2000

The Uneasy Marriage of Utilitarian and Libertarian Thought

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
I am grateful for the opportunity that the Editors of the Quinnipiac Law Review have extended to me to comment on the papers prepared for this Symposium Issue, which is devoted to an examination of my work. Some of the papers themselves formed the basis for a spirited discussion at the Conference held at Quinnipiac Law School in October 1999. Others have been prepared only since the Conference took place. But either way, I hope that it will prove useful for me to set out my reactions to these papers. In organizing my response, I shall start with the most general of the papers and then work my way down to the papers that examine how I apply, or should apply, my general approach to particular cases. The appropriate sequence thus begins with the Alexander and Schwarzschild contribution, which examines my general views on the vexed relationship between libertarianism and utilitarianism. Thereafter I shall say a few general words about Frank Buckley’s paper on the relationship between culture and liberty. At the next level of concreteness, I shall move on to discuss Emily Sherwin’s paper on my analysis of property, especially as it relates to the grand takings question, and to Brian Bix’s paper that does the same for my (and Richard Craswell’s) views on the role on unconscionability in contract. Finally, in the third circle I shall deal with Stephen Latham’s
critique of my views on health care, and with Stephen Gilles's use of my general approach in dealing with the selective funding for education.

The first point goes to intellectual orientation and shapes everything that follows. In dealing with legal questions, the class of necessary deductive truths shrinks as I get older. As a younger writer, I thought that the central libertarian principles enjoyed a privileged logic status, such that it became almost impossible to deny their central postulates save on pain of self-contradiction. That deductivist orientation has some real benefits, for it encourages and allows the detailed examination of key legal concepts, and as such inspired my own early work on causation. Any ability to engage in conceptual clarification paves the way for intelligent normative discourse by eliminating multiple sources of error. But it would be mistaken to confuse a necessary condition for successful legal analysis with a sufficient one. Once the clarification is done, it still becomes necessary to explain why it is that a principle of causation, or any of its possible rivals ("arising out of and in the course of employment") helps advance some sensible set of social objectives. At this point, the ultimate challenge is to devise some consequentialist justification that uses legal rules to help better, in the crudest form, the lot of humankind. One way to state that point theoretically is to ask if rule A provided an outcome that left everyone unambiguously better off than rule B, would there be any reason to prefer rule B? It is of course possible to fight the hypothetical by claiming that no legal rule, especially those which must modify ongoing social relations, could sport that desirable characteristic. But that answer is strictly beside the point if the question is what criteria should be used in principle to examine the merit of legal rules. If one concludes, as I do, that rule B serves no useful purpose, then he becomes, by admission, some form of consequentialist who finds the justification for particular choices in the consequences that they generate.

In principle, this larger inquiry requires some degree of empirical understanding of the incentive effects that various legal rules are likely to have on the behavior of individuals. In addition, this approach has to decide what rules should be adopted when rule A works for the benefit of some and rule B for the benefit of others. Here is not the place to deal with these matters of application in any detail. But it is necessary

to say that no matter how simple or obvious the correct rule, all rules require accepting some degree of trade-offs. In a world of scarcity, no one gets something for nothing, so that the mere fact that all legal regimes leave some expectations disappointed, and perhaps shattered, after the fact is no reason to reject the rule. The question is the frequency, severity and distribution of the losses, tempered by an awareness of the frequency, severity and distribution of the associated gains.

In trying to choose the appropriate set of legal rules, we therefore have to adopt a fallibilist view of the world and hope that by starting in sensible places we can by degrees develop a sensible overall system. In dealing with the full range of rules, I believe that in practice—again there are no necessary truths here—it is only possible to develop complex structures from simple origins. The complex system of DNA works precisely because it involves only four bases and two base pairs, which can be strung together as building blocks for complex biological structures. Chess works as a game because it involves only 32 pieces (half of which are pawns) and 64 squares. Any effort to extend it to 100 squares or three dimensions, for that matter, with or without any correlative increase in pieces would, I suspect, prove to be so unwieldy and awkward that people would just abandon the game. This simple example gives a general clue toward my attitude toward law and social institutions. The basic building blocks have to be simple enough to allow for us to incorporate them into far more complex structures.

