go around the world and try to figure out who owns each of us, you would find nothing writ in stone that says that self ownership is a necessary truth. To put it another way, *to deny the proposition of individual ownership is not to engage in any logical self-contradiction.*”<sup>10</sup> (Emphasis added) Epstein is able to make this statement that a denial of self-ownership involves no logical self-contradiction because he fails to consider the full implications of self-ownership. Hans-Hermann Hoppe has clearly outlined the nature of this logical self-contradiction.<sup>11</sup> The act of denying the proposition of self-ownership in fact involves an inherent self-contradiction. To argue that the individual does not have a right of self-ownership is an act that requires the use of property. The property used in this act of argumentation is one’s own body and all of the resources that can be deployed in presenting one’s position on the issues in question. The resources include the use of one’s brain and physical presentation of the argument through the use of one’s voice. One could even go further and note that that one’s physical gestures and facial expressions are inevitably part of the owned property brought to bear in presenting one’s case. The legitimacy of the goal-oriented, resource-using act of arguing against self-ownership implicitly rests on an acknowledgement of the validity of one’s ownership of the resources employed in this act. Hence, Epstein is indeed incorrect in asserting that “... *to deny the proposition of individual ownership is not to engage in any logical self-contradiction.*”<sup>12</sup>

With respect to the theory of self-ownership, Jörg Guido Hülsmann has made the distinction between property that is intrinsic to one specific human being and property that is not intrinsic (hence extrinsic) to a particular person.<sup>13</sup> For example, ownership of one’s body is a type property that *intrinsically belongs* to one uniquely specifiable human being. But other forms of property are clearly not originally intrinsic to a particular human being. If property is not intrinsic to a particular human being, what ethical means of acquisition to the individual that assures legitimate ownership? The term ‘ethics,’ as applied in this context, is focused most particularly on the origins and integrity of legitimately *acquired* rights of private property. As Murray Rothbard notes, self ownership was of, course, was the building block on which Locke was able to outline his theory of ‘original appropriation;’ the individual becomes the rightful owner of all un-owned, nature-given goods which he puts to use with the help of his body before anyone else does.<sup>14</sup> By extension, it is clear that with the use of the property that he owns, the individual may acquire ownership by creating or manufacturing goods that have value in use or value in exchange. The individual may also become a legitimate owner of property through a

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<sup>10</sup> Richard A. Epstein. 1995. *Simple Rules for a Complex World*. Cambridge, Massachusetts: Harvard University Press, p. 54.

<sup>11</sup> Hans-Hermann Hoppe. 1989. *Theory of Socialism and Capitalism: Economics, Politics and Ethics*. Boston, Massachusetts: Kluwer Academic Publishers, pp. 130-134.

<sup>12</sup> Epstein finds himself to be a supporter of the principle of self-ownership but not on ethical grounds. Rather his support the principle of self-ownership on utilitarian grounds such as productivity and essentially economic benefit.

<sup>13</sup> Jörg Guido Hülsmann. 2004, p. 51.

<sup>14</sup> Murray N. Rothbard. 2004. *Man, Economy and State with Power and Market*. Auburn Alabama: The Ludwig von Mises Institute, p. 93.

voluntary gift or grant voluntarily made by another party. Finally, as Murray Rothbard explains, the individual may acquire legitimate ownership through the process of *voluntary* exchange with another party.<sup>15</sup> Ownership implies one's right to employ these resources as one sees fit so long as one does not thereby, without invitation, change the physical integrity of another's property or delimit another's control over his property without his consent.

The above-described principles of property acquisition form a kind of 'chain of just holding' meaning that the justice of each holding of property is contingent upon the justice of the preceding holding of the property.<sup>16</sup> To this extent, this chain can also be labeled the 'chain of just transfer. But what features of this chain warrant the label 'just?' By building on the principle of self-ownership, the actions necessary to acquire extrinsic property are un-coerced or voluntary; the autonomy of the individual is implicitly acknowledged. But to further extend the metaphor, one can see that the chain is also a chain of just distribution of resources since all holdings emerge out of mutual agreement and assent. But 'the chain of just holding' is broken to the extent that any particular holding that comes into being through acts of coercion.

### **B. 'Fair market value' as a benchmark for judging 'just compensation'**

But some hold the view that 'the chain of just holding' can be maintained if governments that take property compensate owners on the basis of 'value to the owner.' The phrase 'value to the owner' is only roughly synonymous with the term 'reservation price' and is intended to refer to that price at which the owner would willingly relinquish his property in a transfer of property free of coercion. But in more precise terms, a reservation price is that level of compensation for the property that would prompt the owner to rank the payment (price) above the owner's valuation of the property.

But the 'reservation price' or 'value to the owner' principle has proven difficult to apply. In discussing the difficulties leading up to the demise of this principle, Jack Knetsch has observed, "the intent of the value-to-the-owner criterion seemed to be the awarding of compensation that would retain or restore the original level of well-being of expropriated owners."<sup>17</sup> In his description of the public appropriation of private property in Canada, Jack Knetsch acknowledges that jurists have fallen back on the use of 'fair market value' of the property as a valid index of just compensation. "Other [Canadian] jurisdictions, starting with Ontario in 1970, and including the federal government, have substituted the standard of market value as the basis for compensation. This value is commonly defined as 'the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.'"<sup>18</sup> Knetsch cites four reasons for jurisdictions abandoning 'value-to-the-owner' as a basis for compensation and the subsequent reversion to fair market value:

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<sup>15</sup> Ibid., p. 92.

<sup>16</sup> Robert Nozick. 1974. *Anarchy, State and Utopia*. New York, NY: Basic Books, Inc., pp. 151-153.

<sup>17</sup> Jack Knetsch and Thomas Borchering. 1979. "Expropriation of Private Property and the Basis for Compensation." *University of Toronto Law Journal* 29: p. 238.

<sup>18</sup> Ibid. Alternative but similar definitions are examined below.

