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Heidi Li Feldman

Georgetown University Law Center, feldmanh@georgetown.edu

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LIBERTARIANISM WITH A TWIST

*Heidi Li Feldman**

SIMPLE RULES FOR A COMPLEX WORLD. By *Richard A. Epstein*. Cambridge: Harvard University Press. 1995. Pp. xiv, 361. \$35.

INTRODUCTION

Despite its title, Richard Epstein's¹ latest book is actually quite intricate. In *Simple Rules for a Complex World*, Epstein makes the ostensibly straightforward claim that the American legal system should consist of only simple rules. Then, Epstein submits a list that in his opinion fits the bill.

Epstein's position is more complicated than might be suggested by a casual reading of his recommendations for legal reform. Neither his definition of simplicity nor the rules he favors is particularly transparent. Furthermore, the scope of Epstein's argument exceeds the range suggested by the book's explicit aims, which are "to lay bare some of the foundational difficulties in the modern law for readers without any specialized legal training and experience, but with more than a passing interest in the law" (p. ix), and to establish that "[t]here is too much law and too many lawyers" (p. ix). In *Simple Rules*, Epstein goes beyond clarifying current law and urging that we prune the regulatory state. Ultimately *Simple Rules* champions a conservative libertarian policy program.

Epstein argues in three steps for seven substantive "universal prescriptions" (p. 22) that would create a libertarian legal regime.² First, he maintains that simplicity should be the measure of merit for legal rules. Next, he defines simplicity in utilitarian terms. Finally, Epstein claims that a legal regime consisting of his seven proposed rules would be simpler — in his sense of the term — than the current American legal system.

In this review, I focus primarily on the second two steps Epstein takes. The first seems to me to require less attention because, as Epstein's argument amply demonstrates, debating the virtue of simplicity in a legal system turns on what is meant by "simple."

* Assistant Professor of Law, University of Michigan. B.A. 1986, Brown University; J.D. 1990, Ph.D. (Philosophy) 1993, University of Michigan. — Ed. Thanks to participants in a Michigan faculty works-in-progress workshop for their comments on an early draft of this review essay. Thanks also to Lucy Clark for excellent research assistance.

1. James Parker Hall Distinguished Service Professor of Law, University of Chicago.

2. See *infra* text accompanying note 6.

I. EPSTEIN'S CONCEPTION OF SIMPLICITY

"My purpose in this book," Epstein tells us, "is to develop a set of simple rules capable of handling the most complex set of social relations imaginable, whether in the United States or anywhere else" (p. 21). With this goal, Epstein must invoke a criterion of simplicity. He stipulates that "the cheaper the cost of compliance, the simpler [a] rule is" (p. 25). This conception of simplicity is both more idiosyncratic and less clear than it initially may seem.

The Epstein simplicity criterion for rules is unusual in its deviation from other common understandings of what it is for a rule or law to be simple. For example, many people would consider a legal rule simple to the extent that ordinary citizens can comprehend it and can anticipate how police and courts would apply it. On this view, a simple rule has a plain meaning, accessible to courts, police, and citizens. Another view of simplicity in rules derives from science and mathematics. Within this tradition simplicity is a matter of brevity and elegance: a rule or law is simple if it can be stated concisely, without caveats or qualifications. Notice that a rule that is simple in this sense may not be simple in the plain-meaning sense. Using terms of art — or, more pejoratively, jargon — may make it easier to formulate a succinct rule but also may make that rule's meaning fairly inaccessible to many whom it affects. By the same token, legal rules that fulfill either the plain-meaning or the brevity criterion for simplicity may not meet Epstein's utilitarian criterion. It may be expensive to comply with an easily understood rule or with a concisely stated one. The costs of compliance depend on the content of a rule. Epstein is not unaware of this, and he eventually proposes a set of substantive rules that he claims meet his particular criterion of simplicity. Before we consider these rules, though, Epstein's conception of simplicity merits further investigation.