To achieve that result in law, we have to make certain assumptions that simplify our view of the world so that we do not aim for deep precision at the level of human psychology or social organization. On the former, we have to recognize that self-interest of individuals is a dominant, but by no means exclusive, source of human motivation. We have to understand that the law needs in general to do relatively little to promote benevolent human motivations, except to protect them from frustration by others with nasty motivations. But in dealing with complex interactions, the foibles of individuals, however telling, will not afford us an accurate guideline to the rules needed to keep people apart (so that they do not kill each other) or which bring them together (to engage in cooperative ventures). The old Humean account which speaks of self-interest tempered by confined generosity sets the stage as well as can be set, even if it does not capture every form of angst or aspiration that dogs the human soul.
Starting with that stripped-down account of human nature, the first task is to prevent collision between people, and this is done affirmatively, by recognizing the autonomy of each person over his or her person, and negatively, by prohibiting the use of force or deception to compromise that autonomy. Next, the law has to find some way to assign rights in external things to individuals, and here we have to recognize that some forms of property work better in individual hands and others work better when they remain in the commons. The creation of exclusive rights in lands and chattels does encourage investment in the acquisition and preservation of resources. The creation of a commons in water and air promotes the easy coordination of activities between individuals. The creation of so-called intellectual property rights in inventions, writings, and name and likeness is meant to finesse the difficulties for things that are not created unless they are placed in the private domain, but which are not fully utilized unless, at some point, they become part of the public domain. Hence the complex regimes that created limited and guarded monopolies in these resources.

Notwithstanding the critical role that these components place in modern society, the vast bulk of legal thought was directed to things which started out without owners, but which were best managed when placed in the hands of individual owners. For those a rule of first possession—a rule of capture for animals, and occupation for land—often provided a cheap and easy way to make the transition. And once labor and property were assigned single owners, the law of tort could protect them from invasion, and the law of contract could facilitate gains from trade by allowing the transfer and redefinition of rights in both property and labor.

These first four rules, autonomy, property, contract, and tort, which I have termed elsewhere the libertarian quartet, remain a part and parcel of every sensible system of legal rules. Life would be simpler than might otherwise appear to be the case if these rules were able to address every problem that we faced in an ordinary society. But the libertarian position, which stresses the delineation of rights, runs into real difficulties when they appear to disserve all the individuals whom they govern. Historically, the strongest attacks on libertarian beliefs all stemmed from real world examples of how they failed, of which the tragedy of the commons—the overconsumption of natural resources.

under the rule of capture—was perhaps the most notable. The law therefore developed rules that made it impossible to dam up and divert an entire stream, and it authorized the creation of new property rights for oil and gas to prevent the needless destruction of these natural resources.

A common thread runs through these developments. In each case the concern with the systemwide losses created an impulse to allow a broad class of beneficial forced exchanges that work in flat violation of the standard libertarian rules: individuals are told that they must yield what they have in order to gain something of greater value in exchange. Huge portions of the law, from the private necessity cases to the entire area of eminent domain, have dealt with the question of how these benevolent forced exchanges could be identified and sensibly regulated. The recognition of these legitimate uses of coercion were not designed, in my view, to advance social utility as some disembodied good. Rather, they were designed to make sure, to the extent that human institutions could do it, that state coercion was applied in ways that left all individuals better off by their own lights than they would have been if the only rules accepted as legitimate in the state were the libertarian quartet.

As ever, refinement carries a positive price tag. Accordingly, we give up on some element of simplicity so that Simple Rules for a Complex World (1995) does not become The Simplest Rules for a Complex World. In order to overcome some serious bargaining problems, it is necessary to beef up, however reluctantly, the coercive power of the state. The institutional design problem thus becomes: what set of legal restrictions can be imposed on the state to minimize the abuses relative to the accomplishment of its mission of overcoming the common pool and public good problems that arise in nature?

II. REPLY TO ALEXANDER AND SCHWARZSCHILD

My introduction offers, in a nutshell, the world view that Alexander and Schwarzschild attack in their short but incisive critique of my world view. Their central theme is to say that I cannot have it both ways by claiming, as I do, joint allegiances to what could be called roughly the libertarian and utilitarian foundations of the position. They pose question after question, the main function of which is to force me to take sides in the philosophical debate.
My uneasiness with their critique stems from their choice of method. Looking through the short piece, it is clear that it starts with grand questions that always engender the kind of philosophical doubt that I find it, temperamentally and intellectually, uncomfortable to deal with. Their strategy is immediately to raise the debate to its highest permissible level of abstraction. Right off the bat, the question is whether I am a Benthamite who believes in the greatest good for the greatest number. At that rarified level, the question is whether I wish to maximize pleasure, wealth or preference satisfaction, and if so whether I think that the preferences of animals, infants, future generations or cognitively impaired count. Next we have to unpack the idea of preferences, which contains in itself all sorts of hidden ambiguities and instabilities.

