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Levmore on Simple Rules

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LEVMORE ON *SIMPLE RULES*

*by: Richard A. Epstein**

In 1995, the Harvard University Press published my book S*imple Rules for a Complex World*,[1] which set out my world view on a wide range of substantive issues related to, on the private side, the law of property, contract, tort, and restitution; and on the public side, the law of eminent domain and taxation. The framework that I developed in that book relies on key private law baselines to assess, among other things, the efficiency and desirability of various forms of legislation that play off these common law rules dealing with environmental law, land use regulation, and labor law. Saul Levmore poses a thousand questions about if and how the scheme can work but displays at the end of the day some sympathy with my approach, which he thinks corresponds to the many public choice issues to which his own career has been deeply involved.[2] It is impossible to respond to all his well-aimed sallies at this occasion, so I shall try to tease out why I think that the discipline of simple rules continues to survive, notwithstanding his staccato-like criticisms.

From the outset, Levmore demonstrates his love-hate relationship with simple rules. He is attracted to them because he thinks that their simplicity renders them resilient against various interest group attacks that seek to undermine sound legal institutions. But he is uneasy about them: first, because he is not sure that we have the right simple rules and, second, because complexity may be more efficient, as evidenced by the oft-complex rules adopted in multiple corporate and business settings. He then expresses his own angst over the scope of topics with which simple rules can be asked to deal, wondering how any sets of educational or military institutions could be made to fit in this kind of a Procrustean bed.

There is no knockdown answer to his fuselage of objections, but it should be possible to peel them away one layer at a time in order to show that the focus of my simple-rules agenda is on common law rules of property, contract, tort, and restitution, as supplemented by various rules of taxation and eminent domain. I did not attempt to explain how the public should manage or operate institutions that fall within its domain, such as public schools, universities, the military, or Veter-

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1. Richard A. Epstein, Simple Rules for a Complex World (1995).

2. Saul Levmore, *Simplicity and Complexity in Law and in Markets*, 10 Tex. A&M L. Rev. 639 (2023), https://doi.org/10.37419/LR.V10.I4.3.

ans Affairs hospitals, except to express a consistent preference for privatization of as many of these public functions as is deemed possible. That could involve spinning off some government operations into private hands or contracting out certain key functions of public operations that are better handled by the private sector.

The point here often turns on the ability of public and private parties to gain information about how to respond to various forms of uncertainty. Government collection devices are very limited, and it is difficult to monitor the choices that governments make. Private firms have much more efficient oversight mechanisms and better means of collecting needed information. Accordingly, they are, in general, better able to take into account a welter of facts in making decisions on how to act. Hence, it makes sense for private parties to engage in making more fine-grained judgments on how to proceed. But even here it is important to note the following division within the firm. The constant, ongoing decisions on how to manage an employment relationship, for example, work best when there is no government second-guessing the choices, which is why these decisions should be insulated from judicial review. But in those situations where judicial review may be in the offing—cases of layoffs and terminations—private firms well understand the riskiness of complex rules. By way of example, in termination cases there is no requirement that any worker take steps to mitigate damages, which is an impossible task, given that no one knows how an individual worker should balance his own convenience against the costs to the firm. And that problem is utterly intolerable in the many instances of mass layoffs. So the well-nigh universal package substitutes severance pay—pegged to salary history and years of employment—which is paid out as a fixed formula, eliminating the conflicts of interest that arise under any mitigation rule. There is no way that any public body could fill in the formula's blanks, but by the same token, once that information is privately supplied, there is no further reason to worry about judicial misbehavior as courts need only apply the formula, without making any independent determination of its reasonableness.

Levmore is, of course, right that some private law problems do require considering the reasonableness of parties' actions. But as I have recently argued elsewhere,[3] it is important to keep the relative domains of hard-edged rules and rules of reason as distinct as is possible. So here, start with the hard-edged rules. This means that in torts involving strangers, the preference is for strict-liability rules that look at outputs and do not look at inputs (e.g., care levels) to make an initial

3. Richard A. Epstein, *Rules and Reasons, Public and Private on the Use and Limits of Simple Rules 25 Years Later*, 52 EUR. J.L. & ECON. 363 (2021), https://doi.org/10.1007/s10657-020-09681-3.

determination of liability.[4] Those outputs can be discontinuous by using bright lines down the middle of roads, stop signs, traffic lights, and the like. Conform and you are safe; deviate and you are not—at least if the causal connection between breach and loss can be established.

