BOOK REVIEW

THE DECEPTIVE ALLURE OF SIMPLICITY

RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD, Harvard University Press, Cambridge (1995) (361 pages) ($35.00 cloth)

*Reviewed by Craig J. Albert**

One advantage of having a simple world view is that it allows one to organize one's life into neat little compartments. It is not surprising, then, that many legal scholars seek simple organizing principles by which to analyze complicated legal issues. Simple explanations are inherently satisfying, and scientists dub the most beautiful and simple of them "elegant." In a broad sense, the drive for simplicity has been the motivating force behind the major movements in legal scholarship of this century, beginning with Legal Realism. It is natural and understandable to long for the good old days.

It is fair to say, then, that Richard Epstein's *Simple Rules for a Complex World* treads old ground in its effort to reduce law to some small, easily understood group of rules against which to measure behavior. This is both a blessing and a bane. As a framework against which to analyze discrete problems, his approach is a valuable one, couched as it is in classical microeconomic theory presented in a nontechnical narrative. But untested and unquestioned in this approach is the wealth of unrealistic assumptions which underlie the classical approach. What we get is a series of thought experiments, applied to a few discrete areas of law which are anathema to Epstein (such as regulatory takings, fiduciary obligations within the corporation, and antidiscrimination laws, to name a few), which make sense as intermediate microeconomic theory exam questions, but have little applicability to the world in which we live. Thus, while Epstein's arguments are provocative starting points for discussion, they are unlikely to win over any converts.

We live in an economist's second-best world. It is second-best

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because we know that the classical conditions which are necessary for a global Pareto optimum do not exist. This is necessarily the starting point for Epstein's argument, for his goal is to show that the current legal regime's tremendous departures from his free-market ideal are suboptimal. We can agree, then, that our society is not perfect. But the economist's notion of second best differs from the popular notion in a profound way. It is not simply a step removed from the first best. Rather, it is a departure from first-best such that the restoration of some (but not all) of the conditions necessary for a Pareto optimum will not guarantee a Pareto improvement.[1] Nevertheless, I note that in this second-best world, the overwhelming majority of contracts are fully executed, almost all automobile trips end without a collision, and almost all deliveries result in healthy babies and mothers. Epstein would argue that all of these transactions come at a tremendous cost imposed by excessive regulation, but the fact is that his evidence is drawn mainly from a few odd statutes, regulations and appellate cases which have engendered arguably inefficient outcomes. The evidence he adduces, then, is of the exceptional cases, which do not necessarily lend themselves to general conclusions. The challenge that Epstein faces is to justify departures from our admittedly second-best regime by showing that the second-best world that he would create is unambiguously superior to the one that we already have.

As in much of the law and economics literature, Professor Epstein's desire is to be prescriptive rather than descriptive, and his ambition is to create a set of rules which would organize *all* behavior. He claims to have reduced all of what law should be to seven simple rules: "self-ownership, or autonomy; first possession; voluntary exchange; protection against aggression; limited privilege for cases of necessity; takings of property for public use on payment of just compensation,"[2] and (grudgingly) redistribution through flat taxes.[3] If successful, this would be a truly remarkable feat, for it took God ten rules to do the job the first time around.[4]

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[1] The theory of the second best was developed by Lipsey and Lancaster. "The general theorem for the second best optimum states that if there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions, the other Paretian conditions, although still attainable, are, in general, no longer desirable." R.G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11, 11 (1956).

[2] RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 53 (1995).

[3] *Id.* at 148.

[4] *Exodus* 20:1-17. Epstein would claim, I think, that these were both over- and under-inclusive. The first three are at odds with his small-state, libertarian approach since they create a strong central government: two severely restrict freedom of ex-

The distinction between the prescriptive and descriptive approaches is important. If one adopts the prescriptive approach, then it is incumbent upon the proponent to show that his prescription is robust. That is, he must demonstrate that his synthesis has global applicability, rather than simply being a random happy result in the isolated examples that he cares to explore. The descriptive approach is more limited and more scientific, but its weakness for the proponent is that it provides little in the way of soundbite fodder, since it offers no formula for change. It emulates the "scientific method" in that it puts forth a testable hypothesis; the hypothesis is tested against the available evidence; the evidence either refutes or fails to refute the hypothesis; and, eventually, if we are confident that the experiment was sound, then the hypothesis is elevated to theory.