My reaction to their barrage of questions is that it gets us off onto the wrong foot in legal philosophy. My approach starts with the inextricable tie between careful legal analysis of cases and wider questions of general political philosophy. The lawyer does best, and in the long run the philosopher too, not by starting with global issues of immense difficulty. Rather, the simpler approach is to start carefully with particular disputes and to ask which of two given conceptions works better in order to resolve that principle. Thus, if the question is one of contract formation, do we believe in the objective or subjective theory of contracts, and why? Or the question could be, do we think that this or that contractual provision should be nullified on grounds of public policy and, if so, then which? It was just through this incremental method that I developed my overall views that seek to protect the domain of private choice and limit the domain of state power. To get a grip on things, it is not really necessary to decide whether we think that animals have rights in order to attack the minimum wage law and the dislocations that it creates. And even the elaborate discussion of preference formation does not in the end have much to do with the evaluation of the modern generation of civil rights laws that limit the grounds on which one person can refuse to deal or discriminate against another. Concede the racial animus (and recognize that it runs in all directions at times), and one theme still dominates. The power of entry into new markets, when unconstrained by the legal barriers and impediments, will go farther in rooting out odd forms of

social behavior than any state mandates, especially those imposed by their own individuals who all too often are able to seize state power and turn it to dubious ends.

Alexander and Schwarzschild share, I think, my skepticism about the dangers of state power and about the advantage of open entry. I should have been much more troubled by their brief critique if they had indicated which specific rules they endorsed, and how their concrete positions differed from my own, and why. But at this mid level work there is silence. Perhaps this is too much to ask for in a short paper that is simply designed to call attention to the unavoidable tensions between a libertarian orientation on rights and a general utilitarian, or more accurately, consequentialist world view. So let me just mention one tell-tale sign that they can fall into error by keeping the discourse at one level of abstraction too high. They note that "once intellectual property is recognized, something like a 'fair use' standard is probably inevitable." Here of course intellectual property reveals in the most visible form all the tradeoffs that must be resolved in dealing with any system of property. But a bit of disaggregation helps understand the problems of looking at law solely from on high. A doctrine of fair use is needed to deal with both copyrighted and trademarked material. It would be odd if one could not quote material in order to criticize it, or could not use a trademarked name for purposes of comparison or evaluation. Hence the fair use doctrine as applied to these areas offers, as it were, a second round of correction after the law backs off the libertarian position to create legal rights in intangibles in the first place. It is another instance of how forced exchanges can advance overall social welfare. But patent law, which involves invention and not communication, has no such need, and no doctrine of fair use has developed even though the patent law in many other respects constantly has to police the social bargain between the creation of the legal monopoly in exchange for innovation, disclosure and the eventual incorporation of the patent invention into the public domain. Here we can say more or less sensible things about all these forms of intellectual property, which tries to cope with the recurrent trade-offs that each in its own way presents, without having to answer the ultimate intellectual challenges that Alexander and Schwarzschild raise. In large measure, I

7. For a general discussion of the goals and objectives of the patent system, see Rebecca S. Eisenberg, Patents and the Progress of Science: Exclusive Rights and Experimental Use, 56 U. CHI. L. REV. 1017 (1989).
regard much of legal scholarship to be a matter of proportion: be large enough to cover something of importance, but small enough to cover it well. Alexander and Schwarzschild hold particular views that often align closely with my own, and they do so, even though they cannot solve the ultimate mysteries of the world—either.

III. REPLY TO BUCKLEY

My comments on Frank Buckley’s erudite piece are brief. Buckley does not offer a critique of my work, but rather directs his fire to the wide range of communitarian and conservative thinkers who find deep internal contradictions within the kind of simple-minded market-based system that he, and I, generally defend. Here I agree with Buckley that most of these doubts tend to be overstated. Schumpeter may well be right to have asked how it was that capitalist institutions could obtain the loyalty of the general citizenry. And when graduate school in the social sciences and the humanities was the choice of the ablest of college graduates, that criticism may have struck a nerve. But today as we watch these same college graduates veer away from the professional schools, to management consulting, to investment banking, and to internet start-ups—that concern rightly has to be dismissed as a bit dated, if it ever were correct.

Indeed, more powerful psychological forces play their part. No matter what area of work people go into, they are driven personally and socially to rationalize their choices and to reflect critically therefore on the institutions of which they are a part. If market institutions do well by inventors and techies, we can expect some of them at least to come to their defense, if only after retirement. More generally, any student of philanthropy knows that it is a dangerous oversimplification to claim that culture and markets are always at odds. That claim is manifestly overdrawn in light of the many individuals who do both commercial and cultural work, and understand fully the difference between the two sets of norms and the ways in which they reinforce each other.