This pattern has much support by looking at private analogies, particularly to sports. You name your game—baseball, football, golf, hockey, soccer, tennis—and they all have the same structure. The boundary lines for fair or foul, in or out, are always done by looking at outputs, where levels of efforts used to obtain those outputs are totally irrelevant. There, of course, must be some response to various kinds of intentional harms, which give rise to rules on flagrant fouls, potentially leading in turn to fines or expulsions. But note that the one set of rules most conspicuously absent from these regimes is a negligence-based, Hand-formula type analysis[5] of the sort championed long ago by Richard Posner.[6] Why switch when we go from games to situations of life?

These hard edges are, however, just the start. Further qualifications are needed to round out the system. Thus, in many cases, road accidents are structured like sports, but here it is not just a question of who hit whom; it is also the question of, say, who did or did not observe the rules of the road. The solutions have at least four boxes—A, not B; B, not A; A and B; and neither A nor B. This then calls for some function to divide the loss, which is a problem in many cases. There is yet a further complication: The behavior of the two parties need not be independent. If A knows that B has deviated from the rules of the road, then he is under the duty to take reasonable steps to avoid harm by acting in good faith. Note there is no rule that works here because without knowledge of the deviation, the proper response is hard to determine, especially within a fraction of a second. Hence, *by necessity*, we do switch to a reasonableness standard, in which the usual attitude is that if you make a sensible choice, you are safe from liability if it turns out that you guessed wrong. If you decide to jump from a coach whose wheel is coming off, and you injure yourself in the fall, you can still recover if it turns out that the coach itself did not topple.[7]

But note that this second-tier response occurs only in a small fraction of cases and, accordingly, does not remove the hard-edged quality

4. *See* Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. TORT L. 6, 16–17 (2010).

5. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (outlining Judge Learned Hand's formula for determining negligence).

6. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972), https://doi.org/10.1086/467478, an article to which I (inevitably) responded, *see* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973), https://doi.org/10.1086/467495.

7. *See* Jones v. Boyce (1816) 171 Eng. Rep. 540, 1 Stark 493; Tuttle v. Atl. City R.R., 49 A. 450 (N.J. 1901).

of the rules in a huge number of cases where interdependent sequential performance does not arise. Hence, we can employ discretionary rules in a cabined way, without giving up the huge advantage of the simple rules.[8] It will be said that in other kinds of tort situations, we do not have rules of the road, as in cases with occupier's liability, medical malpractice cases, and product liability cases. But even in these places, we have useful categorical surrogates that work well. With occupier's liability, a proprietor must take usual and customary steps to rid itself of liability;[9] once a danger is discovered, it has to be cordoned off and then corrected. Conversely, users must take heed of obvious dangers. With medical malpractice, customary practices dominate, so there is no need to run a Hand-formula analysis at the retail level to determine liability, and when a sudden emergency arises, the same good faith/reasonableness standards kick in.[10] In product cases, the key issue is whether a latent defect created by the original manufacturer persists unchanged until it causes damage in normal use.[11] The formula is not a risk-utility analysis, which wanders far and wide and vastly expands liability while undermining the incentives for users to take precautions when in possession of dangerous instrumentalities.

I stress these cases for one important reason. Levmore is quite right to note that we can easily identify cases where increasing simplicity comes at a loss of efficiency, which is what would happen if no adjustments were made in cases of sequential interdependence. But the tragedy of modern law does not lie in missing the right balance in these low-frequency but difficult cases. Rather, it lies in not getting the *simple cases* right, and in virtually all contexts, the fancy negligence, cost-benefit, risk-utility analysis is both *more complex* and *less efficient*, which is one cause of periodic liability crises that persist until technical improvements in various goods—e.g., medical imaging devices—undo much of the damage of overbroad liability rules.[12]

The related issue of remedies also gives rise to a distinct set of difficulties where the harm is threatened but not complete. Analytically, there are always two kinds of error—intervening when the action turns out to be without danger and not intervening when it turns out that the risk in question materializes. The best result that can be obtained under these circumstances is to try to take sensible precautions

8. *See* EPSTEIN, *supra* note 1, at 151–52.

