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# POSITIVE AND NORMATIVE ELEMENTS IN LEGAL EDUCATION

RICHARD A. EPSTEIN\*

Legal education is a very broad subject, indeed, and I think that in the allotted fifteen minute period it is best not to try to speak about it in the round, but to isolate one issue of legal education that deserves a good deal of comment. I would like to focus on the question: What is the appropriate relationship between the positive and the normative aspects of the study of law? More concretely, how should these matters be presented and understood as part of a general legal education?

One way to understand the importance of this problem is very simple. Law is a business that is very intensely tied up with politics, and politics is a business that is very heavily tied up with normative judgment. One might be tempted to say that any time you are trying to deal with legal rules, you must defend them in terms of some more general ethical and normative theory in order to do an adequate job. I think there is a certain degree of truth in that proposition. The problem, however, then comes at the next stage in the argument. If you are not careful, you might assume that, because there is an indispensable moral component or political component in the normative side of law, this component must become ever larger until it slowly swamps the entire study of law. By degrees the descriptive elements in legal analysis become subordinated until, in the end, they disappear. If you take that line, then law becomes politics by yet another means, and what we talk about among ourselves turns out to be professional mumbo jumbo. Law is left with no independent intellectual integrity, no independent subject matter that stands alongside the descriptive disciplines of the physical and social sciences.

It seems to me that the extended position runs a little bit too far and too fast. Indeed, if I were asked to organize the study of normative and positive questions, I would put the inquiry in quite the opposite way. I would probably start with the positive and then go to the normative. Before I explain why and how that ought to be done, it is important to identify those particu-

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lar areas where, even where the law turns out to be a normative discipline, positive components predominate.

First, in doing law, a great deal of time must be spent in figuring out what other people have said. It is an occupational demand of our profession to understand what judges and other scholars have said, and to determine what contracts, what statutes and what constitutions mean. When we are trying to do that, the subject matter may turn out to have many normative components. Our particular connection to that subject matter, however, is not normative. Our task is to be accurate and fair in the statement of what other people have said and thought in order to establish for ourselves an appropriate baseline for criticism and action. Much of what passes for a traditional case analysis is, I think, an effort to hone these skills as one prerequisite for any serious normative inquiry.

In addition, careful descriptive work is vital because it is impossible for every actor within the system to take the role of shaping policy. There must be, in some sense, those people who lay the policy down and those people who execute it. If one is concerned with developing rules capable of orderly implementation, then cultivating the skills of understanding is an essential part of any overall strategy.

Second, positive, not normative, analysis is called for in trying to analyze the soundness of legal rules. It is essential for lawyers to learn, and for law professors to teach, how to engage in the process of reasoning from the other fellow's premises. That is to say, give somebody a normative premise and then ask whether or not certain conclusions follow. Once you have accepted a normative premise, you have escaped the problem that always haunted Hume, which was that you cannot deduce any rigorous statement about normative conditions from simple descriptions about the way in which the world operates. Yet given a normative premise, it is possible to make logical errors: you can reason from the converse, you can exclude middle steps, you can have misguided analogies, and so forth. So if somebody wants to understand what the law of contracts is, it is rather difficult to say, "the law of contracts is neutral on the question of whether or not serious promises generally ought to be enforced." That is the shared normative premise which makes it possible to ask what legal regime will best ensure the enforcement of the right promises on the right occasions, and

thus reduce the errors of over- and under-enforcement. That inquiry also turns out to be neither normative nor political.

Third, and closely related to reasoning from a normative premise, is an inquiry into the cognitive side of normative discourse. All normative premises contain with them certain descriptive phrases. It is inevitable whether the discussion is about keeping promises, inflicting harm, or avoiding discrimination. One key element of legal education is to engage in the task of explication, to understand those areas, if any, where critical terms have clear meaning and powerful bite. Similarly, it is vital to identify those areas in which those terms lead to genuine disputes.