The first is that although such things as emotional attachment or sentimental value may be important to individual owners of property, they are not readily and objectively measurable. A second reason is that the award would be expected to vary in each case. The third alleged drawback of the value to the owner for determining compensation is that it would result in excessive claims and a consequent burden to taxpayers. The fourth argument against the value to the owner approach to compensation involves the owner's duty to give up land which the community requires.<sup>19</sup>

These reasons are targets for well-deserved and severe criticism. In many cases in which coercive taking is undertaken by a government, the property may be a homestead, or a residence in which the individual or family has lived often for generations. Emotional attachment and sentimental value may be the source of compelling reasons for attachment and dominant basis for the valuation of property on the part of the owner. The courts may ignore the basis for these valuations argued in litigation, but in so doing cast aside any pretense of a truly ethical or just compensation. The other reason given for reverting to the 'fair market value' standard is that payment will vary between instances. This rationale is an attempt to ignore the realities of the real world as it affects valuation of properties by individual owners. Valuations vary between individuals and, for each individual, valuations may differ between different instances in time.<sup>20</sup> Moreover, there is never any defensible rationale for restricting compensation to protect the taxpayer from excessive burden. If governmental officials take property, they should suffer the hostile opprobrium of taxpayers. There is no compelling reason why the property owner should bear the pain of an involuntary property transfer. Taxpayers should pay the full price of the coercive takings that their elected officials undertake. Nonetheless, 'fair market value' has become the default compensation in virtually all cases in which governments exercise the authority of eminent domain.

The fourth reason for reverting to payment of fair market value is premised on the absurd notion that the owner has some sort of civic duty to surrender his land to the community. The feudalistic grotesqueness of this idea is best appreciated by a quote from official English documents.

... the exclusive right to the enjoyment of the land which is involved in private ownership necessarily carries with it the duty of surrendering such land to the community when the needs of the community require it. In our opinion, no landowner can, having regard to the fact that he holds his property subject to the right of the state to expropriate his interest for public purposes, be entitled to a higher price when in the public interest such expropriation takes place, than the fair market value...<sup>21</sup>

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<sup>19</sup> Ibid., p. 239.

<sup>20</sup> Issues of valuation are addressed at greater length below.

<sup>21</sup> Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (Cd. 9229), (London: HMSO, 1918) p. 8, as quoted in Jack Knetsch. 1983. *Property*

The ethical breach implicit in these four rationales can be brought into sharper focus by examining the nature of fair market value and the implications of the coercion that always accompanies the taking of property. Consider the following legitimate definitions of fair market value:<sup>22</sup> (1) the amount of cash, or its equivalent, that the property *would have brought* at the time of the taking, considering its *highest and most profitable use* if then offered for sale in the open market, competition with other similar properties at or near the location of the property taken, with reasonable time allowed to find a purchaser; (2) the amount of money that would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts; (3) the price that the asset would bring by bona fide bargaining between well informed buyers and sellers at the date of acquisition; (4) the price at which *bona fide* sales have been consummated for assets of like type, quality and quantity in a particular market at the time of acquisition; and (5) the amount of money which a purchaser is willing, but not obligated to buy, would pay an owner who is willing but not obligated to sell, taking into consideration all uses to which land is adapted and might in reason be applied.” What do these definitions imply in the in the context of taking and ‘just compensation’? While the definitions are clearly similar, *one notes that none of the definitions are really appropriate to the issue of just compensation in the event of a coercive taking of property.* In terms of the ethical considerations that must be addressed in paying just compensation, all are clearly unsatisfactory.

Certainly each of these definitions can be used to make an ex post assessment of whether of not fair market value was received *in a particular sale* of property that has already occurred. But no rational or logical basis exists for applying any version of these definitions as a prescription for

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*Rights and Compensation*, p. 38. While, this idea was made explicit in an official British document from early in the twentieth century, the sentiments have found their way into American thinking that carries over into twenty-first century institutionalization of injustice. The police power is one such example. The stated objectives of the police power focus on the health, safety, morals and general welfare of the community. If these objectives had continued to define the scope within which the police power were applied, this role of government would not have evolved into the assault on private property that one sees today. Regulatory intervention undertaken in the name of the police power results in functional takings and no compensation to the land owner. Zoning restrictions are perhaps the egregious example of property being essentially taken without any compensation to owners. A second egregious example of institutionalized injustice is the exclusion from compensation of any enhancement in the value of taken property arising from government actions. The courts in the United States have taken this position: “Government condemners should not ... reward owners whose land has appreciated through an anticipation of government plans.”<sup>21</sup> Ellen Frankel Paul. 1987. *Property Rights and Eminent Domain*, p. 81. In discussing this issue, Ellen Frankel Paul references *United States v. Reynolds*, 397 U.S. 14 (1970). Under this perverse logic, the inclusion of scarcity rent in the compensation would mean the owner would be paid an ‘undeserved windfall’ since the prospects open to the property owner in the absence of the taking would have borne to surplus or scarcity rent. A third example of institutionalized injustice is found in the lack of compensation for goodwill lost in the process of taking property. The destruction of goodwill is a common occurrence in the taking of property by governments but compensation is generally denied. Goodwill is an intangible capital asset owned by commercial firms that emerges through actions that are essentially investments yielding a yield a net future return as a result of community of loyal customers, expanded sales, and expanded markets. In denying compensation, jurisprudence in this area of takings law has become another form of institutionalized injustice making just compensation a virtual impossibility.

