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# Preaching to the Choir

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# Book Notes

## Preaching to the Choir

*Simple Rules for a Complex World.* By Richard A. Epstein.\* Cambridge: Harvard University Press, 1995. Pp. xiv, 361. \$35.00.

### I

At a time when many of the most important institutions of government administration are under intellectual and political attack,<sup>1</sup> Richard Epstein's *Simple Rules for a Complex World* attempts to suggest a plausible alternative to the modern regulatory state. Epstein comes to this project with a wide-ranging knowledge of the law and a demonstrated ability to focus on the broadest perspective. A nationally known torts scholar,<sup>2</sup> he is also the author of *Takings: Private Property and the Power of Eminent Domain*,<sup>3</sup> which seeks to provide a comprehensive theory of the Takings Clause.<sup>4</sup> In his latest, more ambitious, book, Epstein envisions an entire legal system transformed to reflect the value of simplicity.

At the core of Epstein's proposal "to edge back toward the state of nature" (p. 36) are seven "simple rules," largely based on the common law. These rules, he advises the popular audience to which this work is directed (p. ix), offer solutions to all but five to ten percent of the possible problems a legal system might confront (p. 53) and "go a long way toward establishing a stable legal order largely impervious to variations . . . within and across societies" (p. 112). They heavily depend on the conviction that cooperative ventures and legal arrangements "are better left to private ordering than to public control" (p. xi).

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1. See, e.g., NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA 7-22* (Ed Gillespie & Bob Schellhas eds., 1994).

2. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (5th ed. 1990); RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY* (1980) [hereinafter EPSTEIN, *A THEORY*]; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Strict Liability*].

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

4. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

Although forcefully argued, *Simple Rules* is ultimately unconvincing. Epstein leaves his critics unopposed or mischaracterized and his own arguments unproven. He calls for nothing less than the dismantling of the regulatory state, but his book will most likely “persuade” only those already in his camp.

## II

Epstein calls his first rule “self-ownership, or autonomy” (p. 53), by which he means that one owns oneself and the product of one’s labor. This principle, he argues, “offers the shortest path from initial entitlement to productive human activity” (p. 57). By instantly decentralizing the market in human capital and bestowing ownership on the person likely to value the asset the most, the rule greatly limits administrative burdens and the need for state interference in the market (pp. 56–57).

Epstein’s second rule is first possession, which, Epstein elaborates, means “you take what you can get” (p. 59). He contends that this rule, like the first, creates security of possession and decentralized control of resources at low cost (p. 62). Although he recognizes that “the first-possession rule imposes costs on those who are excluded,” he asserts that “the overall size of the gain” from the rule “is so large that we need not trouble ourselves over its distribution” and warns that any alternative would require “embracing some regime of centralized authority” (pp. 61–62).

Epstein’s third rule is voluntary exchange (p. 71). As he explains, so long as (1) “we know that [everyone] desire[s] more” (p. 76) and (2) there are multiple contracting partners from which to choose (p. 78), “there is sufficient warrant for allowing voluntary exchange to take place. *Both* sides are better off than they were before” (p. 76). Epstein would invalidate contracts only in cases of duress (defined to exclude economic duress) (pp. 86–88), “infancy, insanity, undue influence, fraud, and misrepresentation” (p. 81).

Grounded in safeguarding voluntary exchange, the fourth rule is protection against aggression (p. 91): Aggression against someone else’s person or property is illegal and gives rise to a claim by the victim against the aggressor. This rule “enforces the separate domains in which all of us, singly, can live our own lives as we see fit” (p. 92). Epstein has long been a proponent of strict liability for torts,<sup>5</sup> and he calls for it in this book (pp. 92–97). However, while his academic work on tort theory focuses on linking causation and responsibility,<sup>6</sup> Epstein’s argument here is simply that the negligence system

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5. See EPSTEIN, A THEORY, *supra* note 2, at 71–75.

6. See *id.* at 15–50.

consumes administrative resources that are not justified by improved incentives for taking due care (pp. 96–97).<sup>7</sup>

These first four basic rules are meant to “cover much of what a good legal system should desire” (p. 16). However, Epstein does not consider them sufficient, and thus his next two rules constitute exceptions to his first four.

The first exception is a rule of limited privilege for cases of necessity. When life or property is in imminent danger, Epstein allows that the basic rules of property may be suspended as long as the person whose property is used is justly compensated (pp. 113–14).<sup>8</sup> He conceives of necessity as a market distortion, in which bargaining is for some reason limited so that “one party is in a position to *hold out* against the other” (p. 113). The task of his first exception is therefore to minimize distortions by “allow[ing] but limit[ing] aggression” and “neutraliz[ing] the advantages of the holdout position” (pp. 113–14). In this model, “a man nearly dead of thirst” is entitled to grab the only available bottle of water, but must compensate the owner for the water’s “ordinary market value” and perhaps also for the loss of control (pp. 113–14).

