Discussion: The Classical Theory of Law

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DISCUSSION: THE CLASSICAL THEORY OF LAW

QUESTIONER 1: I have a question that I will direct to Professor Peller. I think Professor Barry might have been making an empirical argument or he might have been making a phenomenological argument. I am not sure, but, given that he was talking in terms of tradition, where is the formalism in his argument, where is the abstract idea, the idea that one would make from some sort of innate idea or some abstract idea?

PELLER: I may have misinterpreted Professor Barry; if I did I apologize. As I heard his presentation, he presented an image of laws prior to legislation, of the common law and private law as the realm of liberty. And as I understood his presentation, liberty is threatened through the social welfare intervention of legislation. What I was suggesting was that the most important teaching of the realists, what one as a matter of intellectual integrity must confront if one is to hold on to this particular classical image, is the argument that the social welfare legislation of the New Deal is not qualitatively different than the common law because the common law itself is regulative. And the only way I suggested to avoid that realist point is the notion that the common law is not regulative because there is an absolute, determinate way to move from the abstract idea of freedom, equality, contract, and property, to the particular doctrinal manifestations and concrete cases.

BARRY: I will just make one point for clarification. I was making a kind of epistemological argument about knowledge: it was an anti-formalist argument to the effect that the human mind is incapable of encapsulating in a formal body of rules this public/private distinction. And the liberal argument also is that individuals are not ontological entities apart from society who merely contract and set rules for their ontological separate selves. They do exist as members of units which are more than atomized connections between themselves. The point is that through their ignorance they will grope towards a better system of arrangements than if indeed they could somehow formalize this system. So it is a skeptical argument. It is saying that if we look around, we find that human needs and arrangements are better organized through a spontaneous method by individuals who are already social beings, than if some other person could design a different set of arrangements. So it was indeed, as the speaker said, a kind of skeptical, epistemological argument.

EPSTEIN: I have a comment upon Professor Peller's presentat-
tion. I agree with him in part, but I want to set his worst fears aside. I do not agree with him in respect to everything that he said, particularly about my own position. I think the point that he made is clearly correct. The failure of natural law theory today is that, to the extent that one wants to get into a debate about the choice of desirable legal rules and social institutions, he cannot do so on the grounds that we are blessed with the safety of having necessary truths that will work on our side. It is a mistake to use the word "formal" to refer to essentially deductive conclusions which come from unassailable as self-evident premises. And I think, in effect, a lot of people thought they could demonstrate that level of certainty for the rules that they had. The legal scholarship of the realists and others was fairly powerful in devastating that defense of the old order.

The question, however, is, is it possible to make reconstruction of the traditional conceptions by trying to invoke some other more functional criteria and justifications. It is a subject I did not talk about today, but which, for example, I do talk about in the *Takings* book. The first thing you have to do is to be aware of the problem of the straw man. For example, Peller said that people have the idea that common law rules are not regulatory. I do not think anybody really believes that, as the paradigmatic common law rule shifts from contract to torts, we are obviously talking about a whole variety of restraints, some which operate *ex post* by way of damages, some which operate *ex ante* by way of injunctions. The real question is not whether we think the common law is or is not regulatory—of course, it is regulatory. The real question is, does it contemplate a form of regulation which is superior to some alternative that might be devised?

The second point goes back to the characterization of what *laissez-faire* or what the *Lochner* movement meant. Professor Peller mentioned, for example, that when you were talking about classical theory, you were talking about "the absence of coercion" that creates liberty in a system with no government intervention. I do not think any of the classical liberals believed that, and certainly Peckham did not. To give you but one historical example, Peckham was a reasonably strong champion of the anti-trust laws, insofar as they were dealing with horizontal restraints, and he wrote opinions that supported that particular conclusion. In addition, one of his great problems in *Lochner* was that he went a little too far in favor of state power. The errors in the opinion are contrary to those for

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which he is usually castigated. He thought mistakenly that all matters of health essentially were subjects of such great paramount public importance that state regulation could always displace freedom of contract. What one has to do, therefore, is to ask how to deal with the principle of freedom of contract with some sort of functional justification. Let me give a one minute summary of why I think the principle had such a great allure, even though from time to time, it has been misunderstood by those that sought to invoke it.

