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VIEWS ON LEGAL EDUCATION: AN EXCHANGE

RICHARD A. EPSTEIN & DUNCAN KENNEDY

PROFESSOR EPSTEIN: In response to Professor Kennedy, let me just try to present a couple of points where I think there might be some contention. I think the most controversial part of Professor Kennedy's presentation is the pay-off at the end, where a disinterested positive inquiry somehow turns into a general condemnation of greed and self-interest. Or should I say, it becomes a condemnation of the greed and self-interest of the privileged. This seems to be taking a powerful page from the book of one of my favorite political philosophers, Thomas Hobbes.

I ought to spell out a basic premise here that I neglected to state earlier: One of the reasons why political institutions turn out to be so enormously intractable is that, just as plants never cease to move toward the sunlight, so it is that individuals taken in the aggregate never cease to maximize their self-interest. When you start to deal with various kinds of legal arrangements, you find that many people are astonishingly indifferent between producing something of value to themselves and taking it from somebody else. Yet the social consequences of the two moves are rather different; one is a positive sum game and the other turns out to be a negative sum game. What one wants to do if one wants to be a conservative — and I guess it's fair enough to call me a conservative — is to recognize that once you start to talk about greed, you then have to figure out what practices constitute the greediness that you can tolerate and what practices constitute the greediness that you cannot tolerate. That is, attacking people's actions solely on the grounds that they are motivated by self-interest is basically to condemn us all to a life of utter immobility, given what we know about ourselves and about our fellow man.

Starting with that premise, my radical side — remember I said I had a radical side — makes a right-wing critique of modern institutions, a critique which insists upon a distinction between markets on the one hand and mercantilism on the other hand. Both of these practices have travelled under conservative banners because both of them from time to time have been

supported by businessmen. But mercantilism tends to be supported by those that are in positions of power and wealth and are trying to pull up the ladder after they have climbed it, to take the bridge down once they have safely crossed the river. The system of markets is supported by those who wish to climb that ladder or cross that river. People on both sides will likely advance their arguments from base self-interest. But I think we have a set of intellectual and analytical tools which allow us to say that people that want to keep ladders and bridges in operation are generally preferred to those people who wish to erect protective walls around themselves. So while I find a certain very powerful incoherence in many American institutions, I also find a fairly consistent and powerful theory, based upon some mix of liberty and utility. I would fight that one very hard. I am no believer in any massive inequality of bargaining power.

What I would be prepared to do in a more extended debate — any time, any place, any way — is to argue that the sources of the corruption lie in institutional arrangements rather than in individual greed, and that most of the institutional arrangements which have fostered corruption have been the product of modern high-minded liberal democratic reform. What we really have to do is to find a way, either through constitutional means or through intellectual means or through common law means, to try and get back to a situation which many people would mistakenly deplore, the high point of *laissez-faire*. One of the the worst things that you can do when you talk about Herbert Spencer is to apologize for invoking his name. The man had far more institutional sense than Oliver Wendell Holmes, even if the latter was far better at epigrams than the former.

On balance, I think Professor Kennedy's long-term critique is right. But once you understand his program, most of the proposals that he has pushed forward turn out to be one of two sorts. They either turn out to be silly or authoritarian, and I'm afraid of both.

I will end with a little story which my father told me because he was once a socialist. (It lasted for ten minutes. He became a doctor.) I think it captures much of the difference between us, and it goes something like this. Two fellows were standing on a bus, and they were both very active in the movement to overthrow the government. The first comrade says to the second, "Comrade, come the revolution, we'll all have strawberries."

(Note the appeal to implicit wealth maximization.) And the second comrade says, "But I don't like strawberries." (Note the appeal to individual choice.) The first comrade comes back with the punch line: "Come the revolution, you'll like strawberries." PROFESSOR KENNEDY: I guess I would like to say something briefly. Offered a chance to describe one of my proposals by its denunciation as either silly or authoritarian, I really cannot resist.

Before I present my most basic proposal for legal education, I should say that it has nothing to do with any program of the critical legal studies movement. In fact, most of the people in the movement regard this proposal as, I guess, either silly or authoritarian. This shows once again the difficulty of distinguishing yourself from the "bad associations" invoked by those attempting to tar you.

