Pragmatic Liberalism versus Classical Liberalism

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Skepticism and Freedom:
A Modern Case for Classical Liberalism,
Richard A. Epstein. Chicago, 2003. Pp v, 311.

For three decades Richard Epstein has been searching for foundations for his legal and political views—a set of views that he calls "classical liberalism" and others might call laissez-faire, though I shall argue that a more precise description would be Hayekian liberalism. He has not been content to defend his views by pointing out their advantages and disadvantages and asking the reader to decide whether he believes the former outweigh the latter; that would be the pragmatic approach—and it is mostly what he does, in his voluminous writings on issues of law and public policy. But he wants more than a pragmatic justification; he wants his views to have a philosophical grounding and heft. He wants to be able to say that his views are right or true in some strong sense and not merely that they are reasonable and attractive, worth trying, etc. His quest has culminated in his new book *Skepticism and Freedom*, one goal of which is to refute the kind of thinking—which I call pragmatism but he calls moral skepticism and moral relativism—that regards a quest for foundations for legal, moral, or political beliefs as futile: at once quixotic and pointless. Pragmatists regard the quest so because they believe that reasoning to (or from) foundations is convincing only to the already convinced and to others is just rhetorical posturing, and also that it is superfluous; pragmatic arguments for the sort of policies that Epstein advocates are compelling, at least in the present political and intellectual climate of the United States, and will do the work that Epstein needs in order to defend his policy preferences convincingly. It is not as if he were trying to persuade the Iranian clerisy to substitute *The Wealth of Nations* for the Koran.

My policy preferences are similar though not identical to Epstein's. I describe myself as a classical liberal too, though more in the vein of John Stuart Mill than of Hayek. But I will give him his term and instead defend, as against his notion of a philosophically

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grounded classical liberalism, my notion of pragmatic liberalism.[1] But I shall defend it mostly negatively, by pointing out the limitations of Epstein's approach.

Epstein has been generally consistent in the array of specific policies, legal and otherwise, that he defends. The consistency has both a negative and a positive side. The negative is an extreme hostility toward government regulation (greater than my own, certainly), amounting to a root-and-branch rejection of virtually all the distinctive features of twentieth-century liberalism ("modern" or "welfare" liberalism)—the regulation of minimum wages and maximum hours, the legal protection of unionization, the regulation of job safety, antidiscrimination laws, progressive taxation, social security and Medicare, poor relief (and thus Medicaid, earned-income credits, and welfare), the tort of medical malpractice, and much else: in other words, any form of regulation that interferes with freedom of contract,[2] unless the performance of a contract causes palpable harm to nonconsenting third parties unable to protect themselves at reasonable cost, as in certain accident, pollution, and monopoly settings.[3] For Epstein, any further interference with contractual relations is social engineering, which not only reduces freedom but also is premised on an exaggerated belief in the power of conscious, articulate reasoning, in such forms as cost-benefit analysis, to solve social problems. The positive side of Epstein's political and legal philosophy is the faith that he shares with Hayek (and which is the mirror image of the skepticism about the power and reach of conscious reasoning that he also shares with Hayek) in custom as the product of evolution-honed experience, reliable though often inarticulate.[4] He finds it a great comfort if he can trace a legal rule that he likes to Roman law. Like Hayek he sees the function of courts as being primarily to enforce custom rather than to produce social betterment.[5] He is actually to the right of Hayek

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1 See Richard A. Posner, *Law, Pragmatism, and Democracy* (Harvard 2003). The coincidence of our two books having been published within a month of each other is the occasion for this debate.

2 Making medical malpractice a tort, for example, has the effect of preventing doctor and patient from fixing by contract the level of care in the treatment of the patient.

3 Though Epstein seems ambivalent about whether there should be antitrust laws as such, or whether it is sufficient that courts not enforce cartel agreements, which was the common law approach. According to Epstein, "error costs are high even for the best approach" (p 131).

4 "Often it is better to presume the soundness of instincts that survive, even if one does not quite understand why they flourish" (p 5).

5 Compare, for example, Friedrich A. Hayek, 1 *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy: Rules and Order* 87 (Chicago 1973) ("The task of the judge will be to tell [litigants] what ought to have guided their expectations . . . because this was the established custom which they ought to have known."), with Richard A. Epstein, International News Service v. Associated Press: *Custom and Law as Sources of Property Rights in News*, 78 Va L Rev 85, 85 (1992):

(p 118),[6] though a few steps to the left of "anarcho-capitalists," such as David Friedman[7] (p 5).