<sup>22</sup> Henry Campbell Black. 1979 [1891]. *Black’s Law Dictionary With Pronunciation* (Fifth edition). Minneapolis, Minnesota: West Publishing Company, p. 537.

just compensation in transfers of property that are involuntary. Consider the following example of exchange between two parties one of whom has the coercive power (perhaps through physical threat) to force an exchange. In this example, two parties, Akers and Enders, are each in possession of property in which the other may be willing to obtain in an exchange. Akers first contemplates the benefits of an exchange of property. Mr. Akers is in possession of one hundred grams of ambrosia and Mr. Enders is in possession of twenty liters of elixir. However, Akers ranks four liters of elixir more highly than twenty grams of his ambrosia but since he is in a position to exert coercive power over Enders, he decides that he will pay only sixteen grams of ambrosia to Enders for four liters of elixir. Enders would be agreeable to an exchange of four liters of elixir to Akers if Akers were to pay twenty grams of ambrosia. However, Akers has done market research of numerous recent transactions involving the exchange of ambrosia for elixir and has determined that sixteen grams of ambrosia in exchange for four liters of elixir is a representative rate of exchange between willing and informed parties. In other words, all of these transactions satisfy the conditions specified on one or more of the definitions of 'fair market value' specified above. Enders acknowledges that sixteen grams of ambrosia in exchange for four liters of elixir is a typical price but makes clear that he does not agree to the exchange at the rate of exchange proposed by Akers. Nonetheless, Akers presents this rate of exchange to Enders in the form of an ultimatum and forces the exchange of property. Akers has in effect imposed a taking upon Enders. The bald injustice of such a situation stands out in bold relief when typical acts of governmental coercion are instead ascribed to the actions of a predatory individual.

Hence, one can see that the applying any of the previously listed definitions of fair market value as a benchmark does not result in anything that could be honestly viewed as 'just compensation.' Clearly no application of these listed definitions of fair market value is remotely valid in assessing justice of compensation received by Enders in the exchange described above. As Ellen Frankel Paul has noted, "... given the nature of the act -- that government is seizing your property, and that you have not voluntarily consented to the exchange, ... thus no 'market' transaction could be involved."<sup>23</sup> All that can be said is that in any given transfer of property is that if the conditions specified in the definition are met or were met, just compensation is, by definition, received by both parties. The standard itself is only applicable to a particular transaction that has been *voluntarily* consummated and each of the parties has explicitly given assent. But as a benchmark in assessing what compensation should be in a transaction that has not taken place, application of fair market value can never be deemed ethically 'just.'

### **C. The ethical implications of overt assent in assessing just compensation**

The actual nature of a voluntary exchange yields a clearer understanding of the injustice of using fair-market-value as benchmark in determining just compensation. The process of property exchange commences in situations in which each of parties rank certain property in the possession of the other party more highly than the property that they would like to relinquish in exchange. In this example, two parties, Akers and Enders, first contemplate the benefits of an exchange of property. Neither part has the power to exert coercion on the other. As in the

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<sup>23</sup> Ellen Frankel Paul. 1987. *Property Rights and Eminent Domain* New Brunswick, NJ: Transaction Publishers, Inc., p. 81.

previous example, Mr. Akers is in possession of one hundred grams of ambrosia and Mr. Enders is in possession of twenty liters of elixir. However, Akers ranks four liters of elixir more highly than twenty grams of his ambrosia and makes an offer of an exchange to Enders. Enders is agreeable to the exchange because he ranks the twenty grams of ambrosia more highly than four liters of his elixir. *First*, each of the two parties acknowledges that the other person is the legitimate and rightful owner of the property that each would like to obtain in the exchange. Akers acknowledges that Enders is the owner of the elixir and Enders acknowledges that Akers is the rightful owner of the ambrosia. *Second*, both Akers and Enders wish the other party to allow them to become the owner of the agreed upon quantity of other party's property. In other words, Akers wishes that Enders will let Akers become the owner of the four liters of the elixir and, analogously, Enders wishes that Akers will let Enders become the owner of the twenty grams of ambrosia. *Third*, Akers assents to Enders' wish on the condition that Enders assents to Akers' wish.<sup>24</sup> The transfer is characterized by mutual assent.

Mutual assent is critical to the ethical legitimacy of the exchange and the transfer of property. In this latter example, there is no issue over the extent to which compensation is just. Akers has clearly been paid just compensation to Enders in his acquisition of the four liters of the elixir. In similar manner, Enders has clearly paid just compensation to Akers for his acquisition of the twenty grams of ambrosia. *Just compensation is determined not on the basis of the amounts exchanged in the transaction, but rather on the basis of the fact that the exchange was completed on the basis of mutual assent.* The key element is mutual assent to the transfer and assent to the wishes and expressed intentions of the other party. The evidence of assent leads to the clearly valid conclusion that each party has been compensated to the extent of his *reservation price*.<sup>25</sup> What has been described in the above-described transaction would, to one degree, satisfy each of the definitions of fair market value listed above. It also serves as a fair and legitimate indicator of just compensation. But the fairness and the justice of the compensation is contingent on the mutual assent of the particular parties to the transaction. As Murray Rothbard has observed "we must conclude, then, with modern, post medieval economic theory, that the *only* 'just price' for any transaction is the price voluntarily agreed upon by the two parties."<sup>26</sup>

Without assent, damage has been inflicted on at least one party to the transfer of property. But with some few exceptions, the jurisprudence surrounding takings has failed to acknowledge the owner as a damaged party. Yet the payment by governments of compensation equivalent to fair market value does leave the owner in a damaged state that is properly recognized in other legal contexts. The damage arises principally from (1) the fact that the owner in most cases feels a special attachment to the property (usually land) taken, and (2) compensation in the amount of fair market value in virtually all cases will not afford the owner of the means necessary to buy a comparable property yielding equivalent enjoyment. In their examination of compensation issues arising from expropriation of private property, Knetsch and Borchering call attention to

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<sup>24</sup> This sequence of events is outlined by Hülsmann. 2004., p. 54. The names and objects of exchange are relabeled.

<sup>25</sup> The discussion below will examine the reservation-price concept more carefully. The reservation-price has its own mythology bearing on the idea that it even exists in the owners mind prior to the actual transaction.

