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# THE CLASSICAL THEORY OF LAW

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I should say at the outset that I expected to be arguing about some of the fundamental substantive issues separating the Right and the Left in contemporary legal thought. In particular, I thought that Professor Epstein would defend the notion of a sharp distinction between individual economic liberty and public regulatory power suggested by his recent *Takings*[1] book and by tonight's theme of "Classical Law."

If I correctly understand his talk, however, he has abandoned the attempt to portray market-oriented legal ideology as something implied in the very idea of liberty or freedom or the rule of law; I agree with him that the image of a classical common law that is (or was) neutral, objective, and determinate is, quite simply, analytically incoherent. The notion of a return to such a regime is a fantasy because such a regime never existed.

The loss of faith in the ability to present the "free market" as the model for legal decisionmaking is a significant event in our political and intellectual history; it is also a particular challenge to conservative, market-oriented legal theory. Legal theorists on the Right have traditionally presented the hierarchies of our social lives as infused with a transcendant logic or necessity, as if the existing distribution of wealth, power, and prestige either directly reflected an underlying meritocracy of equal opportunity and just desserts, or indirectly would achieve a kind of utilitarian justice in the long run. Either way, the notion has always been that there was something qualitatively different between economic liberty and social regulation, between private freedom and public power.

What we have been calling "classical law" played a foundational role in this idea that something called a "private market" was, or could be, a neutral, impersonal mediator of social relations. In the classical law imagery, as described by Professor Barry, the common law rules of tort, contract, and property were supposed to provide the neutral, objective framework within which individuals could pursue their own, self-defined ends free from social coercion. So long

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[1] R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

as the classical law image was plausible, right-wing legal theorists like Hayek could present their program as embodied in the impartial dictates of freedom. Thus, in the rhetoric of, say, Hayek, free market capitalism is implied in the very idea of the rule of law; economic regulation is not simply bad policy—it is downright inconsistent with having a society ruled by law at all. That is why, I guess, there is a resurgence of interest in classical law among today's conservative legal scholars; the framework of classical law theory promises advocates of right-wing social policy a way to present their programs as the result of a commitment to rational, neutral law as opposed to ideology and politics. But, as Professor Epstein suggested, the return to classical law is a dead-end.

I want to focus tonight on two issues. First, I want to explore with you why the traditional notion of a sharp distinction between the public and private realms as the basis for distinguishing law and politics, or law and legislation, is no longer considered respectable in American intellectual life; this analysis simply reviews the critique of market ideology that the legal realists taught us.

Second, it seems to me insufficient merely to point out the analytic flaws of the classical law approach. The more important task is to understand how people could in fact believe that the classical world-view was neutral and self-evident. To get at this aspect of classical law, we need to consider how classical legal thought worked in the world as a social ideology—that is, how the classical world-view represented the world through particular images and metaphors for perceiving and talking about society. This grid of interpretation was not simply a "theory" in the sense of an intellectual project; it was also a justification for and an ideology of power through which actual, real-world relationships of economic and social domination between workers and owners, landlords and tenants, men and women, were translated, not as the exercise of social power, but instead as free and consensual individual choices.

First, the analytic critique. Here I will take the *Lochner* era as roughly representative of the classical law tradition. Now, in the modern legal context, *Lochner* is routinely criticized because the Court is supposed to have imposed its own values in its reading of the Constitution. But this reaction to *Lochner* presupposes the decline in the belief in the neutrality of classical common law doctrine. That is, it is possible to say that the Court was imposing its own biases in its protection of the "liberty of contract" between employer and employee precisely because it is no longer plausible to believe that the market organized through the common law was neutral and value-free, and therefore the Court's protection of that

realm from legislative intervention also could not be neutral and value-free.