Epstein's conception builds a certain kind of utilitarianism into the very definition of simplicity. He intends his utilitarian simplicity criterion to measure the comparative worth of the current American legal regime against any proposed change:

Relative to the state of nature, any system of laws is complex; so the theme of simplicity would have no independent or normative appeal. Instead, the preference would be for rules that self-consciously maximize human happiness or welfare. Today, however, we are as far removed from the state of nature as can be imagined. Relative to the world as it now operates, simplicity becomes a useful *test* for deciding whether or not a proposed legal reform will *improve* human welfare, even if no set of incremental changes could maximize it. [p. 30]

Note that Epstein does not propose to use his test of simplicity to arrive at the absolutely superior welfare-maximizing regime, or at one such regime if more than one could achieve this epitome. Rather he starts from the position that the current legal regime fails

to maximize welfare — compared to the state of nature — and proposes that we test any alternative by determining whether it produces overall higher welfare. Even if we were to agree with Epstein that current American law does not create the best of all welfare-maximizing worlds, it is extremely difficult to make the sort of comparative judgments called for by his test.³

Epstein assumes the welfare-maximizing inferiority of *any* system of state regulation compared to life in the state of nature: “The *most* simple social organization [is] lawlessness” (p. 33; emphasis added). It is only because we cannot achieve this state that Epstein opts to argue for second-best. Yet, Epstein’s initial assumption is rather odd. Certainly at least since Hobbes, theorists have recognized that the problem with the state of nature is precisely that it diminishes human happiness. As Hobbes himself famously put it:

[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. . . .

. . . In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.⁴

With these remarks, Hobbes eloquently states the welfarist case for the state of laws rather than the state of nature. I do not know exactly what Epstein means by “rules that self-consciously maximize human happiness or welfare” (p. 30). Although Hobbes does not specify the form or content the laws should take, his examples of the fruits of law suggest that minimalist laws directly requiring people to maximize utility would not suffice to yield such utility-enhancing benefits as agriculture, industry, navigation, engineering, geography, history, art, and so forth. These goods are quite sophisticated. Their production necessitates large measures of cooperation and coordination unlikely to materialize without some fairly specific directives. It is rather implausible to assume that a complex civil society could be realized merely by legislating that citizens should do whatever is necessary to maximize overall utility. Aside from citizens’ inability to know which actions would fit the bill, people attempting to comply with such a directive would be thwarted by coordination problems and transaction costs. Epstein recognizes that coordination problems present obstacles to utility maximiza-

3. See *infra* text accompanying notes 18-21.

4. THOMAS HOBBS, *LEVIATHAN* 185-86 (C.B. MacPherson ed., Penguin Classics 1986) (1651).

tion (p. 113). He also acknowledges that legal rules can solve such problems (pp. 113-27), but he downplays the magnitude of the obstacles that coordination problems present and implies that private cooperation can overcome many of these problems despite the high transaction costs generally associated with such efforts (pp. 126, 163-93).

Whatever system of rules would in fact maximize utility, Epstein, like other libertarians, tends to argue that freely contracting parties will bind themselves to the necessary directives without much action on the part of the state. This is exactly the proposition that Hobbes devotes *Leviathan* to denying. One need not be an ardent Hobbesian to think it unlikely that contract can solve all the cooperation and coordination problems that would interfere with achieving a host of modern welfare-enhancing systems. State-constructed legal structures and regulations make possible the existence of entities ranging from museums to national parks to corporations. Compliance with the laws that make these things possible may cost more than compliance with "rules that self-consciously maximize human happiness or welfare" (p. 30). Although perhaps not: it can be expensive to figure out how to maximize welfare compared to what it costs to follow a more specific law that makes no reference — explicit or implicit — to welfare maximization. Furthermore, it can be costly to develop private welfare-maximizing agreements as opposed to implementing state regulations that accomplish the same ends.

II. COSTS OF "SIMPLICITY"

Even if we were to adopt Epstein's definition of simplicity, he must clarify the notion of compliance costs. Epstein tends to write as if the predominant costs of compliance with legal rules consist of the financial expenses private parties incur trying to abide by state-imposed rules:

[T]he *minimum* condition for calling any rule complex is that it creates public regulatory obstacles to the achievement of some private objective. . . .