First, I think it is just wrong to talk about the system and factory as one of oppression. In fact, in the period he talks about, real economic income in the United States was consistently rising, something by about 30-40% in the period between 1870 and 1914—and this in the face of enormous immigration of low-priced labor which could displace higher-priced domestic service. Of course, it was the unions who wanted to keep my forefathers from coming to these shores, not the businessmen. One, therefore, must understand that coercion is not necessarily hierarchical, but often times responds to the greater weight of the greater number.

Analytically, moreover, wage contracts should not be struck down whether at common law or by statute because of an alleged inequality of bargaining power. This concept seems to me to be incoherent. So why worry as long as somebody can sense, no matter what his original wealth, that he is going to be better off after the agreement than he was before? Otherwise if he is going to starve then he might as well starve in style and go out with a stock equal to W rather than W-X. So it seems to me that the principle of mutual benefit within a bargain is something that is perfectly consistent with a rational social justification of a principle of free contract. It is not consistent with the welfare state which says that we know better for what people can do than they can know for themselves.

The second half of the argument is about externalities. The common lawyers did not talk in these terms but they certainly understood the problem. They were always uneasy about contracts in restraint of trade, and the reason was that they had some intuition about the social losses associated with the move from competition to monopoly. They were also certainly exceedingly hostile to those contracts which were designed to inflict mayhem, rape, or murder upon third parties. Those were flatly illegal. There was no principle of common law which said freedom of contract governed wholly without regard to the external effects. But what one can say pretty confidently is that if you are looking at an agreement in which there is only a transfer of goods and services and money between two parties, both of whom will be left better off than before, then to the extent to which you increase the wealth of stock of the two parties to
the transaction, the anticipated external effects are going to be positive when taken in the aggregate. There is now more wealth to go around, and thus the velocity of voluntary transactions can increase. Once one understands these points the regime of freedom of contract becomes pretty powerful on a social welfare ground, modernistically understood. We know that there are gains between parties, and that there are gains with respect to strangers, so it is very hard to figure out the losers under this general regime.

Even with respect to the feminist jurisprudence, it is striking when one looks at the particular catalogue of grievances. Virtually each and every one of them turn out to be legal restrictions against entry into certain markets. It would be a terrible thing for the law to say that women must stay at home, but if some women choose to stay at home when they are free legally to go out somewhere else, it seems to me that we have learned something about their behavior in the absence of barriers to entry. What our principle ought to be is that of the classical liberal idea: keep those barriers down, and the problem of people sorting themselves into occupations and roles based upon tastes and upbringing will more or less take care of itself.

If my analysis of contract is correct, we can make the appropriate reconstruction of private markets and their legal foundations. Indeed, as a constitutional matter, huge portions of the Constitution basically have adopted this program, even though I am quite confident that many of the framers only glimpsed at the justification for their scheme, and could not have given the far more systematic defense of it that I have tried to introduce here. So, I disagree with Professor Peller very sharply when he says that because the natural rights theorist fails in proving his beliefs as necessary truths, there are not sufficient social regularities to justify, empirically, protecting common law rights at a constitutional level.

BARRY: Just a very important point. Almost all of the classical liberal legal theorists were anti-natural rights philosophers, partly because of their skepticism and, I think, partly because they recognized that it is impossible to persuade people of the nature of these natural rights. But it is possible to persuade people of the advantages that come through mutual exchange and spontaneous order. Rules emerge as conventions that meet people’s needs. They are accepted, on reflection, for this reason, not because they are intrinsically right. So I think I agree entirely with Professor Epstein on that point.

PELLER: Professor Epstein opposed the argument I presented, and I think I was not too clear. I was not, of course, saying that Justice Peckham was an anarchist. I was saying that Jus-
practice Peckham has a particular view of the relationship between the private and the public spheres and a particular notion of what the content of the private and public spheres were. Of course, Justice Peckham believed in some kind of liberal state which would take care of the grossest externalities, such as monopoly, and his opinions in monopoly cases confirm that.

The second point that Professor Epstein makes is that there is a functional as opposed to natural law justification for the \textit{laissez-faire} free contract regime. Professor Epstein, again, and I will try to pin him to this point, simply avoids the issue. Is there a natural way to distinguish between freedom and coercion, free will and duress, those concepts as they are actualized in concrete cases, or is there not? If there is not, then the very distinction between what is called free will or a free contract and what is called un-free contract, the distinction between a contract that expresses “preferences” and a contract that expresses someone else’s will, is incoherent, or is itself a function of social power.