9. For the sensible rules, see Robert Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] AC 358 (HL) (appeal taken from Scot.). For the modern reformulation that relies all too heavily on reasonableness, see Rowland v. Christian, 443 P.2d 561 (Cal. 1968). *See also* RICHARD A. EPSTEIN, TORTS § 12.11 (1999).

10. Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. BAR FOUND. RSCH. J. 87, 109 (1976).

11. Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 444 (Cal. 1944) (Traynor, J., concurring) ("The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.").

12. *See* EPSTEIN, *supra* note 1, at 101–02.

to minimize the sum of error and administrative costs in the way announced long ago by Guido Calabresi in *The Costs of Accidents*.[13] The essential point here is to avoid the major error in his famous "Cathedral" article with A. Douglas Melamed, which posits a strict dichotomy between "property" rules that require a categorical injunction and liability rules that require some measure of damages.[14] In fact, there is no good sense in forcing the legal response to either extreme when the common and sensible judicial practice mixes and matches the two remedies in order to minimize the sum of both kinds of error.[15] At this point the notions of simplicity and optimality start to converge. It is imperative to take into account uncertainty in dealing with future actions. The simplest and best way to do that is to minimize the sum of the two kinds of error, which is what an intelligent remedial program seeks to obtain, but which cannot be achieved if the analysis is confined to one of the two corner solutions—only damages or only injunctions.

The same overall analysis, moreover, carries over in other areas. The contract at will has its tricky moments, but it is child's play compared to the endless complexities that arise from the application of the Fair Labor Standards Act, the National Labor Relations Act, and the full range of antidiscrimination laws on race, age, sex, national origin, sexual orientation, and the like. The one simple, operative principle that brings order to these cases is that, in the absence of monopoly power, there is no reason to interfere with the operation of competitive markets. That point was made over 200 years ago in *Allnutt v. Inglis*, where it was said that "[a] man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers may agree . . . ."[16] But that is not true with the public wharf, where there is crown monopoly: "[I]n that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, [etc.] . . . but the duties must be reasonable and moderate."[17] My point here is not to delve into the mysteries of rate regulation, but a simpler one: None of the complexities of determining what is fair, reasonable, and non-discriminatory are required in competitive markets, in which the power of entry and exit on both sides of the market offers far greater protection than any regulatory scheme.

Next, there is the public sector, where the dominant topics are taxation, eminent domain, and regulation. On this score, the principle of simple rules calls for a flat tax for any general revenue measure. The

13. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 312 (1970).

14. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

15. *See* Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493 (2018).

16. Allnutt v. Inglis (1810) 104 Eng. Rep. 206, 208; 12 East. 526, 530.

17. *Id.*

logic here is that any revenue target can be reached by this approach, and the flatness of the rate structure avoids the political tussles in which interest groups seek to impose greater burdens on their rivals, obtain greater benefits for themselves, or obtain some combination of the above through the political process.[18] It has been sometimes suggested that a head tax is equally simple and, therefore, equally desirable as a flat tax. But its incentive effects are largely perverse, given that the head tax needed in many cases could exceed the available income of many taxpayers, who therefore would be required to starve as a result. Here, too, it is important to compare equally simple rules to make sure to adopt the one that has the more desirable incentive effects, which in this case is not a close call.

The same logic applies in the field of eminent domain, where the constitutional protection of the full set of property rights (possession, use, disposition, and access) makes it difficult for the state to impose selective regulation or taxation on the use of various forms of property that work a wasteful redistribution without offering any positive welfare benefits. Dealing with this issue requires a two-part solution, where the combination of the just compensation requirement (so as to prevent isolated individuals from taking losses from general schemes of regulation) and a nondiscrimination rule (designed to prevent any group from seeking a disproportionate share of surplus) when positive-sum projects are undertaken. That latter question is addressed by the doctrine of unconstitutional conditions, which imposes limitations on how to divide the cooperative surplus that arises from any positive-sum transactions.[19] Hence, it becomes necessary to allow persons to attack provisions that skew surplus, in order to prevent its dissipation. To put the point simply, in a two-person gain, a Pareto improvement from the origin is any point in the northeast sector. But the battle between (10,2) and (2,10) is a battle between two Pareto improvements, which will result in surplus dissipation as each person seeks to move the needle in his or her direction. The doctrine of unconstitutional conditions in effect requires, via proration, a distribution in all cases of (x,x) that avoids that struggle. That formula is, moreover, capable of easy extension to *n* persons, and thus to larger social questions.