On this vein, I would just make brief reference to Tyler Cowen’s recent study, In Praise of Commercial Culture (1998) whose main point reinforces a theme I hold dear. Artistic creativity flourishes in competitive markets where young artists are not beholden to single rich patrons, but can establish relationships with the dealers of their choice. High-minded, patrician monopolists are more dangerous than vulgar dealers. We need to do far more to explore the connections between
culture and commerce. But we should not assume that the latter is some inflexible enemy of the former.

The state presents still other threats to artistic creativity, for it has the capacity to stifle art, culture and liberty simultaneously. It should take little imagination to realize what Soviet dominance did to Russian art and culture, not to mention the local cultures of the many smaller nations under the Soviet thumb. But the United States is not immune to that risk either. Short of banning private contributions to art, we could remove the charitable deduction, so that an ever-larger fraction of support for the arts comes direct from the state. The eminent domain power can break up coherent communities by uprooting individuals from their traditional homes. It is all too easy to assume that defenders of private property neglect neighborhoods and relationships that allow human culture to flourish. But at the end of the day the true villain of the story is often the eminent domain wrecking ball which swings too frequently precisely because the loss of good will—the loss of affective relationships—is systematically kept out of the compensation calculus by Supreme Court Justices who are so anxious to defend comprehensive state planning that they are blind to the excesses that it induces. After all, good will is not taken, only destroyed. Soft values are of course important to any culture, and it should hardly come as comfort to either communitarians or conservatives to note that the courts remove these from the social calculus because of the difficulty of calculation.

IV. REPLY TO SHERWIN

These brief ruminations on culture and condemnation segue nicely into Sherwin’s paper, which is also written from a sympathetic point of view. As with Alexander and Schwarzschild, she writes from a critical rather than a programmatic stance. Her appointed task is to expose the weakness of my position, not to develop her own alternative world view. Her basic point is that my willingness to defend the eminent domain compromise—the state may take if for public uses but only if it pays the owner just compensation—runs into serious tension with any tough-minded theory of property. As she notes in her paper, a complete set of property rights (including, of course, their correlative duties) entails three different sets of rules. “One set defines an object of property, another defines the conditions of its ownership, and the third

governs the incidents of property ownership.” Thus a good set of rules would have to treat land, or at least interests in land, as property rights; it would have to develop rules to determine who owned that thing; and, lastly, it would have to decide the rights that flowed once ownership was established, most notably the classical trinity of possession, use and disposition.

Sherwin is correct to note that the shift between the second and third stages is critical to the overall project: what use is there to the protection of property if, for example, it carries with it only the right to exclude, but does not carry with it the right to occupy, use or dispose? The case law generally pays lip service to the larger definition of property, but in cases of the so-called regulatory takings, it often follows that initial crescendo with the limp conclusion that property is not taken so long as some viable economic use for it survives. So the real question is whether the payoff to rights has the hard-edged position that I defend in *Simple Rules* or whether the ostensible rigor of the first two stages turns to mush at the third.

Clearly, the full set of common law decisions, ancient and modern, exhibit a kind of intellectual sprawl from which it is possible to extract any given conclusion. And Sherwin is surely right to note that the common law of nuisance, as articulated in the *Restatement (Second) of Torts* resorts almost effortlessly to terms like “unreasonable invasion” in drawing the line between tortious and nontortious conduct. But of course there is yet another way to look at this problem that coexists with the *Restatement* approach and which I have long defended. Any large

---

10. Kaiser Aetna v. United States, 444 U.S. 164 (1979) (finding a taking where the United States demanded public access to a private marina as a condition for allowing access from the marina to public waters).
11. *See e.g.*, Petty Motor Co., 327 U.S. at 372.
14. *See* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49 (1979). The title of this paper indicates that it is a transitional phase in that I think that the basic libertarian rules for the rectification of wrongs under a corrective justice, strict liability principle are subject to an overlay to take into account the weaknesses of that rule in high transaction costs environments. What I did not see in that paper is that the initial decision to lump the rights of possession, use and disposition in the same person itself has strong transaction cost justification, for it prevents holdouts between those who would have, by assumption, the right to possess, but not the right to use or to sell. It should not be thought that the
invasion of one person's property should be regarded as prima facie wrong and subject to injunction unless the defendant brings himself within a narrow set of justifications, such as consent or self-defense, both of which are usually inapplicable in disputes between neighbors. The idea of reasonableness is then tied to the older "live-and-let-live rules," in which one set of low-level interference is tolerated precisely because it improves the lot of all individuals to the overall social situation. On this view the legal inquiry is not whether, as Sherwin sometimes put its, "Do X, unless you can achieve more good by not doing X," at which point the rigor of the initial premise breaks down because of its mushy exception. Rather, the question is whether each side looks better off when it swaps out its right to enjoin certain low-level interference for the same right as others. That bargain looks good to me, and the rule here has proved amazingly stable over time. Its key virtue is that it allows us to escape the dilemma that Sherwin thinks takes hold in these cases. Either have rules of compensation that are as tough as those which define property, or the advantages of hard-edged rights are lost in the search for a set of flexible case-by-case rules—the very point on which she ends her article. Yet there is a nifty way out. By asking people to put themselves all into the same boat, and by giving them the choice only of low-level interference or no interference, we do not have to deal with some grand question of valuation for each petty incursion on a case-by-case basis. That ability to reduce the level of generality means that both the rule and its exception maintain a workable level of precision.