Professor Epstein wants to offer a very thin justification, a utilitarian justification for the free contract regime he envisions by using the notion that people are moving to preferred positions. The problem with that notion is that you have to start out with a free contract concept. Professor Epstein accepts my argument that you cannot do it through mere formalism, through the notion that the distinction between free will and coercion is a natural distinction that we can all simply apply as some kind of vision of natural law. So he moves to utilitarianism, but utilitarianism, once you open up the possibility of externalities, gets you nowhere.

If you are going to justify the free contract regime and include the possibility of externalities, which any utilitarian calculus must, there is simply no determinate way to account for externalities for two reasons. The first reason is that any criteria for evaluating two states of affairs, one in which people have moved to an aggregate preferred position, and the other where there is a sub-optimal state of affairs, any compensation criteria is either totally abstract, merely filled up by the empty concept of “utils,” or it is more concrete and more descriptive, that is, more empirical, and as soon as it gets more empirical it gets more controversial. Do we include in the notion of aggregate utils people’s preferences as to distributional states? No, of course, we could not because that would unwind the whole free contract distribution regime. Do we include, in terms of what counts as utils to figure in the aggregate social welfare function, people’s aversion to alienation or preferences for social solidarity? How would we count them? These are not goods that are currently produced in the current market structure. Is the utilitarian function
simply a replication of status quo commodities or is it wide enough to include the possibility of the creation of new commodities that people might prefer more than the existing market structure. If it does not include the possibility of new structures, then the claim cannot be made that the preferences are in any meaningful sense, exogenous.

The second major problem is the problem of third party preferences. Once we are willing to do an aggregate social welfare function analysis, what about third parties who are really bugged out by people working in sweatshops for sixteen hours a day. The fact that we might not grant these parties a legal entitlement to interfere in the relationship between the employer and employee does not mean that once we use a utilitarian justification for free contract regime, there is any basis for ignoring those preferences. They are preferences. To ignore them is a political, controversial, not a simply theoretical, question.

QUESTIONER 2: I was wondering if Professor Peller could describe a non-utopian situation in which the decision to stay home with the kids would in fact be a free choice, and if he cannot describe a choice like that which would be created, what is the point of critiquing the current choice as not being free?

PELLER: I have tried to argue that the notion of individual free choice as opposed to social coercion, that that way of filtering our experience of social life, sets up categories that are incoherent. No decision is totally divorced from social life and social influence. In that sense if you believe in free choice as this pure kind of individual preference, I cannot define that kind of utopia. But I can define, I am suggesting, a kind of quality of life where people are fulfilled—where people feel that they are able to develop according to their wishes with due concern for the interest of others. With respect to the specific gender example, in current social life, the economic sphere and the public sphere generally are constructed to close-out women, so that it would be very difficult to say in any instance that a particular women's decision was "free" since the range of options is so limited vis-a-vis others—males'—options.

QUESTIONER 3: I get the impression that Professor Epstein likes the order that is embodied in the American Constitution because it is remarkably close to a sort of Benthamite utilitarian conception of the sort of interactions among individuals that would produce the best world from the utilitarian point of view. But when one reads the Constitution, or probably more appropriately looks at historical documents that describe the sorts of human virtues that the framers valued, one gets the impression that they, at least, had all kinds of values that would be rather difficult to capture in the
utilitarian calculus technique which at its best, I think, suffers from certain technical defects. Now on the other hand, Barry, who has given a wonderful summary of Hayek, suggests that the problem with theoretical rationalistic approaches to politics is that they tend simply not to capture certain, admittedly sometimes aesthetic, sometimes spiritual, sometimes hard to categorize goods of human knowledge about society, and the ways society should be organized are not easily captured by any particular theory. So I guess my question is, what is it that is so great about the utilitarian approach, what is it that is so persuasive about it, that we should only save that much of the constitutional order that is consistent with it and abandon or leave critiqued, as I take it your approach was to the Roman law, those portions of it which are not easily justifiable in functional terms but may embody hard to articulate traditional knowledge, those forms of Hayekian knowledge which simply cannot be captured in utilitarian terms?