. . . In practice, the most ubiquitous legal safety hatch adds three words to the formal statement of any rule: *unless otherwise agreed*. Any rule that explicitly begins with these three words cannot in my view constitute a complex rule, for those who do not like what it provides will run and hide from its application. [p. 27]

This escapist slant on the costs of rules downplays or overlooks not only the social costs of rules that too easily can be ignored or set aside but also the social costs of abandoning rules altogether. Moreover, Epstein's general suspicion of legal rules seems to distract him from costs entailed even by the rules he ultimately does endorse. Even privately agreed-upon rules generated through con-

tractual agreement can be quite dear both in terms of what it costs the parties to obey and in terms of what it costs the government to enforce the rules if one party fails to perform. In emphasizing rule-escapism, Epstein seemingly fails to notice that a rule that is inexpensive for a citizen to obey or avoid nonetheless may cost the government much in ensuring compliance.

No matter how we count costs, Epstein himself acknowledges it often will be unclear whether a rule or system of rules is simple according to his utilitarian simplicity criterion (pp. 25, 28). Yet he does not attend to a further problem: the expense of any effort to ensure that proposed rules *pass* Epstein's test for simplicity. This effort requires an analysis of the costs and benefits of the proposed rules or system of rules. As many torts scholars have noted, performing a cost-benefit analysis can itself be costly.⁵ It takes resources to gather data on the likely costs of compliance and the probable benefits of a rule; it requires even more resources to confirm whether hypothesized costs and benefits really materialize. Even before we can make any of these calculations, we would have to ascertain how to interpret, apply, and enforce the proposed rules; otherwise, we could not establish the genuine costs of compliance. In short, often it will not be simple — in Epstein's sense — to apply the utilitarian simplicity criterion to any given legal rule. Moreover, assessing simplicity as Epstein defines it will require expertise and skill in compiling, synthesizing, and analyzing data relevant to measuring the costs and benefits associated with a rule or set of rules, as well as expertise and skill in anticipating how proposed legal rules actually will be understood and used. Currently, lawyers often perform these tasks, either in the capacity of adviser to a policymaking body or in the capacity of advocate before a court. Epstein claims that a regime of simple rules would reduce the number of lawyers — a good thing, in his opinion — but establishing and maintaining such a regime would itself seem to demand a sizable number of lawyers or people similarly, or perhaps more suitably, trained.

III. EPSTEIN'S NOT-SO-SIMPLE RULES

Epstein's own candidates for a complete, simple legal regime are the following rules:

1. *Self-possession*: each individual owns herself (pp. 53-59).
2. *First-possession*: the first person to possess property owns it (pp. 53, 59-63).
3. *Exchange by mutual consent*: goods and labor may be exchanged only if all parties to the transaction consent (pp. 53, 71-80).

5. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 28, 256-59, 286-87 (1970).

4. *Keep off or else*: if someone aggresses against another's person or property, the victim is entitled to compensation from the aggressor (pp. 53, 91-92, 101-09).
5. *Necessity*: when there is imminent peril to life or property, one person may use another's property; the user ultimately must compensate the owner (pp. 53, 113-16).
6. *Take and pay*: whenever the government occupies private property or regulates a private owner's use of her property, the government must compensate her for the market value appropriated unless "the regulation is necessary to prevent the kinds of losses that neighbors could enjoin" (p. 132) under the keep-off-or-else rule (pp. 53, 128-40).
7. *No redistributive taxation without representation*: "if there must be public redistribution [of wealth], then it must be financed out of general revenues collected from the same group of individuals that votes the program into place" (p. 145; pp. 140-48).

Just by noticing the terms embedded in these rules, we can begin to appreciate the intricacy involved in ascertaining whether Epstein's rules satisfy the utilitarian simplicity criterion. Terms such as "ownership," "possession," and "market value" may seem clear, but as corporate lawyers and working economists, among others, know, when courts, attorneys, and business executives have to apply these concepts, their meaning often is not so clear after all. Epstein gives no indication of recognizing this problem, perhaps because he is confident in how he himself would apply his recommended rules in the myriad of cases presented by the real world. We have reason to doubt the ease of the rules' application, however. As Epstein reminds us, he derives some of his rules from the common law (pp. 59, 71, 91). As packed case reporters attest, courts and lawyers have devoted much effort to figuring out how to interpret and apply concepts like *necessity* and *aggression against property*.⁶ Such concepts do not speak for themselves.⁷

6. For an example of the complexities of interpreting *necessity*, see *Shell Cal. Pipeline Co. v. City of Compton*, 41 Cal. Rptr. 2d 753, 758 (Cal. Ct. App. 1995) (noting statutory requirement that public necessity be shown before eminent domain exercised; public necessity to be construed liberally in favor of condemnor). For an example of how complicated circumstances make it difficult to decide what constitutes *aggression*, see *Commonwealth v. Viar*, 425 S.E.2d 86, 89 (Va. Ct. App. 1992) (reversing circuit court's grant of motion to suppress physical evidence seized from home and holding that "knock and announce rule" did not apply).