But the inquiry does not end there. New circumstances may arise against which the theory can be tested, and if the theory is no longer applicable, then the time has come to scrap or modify the theory. The arrival of new evidence does not mean that the first theory was a bad theory; the theory of gravitation worked perfectly well for the 200 years between Newton and Einstein, and gravitation still works fine if you want to shag flies on a sunny day and you don't want to travel to a distant galaxy. Add a strong wind and you need to know something about air resistance; we modify the old theory, but we don't throw it away. My point here is that we can choose an appropriate level of detail at which to describe scientific, economic or legal phenomena and gain some insight commensurate with that level of detail; it is a mistake, however, to conclude that a theory which explains ninety percent of the observed data is necessarily the correct stopping point.

A limited descriptive approach would have been far more convincing. When I first read a draft of the introductory three chapters of this book, I was struck immediately by the elegance of its approach, for I was then under the impression that Epstein's goal was to describe the majority of legal relationships, rather than prescribe a set of rules to govern all legal relationships. I believed that Epstein was going to point out, correctly, that the vast majority

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pression and one unduly restricts the ability of an employer and an employee to bargain over the terms of employment. They are simple, though. It's those nasty regulations that really messed things up. *See, e.g., Leviticus* passim (setting forth regulations in administrative form); *Luke* (setting forth regulations in parable form); *Talmud* (private letter rulings). They are under-inclusive in that, while three of the rules presume the existence of a set of transferable property rights, none establishes those rights or creates a mechanism for transfer.

of interactions between persons in our society are organized about an essential set of simple rules.

Stripped to their core concepts, for example, the Uniform Commercial Code is about voluntary exchange; the Thirteenth Amendment is about self-ownership; much of criminal law expresses the "keep off" and "don't touch" principles; and the takings clause expresses the just compensation idea. But the goal of the book is different. He seeks to prescribe a set of rules to govern all actors at all times in all circumstances, claiming that they "have the virtue of offering solutions for 90 to 95 percent of all possible situations."[5] And the other five to ten percent? Epstein replies:

> Never ask for more from a legal system. The effort to clean up the last 5 percent of cases leads to an unraveling of the legal system insofar as it governs the previous 95 percent. No single, carefully constructed hypothetical case offers sufficient practical reason to overturn any rule that has stood the test of time.[6]

Let us understand the terms of the debate as stated by Professor Epstein. First, the seven simple rules cover more than ninety percent of all possible situations, although the book is devoid of any support for that proposition. Second, any attempt to refute the argument by counterexample is an attempt to use one of those "carefully constructed hypothetical" cases which falls into the remaining five to ten percent. Third, any effort to account for the world of the counterexamples will unravel the entire legal system. This is a daunting challenge, for the terms of the debate as set forth by Epstein are stacked in his favor.

I propose an alternative structure: test the argument by examining one essential assumption, and then attempt to replicate the experiment using one of the rules. First, let us test the assertion that deference to individual decisionmaking is or should be the primary motivation for our political system. Second, test the rule of self-ownership using Epstein's own criteria.[7]

The devolution of decisionmaking down to the smallest possible administrative unit is the "small is beautiful" school of political thought, embodied in Epstein's "spheres of hegemony" construction. At its core is an unprovable assertion of values, claiming that small group decisions are better than large group decisions be-

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[5] *Id.*

[6] EPSTEIN, *supra* note 2, at 53.

[7] This one is my favorite, because Thomas Jefferson wrote in the Declaration of Independence that it was "self-evident," but apparently it was self-evident only for white males.

cause dividing society into ever smaller groups creates a larger number of groups from which to choose, and choice is always welfare-improving. Before we start down this path, we should recognize that the need for collective decisions is itself a response to market failure. Individual decisions are undermined by the cost of collecting information, imperfect evaluation of information and the nature of information as a public good, for example. Changing the level at which decisions are made does not correct these market failures.