EPSTEIN: I think there is a real difficulty in understanding what a utilitarian conception of governance entails. On the one hand, one can endow at the outset legislators and governors with perfect knowledge of what is going to happen. If people had that degree of knowledge and we are all well behaved, then in effect we would want comprehensive social regulations in order to control and domesticate all those elusive externalities that Professor Peller talked about. But my sense about utilitarianism is very much Hayekian. While abstract theorists may identify certain directions, tendencies, and so forth, there are both imperfections in knowledge and corruptions in politics with people co-opting, or abusing public trust for private ends. We should give up on trying to be able to bring every utilitarian virtue into public life. One of the key utilitarian virtues, oddly enough, is self-destructive. It says, do not adopt those kinds of rules which in their own form are explicitly utilitarian; do not count costs and benefits, because once you do that you will get results that somebody standing back from the fray will see to be profoundly anti-utilitarian. The balancing tests of an overtly utilitarian nature fuels much of the law of product liability, public liability, and medical malpractice. So too in constitutional adjudication, these people were trying to be utilitarians. But the difference between an analyst outside the system and a practitioner within it is critical. We can know about problems that we cannot solve.

Let me give you one sense of what some of these difficulties are. Professor Peller noted for example that the utilitarian calculus has to take into account that there are some people who are "bummed out" by virtue of the fact that other people are working in sweatshops. But, of course, the bumming out phenomenon runs the
other way around. There are lots of people, many of whom sit in this room, who are bummed out if somebody else comes along and says, "Gee, I know what's best for these fellows. I'm going to keep them out of the borders so they can starve to death in Mexico." And he gets bummed-out by a series of restrictive social legislation. To what extent is any government official going to be able to figure out which set of bummed-outedness is going to dominate the other? There is also a moral hazard problem. If you know that freaking out is the way to get legislation your way, then get yourself some uppers, put the other guy on downers, and do war dances in the street.

So these elusive externalities run in both directions. It is not a simply a one-directional phenomenon as he implied by that example. They are bi-directional. In the long run you will get a better assessment of the total utility if you systematically and vigorously ignore those psychological concerns running in both directions than if you try to measure them case by case. Take into account the imperfections of measurement, and a lot of the things that a pure moral utilitarian might regard as relevant should be made essentially irrelevant for the legal order.

Does that mean that people who are bummed out by sweatshops are absolutely helpless in my world? Not if there are all sorts of voluntary aid societies. Indeed, a classical utilitarian or libertarian like myself accepts the distinction between legal obligations backed by force, and moral obligations. (Force is "your time or your life," not a hard bargain of your money for my property.) There are lots of people who have money, and there is nothing which says they have to be egoistic in the way they spend it. If they wish to give it to help people laboring in sweatshops, they can. Is this a trivial concern? Of course not. There are billions of dollars, even today, that are spent exactly that way by people with just those sentiments. People who are upset with the status quo can spend their money in order to try to bring about a better social order. To understand the full liberal construct, it is a mistake to concentrate excessively on the legal side of it. This very powerful set of informal social and religious obligations is essential to a free society. While there are some obligations which you cannot define with sufficient precision and clarity to bring the power of the state to bear, still it does not mean that social sanctions should be introduced. If you take the two-tier perspective, it seems to me that both of his points vanish. We can define a distinction between coercion and non-coercion, because we have a system of property rights which gives us the legal baseline, while preserving a place for non-unanimous voluntary conduct to alleviate suffering and to bring about perfectly coherent redistributions of wealth from rich to poor.
QUESTIONER 3: I guess my question is should the Constitution be followed and is the Constitution to be admired only to the extent that it is justifiable in utilitarian terms? Is there something in the Constitution that is clearly not utilitarian?

EPSTEIN: The answer to that is sure. I do not admire the provisions which say that slaves count for 3/5 of a person for the purpose of the census, but not at all for vote. It was in the original Constitution, but I am not going to venerate it. I think the provision was a mistake. Maybe somebody wants to argue the opposite. I do not think it will be Professor Peller.

Overall, large parts of the original Constitution are blunders. There were bad provisions which controlled the election of the President and Vice-President, and these were removed by the twelfth amendment in 1804. But it is a theory of utilitarianism which says "Look, for heaven's sakes, do understand the one thing that Hayek understood so well, that the limits of the public knowledge should very much influence the way in which we structure our public bodies." There is a critical distinction between public and private bodies. Unfortunately, the state has got the monopoly of force. There are many employers to whom you can turn, there is only one state from whom you have to run. That is the difference you worry about.