It is instructive to note that in all cases where that nondiscrimination rule is categorically applied, the ability for political intrigue is sharply limited. Thus, *Armstrong v. United States* relied on this proposition:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public

18. *See* EPSTEIN, *supra* note 1, at 137–40.

19. RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 98–103 (1993).

> burdens which, in all fairness and justice, should be borne by the public as a whole.[20]

The upshot in that case was that the United States could not escape liability for the destruction of a valid materialmen's lien on naval vessels that were sailed into international waters.[21] There was no reason that a huge fraction of the costs of boats designed to protect the nation as a whole should be borne by a subcontractor whom the United States government decided to stiff.[22] Though the lien on property was a partial interest, it was entitled to as much protection as the whole.[23] But when that principle is lost sight of, massive expropriation can take place, as occurred in the notorious case of *Penn Central Transportation Co. v. City of New York*, whose most infamous sentence cast *Armstrong* aside, stating:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 [ ] (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[24]

Hence the retreat to "ad hoc, factual inquiries,"[25] which routinely allow governments to take partial interests—in *Penn Central*, air rights that were fully protected under New York law—without compensation. The practical effect is that in virtually all regulatory takings cases, wipeouts of well over 80% go without compensation, without any effort to identify the public gains that justify those losses.[26] Indeed, it is at just this juncture that the gap between Levmore and myself becomes clear. When he speaks of regulatory takings cases, he tends to celebrate the same trend of increased politicization that I deplore:

> [M]ost taxes and rent control schemes are not compensable takings because they are the products of political exchanges; taxpayers and landlords are left to protect themselves in the political arena. In contrast, individuals who are subjected to "spot zoning" are often

20. Armstrong v. United States, 364 U.S. 40, 49 (1960).
21. *See id.* at 48–49.
22. *See id.* at 43–44.
23. *See id.*
24. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978). It turns out that Justice Brennan misread every single applicable precedent. *See* Richard A. Epstein, *Will the Supreme Court Clean Up Takings Law in* Murr v. Wisconsin*?*, 11 N.Y.U. J.L. & LIBERTY 860 (2017).
25. *Penn Cent. Transp. Co.*, 438 U.S. at 124.
26. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 87–88 (2016) (showing that takings claims based on government regulation almost invariably fail).

> politically unprotected, because they are burdened in a way that makes it unlikely that they can find political allies, and takings law will often protect them from majoritarian exploitation.[27]

These prognostications about political battles are wrong in two key ways. First, the purpose of legal doctrine is not to protect only people who are unable to protect themselves through the political process. That highly imperfect form of protection involves costly intrigue on all sides of the battle, and those maneuvers dissipate social resources no matter what the outcome. The point of sound legal doctrine is to make sure that these senseless battles never take place in the first place, and that goal is advanced when the just compensation requirement is imposed on the state takings of *all* property rights, so that the government (and hence its taxpayers) have to internalize the costs of its systematic errors, such as those in *Penn Central*.

Nor did Levmore prove prophetic in his view that compensation should be required for spot zoning. The spot zoning claim in *Penn Central* gained the support of a Justice William Rehnquist dissent (joined then by Justice John Paul Stevens!), but it failed to move the Brennan majority there or have much traction in subsequent cases. Hence, looking over today's dismal legal landscape, it should be all too evident that while the use of simple rules will not solve all our problems, it will go a long way to correct a huge cluster of endemic blunders in both private and public law.

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27. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1345 (1991). For my criticism, see EPSTEIN, *supra* note 1, at 45, 128–37. Neither of these passages is directed specifically to Levmore.