7. When used, such concepts blend evaluation and description. Their development responds to both these dimensions. The combination of complex evaluative purpose and descriptive constraint on application can complicate greatly the use of legal blend concepts. For further discussion of this point, see Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1195-1212 (1994).

IV. EPSTEIN'S UTILITARIAN LIBERTARIANISM

While the terms of Epstein's rules are not exactly clear, those familiar with contemporary political philosophy will realize immediately that these rules aim to create a libertarian minimalist state along the lines suggested by Robert Nozick in his 1974 book *Anarchy, State, and Utopia*.⁸ Nozick argues for such a state on grounds of a preference for the maximal amount of individual liberty for each person compatible with the same amount of liberty for everybody else.⁹ Like Epstein, Nozick defines liberty primarily in terms of property rights: control over one's own body and whatever other resources — usually physical goods — over which one can gain possession without force through personal discovery or mutually consensual bargain.¹⁰ Nozick's argument suffers from some standard problems with the libertarian position: his conception of liberty has some serious rivals,¹¹ and his preference for liberty at the expense of equality is highly debatable. In *Anarchy, State and Utopia*, Nozick devotes little or no argument to defending his conception of liberty or his strong preference for liberty over equality.¹² Although this book has become the standard-bearer for contemporary libertarianism, there is not much in it to persuade those not already convinced of its basic premises.

While Epstein's libertarian vision suffers from some standard problems I have not yet discussed, he at least attempts to address the issues Nozick neglected. Epstein's appeal to utilitarian simplicity provides a vehicle for defending the libertarian conception of liberty and the libertarian preference for liberty over equality.¹³ Epstein deserves credit for recognizing the need to remedy libertarianism's foundational weaknesses and for making an effort to do so.

Marrying utilitarianism and libertarianism allows Epstein to argue that both a property-based conception of liberty and a prefer-

8. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

9. *See id.* at ix, 30-35, 113-18.

10. *See id.* at 10-22.

11. *See, e.g.*, IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., Harper Torchbooks 1964) (characterizing liberty as realization of one's capacities as a rational being); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 141, 147-53 (Donald A. Cress ed. & trans., Hackett Publishing Co. 1987) (arguing that genuine freedom is available only in democratic civil society); CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 100-18 (1979) (explaining Hegel's view of freedom as achieving self-identity within political community).

12. Thomas Nagel makes this point in his insightful review of Nozick's book. *See* Thomas Nagel, *LIBERTARIANISM WITHOUT FOUNDATIONS*, 85 *YALE L.J.* 136, 137-38 (1975) (reviewing NOZICK, *supra* note 8), *reprinted in* THOMAS NAGEL, *OTHER MINDS: CRITICAL ESSAYS 1969-1994*, at 137, 139 (1995).

13. Nozick himself considered the libertarian minimalist state antithetical to utilitarianism and even to consequentialism more generally. *See* NOZICK, *supra* note 8, at 28-30.

ence for liberty over equality maximize overall welfare. If this argument were successful, it would provide reason to favor libertarianism, assuming one were committed to utilitarianism. As this twofold counterfactual indicates, however, problems plague the alliance between utilitarianism and libertarianism. It is not at all clear that libertarianism is in fact utility maximizing. Utility maximization even might require abandoning utilitarianism. As I suggested before, even if a fully implemented libertarian regime were utility maximizing, the costs of figuring out whether this were in fact the case along with the costs of shifting to such a regime might be so large that it would not be worth it in utilitarian terms. Finally, even if libertarianism and its operationalization can be justified on utilitarian grounds, the appeal to utilitarianism saddles libertarianism with all the usual difficulties of the utilitarian view.