QUESTIONER 4: As I heard the two sides going here, it strikes me that you are both really driving at something very similar. I think that Professor Epstein's position is not that we have this radical bi-polar limited government against the individual, as Professor Peller in some ways tends to characterize the other side; but then on the other hand, I also believe that Professor Peller has a point, that since we do not live in such a neat bi-polar society, that there are more factors involved than just the freedom of contract between two individuals. Now at the bottom of all of this, it occurs to me that maybe the people who were so committed to natural law were not such dummies. Maybe this was the way they tried to resolve this thing. My question is, where do we find a principle or a standard of what is just? If two people making contracts in Professor Peller's view are not really free, then who is going to help them be free? Is it going to be the state? If the state makes a decision for them does that force them to be free? I know that is not what you are saying, or at least, I hope that is not what you are saying. What you are crying for is an objective standard of how we can measure justice. Now how do we go about finding that standard? How do we determine what is just?

EPSTEIN: I think it is a fundamental point to distinguish between scarcity and coercion. If you argue that scarcity of resources is a form of coercion, there is no such thing as free contract because
the resources in the world are finite. I think that Professor Peller gets himself in that position when he finds that he cannot say when somebody is truly free. The answer is that scarcity coerces. There is always coercion no matter what the social arrangement, so I think that one has to go back to the Hobbesian insight as to what coercion is about. He used to rail against force and fraud. These may be controlled even if scarcity cannot be.

QUESTIONER 4: But still the question I am placing before you is, how do we determine a standard of justice?

EPSTEIN: I gave you the theory that I would use which is freedom of contract.

QUESTIONER 4: But you contradicted yourself because in your main address you sort of kicked out the natural law tradition altogether.

EPSTEIN: No, I did not. I said that you could not use the natural law tradition to support constitutionalism because the natural law was always a default rule. What I said was that you could always reconstruct the justifications and that basically the position would be, I think one—and here Professor Barry and I are close—that Professor Barry calls indirect utilitarianism, which recognizes that all the cost-benefit calculations come into the formulation of general rules, but once the general rules are in place, you avoid the inherent errors of *ad hoc* exceptions or *ad hoc* balancing. I think many of the early natural law philosophers were indeed indirect utilitarians, but they just did not use that terminology. You certainly could read Locke that way when he said that there is a happy coincidence between social welfare and natural right. It is not a very long passage, but it is suggestive that the distinction between ontological and consequentialist theories of ethics is in fact more modern than classical. The classical natural law scholars were very smart in certain ways, but they also made a lot of blunders because they were not systematic. They did not have twentieth century knowledge. We know more than they did, not because we are smarter, but because we can build on what they said.

BARRY: I would just like to make one point against Professor Peller. I found that his argument embodied a certain kind of perfectionism. Look at a market exchange process governed by common law rules which nobody designed, and you can always find disadvantages enjoyed by some people or endured by some people and advantages enjoyed by others. There always appears to be an element of private coercion, even in a purely private world. Why does there appear to be that element of coercion? Well, because you have a perfectionist vision of a world without coercion, that is, a world in which all sorts of human things have been eliminated, like self-inter-
est, greed, scarcity, time preference, and so on. If you look at the real world with a perfectionistic vision, you will find coercion everywhere. But you only find coercion everywhere because you have got a kind of vision of a non-coercive world. And I wish that vision were to be explained more fully for people who take a cautious, skeptical, or indirect utilitarian view as I do. I mean, it is possible to look at a market exchange process and see inequality even though the two parties only act to improve themselves—it is still possible to say, well, one comes off slightly better than the other; if it is a pareto criterion, as long as somebody stays where he is and someone gets slightly better, then we say it is still an improvement. Looks very tame from a perfectionist standpoint. But what disturbs me is that we do not have any alternative evaluation which is at all consistent with what we know about human nature and human experience. So what is the alternative, coercionless world you propose?

PELLER: I think that you have mischaracterized my argument if you believe that I was arguing that there is something called coercion that has a natural correlate in the world and I can just go out and match up the word with the thing coercion. My argument is that the mode of thought that operates on the distinction between free will and coercion, and that ends up justifying the gross inequalities of wealth that result from the so-called free market, is itself a political question unless one is a formalist, or unless one believes in a natural law of the status quo, as Professor Epstein attempted to make the distinction between free will and coercion turn on the retention of existing property entitlements. What I am arguing is that the distinction between free will and coercion is merely a result of social power. What we call free will is what is not coercion. What is not coercion is what we call free will. Now unless there is some independent, substantive correlative of these things, I would say that the notion that coercion in a contract, for example, only exists when a gun is held to one’s head, is about like the notion that rape only occurs when there is physical force and resistance and the overcoming of resistance. This is the old world. We are in a new world.