Epstein’s second exception is that the state may take property for public use, even in the absence of necessity, so long as just compensation is paid (p. 128). This proposition is, of course, embedded in the Constitution,<sup>9</sup> but Epstein, “[a]t the risk of being dogmatic, . . . assert[s] that the *only* correct position is to recognize that *all* forms of regulation are subject to scrutiny under the takings clause” (p. 132). He would allow exceptions only for regulations that prohibit common law nuisances (p. 132) or that “*benefit[] and burden[] in equal proportions*” (p. 134). In support of this view, he relates the standard economic argument that full compensation promotes efficiency by protecting private investment and limiting the state to takings in which the public gain exceeds the private loss (p. 129).

In his final rule, Epstein attempts to come to terms with what he calls “one of the persistent themes of modern society—the pervasive desire to engage in acts of redistribution” (p. 16). Epstein believes that any public redistribution will be crippled by the difficulty of channeling money to the proper person, administrative costs, and what he sees as the necessary dulling of incentives for both taxpayers and recipients (p. 143). Nevertheless recognizing the popularity of contrary sentiments, his seventh rule states that if there must be government redistribution, this redistribution should be financed exclusively by flat taxes (pp. 145–48). Flat taxation, he argues, would expose social

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7. For instance, Epstein argues that “collecting and interpreting information on the three critical variables” in Learned Hand’s test for negligence “is likely to be an exercise in frustration” (p. 96). Epstein has made this argument before, but it has not been central to his work. *See, e.g.*, Epstein, *Strict Liability*, *supra* note 2, at 188.

8. This position, of course, was famously expounded in *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221, 221–22 (Minn. 1910).

9. U.S. CONST. amend. V.

engineering in taxation to public view, thereby increasing the likelihood that only programs with strong popular support would survive (p. 146). Moreover, flat taxation would lower administrative costs by simplifying tax law; reduce government discretion over taxes, eliminating “a level of political discretion and class struggle whose effects on overall wealth production are likely to be negative”; and reduce disincentives by abolishing “[h]igher marginal brackets [which] mean less production from the most productive people” (p. 147).

Having presented his seven rules, Epstein then applies them to a cross-section of the law: the regulation of labor markets, employment discrimination and comparable worth, professional liability for financial loss, product liability, corporate law, and environmental protection. His conclusion throughout is that much of the regulatory state must be torn down.

For example, Epstein argues that all antidiscrimination laws “are mistaken and misguided” (p. 171). “As long as people know their own self-interest, contractual bargains” will, he asserts, “advance the joint welfare of the parties without having, on balance, harmful external effects, and should therefore not be disturbed” (p. 171). Acknowledging that his view “looks past the disappointment that individual applicants always sense when passed over for any reason they regard as improper” (p. 171), Epstein contends that “the element critical to success for members of minority groups is not the ostensible protection of an antidiscrimination law, but free entry of firms and workers into an open market” (p. 176). In this environment, job-seekers can find the person who most values their services, and “the employer who sacrifices economic welfare for personal prejudice will pay for her preferences on the bottom line” (p. 176). While many employers “may find it cheaper to operate if they hire all members of a single racial group or only men or only women” (p. 177), Epstein argues that the consequences of permitting their discrimination to continue are outweighed by “the highly positive overall” consequences of repealing antidiscrimination laws (p. 171).

### III

Epstein is a skilled writer. Many readers already dissatisfied with modern administration will surely be swayed by the power of his prose. Yet Epstein does little to convince anyone else. He fails to acknowledge and directly confront his opposition.<sup>10</sup> When he does refer to his critics, he is often unfair.

Epstein’s discussion of potentially unconscionable contracts is a good case in point. In rejecting the argument that contracts may be invalidated based on

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10. For instance, Epstein does not address an interesting challenge to his economic argument in favor of compensation for takings. The work of Lawrence E. Blume, Daniel L. Rubinfeld, and Perry Shapiro suggests that compensation is *inefficient* because it encourages landowners to overinvest in private capital by allowing them to disregard the value of their land for public projects. See Lawrence E. Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984).

a gross inequality of bargaining power, Epstein, uncharacteristically, starts by describing the opposing camp. Focusing on labor contracts, he argues that advocates of an unconscionability doctrine (who are left unnamed) are so committed to the view that employers can absolutely dictate the terms of employment that they imply that employers are able to systematically force workers to labor for no pay (pp. 83–84). Epstein notes that he does not “observe people working for employers at a zero wage” (p. 84), which is not surprising given the existence of minimum wage laws (which Epstein opposes) (pp. 144–45). He concludes that “[t]he idea of inequality of bargaining power, the idea of dictation, fails the most decisive test: it has no *descriptive* power” (p. 84). After dismissing the “all-or-nothing characterizations of the standard account” (pp. 84–85), he then offers, as his own more reasonable view, that “[t]he critical question is what percentage of the surplus [from trade] will be captured by each side” (p. 85).<sup>11</sup>