Epstein argues that:

> the function of the law is to set the spheres of hegemony for each person. The insistence on the autonomy of the person, and on the dominance of private over collective property, is an effort not to promote greed and selfish behavior but to create many small separate domains in which informal norms can take over, at far greater precision and lower cost.[8]

Consider, for example, the hegemony of the family. Epstein claims:

> A legal rule that calls for noninterference in the ordinary life of the family is one such rule. It recognizes that huge areas of personal behavior, from child raising, to sexual conduct, to financial affairs, are best regulated not by one collective response from the center, but by many smaller and autonomous groups pursuing their ends by means that they devise for themselves without popular or electoral approval.[9]

The critical question here is what Epstein means by "ordinary life," for in that qualification lies the erosion of the argument. States split, for example, on whether or not parents are immune from suit by their children for their non-negligent torts, creating a wide disparity in the legal regime regarding parental imposition of corporal punishment.[10]

Florida, Kentucky and Mississippi all recognize a defense to murder for a man who finds his wife *in flagrante delicto*,[11] but California and New York permit no such defense.[12] The age of consent varies from state to state for marriage, intercourse and years of

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8 *Id.*

9 EPSTEIN, *supra* note 2, at 46.

10 *See* Caroline E. Johnson, *A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U. L. REV. 617, 620-21 (1993).

11 Whidden v. State, 59 So. 561 (Fla. 1912); Vaughn v. Commonwealth, 204 Ky. 229 (1924); Haley v. State, 123 Miss. 87 (1920).

12 People v. Hurtado, 63 Cal. 288 (1883), *aff'd*, 110 U.S. 516 (1884); People v. Wood, 126 N.Y. 249 (1891).

compulsory education. What is "ordinary life" in these states? One possibility is that "ordinary life" varies from state to state, but that would reduce Epstein's argument to an absurdity. If the state is the arbiter of "ordinary life," then there is no room for small group hegemony; the large group defines the legitimate scope of small-group decisionmaking. And such a view would conflict with Epstein's small-state, libertarian view that the individual is and should be the core decisionmaking unit in society.

"Ordinary life" has to rest on some collective notion, and the nub of the issue is how we as a society come to an agreement on what that notion is. An extreme view, which I do not hold, is that everything which goes on within the four walls of the home is nobody else's business. That is certainly hegemony, and it certainly comports with Epstein's "keep off" view of law, but it means that battered women have no choice other than to leave; emotionally, physically and sexually abused children have no access to guardians ad litem and foster care; and senior citizens have no protection against financial misdeeds of their defalcating children. One easy answer is that these activities are proscribed by virtue of the "protection from aggression" rule, but that merely begs the question of what is the appropriate level of decisionmaking. If the family is the appropriate level, then by definition there is no aggression.

As a society, we now say that these things are wrong, irrespective of the fact that there are those who defend such practices. Our collective decision, therefore, is not a result of a Pareto-improving transfer, which is generated by the consent of all individuals. It is the will of a political majority, and we all accede to it; the dissenters in the political debate are given their say, but once the rule becomes law, then the dissenters who act rather than speak are punished. Epstein concedes as much:

> The differences in cultural views and elaboration will not be resolved harmoniously by political debate, even though they may be determined by fiat through majority rule. But no one should think that the outcomes that result from protracted political conflicts approximate those that come within a country mile of satisfying those that come within a mile of satisfying some ideal of unanimous consent. A system of limited government—one that does a few tasks well—is far more likely to achieve social harmony than a system of government that unleashes the warring impulses of clashing political forces.[13]

We all recognize that, as a society, we should embark upon those

[13] EPSTEIN, *supra* note 2, at 47.

courses of action which enjoy unanimous consent. Those are the courses of action which would be undertaken in the absence of any formal mechanism of government whatsoever. But our hard questions revolve around those decisions which cannot be made unanimously, so to say that the outcomes achieved through political conflict do not satisfy the ideal of unanimous consent is to set up a false basis for comparison. The candidates for decision by majority rule are necessarily those which have failed to achieve unanimous consent.

An alternative view is that individual decisionmaking is a necessary first step in the process of experimentation, but it is not the ultimate goal. When Justice Brandeis advanced the view that states were the laboratories of federalism,[14] his point was that our political subdivisions were free to experiment with alternate legal and economic systems which might benefit their citizens, subject to regulation by the federal government under such doctrines as the dormant commerce clause.

What happens, though, when two laboratories reach different results, but the gains to one state from a uniform national law exceed the losses to another? Coasean trade might theoretically result in an agreement to adopt a uniform national law and reallocate the gains to the loser, but our experience shows that such results do not occur in practice; Article III's creation of original jurisdiction in the Supreme Court of disputes between states[15] was at least tacit admission of the potential for friction. The proper role of federalism, in an evolving national economy, may be to create an evolution toward a stronger central government, rather than the devolution to states, localities and individuals.