With so definite, so specific, and so Utopian a set of views—no existing society approximates Epstein's concept of the just society or is likely to do so in the foreseeable future—Epstein, again like Hayek, is inevitably only weakly supportive of democracy; more precisely, he is supportive of democracy in only a very limited sphere. Democracy can no more be relied upon to produce the minimum state of Epstein's imagination than to produce the slightly less minimal state envisioned by Hayek. Hayek's proposed solution to the inability of democracy to produce the minimal state was the bizarre one of creating an upper house of the legislature composed of persons between the ages of forty and fifty-five who would serve a nonrenewable fifteen-year term, the length and the nonrenewability assuring these Nestors' independence from direct or indirect control by the electorate.[8] Epstein's proposed solution, the more natural one in the American setting, is to persuade the Supreme Court to make freedom of contract the supreme constitutional principle (pp 69–73). Like Hayek, Epstein believes that legislatures have very little business regulating private conduct. Their proper business is financing the government through either flat or proportional taxation, and the proper scope of the democratic principle is the selection of officials not to make policy (except foreign policy) but to execute the policies dictated by Epsteinian or Hayekian liberalism. Even the officials' control over tax and spending, the traditional legislative prerogatives, is tightly constrained, for they are not to impose progressive taxes or redistribute wealth from rich to poor. Liberalism in Epstein's construal of the term refers not to self-government but to freedom from government regulation. It is democratic liberalism without much democracy. For him, self-government means government of the self by the individual free from interference by public officials.

> [The state's] chief function is to discover and reflect accurately what the community has customarily regarded as binding social rules and then to enforce those rules in specific controversies. The image in this context is not of courts—or even legislatures—that "make" the law, but rather of courts and legislatures that "find" and respect the law, which they then refine by incremental changes and marginal decisions.

[6] Epstein has criticized Hayek for what he calls the latter's "unwise concessions to the benevolent use of state power." Richard A. Epstein, *Hayekian Socialism*, 58 Md L Rev 271, 273 (1999). These consist primarily of support of welfare rights (minimum income). See id at 291–95.

[7] See David Friedman, *The Machinery of Freedom* xi (Arlington House 2d ed 1978) ("I am an Adam Smith liberal, or, in contemporary American terminology, a Goldwater conservative. Only I carry my devotion to laissez faire further than Goldwater does. Sometimes I call myself a Goldwater anarchist.").

[8] See Friedrich A. Hayek, *Economic Freedom* 395 (Basil Blackwell 1991).

In his early writings, Epstein sought a foundation for his political philosophy in the concept of causation.[9] He argued that responsibility followed (did follow and should follow) causation. So if one inflicted an injury on another, one had to compensate the victim, but there was no duty to compensate if one merely failed to protect another from injury—failed to warn or rescue. The principle that responsibility follows cause implied—paradoxically for a libertarian, because it suggested an expansion in the scope of legal regulation—that strict liability rather than negligence should be the dominant principle of tort law. The libertarian justification that Epstein offered for strict liability was that in a system of strict liability judges and juries would have to decide only whether the defendant had caused the plaintiff's injury and so would avoid making a social-engineering or cost-benefit type of judgment as to whether the defendant had acted unreasonably (inefficiently) in causing the injury.

Epstein's attempt to base tort rights and duties on the principles of causation foundered. For one thing, it was pointed out that ascriptions of causation typically follow rather than precede ascriptions of responsibility.[10] We say that the arsonist caused the fire, rather than the match or the oxygen in the air, because we want to make the arsonist legally responsible. But if we were a chemist interested in why a match will not burn in an atmosphere consisting entirely of nitrogen, we might say that the oxygen had caused the fire, because the "responsible" party from our scientific standpoint would be the atmospheric element that enabled combustion. If we want to make a potential rescuer liable for having failed to rescue, we can say that he caused the victim's death by failing to intervene when he could have done so without risk or, jettisoning notions of causation, we can say simply that he should be deemed responsible for the death, since people can be deemed responsible for things they don't cause: a pertinent example is someone who reneges on a legally enforceable promise to rescue. As for whether strict liability or negligence was the better regime for particular classes of accidents, that question was seen to depend on such practical considerations as the amount and complexity of litigation

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[9] See especially Richard A. Epstein, *A Theory of Strict Liability*, 2 J Legal Stud 151 (1973) (arguing that strict liability based on notions of causation and volition provides better legal rules than theories based on negligence).