To mainstream lawyers of the *Lochner* era, however, the Court's protection of the liberty of contract was not necessarily a value question at all; instead, *Lochner* could be seen as the constitutional manifestation of a broader, integrated view of law very closely resembling Professor Barry's description of the classical theory of law. From this perspective, the judiciary was merely performing at the constitutional level the same tasks that it carried out at the common law level—the protection of private, individual choice, or, more generally, the protection of the private realm from public interference. Accordingly, the judiciary at common law enforced contracts that were the freely-willed result of bargaining between competent parties; it refused to enforce contracts that were the product of duress or fraud, because in such circumstances the private choices of individuals were tainted by external interference. When this imagery of what law was about was transferred to the constitutional level, it meant that, just as the judiciary would protect the free choice of parties through the rules on duress and fraud at the common law level, so at the constitutional level the judiciary would protect the free choice of individuals from interference by others more generally, these others represented by the State.

There was this deep metaphoric connection between the common law and constitutional law, a grand integration of public and private law within which legislative interference with the liberty of contract very closely resembled interference with the free choice of a contracting party through the infliction of duress or fraud; just as the judiciary refused to enforce a contract that was the result of duress or fraud because in such circumstances the basis for enforcement, the free choice of an individual, was absent, so also the judiciary would refuse to enforce legislation that invaded this private realm of free choice. And accordingly, in breathtaking symmetry, the logic of the common law also governed the logic of constitutional law—the permissable range of legislative regulation roughly corresponded to the realm in which the common law itself recognized an absence of free choice. Hence, the legislature could regulate and forbid bargaining practices that the common law would recognize as fraud or duress; the legislature could not go beyond those limits in regulation because, by definition, if the common law would enforce a particular transaction, it was the result of free choice and therefore simultaneously immune from legislative interference.

This is how the classical law theory can end up with the fairly odd-sounding institutional premises that Professor Barry advocated.

In this vision, the legislature threatens liberty because it represents the possibility of collective power, rather than individual choice, determining social relations. The judiciary, on the other hand, does not threaten liberty because it simply facilitates the achievement of individual desire. Public law is legitimate in this scheme only when it is truly neutral to private individuals; public law is illegitimate when it is overtaken by interest-groups pursuing rent-seeking legislation because then the government would be taking sides in the private market and thus acting in a regulatory rather than facilitative fashion. Of course, public law is necessary to achieve the "public goods" that the market is structurally unable to produce, but it must be restricted to this fairly narrow role lest the public realm invade the private realm, replacing freedom with coercion. Similarly, in the mainstream political economy of the eighteenth and nineteenth centuries, the relationship between the private and public spheres was also conceived on the contractual model—free, private individuals come together and out of the necessity to get public goods create the public realm in a broad social contract, but that contract limits the State to the public realm; legislative interference with liberty of contract, the core of the private realm, is illegitimate because it is not grounded in the free choice of individuals; it amounts to a breach of this original, imaginary social contract.

We can see the enormous weight put on the notion of individual free choice in the classical law approach. Both the common law and constitutional law referred back to an initial, foundational image that in a contract between competent parties, individuals freely determined their own fates and therefore the classical common law rules and the corresponding limits on legislation were legitimate because they were implied in the very idea of freedom under law. Both the contours of the private realm and the contours of the public realm were legitimated by reference to the free choice of individuals determining their particular social relations in contracts and agreeing to a broad social contract in public law. Thus, public power was legitimate to the extent that it was taken as derivative of private consent. On this world-view, the inequality of bargaining power between contracting parties could not impugn the consent grounding contract because inequality of bargaining power itself, as the *Coppage*[2] Court asserted, was a result of freedom to contract as one saw fit.

Now it is possible to object to this approach on external grounds—that is, through a basic disagreement with the individualist model on which the classical approach rests. One might initially

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2 Coppage v. Kansas, 236 U.S. 1 (1914).

disagree with the founding ontology governing the reigning distinction between the public and private realms. Rather than imagining that we begin in the world as private beings, as discreet, atomistic individuals with particular desires and talents that are part of us as individuals, exogenous to the social world in which we find ourselves, and that group life is threatening and coercive to our personal identity, we could begin with the competing ontology of community, that is, the idea that we are not in any meaningful sense discreet, unconnected individuals, but are interdependent and inevitably connected to one another, that we need and desire fulfillment outside ourselves, with others in group life, and that even our personal identity and meaning depend on our connections as members of a community. The possibility of this alternative ontology for imagining the relationship between individuals and groups impugns the first premises of the classical world-view because it calls into question the self-evident character of the main problematic of the classical approach—the premise that there is a fundamental and qualitative distinction between the individual and the group, the private and the public, and that the job of law is to mediate the conflict between the two realms.