I am a very strong believer in the idea of voluntary work place autonomous self-activity, which I think is just another way of expressing what Professor Epstein just described. Like him, I am a passionate believer in people voluntarily ordering and re-ordering their own destinies on a small scale, taking power in the places where they live, and making voluntary arrangements which then can resist the attempts of larger structures to interfere and control them.

Given my belief in that, I think the hierarchical ordering of the American legal education system is not socially useful when looked at from an instrumental point of view. It does not maximize wealth and it is not conducive to the maximization of the value of resources. In fact, quite the contrary. We have this enormously hierarchical ordering of schools in which the schools at the top of the hierarchy have the most money, the supposedly best trained faculty, and the students who get the best test scores. Many kinds of justification are offered for this. I think they all fall before an Epstein internal critique. The minute you begin to look at the way people justify the hierarchy, it becomes clear that you just can not do it. You do not have to arrange things that way.

Along with the liberty of groups to reorder themselves, I am in favor of the substantive ideals of equality and fraternity. These ideals suggest voluntarily scrambling the hierarchy of law schools; law teachers and law students voluntarily scram-

bling so that in fact people are assigned within regional preferences.

PROFESSOR EPSTEIN: Whoops!

PROFESSOR KENNEDY: Assigned . . . voluntarily. This is to say that the group voluntarily devises a system of assignment. There is nothing self-contradictory about the idea of a group deciding to govern some of its own activities by a principle of random assignment. That happens within actual groups quite often. People decide to get together and they all agree: "Let's do it this way rather than doing it that way." The democratic decision rule will vary from group to group. It might be majority rule, it might be the corporation controls everything at Harvard, it might be the board of trustees, it might be a 2/3 majority of the faculty. Whatever the democratic decision rule that you consider to be legitimate is, the argument is that we, acting as a democratically empowered group to make voluntary arrangements, should reorder the system and level the hierarchy.

Now people often say: "Well don't you realize, Duncan, that hierarchy is absolutely inevitable and it's a consequence of 'human nature'?"¹ Hierarchy would re-emerge, and then this same democratic majority ought to decide to rescrumble the system.

This is a proposal which is often misinterpreted as authoritarian because the group has decided what it wants to do — voluntarily. It is also sometimes interpreted as silly on the grounds that it could not possibly happen. But it does not seem to be true that it's either "authoritarian or silly." It is an example of the libertarian impulse at work.

PROFESSOR EPSTEIN: Well, libertarians, I think, would disagree with it. I certainly would. I mean there are a couple of moves in this dance that seem to leave the partners standing alone on the floor. We are told that we want it to be done by free and voluntary arrangement, and everybody is thinking: "Ah hah! Now we have a situation of unanimous consent." And

1. Incidentally, it seems to me that "human nature" is something about which you conservatives have an unjustified sense of deep knowledge. You tend to emphasize how little can be known; that is implicit in everything you say about reform. for example. If you were as skeptical about your knowledge of human nature as you are about the consequences of reform, I think you would appeal to it less often as a sort of "killer argument" that settles everything. Maybe, maybe not.

so what happens is that all agree to put themselves in some kind of a common pool and allow somebody else to allocate.

Well, my first advice, Duncan, is include me out. You want to have this kind of a system; I want to resign. And now it turns out you have said: "Well, once you signed on for this contract, you can not retreat." What you have done is take from everyone the power to control his own destiny. You have at least abolished the idea of contracts at will on the other side. The reason everyone fears the dynamic of collective choice is that, if left untrammelled, the passions of some work against the liberty of others. Yet your system of group control does not even begin to account for handling the conundrums of collective choice. Until any kind of system of reform tells you how to respond to abuses of voting power, you are not talking about liberty. The key point is that I want to be the guy who makes the assignments. I know where I can send you and I know where I can send me, and I do not want to teach at Nome Law School in my underpants.