I think that this point can be generalized to note that the valuation problems imposed by any recognition of the eminent domain right do not cast us adrift in some formless utilitarian sea. Start with the simple case where land is simply taken outright. If it has improvements on it, if it has private locational advantages for business, or if it faces uncertain market demand, then valuation is always a problem. Does one use a capital asset pricing model? What about the use of replacement cost less depreciation? What about sales of comparable properties? The

---

15. Restatement (Second) of Torts § 822 cmt. g., § 831. For the classic exposition, see Bamford v. Turnley, 122 Eng. Rep. 27, 32-33 (Ex. 1862).
16. Sherwin, supra note 1, at 713.
17. See id. at 714.
cases are filled with discussions of the proper method of valuation. Yet here we are fighting usually over the last ten percent of value, and the system that can keep the wobble to that level can usually survive even if it does not nail down severance damages to the precise dollar. I would be hard pressed to think that these problems of valuation would lead anyone to advocate getting rid of the compensation requirement altogether or advocating some clear rule that is known to be wrong—all parcels get $10 per square foot regardless of market values.

Regulatory takings of land—I shall turn later to overall economic regulation—differ from outright condemnation in two ways. First, the owner is left in possession of the property, so the taking is by definition partial. Second, the legal initiative applies to many persons, thereby opening up the possibility that the new restrictions on one provides offsets to others. Here we can carry over the insight about the average reciprocity of advantage from the live-and-let-live cases to make some progress on the question of valuation. Some restrictions are so skewed that the market value of the land subject to the restriction gyrates instantly. Two parcels of land, both of which were once worth $10,000 are now worth $15,000 and $2000 respectively, a distributional skew and an overall loss in market value, which is, it must be stressed, not likely to be set off by some mysterious increase in joint subjective value. In this case the usual appraisal practices used for land taken can be carried over, on a before and after basis, to land subject to regulation—taking care that the before value is not improperly reduced to reflect the risk of insufficient compensation under the takings law. Since the return benefits of regulation to others are included in the valuation, we do not have to try to value separately the restriction imposed and the return benefits received. The one number will work across the board.

In most cases, moreover, the calculations will be clear. The land in *Village of Euclid v. Ambler Realty Co.*,18 lost seventy-five percent of the value when the zoning ordinance was imposed, and no one was prepared to make that up out-of-pocket in order to keep the zoning scheme alive. What could be easier than saying that this restriction on use—tantamount to the taking of a restrictive covenant for the public-at-large—generates a prima facie obligation to compensate. That obligation of course could be tempered by showing that the regulation was needed to curb some wrong to third parties, such as the creation of a

nuisance. But this case involved the regulation of a contiguous sixty-eight acre plot of land whose use (as a Fisher Body Co. plant) posed no harm to anyone. In cases therefore where the level of government behavior is most egregious, the dangers of case-by-case evaluation of losses do not pose much of a risk. Indeed, in most cases the state would abandon the regulation once the obligation to compensate was made clear so that the precise valuation would not have to be known. This dilemma has no horns. All questions of valuation, whether regulation or occupation, require hard work, not philosophical despair. Sherwin is unable to show that valuation problems are so endemic that they endanger the entire enterprise.

V. REPLY TO BIX

Professor Brian Bix questions my approach to yet another linchpin of the classical system: freedom of contract. Bix begins on the right foot by acknowledging that my defense of freedom of contract treats it as a presumptive virtue, not as a necessary truth. Starting from the midlevel I am quite happy to recognize—indeed, to insist upon—limitations of freedom of contract that take into account the vulnerable status of certain groups (infants, insane people, some elderly), the defects of contract formation (duress, fraud, nondisclosure), and the risks of adverse external consequences (contracts to kill or maim, to bribe, to restrain trade). In many cases, I believe that certain overbroad prophylactic rules may be preferable to case-by-case adjudication after the fact. The writing requirement under the Statute of Frauds is such a rule because it helps remove disputes over contractual formation. The use of these formal requirements (of which notarization and witnesses are other examples) may well make good sense. They help to avoid impulse, to reduce the risk of fraud, and to memorialize a transaction that might be litigated only years later. Most importantly, they do not place any substantive restrictions on the price or other terms that are incorporated into the written (or oral) agreement that complies with the chosen formalities. Of course, we can run the risk that the forms are imposed when they are not needed, so that they serve as a trap for the unwary. But when the requirements are simple and well known, such as those contained in the Statute of Frauds or the Statute of Wills, then these dangers generally disappear. The security of transaction increases

in ways that only complement the general legal objective to freedom of contract, subject to the qualifications noted earlier.