Early in his academic career Epstein championed strict liability in tort on libertarian principles.¹⁴ He presented his view as a matter of moral-political justice¹⁵ and touted strict liability as an alternative to the negligence standard whose defenders often advocate it using utilitarian arguments of one kind or another.¹⁶ Epstein favored strict liability because he regarded injury inflicted by one stranger upon another as a kind of wrongful taking: an illicit use of the victim's person or property.¹⁷ Such "use" violates traditional libertarian protections of the individual's bodily integrity and right to total control of one's possessions. In contrast to the position he adopts in *Simple Rules*, Epstein's early defense of strict liability made no appeal to utilitarianism. This was unsurprising because traditionally libertarianism has elevated personal liberty (of the libertarian variety) above the goal of maximizing utility or welfare. In other words, traditional libertarians do not accept sacrifices of personal liberty for the sake of increasing overall welfare. This principle lay at the heart of Epstein's objections to a negligence regime in tort. Because negligence principles allow one person to interfere with another's person or property when it is cost-efficient or utility-maximizing to do so, negligence subordinates individual liberty to social welfare — a strongly antilibertarian outcome.

Epstein has changed his mind. He writes:

Within professional philosophical and economic circles, "utility" has become the all-purpose placeholder for those goods and consequences that are desired, either by individuals or by collectives. Ac-

14. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

15. See *id.* at 203-04.

16. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 14-15 (1987) (demonstrating the economic efficiency of a negligence regime under specific assumptions); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-34 (1972) (arguing that the common law of negligence in fact promotes economic efficiency).

17. See Epstein, *supra* note 14, at 158-61.

cordingly the maximization of social utility becomes the objective of a sound system of legal rules. Although I have from time to time been of different minds on this proposition, I have now made peace with myself and believe that these consequentialist theories — that is, those which look to human happiness — offer the best justificatory apparatus for demarcating the scope of state power from the area of individual choice. [p. 30; footnote omitted]

Although Epstein's ambivalence about social welfare as a legal goal seeps through a bit — he equivocates somewhat between endorsing maximization of aggregate social welfare and endorsing maximization of as many individuals' welfare as possible — ultimately Epstein adopts the standard neoclassical aim of maximizing overall social welfare. He rejects the claim that this position is incoherent because it demands interpersonal comparisons of individual utility (p. 141) and justifies a certain form of income redistribution with reference to its ability to maximize social welfare (pp. 141-42). In any event, Epstein's endorsement of utilitarianism as the justificatory means for delimiting the scope of state power — and, by the same token, defining the extent of individual liberty — marks a radical departure from traditional libertarianism.

V. EPSTEIN'S DEFENSE OF THE SEVEN RULES

Epstein obscures the significance of this shift in *Simple Rules* because the rules he specifies resemble or are identical to those advanced by traditional libertarians such as Nozick. For Epstein to defend fully the seven rules he specifies, he must convince us that it would maximize social welfare to substitute them for the current legal regime or any other proposed alternative.

This would be a monumental task. It would be unfair to suggest that in *Simple Rules* Epstein should have demonstrated conclusively that his seven rules yield higher social utility than every single alternative regime. Nonetheless, it is fair to expect Epstein to show rather conclusively that the seven simple rules would promote greater overall welfare than either the current system or some fairly obvious alternatives to his own. This Epstein does not do.

Epstein takes an ad hoc approach to comparing the utility of the current American legal regime with the seven simple rules. For example, consider Epstein's very strong version of the rule of exchange through mutual consent. According to Epstein, genuine consent obtains even when a bargain has been achieved by use of extreme economic pressure, when one party is exploited by the bargain, or when the bargain transforms into a market commodity a good that social, moral, or political norms generally resist treating as an item for market consumption (pp. 82-90). This highly libertarian rule of freedom of contract is, Epstein claims, superior to any rule that constrains contracts on any of these grounds. Recall that

for Epstein superiority in a rule is a matter of simplicity, which is, in turn, a matter of the social utility or disutility generated by compliance. By this measure, Epstein has to demonstrate that exchange through mutual consent — construing consent broadly — maximizes social welfare more than either of at least two alternative rules: exchange through mutual consent — construing consent narrowly — or exchange through mutual consent unless consent either is extracted under conditions of economic duress or exploitation or results in unacceptable commodification.