<sup>26</sup> Murray N. Rothbard. 1998 [1982]. *Ethics of Liberty*. New York, NY: New York University Press, p. 249.

the following incongruity in the way in which property law deals with damage: “It is most interesting to note that in real estate transactions are normally treated differently in the event of contractual breach. For breach of contract, courts favor an award of damages to the party suffering loss. In real property cases, specific performance is commonly ordered largely on grounds that real property usually has unique attributes for the buyer so that he or she cannot be expected to find a duplicate with a cash settlement.”<sup>27</sup>

In a taking, the property owner is a damaged party as surely as if he were the victim of a perpetrated tort. A tort “is a direct invasion of some legal right of the individual.”<sup>28</sup> While there are several costs of displacement that are likely not to be covered by payment of fair market value, damage is made ethically evident by the absence of explicit assent -- *not by the extent or magnitude of compensation*. While the initial intent of the *eminent domain* provisions of the U.S. Constitution may have been to ‘keep the property owner whole,’ that objective cannot be ethically achieved with any prescribed and imposed payment by the government. While compensation in any given circumstance may be financially substantial, the damage to the property owner still exists in an ethical sense. The absence of any action expressing overt assent in the transfer is all the evidence that one needs to infer that the property owner has sustained damage. Any claim to the contrary is no more than intellectual dishonesty. Any imposed level of compensation fails as an ethically just standard of compensation. On strictly ethical grounds, coercive taking cannot render any sort of justice to the property owner regardless of the amount of compensation offered by government.

What bearing on the issue of justice in compensation is to be found in efforts by governments to pay premiums above fair market value? A later section of this paper deals with epistemic issues surrounding the payment of premiums above fair market value for property taken by governments. At this point it is sufficient to simply note that inclusion of premiums in compensation to owners does essentially nothing to make compensation ‘ethically just.’ In general, the payment of a premium over fair market value may diminish the loss inflicted upon the property owner, in an ethical sense, damage remains. The lingering ethical injustice is not really removed by the addition a premium to the compensation presented to the property owner. The reality of coercion and the absence of overt assent mean that even with the premium, compensation is not ‘just.’ The property owner is certainly not made *ethically whole* by the payment of a premium even if the additional payment is generous.

### III. EPISTEMICS OF COMPENSATION AND THE PROPERTY OWNER’S ‘WHOLENESS’

There is a growing recognition that there is nothing fair or just in compensation equal to the legal definition of ‘fair market value.’ It does not leave the landowner ‘whole’ but rather in a damaged state. As noted above, various writers have acknowledged this reality and have proposed various solutions. One option focuses on payment of the owner’s ‘reservation price’ as

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<sup>27</sup> Jack Knetsch and Thomas Borcharding. 1979. “Expropriation of Private Property and the Basis for Compensation,” p. 242.

<sup>28</sup> Henry Campbell Black. *Black’s Law Dictionary With Pronunciation* (Fifth edition). p. 1335.

a ‘just’ solution to the issue of compensation. Others have taken the position that the property owner should be paid a premium over fair market value to arrive at just compensation. Not surprisingly, these alternatives lack epistemic means by which to impute a level of compensation to the owner that offsets damage and renders the property owner whole. In other words, both of these options face epistemic problems that make them non-operational. These problems arise from a faulty theory of valuation.

#### **A. The mythical infra-marginal owner and his ‘reservation price’**

The preceding discussion noted the fact that one of the principal reasons for reversion to ‘fair market value’ as compensation to the owner bore on the difficulty in measuring ‘value to the owner.’ Yet implicit in the discussion is the idea that somehow, with enough effort and ‘data,’ valuation can somehow be imputed. Once imputed, this presumed ‘value’ is to be applied as the basis for compensation with the result that the property owner is somehow rendered ‘whole.’ This idea emerges out of the unfortunate fact that economists have never fully abandoned the idea that valuation is something measurable and still somehow tied to the individual’s pre-existing utility function. While economists were grudgingly taught long ago that interpersonal comparisons of utility have no scientific validity, economists have continued to cling to the notion that utility still exists in some nascent form in the mind of the individual.<sup>29</sup> This idea of utility also carries over into the way economists find themselves thinking about compensation in the context of takings of private property. This thinking manifests itself in the well-meaning but misguided notion that the property owner has a ‘pre-existing reservation price’ that somehow emerges from a utility function that is postulated to pre-exist in the mind of the owner.<sup>30</sup> In the context of just compensation for the taking of property, the idea is that if ethical breach is to be avoided, ‘justice’ then hinges on being able to pay the un-assenting owner a level of compensation at least equal to this ‘reservation price.’ The reservation price is assumed to be something in the mind of the property owner and the task of the economist is to use clever means to discover it.

One way in which economists try to give some concreteness to the idea of ‘reservation price’ is to think about it in the context of supply and demand schedules. Economists are accustomed to thinking about supply and demand schedules as pre-existing, empirical realities that are relatively stable through time and are, hence, amenable to some type of estimation. In reality, these schedules are really an over-used metaphor. Assume for the moment that there is a market for the type of land being appropriated by government, and, also assume that a roughly approximated market price for similar properties emerges and that this price can be empirically discerned.<sup>31</sup> Of no

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<sup>29</sup> Lionel Robbins. 1932. *An Essay on the Nature and Significance of Economic Science*. London, U.K.: Macmillan and Company, p. 132.

<sup>30</sup> The payment of the owner’s ‘reservation price’ is essentially the idea that the owner should be paid a price at least equal to his valuation of his own property. See: Jack Knetsch and Thomas Borcherting. 1979. “Expropriation of Private Property and the Basis for Compensation,” p. 247. See also: Jack Knetsch. 1983. *Property Rights and Compensation: Compulsory Acquisitions and Other Losses*, p. 45.