[10] See John Borgo, *Causal Paradigms in Tort Law*, 8 J Legal Stud 419, 443–44 (1979):

> [I]t is impossible to identify some type of conduct . . . and say that whenever an instance of that type is a necessary condition for the production of a harm, it will be selected as its cause. Whether or not it will be selected depends upon the particulars of the context in which the harm is produced. And the context cannot be known in advance of the harm's occurrence.

under the respective regimes and the incentives of potential injurers and potential victims to take care under them.[11]

Epstein did try to tie causation to something having more perspicuous moral relevance, and that something was "corrective justice," which he interpreted to mean a legal duty on the part of one who caused an injury to "correct" the injury by compensating the victim. That was not what Aristotle, the inventor of the concept, or his successors, meant by corrective justice.[12] He (and they) meant something important, but sparer. He meant that when a wrongful act is committed and it injures the wronged person, the law must do what it can to restore the preexisting equilibrium between the two parties, and therefore it is not to consider their relative merits—that is the domain of distributive justice.[13] This idea of abstracting from the personal worthiness of the parties to a lawsuit is extremely important; it is the foundation of the deservedly influential notion of the rule of law.[14] But it has nothing to do with causation. The duty of corrective justice arises only when a wrong is committed, and the concept of corrective justice is silent on when that is; the concept does not kick in until some act has been defined as wrongful. Injuring and wronging are not synonyms. To cause an injury is not necessarily to commit a wrongful act; and to fail to act can be wrongful.

In the course of defending first causation and then a causation-flavored notion of corrective justice as the foundations of his legal philosophy,[15] Epstein spoke often the language of natural law, and particularly of rights in a noninstrumental sense.[16] It was apparent that in

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[11] See, for an early discussion, Richard A. Posner, *Strict Liability: A Comment*, 2 J Legal Stud 205 (1973). For fuller statements, see William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 54–84 (Harvard 1987); Steven Shavell, *Economic Analysis of Accident Law* (Harvard 1987).

[12] See Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J Legal Stud 187, 189–91 (1981); Richard A. Posner, *The Problems of Jurisprudence* 313–35 (Harvard 1990).

[13] For Aristotle's discussion, see Aristotle, *Nicomachean Ethics* 1131a10–1132b13 (Cambridge 2000) (Roger Crisp, ed).

[14] See Posner, *Law, Pragmatism, and Democracy* at 284–85 (cited in note 1).

[15] For further criticism, see Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J Legal Stud 457 (1979) (arguing that Epstein's attempt to assign liability based on causal principles lacks clear explanation, is inconsistent with freedom of contract, and becomes circular once Epstein shifts from causation to rights as the starting point for analyzing tort liability).

[16] See, for example, Epstein, 2 J Legal Stud at 203–04 (cited in note 9); Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 Ga L Rev 455 (1978) (criticizing my economic theories of privacy law and arguing that legal privacy claims are better justified by traditional theories of tort law and that I ignore the "powerful moral constraints that abound in this area"); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J Legal Stud 49, 74–75 (1979):

> The fundamental weakness of the pure utilitarian point of view is that it fails to explicitly recognize any antecedent or natural rights that the legal system is called upon not to create but to recognize and protect. Rights and duties are treated as having explicit instrumental

his mind the right to own property, the right to make contracts, and the right to be compensated for certain injuries (the right, in effect, to own one's body and one's peace of mind) were not merely instruments of social betterment; they were moral entitlements and not ones based merely on ideas of causation and corrective justice, either. Property rights cannot be founded on such ideas. Liability, whether it follows causation or some theory of corrective justice, presupposes rather than assigns rights. So we find Epstein early on saying such things as "each person has a natural right to own his person as a condition of birth and as part of the recognition of his common humanity."[17]

What the precise basis of these Epsteinian rights might be did not become clear until 1993, when Epstein declared that he was a utilitarian and that economics, derived from utilitarianism, was now his theory of law.[18] This was a dramatic shift from his original position, in which he had criticized economic analysis of law as a rival to his own approach.[19] One consequence of his conversion to the economic approach was his abandoning the idea central to his earlier writings that strict liability had some ethical priority over negligence as the standard for tort liability. He now agreed with the economic analysts of law that "the differences between them [that is, between strict liability and negligence] therefore extend only to second-order matters, dealing with the relative cost of administering the rules" (p 95). He had *become* an economic analyst of law; and given his prominence and distinction, he was a very welcome convert indeed.

For a foundationalist, however, utilitarianism or any other philosophy can be only a station on the way down; it needs a foundation. (An objection to foundationalism is that there is no natural stopping point; an infinite regress looms.) And so *Skepticism and Freedom*, in which Epstein endeavors to supply a foundation for utilitarianism and,

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origins, without answering the recurrent question of how can "we assign" rights to certain individuals and impose duties upon others in order to maximize some social goal.