Epstein supplies a bit of anecdotal evidence to support his preferred rule. He asserts that “[t]he exodus in talent from IBM that led to its 1992 shake-up” (p. 83) illustrates that exploitation is not a genuine impediment to utility maximization in our society because businesses do not possess the power to prevent unhappy or undercompensated employees from exiting to a rival employer where they will be better off. Epstein does not document that there was an exodus from IBM in the early 1990s, nor that the exodus was due to the availability of better working conditions elsewhere, nor that those who left in fact found new, higher utility-yielding jobs, nor that, even if they did, this made up for any loss of social utility created by the initial exodus. Even if we grant every one of these claims, one anecdote does not prove a general empirical proposition. What is true in the computer industry is not necessarily true in other fields. Rather than provide further empirical evidence, however, Epstein suggests a thought experiment to demonstrate that the bargain between “a perfectly rational employer who possesses the power to dictate terms” and “a worker [who] has a relatively lower income” is in fact utility maximizing (p. 83). According to Epstein, by definition, the employer will offer terms that will maximize its utility, and if the worker accepts them it must be because she is better off than going without the job — so the bargain also generates utility for the worker. This thought experiment does not establish Epstein’s general proposition. It does not demonstrate that government intervention requiring the employer to offer better terms could not create even more utility. Even if this decreased the employer’s utility somewhat — which it might not — the improvement in terms might increase the worker’s utility so greatly that the net gain in social utility would be greater in this regime than under the strict libertarian freedom-of-contract rule.

For each proposed rule, Epstein repeats the same strategies to defend its utilitarian simplicity. Consider Epstein’s argument in favor of his seventh rule, barring redistributive taxation without representation. As with his other rules, Epstein urges this one on the basis of its simplicity; that is, its supposed power to maximize utility better than a rule that would fund redistribution through specialized taxes such as extra taxes on alcohol, cigarettes, or gasoline.

Presumably Epstein thinks that funding redistribution with these sorts of taxes leads to the imposition of disutility on those particularly affected by them without producing a sufficient amount of utility elsewhere in the population to outweigh the loss in the taxed group. There are many problems with this presumption. Most significant, there seems to be at least some empirical counterevidence to the thesis.

Consider Michigan's shift from funding public schools through property taxes to funding schools via lottery revenues and various taxes on goods. In March, 1994, Michigan voters approved Proposal A, a nationally noticed plan to reform the state's property-tax-based educational funding.¹⁸ A new system based on alternative revenue sources replaced the property tax, which for almost one hundred years had provided the prime source of school revenue.¹⁹ Sales and excise taxes and lottery revenues now comprise sixty percent of Michigan's education funding.²⁰ Commentators differ over whether the new system is fair overall.²¹ Regardless of equity considerations, the new tax system does seem to cost many individual Michigan residents less than the old: financial experts maintain that the plan will save a typical Michigan household about one hundred dollars per year. This suggests that Proposal A's plan for funding Michigan public schools passes Epstein's simplicity test understood most narrowly. Epstein also might argue that the savings to each resident do not make up for losses of utility elsewhere in the system due to the shift in the tax base, but that just reveals again the obscurity of Epstein's approach to simplicity. Epstein also might argue that statewide sales taxes are in fact more general than locally imposed property taxes. In either case, however, the taxes are imposed by the citizens' elected officials and to that extent come from general revenues. Without further clarification of what constitutes general revenues, it is hard to know whether Epstein would regard Michigan sales taxes or local property taxes as more general.

It is obvious that any brief consideration of Michigan's school-funding experience is certainly not conclusive as to when and whether specialized taxes are utility maximizing in comparison to more general taxes. At minimum, however, the foregoing discus-

18. See Recent Legislation, *Education Law—School Funding—Michigan Moves Toward Statewide Collection and Distribution of Education Funds* — Mich. Const. art. IX, § 11; Mich. Comp. Laws Ann. § 388.1620 (West Supp. 1994), 108 HARV. L. REV. 1411 (1995).

19. See Laura Laughlin, *State Pursues Fairer School Funding Plan, Solution to Inequities Will Test Lawmakers*, PHOENIX GAZETTE, Sept. 23, 1994, at A1.

20. See Mark Hornbeck & Charlie Cain, *Voters Overwhelmingly Back Sales Tax Increase*, DETROIT NEWS, Mar. 16, 1994, at 1A, 10A, cited in Recent Legislation, *supra* note 18, at 1413.