The hard question for Bix and other critics of this position is to ask what improvements they can make on the system in the name of justice, which as Bix claims "in all its infuriating vagueness, remains the ultimate goal." In taking up this theme, Bix compares and contrasts the approach that I have taken on unconscionability with the more cautious approach to the same subject offered by my former student and colleague, Richard Craswell. It is not possible for me to do justice to Craswell's finely honed system here, but it is sufficient for these purposes to note that his overall objective is to see if there is some nuanced way in which a doctrine of unconscionability could be introduced into the law of contract so that it allows for the modification of certain key provisions short of the total invalidation of the contract. In Craswell's view consent is not always a binary concept, so that partial or imperfect consent might require selective intervention into contractual freedom. From my point of view these refinements do not do much to justify the expansion of the doctrine, even though they often appeal to sophisticated notions of behavioral economics or game theory to explain how certain bargains come to fail.

The nub of the difficulty is this. The various qualifications to the principle of contractual freedom go a long way to remove from the system those contracts that do not serve the interests, ex ante, of both sides, and those contracts that impose system-wide prejudices against third parties. That said, the question is, what gains can we achieve at the margin by pursuing other strategies for intervention? The appeals to behavioral economics and cognitive biases and game theory can surely identify that contracts do not work as smoothly as we would like. But the proof of the existence of these defects hardly guarantees that the aberrant cases will be picked out in litigation (where the tendency is always to overestimate the occurrence of rare cases) or cured in the lucky event that they are picked out. Given the public choice risks inherent in any curative legislation, I have strong doubts that this program will be frequently realized, and am worried about efforts to start down a path which promises so little by way of return and exposes

---

20. Bix, supra note 2, at 725.
the legal system to so much risk. I could be persuaded to change my mind if someone could show an intervention that falls outside the exceptions that I recognize as generating some overall Pareto improvement: the simple requirement that all contracts state an annual percentage rate of interest under some pre-established formula could be one example. But in most instances the argument cannot be made. Indeed, today the case is weaker than it has ever been, given the ease with which anyone can enter into credit transactions, including those executed on-line. The geographical separation of markets, which bolsters the unconscionability doctrine, becomes weaker with each passing technical innovation.

By parity of reasoning, I am deeply suspicious of any attempts to approach the elusive virtue of justice head on. The program that Bix heartily endorses has been invoked to defend labor unions, minimum wage laws, fair housing laws, antidiscrimination laws and the like. But the detailed investigation of each of these cases persuades me that these forms of intervention do more mischief than good. The way to improve markets is to open access and reduce transaction cost. Web-based transactions do more to protect vulnerable and isolated individuals than all the consumer protection laws that have ever been invented. We can continue to seek justice, just so long as we do not pursue it directly. The right path is to do what can be done to insure the procedural prerequisites to sensible bargains—and then to stand aside.

VI. REPLY TO LATHAM

The generalized concerns raised by Bix receive a more concrete instantiation in Stephen Latham’s careful examination of my writings on health care. As Latham rightly notes, my basic position has long been to insist that positive rights (the right to health care, funded by the state) is a great mistake that simply requires one class of individuals to subsidize others—often others with greater wealth and access to the political process. As a matter of first principle, therefore, I reject a full range of common reforms starting with universal health care and extending through Medicare, Medicaid, or guaranteed access to health care. By implication, I think that those narrower and more focused concerns that are designed to guard against the possibility of

incompetence, fraud or duress cannot be lightly dismissed in medical contexts, especially since people are forced to make their most difficult life-and-death choices when ill-health and financial pressures leave them vulnerable and compromised. So my basic orientation carries over to health care, subject to the caveat that there is greater likelihood for intervention—preferably by other private parties—on the same grounds that I set out in my treatment of unconscionability.