17 Epstein, 12 Ga L Rev at 457 (cited in note 16).

18 See Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: Another Tribute to Ronald Coase*, 36 J L & Econ 553, 554 (1993) ("I [Epstein] came therefore to law and economics first as a critic, and only after I was able to satisfy myself did I become an adherent and practitioner of the art.").

19 For his criticisms, see, for example, Epstein, 12 Ga L Rev at 456–64 (cited in note 16). On his change of heart, see Epstein, 36 J L & Econ at 554–55 (cited in note 18); Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U Chi L Rev 1167, 1168–70 (1997) (discussing the future of law and economics, and Epstein's becoming an adherent to the movement). I do not wish to exaggerate the extent of his conversion. As the two articles just cited make clear, while he now believes that economic analysis provides the proper framework for evaluating legal doctrines, he thinks I exaggerate the extent to which common law doctrines are explicable in economic terms.

more broadly, for the laissez-faire theory of law and society that he has been advocating for so long.

He calls the position he defends the "revised natural law position" (p 18). By this he means the set of rights and duties long defended by him, defended still as objectively sound, as morally *right* and not merely as expedient, but defended, not on religious or other essentialist grounds (or by reference to causation or corrective justice), but on utilitarian grounds informed by the universal facts of human nature and the human situation, such as scarcity, self-interest, and family feeling—phenomena that are in turn illuminated by modern Darwinian theory (pp 15–27). Epstein believes that his version of laissez-faire, being realistic about human beings (because Darwinian), will produce greater happiness than any other social philosophy. This may seem to make utilitarianism the foundation rather than the next layer up. But Epstein appears to think that only utilitarianism is compatible with the facts of human nature; and so the underlying, the bottommost, foundation of his philosophy is biological. And because it is biological and the human race is biologically uniform, he regards his laissez-faire ideology as *universally* valid. He seeks "to use or understand the basic or 'natural' impulses of human behavior as a guide to what counts as right or wrong in human affairs" (p 75).[20] Or, as he puts it elsewhere, "the biological anchor weighs heavily on the types of feasible social organizations."[21]

But the distance between human biology and a laissez-faire organization of society is too vast to enable the second to be derived from the first. Of course biology constrains the range of feasible human social organizations, but it does not do so tightly enough to compel rejection of the rivals of classical liberalism as biologically unfit and therefore doomed to extinction. Epstein's version of classical liberalism, which denies the legitimacy even of poor relief, is not to be found in any nation in the world, past or present. This absence is inconsistent with his notion that it is the only system of governance compatible with our biological nature.

Epstein's precise philosophical position is unclear. For one thing, he distinguishes without adequate explanation between "crude" utilitarianism, which he rejects, and utilitarianism that exhibits an "affinity for natural law," which he accepts (p 75)[22]—though utilitarian and natural-law thinking are usually considered opposites, the former as-

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[20] Elsewhere he speaks of "general regularities in human conduct" (p 72).

[21] Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 Harv J L & Pub Pol 713, 719 (1989) ("What is distinctly human does not depend on how persons are socialized in this or that particular environment. It rests in the common set of biological necessities that have shaped the way all individuals, and indeed entire populations, have evolved over time.").

[22] See also id at 726.

serting the interest of the community as a whole and the latter the rights of individuals. For another thing he rejects the "conflation of natural law with Darwinist theories" (p 76)—the connection between biological fitness and moral worth is indeed obscure—while riding both those horses.[23] He attempts to resolve these tensions by saying "that the better form of consequentialism [a term he uses interchangeably with utilitarianism] places the autonomy assumption front and center (on the grounds that it looks to be strongly Pareto superior to the state of nature, and its attendant difficulties)" (p 77), meaning that government is prima facie forbidden to coerce anyone; but when this rule cannot be implemented without seriously adverse consequences "we gravitate toward the weaker Kaldor-Hicks test, under which as a practical matter we accept some relatively small compromise of individual entitlements in order to achieve major advantages for the public at large" (p 77).

A measure is Pareto superior if at least one person is made better off by it and no one is made worse off, that is, if all the potential losers from the measure are fully compensated. The Kaldor-Hicks test, also known as wealth maximization, requires only that the winners' gains exceed the losers' losses; compensation of the losers is not required. This is a consequentialist criterion similar to utility maximization, because it maximizes without concern for the distribution across individuals of the good that is being maximized, whether utility or wealth. If the total wealth of society is $100 trillion, distributed more or less equally across the population composing the society, and some government measure would increase that figure to $110 trillion yet at the same time allocate all but one cent of the $110 trillion to a single individual, the measure would satisfy the Kaldor-Hicks criterion. The example is unrealistic. Nevertheless, the distance between Epstein's "revised natural law position" and "crude" utilitarianism does not seem great.