When one looks, for example, at the classical torts literature, starting, say, with Holmes and going through Beale and more modern writers<sup>1</sup> on the issue of, say, causation, one finds that they were basically trying to explicate what they thought to be the central cognitive component of one of their moral premises: You ought not to inflict harm negligently, perhaps accidentally as well, upon another individual. All of the very detailed discussions about the relationship of proximate causation, joint causation, substantial factual causation, but-for causation, and so forth, strike me as being neither political discussion nor normative. It is rather an effort to explicate a central premise of the theory. If you can not do that, then the theory will not be a very adequate basis for normative inquiry. If you can, you have overcome at least one obstacle which stands in the way of using that particular premise to reach certain conclusions.

Fourth, the connection between means and ends raises descriptive, not normative, issues. Somebody is going to propose a certain rule X which is claimed to have beneficial normative properties because it achieves Y. Somebody else is going to ask the question: "Will the rule as stated achieve its intended goal?" That questioning of the connection between means and ends seems to me to be intrinsically a descriptive inquiry. Somebody could argue, for example, that the purpose of a product liability law is to improve the welfare of individual con-

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1. O. HOLMES, *THE COMMON LAW* (1881); J. BEALE, *PROBLEMS IN THE LAW OF TORTS* (1933); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (1941); H. HART & A. HONORE, *CAUSATION IN THE LAW* (1959); Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973).

sumers. You may be able to accept that as a general proposition and treat that goal as normatively correct. But there is a subsidiary factual premise that must be argued for independently. You must ask the question: When you look at the present array of rules, do they achieve the stated goals? To answer that question, you have to appeal to some classical descriptive body, often microeconomics, in order to understand whether or not the institutional arrangements endorsed by one side or another yield the consequences which they promise. If it turns out that there is a major slip between means and ends, as is so often the case on every side of the political debate, then one can short circuit much of the normative debate by showing that the end is unattainable, given the way the factors of production are organized.

Now, by repeatedly going through these inquiries, the normative questions will start to sort themselves out. The implicit assumption about normative inquiry is that "ought" presupposes "can." In other words, you can never demand of a set of legal institutions something which is impossible for them to achieve. Somebody who has a powerful descriptive framework for understanding language and analyzing behavior is going to be in a position to pare down the set of possible alternatives and then to make his normative choices from a narrower set of possibilities.

Fifth, in working legal inquiry it is important not to be misled by the apparent disorder in the appellate decisions. To be sure, the first step in organizing rules is taking into account the difficulties presented by the marginal cases. Take a given body of law and look at the classic treatise on the subject. You will probably note that there are several thousand cases, all of which desperately try to adjust very difficult concepts at the margin. The stuff appears to be utterly incoherent. One of the arguments made in favor of the rejection of that system, and in favor of some alternative, is that it basically cannot work. This, I think, involves a certain kind of error, which is to assume that the appellate cases are a representative sample of the cases actually decided under the rule in question.

One nice illustration of this error and its consequences derives from the decline of the old tort law of employer's liability and its replacement with the more modern law of workers' compensation. One of the standard arguments for workers'

compensation insists that we look at a classical treatise on the subject, say Labatt on employer's liability.<sup>2</sup> Under assumption of risk, you will find ten thousand cases which shows that nobody knows the meaning of the phrase or the scope of the defense. What we ought to do, it might be concluded, is to replace this defense with a simpler conception. One simply decides that liability is going to turn on the question of whether or not certain accidents "arise out of and in the course of employment." Once you do that, all of the marginal problems that you had to face under the alternative regime will disappear. Indeed, one could look at virtually all the cases of the day found in the standard treatises and conclude that they would be covered under the proposed workers' compensation rule. So your problems are going to disappear.