Latham takes issue with much of what I say, and takes issue with me chiefly on the questions of guaranteed access to medical care. In so doing he attacks both my account of individual behavior and the argument that individuals behind the Rawlsian veil of ignorance would make do with a precarious and incomplete system of voluntary health care, that is, one that would deny that each person had a right to health care that could be cashed out against the state. On the first point, Latham correctly notes that desperate individuals often spend small and large fortunes in the pursuit of useless alternative therapies or diet supplements, and often jeopardize their long-term health for foolish or vain reasons. Yet note that these happen in today’s heavily regulated environment, which shows the futility of the state to overcome individual acts of self-destruction, even when it tries. Once again, my argument for markets does not rest on any illusion of human perfectability, but only on the observation that individuals who are forced to internalize the cost of their errors will be less likely to make them in the first place. That said, it may well be that we can justify some intervention for the reasons that I outlined in discussing Bix’s analysis of my views on unconscionability. As Latham suggests, drug labeling laws offer one path to prevent fraud and confusion, and to guard against inadvertent but deadly mistakes. But to complete the analysis, Latham would have to ask whether private vendors of drugs would supply these warnings voluntarily, and, if not, whether the undersupply of private warnings is better met by government intervention, which could easily overstate the risks of certain therapies, as opposed, for example, to an independent website that is devoted to drug side-effects and interactions. Here he has to take into account the risk that the competitor of drug A may wish to saddle it with ominous warnings in order to promote the success of his own drug B. It is all too easy for health regulations to become hijacked for anti-competitive ends.

24. See Latham, supra note 2, at 733.
I am quite open to any argument that addresses these difficulties. But what I fail to understand in Latham’s argument is his leap from difficulties in labeling to guaranteed access to minimum levels of health care at public expense. More concretely, why does Latham then switch ground by noting that the irregular nature of demand for medical services introduces a whole raft of complications when people cannot fund the costs of crisis care out of income or savings, and thus have to make peace with insurance carriers who then insist on restricting access to care after the fact? Here Latham supplies his own answer to the question: markets are never efficient if that test requires that they respond ideally to all crises. But the real issue is whether on average private markets respond better to these challenges than government, which often supplies first dollar coverage, even when the insurance risk is negligible, takes the position, as with present proposals to add prescription drugs to Medicare for first dollar coverage. To show that markets perform better with wheat than in health care is quite beside the point. The real issue is how, in dealing with health care, markets outperformed, or are out performed by government regulation. On this point, Latham shows commendable caution by noting that the hard cases for markets are precisely those which are the hard cases for regulation. If it is difficult to monitor or evaluate medical services for a private provider, those difficulties do not disappear once the government moves in to provide or fund services on a grand scale. And on this score at least the conventional incentives to get things right are stronger with firms that have a financial nexus than with government regulators who do not have to bear the consequences of their own mistakes.

Latham then chides me for failing to note that the outcome of efficient markets could well have devastating effects for those people who have made mistakes in their choice of health care plan or medical provider. Once again no one could deny this brute fact. But his argument gives rise to the question: compared to what? Government monopolies also make mistakes in rationing health care, and these too can be devastating in individual cases, but here there is nowhere to flee but onto some government queue. When some private health care plan fails, we have at least the hope that something better will arise in its place—or so we would in an unregulated market. Unfortunately, it is very difficult today to disassemble the information on firm failures. Latham is right to note the major distress of these plans, but does not pay sufficient attention to the source of at least some of their afflictions: government restrictions on the terms and conditions on which these
services can be determined. Doubtless there are ample market failures, but the current situation is a mix of two elements. Unless we disentangle regulatory from market failure, we are likely to fall into the trap that holds that the only cure for bad regulation is more regulation—a cycle which no market system can survive. We have to be aware of the Nirvana fallacy here, as everywhere else: we cannot compare ideal government to imperfectly regulated private institutions.

Latham next criticizes me for the reliance that I would place on private charity to fill the gap in a market-based system of medical services. To his great credit, he does not simply assume that every dollar of publicly provided medical care has to be covered by private charity. One great tragedy of the current situation is that regulation has run up the cost of medical service and crowded out charitable care, so that it is quite difficult to guess what the market shortfall would be if we had never put into place today’s massive Medicare and Medicaid programs. Yet even after making these adjustments, Latham thinks that the old institutions could not cover the new problem because new and expensive technology prices medical care out of the reach of most individuals. No doubt technology is an important driver in health care, but it is hard to see why it should be regarded as the source of modern woes in medicine. In most private industries, new technology reduces costs and expands opportunities, so the hard question is why has that not happened here. After all, better computers should reduce the costs of medical records, allow for the better tracking of individual cases, and permit the creation of useful comprehensive databases. In other cases, it could replace complex technologies with easier substitutes. Complex intestinal operations can be eliminated with a single pill; balloon angioplasty can eliminate costly surgery, and so on down the line.

