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My Methodological Flip-Flop on Individual Liberty

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I have always been a small-government thinker. At the most general level, that position is captured in Aaron Director's maxim that the laissez-faire system starts from the assumption that government intervention is an evil until it is proved to be a good. As a general rule of thumb, this proposition is hard to beat. But as a guide to individual decisions, it does not tell you when or why that presumption should be overcome. One obvious area involves the commission of torts by one person against another. At least in the simple cases of trespass—the direct application of force by one person to the body or property of another—the presumption against legal intervention seems to be overcome. But it is important to understand just how far this kind of exception runs. It is easy to invent indirect-harm cases, as every legal system from Roman law to the present has done, in which a defendant is held responsible for setting hidden traps or supplying poison to someone else who in ignorance ingests it. It takes only a little more imagination for

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the notion of a tort to cover the transfer of a good that contains a latent defect that manifests itself when the good is used in a normal and proper fashion and in its original condition.

It is thus possible to elaborate a theory of causation that covers a lot of the familiar cases. The one class of cases that resists easy incorporation into this basic pattern consists of those situations where the omission of a common precaution leads people to harm each other. This duty to take affirmative action is narrowly accepted in those cases where there is some independent duty to act, the two most common of which are status-based relationships, such as that between parent and child, and consensual arrangements, such as when a school or camp takes a child into its charge for daycare or an outing.

The far more difficult cases are those involving an asserted duty to rescue a stranger in need, often subject to the proviso that this duty arises only when the rescue can be easily accomplished. Yet we find that this expanded notion of responsibility—a duty to rescue strangers—has been stoutly resisted by common-law judges. Moreover, modern state legislatures are uniformly reluctant to impose such a duty by statute. Such reluctance is found even in cases of “easy rescue,” where one person, at no risk to himself, need only throw a line to a person drowning in the waters below a bridge. What explains the widespread reluctance to recognize the duty?

In an early article on the theory of strict liability, I challenged the utilitarianism that seemed to call for duty-to-rescue in these “easy cases.” At that time in my life I was, or at least thought I was, a libertarian who believed that an abiding respect for individual liberty was the explanation for the reluctance and that the liberty-based reluctance rested on ‘deontological’ reason—a word that I have come not to understand. I have thus come to regret a passage that I wrote in 1973 in which I played off a famous article by James Barr Ames (1908), who famously proposed the “easy rescue” duty. My 1973 passage follows:

Under Ames’ good Samaritan rule, a defendant in cases of affirmative acts would be required to take only those steps that can be done “with little or no inconvenience.” But if the distinction between causing harm and not preventing harm is to be disregarded, why should the difference in standards between the two cases survive the reform of the law? The only explanation is that the two situations are regarded at bottom as raising totally different issues, even for those who insist upon the immateriality of this distinction. Even those who argue, as Ames does, that the law is utilitarian must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—is a good in itself not explainable in terms of its purported social worth. It is one thing to allow people to act as they please in the belief that the “invisible hand” will provide

the happy congruence of the individual and the social good. Such a theory, however, at bottom must regard individual autonomy as but a means to some social end. It takes a great deal more to assert that men are entitled to act as they choose (within the limits of strict liability) even though it is certain that there will be cases where individual welfare will be in conflict with the social good. Only then is it clear that even freedom has its costs: costs revealed in the acceptance of the good Samaritan doctrine. (Epstein 1973, 198–199)

This passage rested on two premises. The first was that individual liberty, if it was to be taken seriously at all, must be a trump before which all utilitarian considerations fell. The second was that the utilitarian calculus, as reflected in a sound cost-benefit analysis, would indeed deem it socially desirable to impose a duty of rescue, at least if it could be confined to some narrow set of circumstances.

Today, I think that both of these premises are wrong. Instead, I would ground my rejection of Ames's rule in a kind of rule-utilitarianism. I do not believe that any narrow act-utilitarian theory works as a moral (much less a legal) theory: It is not easy to make interpersonal comparisons of utility, and it is extremely difficult to do so collectively. Individual actors may make private assessments of relative interpersonal utilities—such as when one makes a charitable gift—but such calculations are difficult to make or validate on a society-wide basis. Instead, the appropriate standard is a rule-based approach which asks, in the *ex ante* position, whether any reform made to the prior state of affairs constitutes a Pareto improvement, so that at least one person is left better off and no one is left worse off than before.

It is not clear that imposing an affirmative duty to rescue represents a Pareto improvement. The explanation requires a much closer look at the institutional and social arrangements around rescue. Imposing a duty of this sort may deter people from going to places where they think danger lurks. Even if the duty is only one of *non-risky* rescue, there remains the risk of the courts misidentifying non-riskiness! The best work on this issue is from David Hyman, who writes:

During the past decade, there have been an average of 1.6 documented cases of non-rescue each year in the entire United States. Every year, Americans perform at least 946 non-risky rescues and 243 risky rescues. Every year, at least sixty-five times as many Americans die while attempting to rescue someone else as die from a documented case of non-risky non-rescue. If a few isolated (and largely unverified and undocumented) cases of non-rescues have been deemed sufficient to justify legislative reform, one would think a total of approximately 1,200 documented cases of rescue every year should point rather decisively in the opposite direction. When it comes to the duty to rescue, leaving well enough alone is likely to be sufficient unto the day. (Hyman 2006, 712)

In other words, the larger social problem is risky rescue, not non-risky non-rescue. The issue requires institutional and not individual responses. For example, police and firefighters, trained for their jobs, keep crowds at a distance, lest they make any rescue efforts more difficult. So while there is good reason to believe that a generalized prohibition against the use of force and fraud does produce huge social improvements, once that baseline is established there is no reason to think that there is any social gain to be had from upsetting the standard rules on individual liberty in rescue cases.