I have called this objection to the classical approach "external" because it challenges the first premise of classical law as itself a controversial value choice; it amounts to saying that one can understand the coherence of market ideology, but disagree that individualist as opposed to communal premises should govern social life. Or that other values, such as security, must necessarily compete with the classical value of freedom and, indeed, even within the classical structure, the recognition of duties to others reflected in the competency, fraud, and duress rules of contract, and in torts generally. This objection to the starting-point of classical law is important because it refutes the classical pretensions to neutrality by finding a controversial value choice at the core of the whole classical approach. I will return to the issue of the classical image of the relationship between individuals and groups later; now I want to move on to what I consider the more telling objections to the classical approach made by the legal realists.

The legal realist analytic is an "internal" critique of classical law to the extent that the realists demonstrated that, even if one were to accept the individualist premises of the classical approach, there was no neutral, coherent basis for implementing the program in legal doctrine. Instead, the realists demonstrated that the issue was not, and cannot be, the choice between a free market and public regulation, or between the competing values of freedom and security, because the very concept of a neutral common law regime of private

law is analytically flawed. There is, simply, no such thing as a free market at all. The classical image of a realm of private free choice was false because, as soon as a legal regime was in place, there could be no such thing as a private sphere of civil society separate from public, social power. The classical distinction between the private common law and public legislation was, in a word, incoherent.

Now, there were various levels in which this critique was worked out, and if you are interested in seeing it explicated fairly fully, the best contemporary piece I know of on this is Duncan Kennedy's and Frank Michelman's article, *Are Contract and Property Efficient?*[3] Let me now just trace the outlines of the critique and draw out the significance for the theory of classical law.

One angle pursued by the realists was to demonstrate that the distinction between free will and duress upon which legitimacy of the classical approach rested was itself a political decision, a social construct. For example (I am thinking of Robert Hale's work here) in the paradigm private law field of contract, the so-called consent to a contract was actually conditioned on something external to the contracting parties, the bargaining power created by the legal protection of property rights. If an employee wants to eat, and the property rules have been structured so that all the available food in the community is owned by someone, and all the available means of production are privately owned, then the employee is coerced into agreeing to some employer's contractual terms. And this coercion is rooted in the legal decisions about what interests to protect as property and what interests not to protect. In the classical imagery, the employment contract should be enforced because it is the result of a private, unregnlated decision between two competent parties. The realists showed that the consent to the contract was the result of social power embodied in the property rules, and there was no neutral way to justify the property rules themselves as pre-social or natural. When the common law judges thought they were simply ratifying individual free will in private law, they were really ratifying the exercise of will in the broader context of social power, the existing matrix for the distribution of privileges and entitlements, including property rights and entitlements to be free from harm or privileges to inflict harm. As Holfeld taught us, any distribution of entitlements creates power in some people and loss of power in other people. There is nothing particularly natural or self-evident about any particular scheme for making this kind of distribution of legally protected interests; it could be structured completely differently, so that others would be benefited and burdened.

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[3] Kennedy & Michelman, *Are Contract and Property Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

The classical argument that inequality of bargaining power could not justify regulation of the employment relationship because such inequality was the result of free choice, the result of a free market, could then be turned completely inside out—since inequality of bargaining power necessarily influenced consent, and bargaining power is the result of the law's distribution of entitlements, there could be no private realm of consent free from the influence of social power, and therefore nothing outside the legal categories themselves determined what would be called public or private, free or coerced, an entitlement to security or a privilege to harm.