<sup>31</sup> One of the principal and practical reasons for labeling the assumption of an equilibrium price for land as unrealistic is that such property is heterogeneous in nature with unique features of location or resource content. While there is some degree of substitutability between land properties in different uses, the competitive forces in the

incidental importance is the fact that any estimated market price yields only historical information, a reality that fits only with awkwardness into economists' analytical framework.<sup>32</sup> In essence, economists pretend that an estimated market price emerges from the intersection of currently existing supply and demand schedules. Within this mythical framework, economists label one who places his land for sale at a 'market price' may be considered the *marginal seller*. This price is just sufficient to induce him to prefer this prevailing market price to the retention of his property. In other words, an expressed willingness on the part of the owner to sell reveals a ranking of the market price above the retention of the property. In such an instance, the price is revealed to be ethically just in that the seller has ranked the amount of money represented by the market price higher on his personal scale of values than the land he offers for sale. From an epistemic perspective, there can be no question that, at the moment at which the land is sold, that the seller has received *just compensation*. This fact has been made clear by the overt expression of assent to the sale at the price asked. Hence, in a theoretical sense, the successful seller can be seen as a *marginal seller*. The expressed assent reveals evidence of the voluntary transfer at the market price yields objective confirmation of just compensation.

But, the real issues surrounding 'just compensation' bear on those who are unwilling to relinquish their property at the fair market price. To deal with this analytical issue, economists have contrived the notion of the 'reservation price.' Of course, in a taking, this reservation price, were it to exist, would be 'unexpressed reservation price.' By what analytical means can economists deal with the notion of an unexpressed reservation price in the context of takings? In trying to make the reservation price a magnitude that can be estimated, the economist may retain the presumption of the pre-existing supply schedule. Within the context of such a supply schedule, these owners are referred to as 'infra-marginal suppliers' or, in this case, as 'infra-marginal owners.' By definition, the infra-marginal owner is an unwilling seller at the market price or at fair-market value but would be a 'potential seller' at a higher price. Obviously, the market price at which similar properties may be exchanged on the market has no bearing on the aspirations or planned actions of the infra-marginal owner. But from the economist's perspective, this property owner has a 'pre-existing' reservation price above the market price or above the price for similar properties being purchased and sold in the market. In the context of the economist's supply and demand framework, the property owner's reservation price would place him on an upward sloping supply schedule to the right of what may be a fair market price. By attempting to employ this conceptual framework, some scholars make the case that the task of awarding just compensation is only one of finding or imputing the 'pre-existing' reservation price' on a 'pre-existing' supply schedule. But even if the supply schedule were to 'pre-exist' in the manner presumed, what epistemic basis exists by which to place a property owner's decision to sell at one point on this schedule rather than another? There is no answer that can be given to this question.

Ludwig von Mises has placed the importance of these imagined demand and supply schedules in proper perspective. "But it is necessary to comprehend that such pictorial or mathematical modes of representation do not affect the essence of our interpretation and that they do not add a whit to our

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land market can never produce a uniform price as one might expect to see during a trading period for a relatively uniform commodity. Moreover, real market prices fluctuate as buyer and sellers adapt to emerging market information.

<sup>32</sup> Ludwig von Mises. [1949] 1998. *Human Action: A Treatise on Economics: The Scholar's Edition*. Auburn Alabama: Ludwig von Mises Institute, p. 327.

insight. Furthermore it is important to realize that we do not have any knowledge or experience with the shape of such curves. Always what we know is only the market price – that is, not the curves but only the point which we interpret as the intersection of the two hypothetical curves.”<sup>33</sup> To further amplify the point being made by Mises, one can note that an actual observable market price at which transactions have actually occurred provide only historical evidence of situations in which buyers and sellers have, in the past, made choices and *acted to express mutual assent* to market exchanges. But other points on these schedules are not even historical evidence; they are only hypothetical conjectures. These points represent no choices nor can they be presented as prospective choices that would result in prices. With respect to points on the supply schedule, the points are only imaginary and represent nothing of any epistemic significance. They are simply hypothetical exchanges that may be made by hypothetical property owners who may rank a hypothetical price above the option of retaining of their property. Until such choice is manifested in the action of expressing assent to the exchange, it remains only a hypothetical contingency not of the real world and not amenable to any sort of imputation. Preference must be demonstrated; it cannot be imputed.<sup>34</sup>

In his book *Property Rights and Compensation*, Jack Knetsch has suggested another approach to the derivation of reservation prices. Knetsch believes that survey methods may yield the desired answers. He proposes techniques in which property owners are presented with various hypothetical contingencies to reveal preferences among them and “thus indirectly assess their reservation value or the amount of payment necessary to leave them as well off as they would be without the taking of their property.”<sup>35</sup> One may be tempted to conclude that these proposed techniques of *contingent valuation* have overcome imputational barriers to deriving reservation prices. As developed by economists, these techniques of contingent valuation purport to educe information on valuations of things that are not revealed in market transactions.<sup>36</sup> Murray Rothbard has exposed the uselessness of such information: “One of the most absurd procedures based on a constancy assumption has been the attempt to arrive at a consumer’s preference scale not through observed real action but through quizzing him by questionnaires. ... no assurance can be attached to the mere questioning of people. Not only will a person’s valuations differ when talking about them than when he is actually choosing, but there is also no guarantee that he is telling the truth.”<sup>37</sup> In the absence of demonstrated preferences revealed through acts of exchange, answers to questionnaires cannot be considered meaningful.

Clearly these confused attempts at imputing valuations of property owners will not do. They are based

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<sup>33</sup> Ludwig von Mises. [1949] 1998. *Human Action*, p. 330.

<sup>34</sup> Murray Rothbard observes: “Demonstrated preference ... eliminates hypothetical imaginings about individual value scales. Welfare economics has until now always considered values as hypothetical valuation of hypothetical ‘social states.’ But demonstrated preference only treats values as revealed through chosen action.” See: .Murray N. Rothbard. 1997. “Toward a Reconstruction of Utility and Welfare Economics” in: *The Logic of Action: Money, Method and the Austrian School*. Cheltenham, UK: Edward Elgar Publishing Company, p. 240.

<sup>35</sup> Jack Knetsch. 1983. *Property Rights and Compensation: Compulsory Acquisitions and Other Losses*, p. 51.