Epstein's first rule—that each person owns himself—is unobjectionable, but his justification for the rule is flawed. Consider the extreme cases of slavery (third-party ownership) and collective ownership. It is unclear to me whether Epstein's objection to slavery is based on moral grounds or on economic grounds, although it appears to be an amalgam of the two. He identifies the basis of the moral objection to slavery as based on "the indignities that it heaps upon those who are its victims. Stated in familiar terms, the inability of slaves to say no (save on pain of torture) to whatever is commanded of them creates terrible incentives for exploitation by

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[14] New State Ice Co. v. Liebman, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

[15] U.S. CONST. art. III, § 2, cl. 2.

the owner."[16] He contends that, "[u]nder slavery, the gains to the owner will systematically fall below the losses to the slave."[17]

If Epstein's claims were correct, then our country's bitter dispute over slavery would never have ripened, as it did, into the Civil War. Slaves, who could be freed through voluntary manumission by their owners, could have contracted Chicago-style with their owners for their freedom. The federal prohibition on importation of slaves beginning in 1808[18] should have begun a steady decrease in the number of slaves held. In fact, however, the opposite was true.[19]

Take Epstein's transaction cost indictment of the slavery system. If the administrative burden of establishing title to slaves were so cumbersome, then the system should have collapsed under its own weight. Yet *Dred Scott*[20] affirmed the vitality of the administrative system for controlling slave ownership, maintained under a series of fugitive slave acts[21] adopted from time to time from the beginning of the Republic through 1850. In my view, the fact that almost four centuries passed between the introduction of slavery into the Americas and its abolition bears silent testimony to the conclusion that administrative costs were not a major concern of slaveowners.

Then again, if it is merely an administrative burden and the absence of voluntary contracting that condemns slavery, what would Professor Epstein say about the establishment of a feudal system, since the initial transaction in which the serf is tied to the land (or, in a modern context, tied to shares of common stock or

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16 *Id.*

17 EPSTEIN, *supra* note 2, at 56.

18 U.S. CONST. art. I, § 9, cl. 1 (barring federal prohibition on slave trade until 1808); Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (barring international slave trade beginning in 1808). By 1808, before the federal ban on international slave trade had taken effect, many states (including slave states) had already acted to ban the import or export of slaves. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1878 (1993).

19 Between 1820 and 1860, the "free Negro" male and female populations approximately doubled (from 112,734 to 234,119 and from 120,790 to 253,951, respectively), while the corresponding slave populations nearly tripled (from 788,028 to 1,982,625 for males and from 750,010 to 1,971,135 for females). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 18 (1975).

20 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

21 U.S. CONST. art. IV, § 2, cl. 3; Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. The Kansas-Nebraska Act, ch. 60, § 32, 10 Stat. 277 (1854) finally unraveled the Missouri Compromise and the precarious Compromise of 1850.

to equipment or real estate leases) would be a voluntary one, to which the prospective serf has the power to say, "No."

No, the thing that turned some people into slaves and left others free was the same thing that kept some of us safe in Brooklyn rather than fearful in Warsaw during the Second World War: luck. The lucky ones—the ones who avoided becoming property by virtue of conquest and capture—remained free, while the unlucky ones were drawn into a society which recognized Epstein's second rule (the rule of first possession), but not the first rule.

Epstein attempts to tread a line between majoritarianism and individualism, asserting instead that he "seeks to avoid both horns of the dilemma by creating separate zones of influence, where smaller groups are able to achieve through informal means greater cohesion and consensus, and to leave old groups and to form new ones when old alliances fail or become outmoded."[22] His central claim, then, is that the line is found by encouraging "the development of a network of voluntary transactions in which individuals deal on their own behalf with trading partners of their own choice."[23]

Given that the world is second-best, has Epstein made a convincing argument to scrap our legal regime in favor of the small-state, libertarian alternative? I think not. The world which Epstein longs for—that of the good old days—is one which we as a society abandoned piecemeal beginning in the late nineteenth century. That world was one of twelve- to fourteen-hour workdays, six days a week; unsafe factories; low wages; short life spans; education for the few; unplanned growth of cities; and environmental nightmares. Our predecessors in this society agreed, against vociferous and bitter dissent, to change, reflecting what I believe to be a rejection of the arguments which Epstein has resurrected today. The good old days, it seems, are good in our dreams, and perhaps that is the way they should stay.

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[22] *Id.*

[23] EPSTEIN, *supra* note 2, at 47-48.