

Epstein on Epstein

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Richard A. Epstein, the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, recently visited Australia to address some IPA functions. Here he discusses some of his formative experiences and his classical liberal outlook for a better world.

RICHARD Epstein is an unbridled optimist. He holds a firm belief that, through patience and the logical application of well constructed arguments, social conditions will improve.

But he is also a noted contrarian. In an interview several years ago, Epstein once remarked, 'My intellectual style has always been that of a contrarian. If there's a position everybody thinks is right and is happy with, then they're probably wrong. And the reason they are probably wrong is that they spend too much time on self-congratulation instead of attacking each other.'

To put it another blunter way, his attitude is, 'talk is cheap, so let's debate'. Although he attributes some of this attitude to his liberal law education when he studied at Oxford back in 1966, when challenged that this disposition had perhaps more to do with basic personality than coursework, he volunteered, 'I wish I knew where it came from. To some extent it came in part from my parents, both of whom had strong contrarian instincts. Both were tenacious in the way they thought about certain problems. In part, it was just spending my life in thinking about things. I recognized that people tend to go lax when there is no competition, so I decided that I was going to become the competition!'

But Epstein is not always a contrarian. Where he sees a set of manoeuvres, or set of arguments or doctrines, with which he is in logi-

cal agreement, he asks 'Why add anything?' It appears that there is a selection effect going on which leads him to choose those particular topics where things appear wrong.

Clearly, Epstein found a good deal wrong with cartels, on the one hand, and with limitless libertarianism on the other. In a book just jointly published by the IPA and NZ Roundtable, *Free Markets Under Siege*, to coincide with his Australian visit, Epstein made some very simple institutional observations. When he looked at the so-called reforms of the

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1930s and the New Deal period in the US, he discovered that virtually every constitutional argument in favour of legislative discretion was an argument which allowed somebody to maintain or perpetuate some kind of cartel. He explained: 'When you square that against Economics 101 on the relative effects of competition and monopoly, it becomes almost amazing that someone in the political arena could be completely indifferent between the two systems, when the social theory on their re-

source effects is so clearly in favour of competition unless there is some independent justification for a monopoly, as with intellectual property and certain network industries'.

Epstein believes that he has been very lucky, because in addition to that insight, he was also able to figure out what was wrong with his libertarian theories. 'Historically, there are no pure libertarians in the common law or in the Roman law. I realized that the exceptions made to libertarian principles on contract and property had an underlying pattern. And I found it. It became clear to me that the whole doctrine of "privilege" was very well constructed. The basic proposition was that you can use coercion to override common law rights to the extent that it provides benefits to all the individuals who are subject to the coercive power of the state.'

Epstein is known internationally for his logical rigour. A very fast and precise speaker, he seems to develop arguments that create seamless and completely watertight cases, in all circumstances. The notion of abstraction is anathema to him. He is understandably quite scathing about the post-modernists. 'The French modernists, the people who start talking about language, Dada, Foucault and all the rest of that tradition, I regard as next to useless for the business of making and interpreting laws and agreements. Language is too powerful a tool for one to assume that every time you make a proposition, you are really inviting someone to write a poem about it.'

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Lawyers do exactly the opposite thing. Through constant trial and error, we identify ambiguities that matter and then try to eliminate them so we know where we stand. To celebrate the ambiguity rather than try to eliminate it is exactly the opposite of the legal impulse. A commitment to a high level of abstraction doesn't quite carry the day.'

In his *Free Markets Under Siege*, Epstein talks about easy cases and hard cases, and suggests that we solve the easy ones first. He cites agricultural policy as a clear example of an easy case about which it is easy to make good decisions, that is, to see the social superiority of the competitive system. Although he acknowledges that huge variations in social and cultural patterns exist amongst nations, the suggestion that reform of the agricultural sector in the Europe, especially France, and Japan might be difficult to bring about, brings out his infectious and overwhelming optimism and confidence in the future through logical argument about what is best. 'But that's true of every country. That's also true of the US. My argument about this is not about the historical difficulty in eliminating these practices, but the weakness of the intellectual case that has been used to keep it in place'.

Epstein saw, both in the US and in England, an increased willingness to crack down on agricultural subsidies, and it was one reason to have another go and write *Free Markets...* 'These kinds of protection are wholly illegitimate, but in France in particular, where you have a very monolithic state and no tradition of strong private rights, getting rid of these things is very difficult. And since the Common Market, the EU hasn't done an enormous amount to pry these markets open but has created, in part, fortress Europe, it is not at all clear that it is going to be a countervailing influence. So, in the end, trade liberalization will come, even in the agricultural sector, but it's going to be a long and bumpy

road. And to figure out how you solve these transitions questions, you need to know more than the general theory. But if you don't get the basic theories right, you will never be moving your transitions in the right direction.'

Elsewhere, Epstein has written extensively on discrimination law and its perverse consequences. He claims that these laws create a dispersal effect, benefiting the well off, and hurting the poor. These arguments are very pertinent today in Australia for Aborigines, the long-term unemployed and other target groups. He explains: 'You have two issues here: one is affirmative action and the other is the minimum wage.

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They work the same way. If you have a preferential programme, employers will, paradoxically, often be reluctant to hire targeted people because it becomes difficult to get rid of them because it would be seen as a form of discrimination. There is no point giving protection to someone in a job, if he doesn't get the job in the first place.'

The minimum wage is a slightly different issue but has exactly the same outcome. 'By requiring people with low productive skills, for whatever reason, to take a higher wage base invites employers to respond by

reducing the number of people they will employ, or by making other features of the work less attractive than they should be'. Epstein is emphatic: 'You can't protect people by pretending that they are more productive than they really are. Because, without protective restraints they would have worked at lower wages to begin with, and as productivity increased with their skills, the value of their labour would increase and it would then be bid up by somebody else if the original employer refused to make wage adjustments.'

His endorsement of the old theory of *laissez-faire* demonstrates his view that optimism and patience are virtuous qualities. 'In an ordinary life, it takes a bit of time to accumulate human capital. If you don't have patience, because you don't have confidence in the system, you'll try to get the quick fix and you'll only set the very people you are trying to help back another step.'

Epstein lives in America and remembers race relations before 1954. He admits that there are still problems today at the higher level of political discussion, but in terms of day-to-day interactions, the transformations have been 'so total and so complete that anybody that was alive then and alive now would have to remark with some degree of amazement just how far progress has come.'

Although he appears to be an unbridled optimist with a watertight explanation for every situation, it is nevertheless true that reform and progress are happening all around us. We must learn to work at them, make wise decisions and be patient. As for Epstein, he is clearly ahead of the field and is right so often about so much that he tends to dazzle people with his logical solutions. This was certainly the impression he made on several Australian audiences.

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