EPSTEIN: I hope not on the rape issue, Professor Peller.

QUESTIONER 5: Since the notion of legal coercion does depend, at least to some extent, on the baseline of property rights, since that is what determines what constitutes force or fraud for purposes of the legal system, assuming that one would want to do so, how does one avoid interjecting a traditional natural law justificatory element at the level of a developing theory of initial acquisition of property, as opposed to exchange, which can be handled by reference to subsequently developed contract law?

EPSTEIN: I think that you asked the right question. I think it
can be done, and I think what you have to do is to go back to the theory of transaction of cost economics, which is not where I would have started this life twenty years ago.

QUESTIONER 5: Let me interrupt. There are two parts to the question, one is why would one want to avoid a natural rights justification, and the second one is, assuming that one would want to do so, how.

EPSTEIN: I do not want to avoid it if you can make it go. The problem is that I do not think that you can make it go simply by an assertion. What one tries to do is to figure out how those natural rights serve some social ends. If we had a system of natural rights of the sort that the Lockeans or the common lawyers envisioned, but it turned out that we could figure out that everybody was worse off under that regime than under some alternative arrangements, presumably, we would want to move from the natural rights arrangement to the other. If the various tests of pareto-dominance make sense, then you cannot ignore them when it comes to the formulation of natural rights.

Now, it is quite clear that there is an ambiguity in talking about existing rights structures. There is nobody here in the natural law, the utilitarian tradition, I take it, who would want to say that if somebody happened to steal something without being caught, that has created an appropriate natural distribution of rights which serves as the baseline for all subsequent transactions. There is a very radical streak to natural rights and utilitarian theories which says that huge transfers, like for example, those from the Indians and those acquired by force and fraud from others, are not to be protected. The great difficulty is to figure out some way to undo these improper moves without completely undoing the society. A system of wealth which comes out of apartheid or segregation is not the kind of natural distribution that I would want to defend, even though it is the status quo.

The second point is the empirical point. I think Professor Peller is just wrong when he says that when you look at the distribution of wealth, the vast inequalities of wealth are attributable to market institutions. The empirical argument is that disproportionate wealth arises from entrenched monopolies protected through legislation that exclude rivals. If you were to use any measure of income dispersion for market economics against totalitarian societies, or socialist countries, you will find far greater skews where people can keep out rivals. What competition does, not perfectly, but inexorably and inevitably, is to reduce certain super-normal profits to normal returns.

Now, the analytical question, how do you get a system of natu-
eral rights based on first possession, how do you decide what things are both public and private, I think the answer to use if starting from a blank slate is to try to figure out which distribution of original property rights will minimize the number of transactions necessary to reach the optimal social state. That would be the formula. Self-ownership, for example, fits that very well because it now means that everybody has a capacity to deal on his own account; no one has to engage in all sorts of preliminary transactions to decide who is entitled to deal for whom. With respect to the external world, the “no-ownership” position, standard common law probably does better than anything else because first possession is a cheap and easy way to get property rights established. Thereafter the eminent domain calculus says that, where the markets break down because transaction costs are too high, we could overcome it by force. So I think that basically that single regimen, the insight that Ronald Coase started with in a completely different context, if pushed far enough, explains huge portions of traditional natural law theory and essentially makes it much more respectable than the intuitive explanations offered by natural rights theorists.

QUESTIONER 5: The notion of an optimal social state as part of the justification for the initial property rights scheme involves laying claim to a kind of knowledge that the Hayekian analysis would suggest we cannot have.

EPSTEIN: The problem arises only if the argument is used to mandate a set of individual outcomes, but it has less force when figuring out some simple rule that works as a default provision. And that is what the common law rules did. They were extraordinarily simple; they were extraordinarily de-centralized; the cost of implementation of getting everybody into self-ownership was lower, I think, on a first cut than on anything else. The Hayekian impulse is do not try and be fancy and overdo that with something more convoluted and complex just because you want to correct every last error. Simple rules have major practical advantages. Beware of Peller's skepticism that everything is coercion and nothing makes any sense. Remember, he cannot be a member of the left; he has to drop off the political spectrum given his own views about knowledge and coercion. I think we can make empirical judgments about property. I think the uniform historical sentiment on first possession is pretty good evidence as to its soundness.