This, of course, *is* the more reasonable view. It is also, however, the position of Epstein’s opponents, those who believe that gross inequalities of bargaining power are grounds for invalidating contracts. Judge Skelly Wright in *Williams v. Walker-Thomas Furniture Co.*,<sup>12</sup> one of the most famous endorsements of contract invalidation for unconscionability, never suggested that the poor plaintiff who signed a furniture contract with a cross-collateralization clause received no benefit from her bargain. Instead, he held that a contract could be invalidated as unconscionable if there was no “meaningful choice on the part of one of the parties together with contract terms which are *unreasonably* favorable to the other party.”<sup>13</sup> The “standard account” that Epstein attacks is a strawperson of his own devising.

As troubling as Epstein’s refusal to address his critics directly is the failure of his own arguments to meet the standards of proof he sets for them. It is not at all clear that efficiency should be the preeminent value that a legal system promotes.<sup>14</sup> But even granting, for the sake of argument, that efficiency matters above all else, Epstein still fails to make a strong case that his rules are superior to existing law. Epstein’s section on the rule of self-ownership is perhaps most telling in this regard. Anxious to avoid “the clash of moral absolutes that has so dominated philosophical discourse” (p. 55), he argues that “the most powerful justification for the rule is empirical” (p. 59). Yet Epstein’s argument in fact proceeds by what he terms “a kind of reverse engineering” (p. 55). Rather than cite specific empirical evidence, Epstein analyzes the

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11. Epstein goes on to argue that “there is no theoretical reason to believe that the employer has any systematic advantage in capturing surplus, and the opposite may well be true” (p. 85).

12. 350 F.2d 445 (D.C. Cir. 1965).

13. *Id.* at 449 (emphasis added).

14. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). Radin’s argument that to speak of “[f]reedom or autonomy . . . as individual control over how to maximize one’s overall gains” “foster[s] an inferior conception of human flourishing,” *id.* at 1885–86, seems particularly relevant here where Epstein refers to individual “autonomy” and “self-ownership” interchangeably (p. 53).

theoretical disadvantages of alternatives to self-ownership based on the assumption of rational maximizing behavior (pp. 55–58). On that basis, he concludes that his rule maximizes efficiency and asserts that people would choose such a regime if placed behind “a veil of ignorance” (pp. 57–58).

While the view that human beings are, and should be, rational maximizers is widespread,<sup>15</sup> the paucity of genuine empirical inquiry throughout this book is an important weakness, both because Epstein asserts that he will so justify his rules and because of the possibility that empirical work might undermine Epstein’s core beliefs. For instance, Epstein begins his book by declaring that “[t]o [his] mind there is no doubt that a legal regime that embraces private property and freedom of contract is the only one that in practice can offer . . . permanence and stability” (p. xii). While one could very plausibly argue that recent world history bears him out, Epstein does not avail himself of this history. And the claim that private property reduces uncertainty cannot be deduced solely from the assumption of rational maximizing behavior.<sup>16</sup> As Duncan Kennedy and Frank Michelman have demonstrated, assessing the certainty of any property regime depends on “concrete knowledge of people’s actual wants, circumstances, and proclivities.”<sup>17</sup> For example, a collective property system that effectively distributes risk (such as a law firm)<sup>18</sup> might very well create more “permanence and stability” than a regime in which all can keep what they earn, but have claim to nothing more.<sup>19</sup>

*Simple Rules for a Complex World* is a rhetorically powerful response to widespread disgust with and fear of the modern regulatory state. Almost certainly, it will become a rallying cry for the already converted. Yet Epstein’s refusal to take on his critics and his failure to provide empirical support for his own arguments may very well mean that *Simple Rules* will convince few other people. Epstein is just preaching to the choir.

—Jill Elaine Hasday

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15. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353 (1990) (“The basic assumption of economics that guides the version of economic analysis of law that I shall be presenting is that people are rational maximizers of their satisfactions.”); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

16. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 714, 722–26 (1980).

17. *Id.* at 714.

18. See Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 320–21 (1985) (“[A] law firm can provide the opportunity for individual lawyers to diversify the risks inherent in human capital. . . . [B]ecause [seniority-based profit] sharing facilitates diversification, the sharing model is superior, provided that shirking, grabbing, and leaving can be constrained.”).

19. See Kennedy & Michelman, *supra* note 16, at 722–26.