If he were content to say merely that given what science tells us about ourselves, laissez-faire is the best system for giving most of the people in a society at a certain level of development (the current U.S. level, for example) what they want, this would be plenty; and much of what Epstein says throughout *Skepticism and Freedom* as in his earlier

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[23] These are not his only contradictions. He defends the invalidation of a maximum-hours law in *Lochner v New York*, 198 US 45 (1905), in part on the ground that private property is essential to liberty (pp 72–73), yet criticizes Hayek for thinking that "concentrated state power under democratic socialism [would] lead inexorably to the horrors of Nazism. The historical record now seems clear that a system that has strong elements of private property can resist tyranny, even if it allows extensive regulation in other areas, which our system does" (p 74). This is correct and indeed it would be preposterous to suggest that a maximum-hours law endangers liberty, though if it does not then Epstein's defense of *Lochner* on grounds of political liberty is untenable.

writings could easily be so translated. But so translated, Epstein's social theory would have no relish of natural law—of moral imperatives, of universal validity—and so it would not satisfy his longing for a system of "moral universals" (p 75) and not just a political and legal theory.

His dissatisfaction with a merely pragmatic defense of laissez-faire becomes vehement in his critique of what he calls "moral relativism." Relativism and skepticism are of course related—relativism is a form of skepticism—and given the skepticism about the knowability of human desires that underlies Epstein's (like Hayek's) theory of the state, Epstein has first to distinguish good from bad skepticism. The good is the skepticism that questions the ability of a government to acquire enough information about people's desires and capacities to be able to engage in ambitious schemes of social engineering with reasonable chances of success. The bad skepticism is "unbounded moral skepticism" (p 67), which stands athwart Epstein's effort to give moral force to laissez-faire, and specifically his desire for judges to be comfortable using laissez-faire principles to rein in the modern state, as they would not be unless they thought those principles somehow part of the very fabric of the moral universe. "So long as the judge has no clear conception of right and wrong, then any broad philosophical generalization is too empty to supply precise guidance for hard cases. If so, then by all means let the legislature, with its democratic imprimatur, call the shots" (pp 67–68)—which is what Epstein does *not* want legislatures to be permitted to do. Democratic imprimaturs carry no weight with him. (His alienation from the actual practice of American democracy makes him a bedfellow of deliberative democrats, of whom more later.)

Oddly, he wholly approves the passage in Holmes's famous dissent in the *Abrams* case in which Holmes said that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (p 68).[24] This passage is a classic of fallibilism, which is a facet of pragmatism. Truth is not discoverable by studying the correspondence between our assertions and the world (including the moral world, if there is such a thing) as it really is. It is the label we give to those ideas that have not yet been falsified in a competitive, an experimental, process. The test of truth is thus the test of time, and since time is unending we can never be certain that we have arrived at truth. This view is very damaging to anyone who believes, as Epstein does, that a body of beliefs that has not yet gotten itself "accepted in the competition of the market" is true. One such body of beliefs is laissez-faire, Epstein being in a small minority in the United States

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[24] Quoting *Abrams v United States*, 250 US 616, 630 (1919).

and an even smaller one in the world as a whole in believing that the minimum state is the best state. Only the minuscule Libertarian Party subscribes to something like Epstein's political philosophy.

The denial that there are universal moral truths is what Epstein calls "moral relativism" and believes "prevents us from attacking on moral grounds the Nazis or indeed any other alien practice that disgusts our own sensibility" (p 79). But that is not what moral relativism is or does. A moral relativist is someone who believes that no moral principle is better or worse than any other. A disbeliever in a universal moral law is someone who realizes that while some moral principles may well be better than others, this cannot be proved to the satisfaction of someone who reasons about moral questions from different premises than his own. To virtually all Americans, the perpetrators of the September 11, 2001, terrorist attacks were evil; but the perpetrators themselves apparently believed that they were doing the will of God and so they would have been impervious to the arguments that we Americans might have made to them on the basis of our premises for moral reasoning. Epstein says, "Pressed with the horror of a bin Laden, pleas of moral relativism, even in its most constrained form, rightly fall on deaf ears" (p 93).[25] He should have said, *our* ears. It would not have been the correct response of an American to September 11 to have said "bin Laden is evil, but that's just my personal view." It is not a merely personal view, but it is not a view that could be proved correct in a debate with bin Laden, because the debaters would be proceeding from incompatible premises. It would be like a debate between a warthog and Miss Universe over who was more beautiful.