But the way in which the problem is stated does not preclude the possibility that other deviations from the no-force-or-fraud baseline might help. At this point, the common suggestion is that the law provide a reward for individuals who engage successfully in rescues that they are not otherwise required to undertake. That rule, it turns out, has no application to casual rescues. No one ever claims the money; what usually happens is that the grateful rescuee sends some flowers or a gift certificate to the rescuer. But if the stakes are high, such as in the salvage of ships, now the incentives matter, and the standard practice is to award substantial sums for a successful rescue, often through an institutional tribunal like the Lloyds Insurance Company. Such institutional frameworks for recurring high-value rescue situations give more instructive rationales than does the general invocation of an abstract conception of liberty.

The liberty rationale is also dangerous for another reason. Everyone who is drawn to it accepts the notion that no one should be able to kill or maim another individual. In this context the liberty principle is so strong that it is hard to think of any good reason to overcome that presumption. But it is a very different thing when the notion of liberty is used as a barrier against taking or using someone else's property to avert imminent peril of life or limb. The suspension of absolute property rights to exclude in cases of private and public necessity has long been part of the common law. If possible, the party who avails himself of another's property should pay damages after the fact, but no one would allow a dock owner to demand an exorbitant docking fee from the captain of a sinking ship during a storm.

There are similarly tricky questions regarding the boundaries of liberty in the public sphere. Vexing problems include the imposition of taxes on income from labor or property, and the taking of private property for public use even when just compensation is provided. Working out the details of these rules is an arduous task, which I attempted to broach in my book *Takings* (Epstein 1985), which examines how complex the world turns out to be once these forced exchanges, whether for cash or kind, are allowed. There is no way to cabin this doctrine to simple cases in which the state takes land from one person to build a fort. Most critically, there are also frequent instances of government takings of lesser interests in land, including leases, mortgages, easements, covenants, air and mineral rights, from

large numbers of people, all of which have to be evaluated within the same intellectual framework. It is then necessary to sort all of these multiple types of takings into three groups. First, are those manifold takings that are blocked entirely, because they are not for a public use. Second there are those takings for permissible uses that are allowed only with just compensation. Third, there are those takings or regulations that may be done without compensation under the ‘police power’ to advance public health and safety, and to control monopoly behavior. These are multifaceted inquiries that the simple liberty framework cannot even address, let alone answer.

To be sure, this inquiry often requires empirical estimations, which in some cases are easy and in some cases difficult. It is tough to say whether third parties should be able to claim enforceable rights under contracts to which they are not parties, but stunningly easy to say that no two people by contract can impose affirmative duties on strangers. This framework can be used not only in a constitutional setting, but also to evaluate the various common-law rules for the creation of private property rights in different resources—land, water, minerals, air, spectrum, patents, copyrights and more. There is no way to go through the highways and byways here, but my methodological conversion to consequentialism was complete at the very latest with my article “The Utilitarian Foundations of Natural Law” (Epstein 1989).

Back in 1973 I did not see how such investigations would play out. Then, my chief interest was the theory of causation in the law of tort, usually a rather circumscribed inquiry. Perhaps, I am missing something today. But even if I were to adopt some new position on some issues, I don’t think that I could ever persuaded to go back to the simple liberty framework to which I appealed in dealing with the duty-to-rescue problem. That framework’s powerful claims of personhood against murder, rape, and theft remain rock-solid, because no one is ever permitted to invoke the notion that they labor under some private necessity in order to commit these heinous acts. That principle is applied only in those cases where one person needs to use (subject to an obligation of compensation after the fact) the property of another to escape imminent danger to life or property. Nothing in the consequentialist view displaces that presumption in favor of the protection of individual liberty in the core cases that give that principle its greatest attraction. And the consequentialist view is more systematic, and thus better able to explain a fuller range of simple and complex interactions, in ways that illuminate limitations as well as the usefulness of the liberty principle. I find that reckoning how the various threads fit together to my own satisfaction—much less anyone else’s—involves the work of a lifetime.

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An Economist's Most Regrettable Statement

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Sometime in the middle of 1988 I ventured to predict the outcome of the upcoming Presidential election. I cannot remember now whether this regrettable move was made in a working paper or some professional forum. Fortunately, as far as I recall, it never went further. I asserted confidently that Michael Dukakis would win handily over George H. W. Bush. Since Bush won with a popular vote margin of about eight percentage points and by over 300 electoral votes I could hardly have been more wrong. I exited the election prediction industry forthwith, and I have never returned, at least in professional guise.

At that time the election-prediction industry had more economists hanging around its edges than it does today. There was a flurry of interest among economists in quantifying the connection between economic conditions and electoral outcomes. I have some entries on this topic in this period (e.g., Peltzman 1987; 1990). Economists working in the area were busy presenting, discussing, and

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