So why do we greet these technical improvements with an abiding sense of dread? One possibility is that technology takes on a mixed coloration in a highly regulated and subsidized industry. What sense is there to making great medical advances available free of charge to individuals whose life can be extended just a matter of days or weeks? The right response to some technology is to restrict its use to those cases where it is cost justified. But so long as ICU beds are built, some government program will be there to fill them, thereby crowding out less expensive responses to more treatable conditions. In short, I think that it is a mistake to act as though technology deploys itself, when the wisdom of its use depends on the incentives for its deployment. I have no doubt that when confronted with greater technical possibilities, an
aging and wealthier population, would demand an increase in medical services in both unregulated and regulated markets. But I think that the response to these technologies would be more rational and less wasteful in a world in which the subsidy of medical care was not taken as a moral given.

This last observation brings us to the question of redistribution of wealth. That issue was hinted at in a general way by Alexander and Schwarzschild in their critique of my belief in the compatibility of libertarianism and utilitarianism, generally conceived. Latham puts that insight to a specific test when he asks whether my strong doubts against forcible redistribution of wealth make sense in the healthcare context. As a practical matter, I still think that a combination of greater rationality in the deployment of health care resources, the increases in general wealth, the greater ease of entry, and the provision of some charitable services (whether by cut-rate physician services or disinterested third party grants) could have done better than the current system if we had not opted for the Medicare alternative in 1965.

That is of course a highly contestable proposition which many people strenuously doubt. Latham, as one of the chorus of doubters, makes the further argument that the use of any precarious system of support would not, even if it were efficient, meet the requirements of justice because it does not guarantee individuals the rights to health care that they would, behind the Rawlsian veil of ignorance, demand. But I think that his philosophical riposte rests on a mistake. The simple point is that there are no guarantees in this world. The government that guarantees health care has to cobble together the resources to provide it. If the system fails to generate the wealth then we could get anything from the deplorable health care of the old Soviet system to the erratic health care of the British and Canadian system, neither of which has made the necessary investments in infrastructure to keep pace with technical advances. Behind a veil of ignorance, I think that people would seek to maximize the likelihood that they would receive decent health care. If it turned out that a guaranteed system was likely to suffer system-wide failure, then they would back off those demands in a trice. Indeed, the great tragedy today is that democratic politics has locked us into systems with state-wide guarantees that always carry with them the built-in risk of state-wide failure. It is perhaps not possible in a democratic society to undo the will of the majority. But it is surely within the bounds of permissible discourse to argue against institutional
practices that may in the not-too-distant future prove unable to deliver on their promises.

VII. REPLY TO GILLES

Last I turn to Professor Gilles, and here I am at something of a loss of what to say. Gilles takes on a task quite different from that of the other authors in this symposium. He does not seek to critique my basic orientation but to extend it. His chosen topic is the selective funding of education in kindergarten through twelfth grade, and I am happy to report that Gilles has faithfully applied the position to the problem at hand. He first makes just the right cautious defense of the rule that parents should be guardians of their children. It is not that this arrangement is perfect, but that it relies on the natural sentiments of parents which should be allowed to control until cases of neglect and abuse set in. Next he notes that one possible position for education is to leave it for parents to provide for their children, so that the distribution of sentiments throughout the nation is roughly preserved across the generations, as no group of individuals is required to subsidize the education of any other group. But this system is subject to the objection (which Gilles treats by assumption as valid) that insufficient funds could prevent some individuals from providing the education necessary to allow their children to assume the role of useful citizens upon their majority, so that some degree of state-support is necessary to fill the gap. That said, the question of selective funding arises when general tax revenues are used to fund those children who attend public schools or nonreligious private schools, but not for those children who attend schools of a fundamental religious orientation. In this situation, the ideal system requires those who think that religion is an essential component of education not be asked to subsidize those parents who do not. The principle cannot, I might add, be justified on the ground of the separation of church and state, for that principle would require as much separation on the taxing side of the process as it does on the funding side. So it appears that the liberal virtues that require the state to be indifferent to the ends of its individual members also require that we take either one of two positions—either we fund all educational systems or we choose to fund none. As that is the case, then it follows that we must be willing to avoid the trap of unconstitutional conditions—if the

25 See Gilles, supra note 1, at 745-46.
state can fund all education or no education, then it can fund only some education. The fallacy in this position is that the occupation of the middle zones gives the state a degree of discretion that it does not have when it is forced to take either nondiscrimination position—no funding or full funding. Gilles develops my position at some length and with great care, and enjoys my complete support in his attack on selective funding. Sometimes it is better to end on a high note. Such is the case here.