<sup>36</sup> Robert Cameron Mitchell and Richard T. Carson. 1989. *Using Surveys to Value Public Goods: The Contingent Valuation Method*. Washington, D.C.: Resources for the Future, p. 129.

<sup>37</sup> Murray Rothbard. 1997. “Toward a Reconstruction of Utility and Welfare Economics.” In *The Logic of Action One: Method, Money and the Austrian School*. Cheltenham, England: Edward Elgar, Inc.: p. 217.

on pretence rather than on sound economic analysis. In summary it is sufficient to note that attempts to at least conceptually apply the standard of ‘reservation price’ to compensation issues have arisen because of a misunderstanding concerning the epistemic nature of value and the misguided notion that value to the owner can be imputed. In fact, this reservation price standard, if it can be called that, is a blatant epistemic fallacy because there is no valid means by which a government is able to establish what compensation can restore the owner to an ‘original level of well-being or wholeness.’ Being the victim of an act of coercion and an involuntary transfer of property, it can never be clear to anyone but the owner what compensation must be forthcoming to ‘replicate a level of well-being.’

### **B. Valuation and action epistemically reflective of just compensation**

By definition, that compensation that results in the property owner being made ‘whole’ is ‘just.’ Wholeness implies justice and vice versa. Presumably compensation sufficient to render the property owner whole must faithfully reflect the owner’s valuation of his own property. But at its most fundamental level, valuation can never be more than a ranking of possible courses of action made by individual human beings when confronted with a range of options. In other words, valuation is always a subjective, one-dimensional ranking on a single unified *ordinal scale* that each individual establishes for himself. For one doing the valuing, valuation involves no calculation as such. In essence, as Mises has noted, “a judgment of value does not measure, it arranges in a scale of degrees, it grades. It is expressive of an order of preference and sequence, but not expressive of measure and weight ... The difference between the valuations of two states of affairs is entirely psychical and personal. It is not open to any projection into the external world.”<sup>38</sup>

For the individual property owner, the relative ranking is between his property and alternative hypothetical levels of compensation. He will always rank the prospective compensation either above or below his property. In this sense, the owner simply ranks, chooses and sets aside. This process of value is universally true for all human beings and is always the basis for all conscious action such as the sale of property. This process has been described as a *trilateral relationship* between one human being and two things being valued.<sup>39</sup> The valuation always involves preferring and relinquishing that which is not ranked more highly. But one should emphasize that this ranking by the property owner is not immutable and is always subject to change as the owner changes or the circumstances facing the property owner change.

Valuation cannot be divorced from choice and choice cannot be divorced from action. Action is always an effort to exchange one state of affairs for one that is thought by the actor to be more satisfactory. The actions of individual human beings differ because people have dissimilar objectives and differing bundles of goods over which they have legitimate claims of ownership. The respective ranking of goods by their respective owners may diverge and their respective goals may differ. Hence, one can readily appreciate the reality that even the owners of similar properties may rank their holdings in very different ways. But such differences in ranking foster differing expressions of assent to proposed offers of voluntary exchange. When two individuals

<sup>38</sup> Ludwig von Mises. [1949] 1998. *Human Action*, p. 97.

<sup>39</sup> Jörg Guido Hülsmann. “Introduction”; Ludwig von Mises. *Epistemological Problems*, p. xxxvi-xxxvii.

value property owned by the other more highly than certain items that they themselves possess, a voluntary exchange is likely to occur because *all* voluntary exchanges make both parties better off from making the exchange.<sup>40</sup> But of important note is the fact that exchange reflects differences in valuation without reflecting actual valuation in itself. Here again, the critical feature of the exchange is the overt expression of assent but the valuations themselves are never overt, measurable or quantifiable as in the mythical utility of neoclassical welfare theory. In fact, utility as it was once represented in economic theory does not exist separate and apart from action. Valuation only reveals itself in overt action reflecting the owner's preference for compensation offered over his property or vice versa. As Mises notes, "One must not forget that the scale of values or wants manifests only in the reality of action. These scales have no independent existence apart from the actual behavior of individuals."<sup>41</sup>

The implications for the concept of reservation price are devastatingly clear. The reservation price does not exist for the unassenting owner of property and cannot be imputed estimated or forecast. Wholeness exists as a sense of being or a state of mind much in the manner of satisfaction. Only the property owner can be the judge of what compensation is sufficient to render him 'whole.' 'Wholeness' is a totally subjective state; it can only be assessed or gauged by the individual whose wholeness is in question. It cannot be given any objective content by which some external entity has the ability to detect its presence or to prescribe measures that would assure its attainment for the individual property owner whose property is being taken by government. But the notion of paying the owner his reservation price has been expressed in other variations that aspire to impute an appropriate premium above fair market value.

### C. Epistemic emptiness of proposals to pay premiums to assure just compensation

While some analysts and scholars accept the non-existence of the reservation price and the fact that the concept provides no analytical guidance in the payment of compensation, the policy of paying a premium over fair market value is held out as a realistic and desirable alternative. From the perspective of good intentions, these well-meaning proposals are superior to the payment of fair market value. But clearly they encounter the same epistemic barriers that invalidate the notion of compensation based on the owner's reservation price. While many writers have addressed the issues of premiums, the discussion here will focus on two examples offered by scholars who seem to have sharply differing perspective on the underlying epistemic issues involved. These alternative approaches can be found in the work of two economists: Jack Knetsch and George Reisman. Jack Knetsch's alternative is outlined in his book, *Property Rights and Compensation*. Though he is critical of current jurisprudence on takings policy, he is nonetheless of the belief that governments should retain the power to coercively appropriate property for public use. Knetsch's frame of reference is jurisprudence in various part of the former British Empire including Canada and Australia.