21. See Recent Legislation, *supra* note 18, at 1413-14 (noting that Michigan's new school-funding system, although regressive, appears to be in certain respects more equitable than a property-tax-based approach).

sion illustrates how very complicated — and expensive — it would be to ascertain whether the rule against redistributive taxation without representation passes the utilitarian test for simplicity.

By this point, those familiar with debates over utilitarianism and neoclassical economics will have seen that my objections to Epstein's arguments are specific versions of well-known general objections to these theories. To corroborate any proposed utilitarian hypothesis requires a great deal of data. Often the proposers do not supply this empirical support. Furthermore, simply because one state of affairs yields a higher degree of utility than another does not preclude the possibility that a third state of affairs would yield an even higher degree of utility. One coherently can join in Epstein's utilitarian objections to any given current American law or regulation without thereby sharing his conclusion that the libertarian alternative is utility maximizing.

I have criticized two of Epstein's rules by arguing that they are unlikely to produce greater social utility than current rules or some other plausible alternatives to present ones. Rather than deploy similar critiques against each rule Epstein suggests, I turn now to more schematic problems with his approach.

VI. EPSTEIN AS A RULE-UTILITARIAN

Arguing on behalf of Epstein, someone might characterize him as a rule-utilitarian.²² Although rule-utilitarianism comes in several variants, the basic motivation underlying this approach is to avoid some of the problems of a strict act-utilitarianism. According to traditional act-utilitarianism, conduct is right to the extent that it maximizes overall utility. As my previous arguments suggest, implementing act-utilitarianism can be very difficult because of the costs and problems associated with identifying in every instance the act that indeed will maximize utility. This has led some thinkers to endorse rule-utilitarianism, according to which an act is right to the extent it conforms to a rule or set of rules that, if consistently followed, ultimately will promote high levels of overall utility, even if on some individual occasions following the rule or rules decreases utility. This indirect method for maximizing utility aims to eliminate the need for the moral agent to decide how to maximize on each and every occasion, allowing her instead to rely on more general rules — for example, Epstein's "simple" ones.

For a rule-utilitarian regime to work, it must be fairly easy to understand both the rules and their application. Otherwise, the drawbacks of act-utilitarianism will resurface: agents will sacrifice

22. Epstein himself does not refer to rule-utilitarianism. I am indebted to Don Regan for the suggestion that a defender of Epstein's views might look to rule-utilitarianism for support.

welfare in their efforts to figure out how to behave in accordance with the rules and in making mistakes about what the rules require. Even if the rules are sufficiently accessible, rule-utilitarianism faces two other chronic problems. First, it is hard to identify which rules indeed will promote the most overall utility. Second, it is difficult to keep rule-utilitarianism from collapsing into act-utilitarianism. Since the point of rule-utilitarianism is to accomplish utility maximization, it would seem that a consistent rule-utilitarian should permit exceptions to the chosen rules whenever abiding by them would produce suboptimal results. In Epstein's case, this would mean selectively deviating from his rules whenever a situation arises in which nonmandated behavior in fact would improve social welfare. The tension between rule-utilitarianism's underlying commitment to utility maximization and its surface strategy of rule-following suggests that before acting, moral agents should figure out whether their situations call for exceptional behavior, thereby undermining the advantageous streamlining of the decisionmaking process promised by rule-utilitarianism. Moreover, rule-utilitarianism's utilitarian foundation threatens to undo entirely the distinction between rule and exception. If it is right to behave according to rules that, followed consistently, maximize overall welfare, and general rules do not implement this goal, then it seems the rule-utilitarian must advocate more particularistic rules with whatever qualifications and caveats in fact would produce superior gains in overall welfare. Of course, the more nuanced the rules become, the less streamlined their application can be.

Epstein's proposed legal regime and his strategy for defending it fit the rule-utilitarian profile: he claims that at least relative to the current system, following his preferred rules, which make no direct reference to utility maximization, in fact will increase overall welfare. My earlier arguments show, however, that Epstein's version suffers from the problems endemic to any variant of rule-utilitarianism. Because of the grand terms of the rules, it is difficult to know how to interpret and apply them. Understood simplistically, the proposed rules do not appear to be utility maximizing. If we construe the rules to contain various caveats and qualifications, they still may not be utility maximizing, and the interpretive efforts required themselves may decrease utility.