QUESTIONER 6: I want to ask Professor Peller about his utopia, to take a step back. He criticized, from my understanding, several social relations, which are the basis of our society, and he said that maybe some of it is based on arrangements which provide new commodities that might be more important to the human soul than
perhaps material gains. As I look around here, I see that people always look at each other in order to get an idea of what they want to be. And so this freedom, this utopia, this new system you propose would ask us all to be saints, which is in some sense a little difficult perhaps. But even that would probably be easier than a utopia which asks us all to be very individualistic, to be very different from each other, to be original. And I want to suggest that this is also something very painful for the human spirit, that it is very hard to be original, and so this particular utopia seems very coercive, and perhaps some of the sorts of social relationships in society that define, in very clear terms, the ways people interact with each other, are perhaps milder and perhaps moderate the coercion that comes from social pressure.

PELLER: I really was not trying to offer a big blueprint for what is or is not coercion. And to respond to Professor Epstein's point that I am off the political map because I believe that everything is coercion, once again, I do not know why this point is so difficult to understand. The point is that coercion is a social construct, and that what gets called coercion is a political choice. And the point is, I think, fairly simple.

Now with respect to the various hierarchies between teacher and student, worker and manager, man and woman, and the like that I have mentioned, that I believe inhibit the possibilities for social interaction, I was offering as an utopian vision the notion that we do not need to accept these as simply givens of life, that they have a social subjectivity to them and, therefore, a contingency. My vision is that we could recover the possibilities for acting out social roles with some conviction and engagement while we are in them. Instead, we find ourselves playing out a part someone else wrote, we know not whom. And towards that I simply will assert from my experience that, for example, even if there is some functional justification for the distinction between teachers and students, or workers and managers, at some point that has nothing to do with the particular concrete embodiment in which they are played out today.

I think that the relationship, for example, in an educational institution, in a law school, between teachers and students ought to be far more democratic, and there is simply no functional basis to the kinds of fears that you are expressing, that there will through democracy and the collective engagement of the terms of social life be some coercion or pressure. I think that the risks of that are far less than the coercion and pressure that exist as we all kind of act out these roles. I think that law schools ought to be run popularly and democratically. I do not think that is such a bizarre concept.

EPSTEIN: But the genius is, heaven forbid, that all law schools
should have to run that way. Let him run his that way, let us run ours our way, and then let us see which way the students come. Then we will get information as to their relative desirability, which we could not acquire if we could made an all-for-one centralized choice. That turns out to be the key element. You may have a vision of what you want to do. But I think one has to recognize, and this, I think, is core to liberal theory, that the standards to apply in deciding what to do with yourself and with others who agree with you are different than the standards to apply in imposing by threat of arms and force your views on your rivals or upon your neighbors. It may well be that there is a best way to organize a law school. If so, one could see all evolution in that direction without any change in the legal norms that govern contracts. There is nothing about the liberal order, or the principle of freedom of contracts, that dictates how law schools deal with students. If schools want to change, there is no law that has to be repealed first. Nobody wants to say that people are “autonomous” in some cultural sense that nobody believes. We all know that acculturation is essential. Anybody who has children knows that they do not just grow up like topsy. The real issue is who is going to fit standards? One at the center, or many at the periphery? It seems to me it is that choice which should make us aware of the dangers of monopoly for social experiences as it leads us to recognize the dangers of monopoly for ordinary economic affairs.

PELLER: The law school example is a particularly good example. As Professor Epstein well knows I do not believe in centralized social power as a political theory. The distinction, though, is in the terms of this asserted natural evolution of institutional forms. And this now matches up with the argument about externalities. I think there are a lot of people who have preferences that their work life, that their educational life, and that their family lives be different, be freer, be more engaged, be more emotionally committed, be more fulfilling, be more reflective of the self and subjectivity. The fact that the current structure does not produce those kinds of institutions suggests not that a slow natural evolution will produce them; it suggests precisely the opposite. Professor Epstein’s point that the market will satisfy everything is contradicted by the failure of the “free market” of education to produce democratically run law schools. In addition, Professor Epstein’s comment again misses the central point that I thought I was fairly clear with, with respect to the legal realists. The point is not centralized social power versus decentralized individual choice. The point is that both those concepts are incoherent. There is no such thing as the free market not regulated by social power.
EPSTEIN: I think we have said all we have to say. I think in the end, it is an invitation to totalitarianism if you cannot distinguish between markets and coercion. The willingness to use coercion will be the death of the market and of personal liberty.