Against this objection to the existence or knowability of universal moral principles Epstein argues that the practices that we reject most strongly on moral grounds, such as genocide, are found mainly in societies that are nondemocratic, and so, he argues, they lack legitimacy. But this begs the question by treating democracy (though Epstein's own concept of democracy is a crabbed one, as I said) as foundational of morality and doing so without an argument.

At one point in his book, Epstein accepts the "relativist's" basic point, saying that when "individuals share no moral premise . . . the task of suasion would be hopeless even among ourselves, no matter how local our culture. But of course it is not" (p 80). But of course it is; it is why the purely intra-American debates over such issues as abortion rights, capital punishment, assisted suicide, school prayer, gay rights, preventive war, civil liberties in wartime, redistributive taxation,

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25 A mysterious passage—what does "Pressed with the horror of a bin Laden" mean, and what is the bearing of the reference to the "most constrained form" of moral relativism?

drug laws, local financing of public schools, parental control over children, affirmative action, reparations for the descendants of slaves, subordination of national to international institutions, speech codes, gun control, animal rights, and stem-cell research tend to be interminable.[26] When these issues do get resolved, it is either as a result of fiat by the courts or Congress or some other agency of government, or because the issue just goes away. Sometimes it goes away because the underlying facts change or new facts come to light, or because people's emotions get engaged with the issue in a new way, or because their values change for reasons unrelated to moral discourse. The fact that female participation in the labor force increased along with premarital sexual activity helped make abortion rights an issue, while a "morning after" pill will eventually make it a nonissue—yet before that happens sheer horror at the surgical methods employed in late-term abortions may cause a moral revulsion against such abortions. Moral entrepreneurs such as Martin Luther King, Jr. dramatize plights heretofore unknown. And were it ever discovered that capital punishment had no deterrent effect and was frequently being imposed on innocent people, capital punishment would go the way of the rack and the thumbscrew.

These examples are important in showing that moral principles are frequently entangled with facts and emotions and background social changes (as in the status of women), and when that is so, empirical research and appeals to emotions can bring about a change in the principles. But the principles cannot be proved to be right or wrong to people who reject their opponents' crucial premises.

Epstein's insistence on the existence of moral universals results in some surprising remarks about Nazi Germany. Nazis, he claims, "never attacked any of those bland universals on which Western civilization rests" (p 81).[27] On the contrary, the essence of Nazi ideology was the rejection of such "bland universals" as political, economic, and per-

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[26] Epstein attributes to me the view that within a national community, namely the United States, "radical feminists, religious fundamentalists, and everyone in between . . . can engage in moral discourse with right and wrong answers" (p 81). My view is the opposite, as I tried to make clear in the book of mine on which he relies for my philosophical views. "A left-liberal secular humanist from New York or Cambridge [Massachusetts] does not inhabit the same moral universe as a Mormon elder, an evangelical preacher, a Miami businessman of Cuban extraction, an Orthodox Jew, an Air Force commander, or an Idaho rancher." Richard A. Posner, *The Problematics of Moral and Legal Theory* 28 (Belknap 1999). The moral pluralism of American society, I argue, defeats efforts to resolve moral disputes by reference to universal moral principles.

[27] Epstein adds that the Nazis "could never have carried the German population with them if they preferred . . . aggression to self-defense" (p 81). Clearly they did prefer aggression to self-defense. The suggestion that the Nazis "carried the German population with them" (until Germany began losing the war) is correct, but is inconsistent with Epstein's earlier suggestion that Nazi moral principles lacked legitimacy because the Nazis had silenced the opposition to them (p 80).

sonal liberty, human dignity and equality, nonaggression, and even rationality, in favor of an ideology of a master race, namely non-Jewish Germans, that would prove its superiority by killing or enslaving the other races. It is true that the Nazis did not kill "indiscriminately," but to suggest that this was a bow in the direction of "Thou shall not kill" (pp 81–82) is fanciful; genocide is not indiscriminate killing, and Nazi discriminations were not based on Biblical injunctions. Also fanciful is the suggestion that the Nazis' mistaken beliefs about Jews "converted traditional morality into an instrument of mass destruction" (p 83). The Nazis did hold erroneous beliefs about race, and about much else besides. Yet to suggest that they were adherents to conventional morality who *merely* committed some factual errors is an inadequate account of Nazism. Many people have despised Jews without wanting to exterminate them, believing, unlike the Nazis, that despising a race or ethnic group is not an adequate reason for destroying it. Epstein says that "no one would defend the proposition that killing is not wrongful because the accused did not like the color of his victim's eyes" (p 82), yet many societies have thought that the color of one's skin is a justification for killing.