Knetsch first discusses the prospect of applying a uniform percentage premium to all properties taken. "In some jurisdictions it has been common practice in cases of compulsory purchase to offer an award somewhat in excess of market price as an informal recognition of the involuntary

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<sup>40</sup> Murray N. Rothbard. 1998 [1982]. *Ethics of Liberty*. New York, NY: New York University Press, p. 249.

<sup>41</sup> Ludwig von Mises. [1949] 1998. *Human Action*, p. 95.

nature of the exchange. A five or ten percent premium is not unusual.”<sup>42</sup> But he is immediately on thin epistemic thin ice when he asserts that “[s]uch a policy would need to depend on some consensus of average difference between reservation and market price.”<sup>43</sup> While he acknowledges that preferences may vary widely between property owners, he seems to believe that reservation values can be gleaned through survey techniques. “Each presumably would receive an equal premium even though reservation values would be expected to vary widely depending on individual circumstances and the preferences of each property holder.”<sup>44</sup>

Knetsch quite understandably is forced to reject and the uniform premium as failing to make adequate allowance for the individual preferences and the differing circumstances of individual property owners. But he finds himself considering empirical and quantitative techniques designed to arrive at a solution through legislative means that do not pass epistemic muster.

A variation on the policy of paying a uniform premium could include an explicit attempt at differentiation among the payments of premium over market prices by tailoring compensation to individual owners. That is, some owners would receive larger payments than others based on some factor or factors that might be recognized as proper cause. Discernment of such factors is not a trivial problem, of course. But perhaps it is not an impossible problem either, especially if fairly crude indices are accepted as having some relation to what can be widely regarded as reasons to vary compensation awards. *Differentials could be established quite simply, although perhaps with some degree of arbitrariness, by means of a legislative schedule of premium awards.*<sup>45</sup> (Emphasis added)

In discussing the differentials in valuation between owners, Knetsch critically reviews various valuation criteria that have become law in Australia. These include the following: (a) the interest of the claimant in the land; (b) the length of time during which the claimant resided on the land; (c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land; (d) the period after the acquisition of the land during which the claimant has been or will be allowed to remain in possession of the land; (e) the period during which the claimant would have been likely to continue to reside on the land; and (f) any other matter which is ... relevant to the circumstances of the claimant.<sup>46</sup> He believes that these criteria are useful but do not “provide a complete definition for determining appropriate award in individual cases.”<sup>47</sup> In referring to ‘appropriate award,’ Knetsch is making reference to reservation prices. Again, Knetsch suggests survey methods to arrive at estimate of reservation prices. “The reservation prices of a cross section of property owners (not owners involved in current compulsory taking action) might be obtained by survey

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<sup>42</sup> Jack Knetsch. 1983. *Property Rights and Compensation*, p. 49.

<sup>43</sup> Ibid., p. 49.

<sup>44</sup> Ibid., p. 49.

<sup>45</sup> Ibid., p. 49

<sup>46</sup> Ibid., p. 51.

<sup>47</sup> Ibid., p. 51.

methods that pose various alternative contingencies and record the owners' expressed preferences among them."<sup>48</sup> He suggests that this approach could be refined by asking questions in the surveys that ask owners to express their preferences for trading off one value for another and indirectly assessing reservation values. Not surprisingly, Knetsch's proposal is an epistemic dead end. All of the admonitions spelled out above apply here with equal force. To reiterate Rothbard's point: "no assurance can be attached to the mere questioning of people. Not only will a person's valuations differ when talking about them than when he is actually choosing, but there is also no guarantee that he is telling the truth."<sup>49</sup>

In his book *Capitalism*, Reisman offers a different approach to the compensation of dispossessed property owners.<sup>50</sup> Like Knetsch, Reisman believes in cooperative (governmental) efforts requiring public uses of privately-owned resources and believes that, at least for the present, governments should retain the power to take property for strictly public uses. Like many others who have examined the injustice of current abuses of *eminent domain* jurisprudence, Reisman is critical of recent trends in which private property is taken but not committed to uses that are 'public' in nature. For example, he is understandably critical of practices in which property is taken for the purpose of transferring it to private developers. In taking a longer perspective, he believes that the taking power of eminent domain should be gradually phased out through an amendment to the U.S. Constitution.<sup>51</sup>

But as a shorter terms solution to the violation of property rights imposed by forced acquisitions, Reisman considers a radical procedure for the awarding of premiums. Reisman considers the realities of instances in which property owners do not want to sell. This situation may well arise in circumstances in which the owner has a deep emotional attachment to the property. To deal with these situations, Reisman recommends a particular approach to compensation that includes the payments of very generous premiums. Unlike Knetsch, Reisman is apparently much more skeptical of the ability of governments to impute premiums that provide any assurance of making the property owner whole. What Reisman offers as an alternative amounts to a rather generous 'rule-of-thumb' in which the property owner is paid a premium several time greater than the 'ostensible' or 'estimated' value of the property. Reisman's view is that premiums paid on this scale would remove much of the vicious force associated with current takings procedures and would actually induce owners to willingly relinquish their property for public use. He also believes that the added governmental outlays for compensation would force governments to be

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<sup>48</sup> Ibid., p. 51.

<sup>49</sup> Murray Rothbard. 1997. "Toward a Reconstruction of Utility and Welfare Economics." In *The Logic of Action One: Method, Money and the Austrian School*. Cheltenham, England: Edward Elgar, Inc.: p. 217.

<sup>50</sup> George Reisman. 1996. *Capitalism: A Treatise on Economics*, pp. 422-423.

<sup>51</sup> Reisman offers a longer-term proposal to replace the current constitutional authority of eminent domain. This proposal would be one in which the rights of way for roads, railroads, pipelines, etc. would be acquired far in advance of the time of actual construction and would be "understood to be a precondition for an area's future development." Even though private property would be held under the contingency that the government would at some point in the future exercise a long-term public claim of right-of-way, property owners would still have the right to refuse to relinquish their property in the event of such a claim. Ibid., p. 422.

more restrained in the acquisition of private property.