The present system is far better. I would much rather work out an arrangement with my dean whereby if he wants to pay me enough, I will stay. The point is, I am not at all upset about being greedy because I am prepared to give somebody value for what I get. I am *not* prepared to turn my life over to a committee which can then do the kinds of things which I regard as utterly intolerable, things that are, and I will say the two words again, silly and authoritarian. What is so interesting and so distressing is that Professor Kennedy told us ten minutes ago that freedom and wealth maximization were radically incoherent. Now we are told that once you understand these criteria, they do not seem to apply to the case in hand, which is legal education. Well, of course they apply and both of them point the same way: if you believe in freedom, you do not believe in coercion; if you believe in wealth maximization, you do not take people from the place where they think their marginal product is highest and put them into an environment which they regard as hostile unless you can identify an externality, of which here there is none. This is not a case in which one goes into class and commits a tort of pollution. I do not want to have somebody telling me where it is he is going to lead me by the nose even if he is a nice guy. Once it starts, it *doesn't stop*.

PROFESSOR KENNEDY: Who is going to have the last word here?

PROFESSOR EPSTEIN: You will — with my pleasure. Not the best word, but the last.

PROFESSOR KENNEDY: I guess what I hear you offering is actually about eight reasons why this is a bad idea. They came so fast it is hard to sort them out. But I honestly do not think you would find yourself defending any of them very seriously if we were to pause and go through them one by one.

First of all, I do not think you would want to argue that you can understand the existing system of legal education as just the product of free choice. As a legal theorist, you yourself are always interested in and preoccupied with the structuring role of collective choice mechanisms in the creation of an institutional pattern. In addition, you are always very preoccupied with figuring out what the consequences of a particular set of institutional decisions are. You would ask, for example, whose property rights are protected by the state, what invasions those rights protect the property owner from, and what the consequences of that system are for the character of the social life. Yet your initial reaction is that there is a contrast between the existing system, which you see as free, and the system I am proposing, which you see as based on authoritarianism or force. It seems to me that this is inconsistent with everything you have ever written, all of which is preoccupied with the necessity of understanding the role of, the backing up of, particular entitlements. Like collective choice and force.

So basically what we are talking about here is a classic reordering. We are not going from no order to an order. But then you suggest that there is no conceivable collective choice mechanism which you would accept as a legitimate root for getting from where we are to where I am suggesting we ought to go. You can not possibly mean that. I am perfectly willing to discuss collective choice mechanisms. In fact, you probably have some conceptions of which ones you more or less accept. And you are probably willing to make other arguments, such as that you will be sent to Nome to teach in your underpants, to justify one particular collective choice mechanism rather than another. I am happy to engage in that discussion. But the larger argument is that once we decide what the proper choice mechanism is, then the question becomes what one is going to get up

and say, so to speak, in the proverbial oligarchic smoke-filled room.

PROFESSOR EPSTEIN: No, I do not want to be there. I said include me out.

PROFESSOR KENNEDY: You say you do not want to be involved in the collective choice at all, but you do! You clearly love involvement in collective choice mechanisms.

PROFESSOR EPSTEIN: *Your* collective choice mechanism. I do not want to be involved in *your* collective choice mechanism.

PROFESSOR KENNEDY: But you are, inevitably!

PROFESSOR EPSTEIN: No, I am not! We are of the same country. It is one thing to be, thank God, citizens of the same country, but we are not citizens of the same law school and that is the way I want to keep it. If you want to organize your shop that way, that is fine.

PROFESSOR KENNEDY: This is what I have been waiting for you to say.

PROFESSOR EPSTEIN: Of course there are imperfections in the way in which things have gone on, but that is hardly a justification for creating more and worse imperfections than we have ever had under the present system.

PROFESSOR KENNEDY: Well, this seems to be the kind of area in which we might join issues as long as we are not at this very Olympian domain.

PROFESSOR EPSTEIN: There is nothing Olympian about tackling this problem. It is the instincts of base survival that move me to say what I say. The hell with this abstraction.

PROFESSOR KENNEDY: If I may have the last word, in my image of this, I would certainly welcome you after the scrambling had taken place. I would love to be on the same law school faculty as you. I think as a member of the same collective choice process, we would have a great time together.

PROFESSOR EPSTEIN: Come to Chicago.

PROFESSOR KENNEDY: That is not what I had in mind.