My discussion of Epstein's philosophical views as presented in *Skepticism and Freedom* has brought me only to page 93 of the book, for it is there that his philosophical analysis leaves off. The rest of his 311-page book is devoted to legal and economic analysis that owes very little to the philosophical analysis that precedes it. If anything, a certain impatience with philosophical argument is visible in this part of the book, as when he says that

> we have to be aware of leaping over some philosophical precipice by conjuring up fantastic justifications for killing, such as those that hold it is all right to kill other individuals who make you miserable precisely because they are happy. It is a testimony to common sense that, even with all the weirdness in human history, we have never allowed our discourse to descend to such pitiful levels (p 92).

One wonders who is the "we" here. Fantastic hypotheticals are the stuff of philosophical debate—and remember that Epstein had thought it important to show that the Nazis were bad, rather than ignoring them on the realistic ground that Nazism has no bearing on the legal issues that confront the United States today. The passage that I have just quoted appears in a chapter dealing with the use of presumptions to order legal arguments: killing a human being is presumptively wrong, but the presumption is rebuttable by various pleas, such as self-defense. This is balancing, and is fine as far as it goes, but it has no moral valence, as Epstein seems to think. Nazis could accept the

presumption but then offer all sorts of ingenious rebuttals. Epstein would reject the rebuttals, of course, but his ability to do so would owe nothing to their being embedded in a system of presumptions.

When he gets down to cases, neither moral principles nor reasoning with presumptions does any work for him. Rejecting a legal duty to rescue persons in distress, he asks, "are we confident that imposing legal duties to rescue increases rescue, or does it only lead people to retreat from the scene, lest they be held liable? Why impose the duty to rescue in some narrow class of actions where rescues are likely to take place anyhow?" (p 101). Fair enough, but these points owe nothing to philosophy. They are pragmatic in the sense that, taking for granted that writer and reader are part of the same moral community, the writer treats the legal issue as one of assessing alternative means to an agreed-upon end. The reasoning called for is instrumental rather than moral and is free from the indeterminacies of the latter.

When Epstein turns to the issue of abortion, his attempt to resolve it with the aid of presumptions stumbles at the start, owing to the difficulty of deciding whether abortion is the killing of a human being, a decision that must be made if abortion is to be (or not to be) presumptively murder. He says that abortion *is* killing, no matter how early in the pregnancy, but he bases this conclusion on the very weak ground that "the only truly discontinuous moment in the process [from conception to birth] is that of conception" (p 104). Not so; birth is a discontinuous event as well; and anyway why should discontinuity be the key to applying the presumption? Even if one gives Epstein his arbitrary presumption, his analysis of abortion is severely inconclusive, with morally problematic considerations ignored, such as evidence that abortion causes an eventual reduction in crime rates by reducing the number of unwanted children, who have an above-average propensity to commit crimes when they grow up.[28]

Almost one-half of *Skepticism and Freedom* (chapters 6 through 9) is given over to a sustained attack on a variety of mainly psychological arguments against respecting voluntary choices, the common theme of the arguments being that cognitive quirks, and social and economic inequality, greatly impair the ability of people to make rational choices. Epstein criticizes these arguments on their own terms, as implausible, empirically unsupported, and so forth, with nary a reference to philosophy. His criticisms can fairly be described as pragmatic in the sense (it is always important to explain the sense in which one is using the word "pragmatic") that they presuppose that writer and reader share the same basic premises and so can dispense with

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[28] See generally John J. Donohue and Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q J Econ 379 (2001).

philosophizing. Suppose two people are discussing national defense. They agree that the defense of the United States is a paramount value, but they disagree over the best means of defense—whether it is to have a powerful army, or to forge strong alliances with other nations, or to shift the emphasis from conventional military forces to espionage and covert action. Since they are reasoning from the identical premise, and their debate therefore is over means rather than ends, no occasion arises for recourse to considerations of a philosophical character, as it might in a debate between a pacifist and a militarist.

Debate over means rather than ends is the character of Epstein's critique of such psychological theories as the theory of "adaptive preferences," which is the theory that expressed preferences often are inauthentic, arising from limited knowledge or opportunities (pp 143–49). Sequestered women in traditional Muslim societies may be happy, but perhaps only because they are unaware of the satisfactions that women obtain in Westernized societies. Or though aware of those satisfactions, they may realize they are unobtainable and may therefore resign themselves to their lot, adjusting their preferences to their limited opportunities.