But would Reisman's generous premiums provide epistemic assurance that compensation would be just? Such assurance would only be valid if the premium represented a multiple over fair market value that would prompt all dispossessed owners to voluntarily relinquish their property. But obviously no such assurance could ever be made. One-not-unlikely scenario would be one in which some owners refuse any offers of generous compensation made by the government. The owner would not willingly relinquish property for any price. But Reisman is prepared to question the motives and rationality of such recalcitrant property owners. "There would still be *irrational, capricious individuals* to be sure but their number would almost certainly not be great enough to constitute a significant barrier to the accomplishment of some important cooperative venture"<sup>52</sup> (emphasis added). But clearly there is no epistemically legitimate reason for such an inference. His perspective is in sharp contrast with Jack Knetsch's interpretation of such behavior, "... owners are unwilling to sell their holdings, ... not because they are irrational or unreasonable but simply because they place a higher value on the particular properties..."<sup>53</sup>

#### **D. Assent as the critical epistemic indicator of wholeness and, hence, justice**

Just compensation is centrally dependent upon the extent to which the dispossessed property owner is made 'whole.' But one of the underlying fallacies plaguing both the economics and jurisprudence of just compensation is that wholeness is somehow a quantifiable state of being that can become the object of an enlightened public policy. But wholeness of the property owner cannot be divorced from valuation meaning that public policy on takings must deal with the issue of valuation in some epistemically legitimate way. But how is this task to be accomplished? The problem is that valuation is not imputable, it is not measurable it is not in any way quantifiable. It is a universal fact that valuation for all people at all times in all situations is only a relative ranking of alternatives. This relative subjective ranking is all that can ever exist in the mind of a property owner. But the issue is even more tenuous than the last sentence would suggest. These rankings do not exist independently of an act of choice in which a preference is finally revealed. The ranking only emerges in the context of a demonstrated act of choice. It is not a mapping that exists in the mind independently of some observable act of exchange.

Given this admonition, what compensation renders the property owner whole and is thus demonstrably just? The only legitimate answer is a level of compensation sufficient to induce the property owner explicitly assenting to the transfer. Richard Epstein almost concurs: "In principle, the ideal solution [i.e., compensation] is to leave the individual owner in a position of indifference between the taking by the government and the retention of the property."<sup>54</sup> But since indifference cannot be the basis for an action, a more appropriate wording of Epstein's criterion would be the following: *just compensation is that payment just sufficient to induce the*

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<sup>52</sup> Ibid., p. 422.

<sup>53</sup> Jack Knetsch. 1983. *Property Rights and Compensation*, p. 39

<sup>54</sup> Richard A. Epstein. 1985. *Takings*, p. 182.

owner to rank the payment offered above retention of his property.<sup>55</sup> This ranking can only be revealed in an explicit act expressing assent to the exchange. This act of assent is the only epistemically legitimate means by which compensation can be proven just. The property owner would never assent to a compensation that left him in a less-preferred or damaged state. Assent is the epistemic proof of wholeness. In this demonstrable sense, the property owner emerges from the transfer, by his own assessment, free of damage.

Without assent, no prescribed level of compensation, generous though it may be, can be 'just' in any epistemic sense of the word. This standard holds irrespective of the property owner's actions or presumed motivations. For example, a property owner may pursue a tough bargaining strategy with the government, demonstrating the behavior of someone that would normally be labeled a 'stubborn speculative hold out.' To some the label of 'speculative holdout' may imply some anti-social motivation but no such presumption is warranted in the issue at hand. For a property owner to hold out for a higher price or compensation is a legitimate motivation and entirely appropriate in the face of governmental attempts to acquire property. In this latter instance, the just compensation is that price at which the owner voluntarily assents to the sale of his property. The fact that the owner may or may not have speculative intent in holding out for a higher price is immaterial to the justice of the compensation. At this point the epistemics and the ethics of just compensation come together. The issue of 'just compensation' in coercive takings contains an obvious and irreconcilable contradiction. Assent cannot at the same time be reconciled with a coercive 'taking.' Since the process of eminent domain is defined by coercive taking, compensation for the taking cannot be made 'just.' "Justice" cannot be reconciled with the apparent ethical breach represented by coercion itself.

#### IV. CONCLUDING NOTE

Can the concept of 'just compensation' be reconciled with the coercive taking of private property? More specifically, can the concept of 'just compensation' for private property be reconciled ethically or epistemologically with the coercive taking of such property by a governmental authority? From both an ethical and epistemic perspective, the answer is a clear *no*. From an ethical perspective, one can assert without risk of refutation that if the surrender of property by a property owner is not voluntary, the presumption of injustice is manifest. Ethical breach is evident. Compensation cannot be just until it is voluntarily accepted by the property owner *without coercion*. An absence of coercion necessarily means that the owner of the property has the right to refuse all offers up to the point at which the owner values the money offered more highly than his property.

But from an epistemic perspective, the absence of assent bars any conceivable inference that compensation is just. No epistemic means are available to make any such determination. Market based benchmarks or professional appraisals are epistemically relevant to those willing to sell at a so-called market price. These estimates or surveys have no relevance what ever in gauging just compensation for the un-assenting owner.

If the means by which governments acquire property were altered so that just compensation were

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<sup>55</sup> On the inapplicability of 'indifference' to human action, see: Murray N. Rothbard. 2004. *Man, Economy and State with Power and Market*. Auburn Alabama: The Ludwig von Mises Institute, pp. 307, 309.

the dollar amount that would induce the property owner to voluntarily relinquish his property, the government would then face a fundamental check on its powers to acquire property. Moreover, there would be ethical and epistemic assurance that so called government projects reflect the true cost of the resources employed. The requirement of explicit assent would remove from government a power that it should never have been granted. The individual property owner would then have the power to prevent the government from proceeding with a project if the government were unwilling to pay a mutually agreeable price. The individual property owner, through the ethical exercise of his rights, would be able to block the coercive, confiscatory appropriation of private property.