Wrong. That's not the way the world works. The moment you start to change the legal rule as a simple descriptive manner, the cases that are going to be drawn into both trial and appellate courts will differ systematically from those which were litigated previously. There is a continuum which, for ease of exposition, could be expressed in a single dimension, so that as new factors start getting larded in, the case for recovery of an individual worker becomes stronger and stronger. Workers' compensation puts the line of demarcation at one place, employers' liability with assumption of risk puts the line in another place. Cases which were clear under the first system will be murky under the second system, and vice versa. So if you wait fifty years after the implementation of the reform, and now look not at Labatt on employment relationships but Larson on worker's compensation,<sup>3</sup> you will find that there are three volumes of roughly comparable length which deal with the question of whether or not certain kinds of accidents arise out of and in the course of employment. Marginal cases are generated by the identical process in both legal regimes, notwithstanding their substantive differences. When you are arguing for or against a legal reform, therefore, it is a great mistake to concentrate upon the cohort of litigated cases and the ambiguities they spawn. Instead, you must concentrate your attention on the basic structural features of the two systems. That means, in effect, that you have to see from the litigated case how the

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2. C. LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT* (1913).

3. A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* (1975).

routine cases are handled outside litigation. Generally speaking, you are going to be forced to do an empirical inquiry into the operation of the rules in the world at large, which does not depend heavily on the sample of appellate cases.

Understanding the institutional arrangements in a matter like industrial accidents only complicates the analysis for legal scholarship. For example, one of the standard criticisms of the pre-workers' compensation tort rules was that the doctrines of common employment and assumption of risk always resulted in a state of affairs in which workers rarely received any compensation for industrial accidents. But if you check the voluntary arrangements made to displace the common law rules, you find in certain industries, notably in mining and in railroads, that well-developed voluntary arrangements responded to the problem with coinsurance schemes which were not at all dissimilar to — and indeed served as the models for — the modern workers' compensation statutes.<sup>4</sup>

Once you back off the appellate decisions and look at the routine cases you get a completely different view of what the world is like, which will affect one way or another the desirability of certain kinds of institutions. When I started to teach property, for example, I spent a lot of time on the funny results under the rule against perpetuities. Today I am much more concerned with the operations of a recordation system. Anybody who transfers land uses the recordation system, even though nobody will litigate about it. Even if you litigate “the unborn widow” under the rule against perpetuities three times in a century, you still know absolutely nothing about the patterns of behavior of people who place property under trust.

What does this tell us about law reform? I think the message is a little bit more conservative than might have been expected. The central lesson is what Robert Ellickson once described to me as “the law of conquest”: the more you know about the subject matter, the fewer degrees of freedom you think you have for possible and successful reform. The question to ask yourself is not whether there is part of this present system which we don't like, but rather whether there are alternative institutional arrangements, described with equal specificity and fullness, which respond to the perceived difficulty without creating

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4. See Epstein, *The Historical Structure and Economic Origins of Workers' Compensation Laws*, 16 GA. L. REV. 775 (1982).

others of greater magnitude. By that standard, it turns out that there is a good deal of appeal in the traditional program of legal reform engaged in by the realists and others, which was at bottom a program of incremental changes to curb known deficiencies (even by fine-tuning) at an acceptable cost.

One final caveat is in order. All this is not to say that one cannot make far-reaching normative critiques of present institutions.<sup>5</sup> Indeed, I am quite prone to making those myself. But once you recognize that you are only one of many many actors, then there may be a great deal about the world which makes sense once you understand the full range of forces that are arrayed up against you. Accordingly, you will take a very different attitude on the question of academic inquiry, as opposed to practical implementation. On your academic side, you will push very hard on matters of principle — where it is the legal system should be. But you will also recognize as a distinct practical matter that getting there may be rather more difficult. You may, I hope, develop a certain degree of unwillingness to run over the people who disagree with you because preferences and tastes are treacherous to manipulate and to control. Once you recognize that resistance is going to be very strong, you have to think long and hard before you are prepared to push, and push in a powerful way, to overcome it.

This is not meant to be an argument in favor of quiescence. I hardly wish to state that. Indeed, if I had a longer time, I would sketch an argument which allowed greater normative defense to voluntary arrangements, as opposed to those which are induced as an artifact of regulation. But even if you are worrying about the political agenda that issues from the normative inquiry, then there is a terrible and truthful ring to the old common law maxim: *error communis facit legem*, which translates as “the error of the community hath the force of law.” The question of reform is that if you can identify an error, how can you undo its consequences?

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5. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).