Epstein makes good criticisms of this theory, criticisms that as I have said owe nothing to his philosophy. But he overlooks one criticism, and the oversight seems to me a product of his philosophy. The criticism is that to make the theory of adaptive preferences—or any other theory that questions the authenticity of expressed, of conscious, human preferences—a basis for public policy is undemocratic because if the basis were explained to the public at large the public would be outraged. Suppose a government official said, "We know that black people smoke more than white people do, but they do so not because they *really* want to do so, but because as historic victims of discrimination they are prone to engage in self-destructive practices; and so we will forbid them to smoke. White people, since their preferences are not distorted by a history of discrimination, may smoke if they want." Of course people sometimes acknowledge that they have self-destructive preferences—just think of all the efforts people make to stop smoking. Some, probably many, people think it a good thing to be forced to save for their retirement, because they realize they would have difficulty resisting the temptation to spend all their money before they reached retirement age. But there is a difference between a person's persuading himself that he has a bad preference that he should fight and being told by government that his preferences aren't authentic because he is downtrodden. (And anyway the strongest case for social security is not the need to protect people against themselves but the need to protect relatives, friends, and employers, who in the absence of social security would be under pressure to support the

feckless old.) A system of public policy built on a refusal to accept the authenticity of people's preferences could not be justified in those terms to the public; the officials would have to conceal the grounds of the policy. The model of government would be Dostoyevsky's Grand Inquisitor, an atheist who inculcates religious belief in the citizenry to make them happy.

Epstein points out the danger that criticism of inauthentic preferences may be a mask for the critics' desire to impose their own political preferences on society. But he fails to see this as a danger, not just to his own political preferences, but to democracy. Some influential critics of inauthentic (adaptive, mistaken, etc.) preferences, notably Cass Sunstein, our academic colleague and a target of Epstein's criticisms, are "deliberative democrats."[29] They reject the legitimacy of the actual outcomes of the democratic process when those outcomes fail to reflect or at least cohere with the outcomes that a more deliberate, informed process of political debate and decisionmaking would produce.[30] The potential gap between the actual existing practice of American democracy and the process and outcomes envisaged by deliberative democrats may be wide, and this should give pause. But arguments from the practice of American democracy are unavailable to Epstein, because he has at least as crabbed a view of the legitimate scope of democratic choice as any deliberative democrat. I do not think he would be much troubled by an argument that a particular policy would, if articulated, outrage the voting public, for he advocates a host of policies that we know are profoundly unpopular, because they have no support at all in the political system. Even judges shielded by life tenure from retribution by an outraged public do not support them. But he would like them to. He would like them, for example, to declare social security unconstitutional.

I have said that most of *Skepticism and Freedom* owes very little to philosophy—to Epstein's embrace of utilitarianism and polemic against moral relativism. And by the time we reach the Conclusion (p 259), philosophy has disappeared completely until the very last page, where we are warned once again, but without elaboration, against "drown[ing] in a sea of moral relativism" (p 263). It is impossible to see what damage moral relativism, or what I have emphasized is not the same thing, the rejection of moral universalism, could do to Epstein's legal and political theory. Although he speaks in universalist terms, his policy prescriptions appear to be concerned solely with the United States. No interest is manifested in other societies. No attempt

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[29] See, for example, Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford 2001).

[30] See, for example, Posner, *Law, Pragmatism and Democracy* at 130–43 (cited in note 1).

is made to convince Islamicist, Green, Marxist, Naderite, Vatican, or Chomskyan critics of U.S. values. No attempt is made to convince the extreme Left or the religious Right in this country. The book is addressed to people who share Epstein's belief in prosperity, free markets, individual liberty, and limited government. For such people, the issue is means not ends, and philosophy does nothing to improve instrumental reasoning.

The pragmatic liberal, or at least my brand of pragmatic liberal, agrees with many of Epstein's policy prescriptions, as I said earlier. But we do so without a commitment to natural law, utilitarianism, or any other philosophical ground of moral and political belief. We do so because we think that there are good practical reasons for liberalism that will appeal to anyone who agrees with us that American government should be primarily concerned with promoting prosperity and protecting internal and external security but should also be responsive to strong currents of public opinion that oppose the single-minded pursuit of these goals. The pragmatist is a democratic liberal rather than a liberal *tout court*. And he does not pretend to have a philosophical artillery strong enough to cow people who do not share his basic values.