Whatever type of utilitarianism best characterizes Epstein's position, the combination of utilitarianism and libertarianism remains a peculiar one. Like traditional libertarians, Epstein prefers libertarian liberty to equality of wealth. Unlike traditional libertarians, Epstein must defend this preference on utilitarian grounds. The experience of Western countries with strong welfare states and high standards of living suggests that this may be extremely difficult, especially if we factor in the utility-generating capacity of the mere

fact of equality. If enough people just prefer more equality and less libertarian liberty, libertarian rules will not be simple rules by Epstein's own lights. Depending on the facts, the alliance between libertarianism and utilitarianism has the power completely to undermine libertarianism, all in the name of the utilitarianism that was to justify it.

CONCLUSION

Simple Rules for a Complex World has received a lot of attention. Given the quirks and vulnerabilities in Epstein's arguments, one might wonder why the book has caught the popular eye. In the *New York Times Book Review*, Nathan Glazer declares: "[A]t the very least Mr. Epstein has to be taken seriously, and not only because of the power of his reasoning and his authoritative command of the common law and political philosophy," but also because his proposals "turn out to have much more political life in them than one could have thought possible."²³ The *Wall Street Journal's* reviewer, John H. Fund, writes: "Mr. Epstein's relentlessly logical arguments tell us why we should return to the tried-and-true rules of the common law."²⁴ The legal press also has been kind and attentive to *Simple Rules*. Writing in the *ABA Journal*, Paul Reidinger calls the book "intellectually attractive," although he ultimately concludes that simple rules are practically unworkable in a complex world.²⁵ Otto Obermaier, reviewing *Simple Rules* for the *New York Law Journal*, is more wholeheartedly complimentary:

This is a seminal and timely book by a controversial theorist. The Congress and two best sellers, *To Renew America* by Newt Gingrich and *The Death of Common Sense* by Philip Howard, bruit what amount of law and regulation is best. But they lack the type of intellectual infrastructure that *Simple Rules for a Complex World* provides for the proposition that less is better.²⁶

As I have tried to demonstrate, *Simple Rules* is not "relentlessly logical," nor does it represent the common law as it now stands, nor does it provide firm intellectual infrastructure for the positions it espouses. So what are we to make of these reviews? Why is *Simple Rules* getting extensive attention and a warm reaction?

The answers to these questions lie, I think, in the book's political resonance. Certainly Professor Epstein's prominent position within the American legal academy also plays a role. Conservative

23. Nathan Glazer, *The Law is a Mess*, N.Y. TIMES, July 16, 1995, § 7, at 3 (book review).

24. John H. Fund, *Common-Law Common Sense*, WALL ST. J., May 30, 1995, at A12 (book review).

25. See Paul Reidinger, *Six Degrees of Regulation*, A.B.A. J., May 1995, at 101 (book review).

26. Otto G. Obermaier, *The Lawyer's Bookshelf: Simple Rules for a Complex World*, 214 N.Y. L.J., Aug. 22, 1995, at 2 (book review).

American politicians can and have turned to Epstein's work to lend scholarly weight — and therefore credibility — to their political agenda. Liberals such as Senator Joseph Biden have recognized the political significance of Epstein's work to the conservative movement. During Clarence Thomas's confirmation hearings, Biden claimed that anyone who endorsed *Takings: Private Property and the Power of Eminent Domain* (an earlier Epstein book that lays the foundation for the first-possession and take-and-pay rules adopted in the current volume) was unfit to serve on the Supreme Court.²⁷ Biden's rhetoric reveals the political force Epstein's work tends to have.

Like *Takings*, *Simple Rules* bolsters American political conservatism, regardless of the soundness of the arguments Epstein presents. The book has rhetorical power. Its very title plays upon the current cultural yearning for simplicity, even though the legal regime proposed is not in fact simple in any usual sense of that term. The seven "simple rules" articulate a position with intuitive appeal to those citizens who dislike government regulation or federal taxation whatever the reasons for their opposition.²⁸

Those of us who favor a more activist government — for whatever reasons — must acknowledge the political force of *Simple Rules*, but, more important, we also must develop equally politically compelling arguments for our position. It would be especially nice if those arguments not only carried political resonance but also were intellectually sound.

27. *See id.*

28. Typically, these reasons are not rooted in commitments to libertarian or utilitarian ideals.