Conceptually, the realists demonstrated, the classicals had it wrong—private individual free will did not precede social power; rather, social power, reflected in the property rules by which some were wealthy and some impoverished, preceded and determined, contractual consent. The public precedes the private; there is no way to use private contractual consent to legitimate as neutral and "legal" the common law of contracts because consent is itself derivative of a prior public power reflected in the decisions of what interests to protect as property and what interests to refuse to protect. In the fundamental contradiction referred to by Professor Epstein, there is no natural, pre-social way to distinguish and apply the free market principles favoring the protection of private property and the principles favoring open competition since competition by definition causes harm and insecurity to existing property. The upshot of this strand of realist argument was that it is a political decision what to call free will and what to call coercion, what to protect as property and what to privilege as freedom. The classical common law could not be justified as a protection of the free market because what was called freedom as opposed to coercion was itself a function of the legal rules.

A similar point applies to the fraud rules. It is conceptually possible to conceive of either broad or narrow disclosure duties; narrow disclosure rules would burden some and benefit others; broad disclosure duties would benefit different groups and burden other groups. But nothing in the concept of contract or a free market can tell you which to choose. Rather than simply reflecting and facilitating pre-existing private decisions, the constituent common law market rules actually constituted and regulated what would count as legitimate and illegitimate market power. The classical private realm was, in short, the construct of the public power reflected in the choice of whether to recognize broad or narrow duress rules, or broad or narrow fraud rules. Most importantly, the distribution of wealth was not a result of the private free market, but the result of social power reflected in decisions as to what to protect as property,

what to define as free will or duress, and what range of other-regarding duties to recognize in contract, tort, and property law. The issue could not be a principled distinction between the free market and the social welfare state because the free market was transcendental nonsense; the distinction between a private, unregulated market and public intervention was false, because the particular structure of the private common law was itself, necessarily, a form of public regulation. If what scares classical liberals about the government is the idea that the State represents the threat of social power, the realists showed that there is no escape from social power.

If you are with me this far, the next question is why did not the classical law proponents see the analytic flaws of their justificatory theories? Now here is where the realists stopped short in their challenge to the old order. The realists tended to treat the classical world-view as a mere intellectual error, as a mistake in a train of reasoning, rather than as playing a critical role in the construction of social life, rather than as an ideology that spiritualized the status quo power relations by translating them as a meritocracy of freedom and liberty under law. The realists neglected to talk about the way that the classical ideology worked in the social world, to tell workers in the sweatshops that they had consented to their working conditions and to their own exploitation, to tell the wealthy that their economic power was earned, deserved, and legitimate. Instead, the realist explanation was "formalism"—the classical theorists mistakenly thought that they could move from the abstract ideas of liberty, of contract, and of property, to concrete doctrinal manifestations, such that contract would mean, for example, the particular rules of offer and acceptance, consideration, the distinctions between free will and duress, the limitations on principles of fraud and misrepresentation, and the contours of expectation damages, as if the idea of having a contract regime answered all these subsidiary doctrinal questions for you. The formalist mistake was to assume that you could move from the abstract idea to the particular concrete context without the intervention of social power, of policy or the whim of the judge or the apparent social consensus or something like that.

Without that moment of formalism, that old kind of Aristotelian classificatory belief that the categories of public discourse could somehow magically match up with the categories of independent, pre-public material life, without that kind of intellectual error to explain themselves, the classical system appears simply as an ideology of power rationalizing the apartheid of class and wealth, the exploitation of workers in the factories of turn of the century America, by the propagation of the myth of economic meritocracy in the free market.

Let me be clearer. I am not talking here about classical law as an abstract theory concerned with the source of law, or with whether law has an author or not. I am talking about law as social ideology, as a matrix for translating social experience, and specifically how the classical approach translates actual people's lives on assembly lines, in bread lines, on street corners, in interviews, in families, and across the "private" realm as free and consensual, as devoid of public power. The image that when we are in the private realm, as defined by classical law, we are free is a false image; it was false when it presented the economic relations of the early twentieth century as free, and it is false today when it presents women's roles in the "private" realm of homelife, workplace, families, and sexuality as a result of private, free choice. It is a lie that represses all the ways that our "private" relations are socially constructed, through the ideology of gender roles, of sexuality, and through the material distribution of power and privilege.

The point here is that there is more to the flaws of the classical approach than some intellectual error. The problem with the classical approach is not that there is some mistake in the chain of reasoning that could be corrected by the substitution, as Professor Epstein suggests, of utilitarian for natural law premises; rather, the representation of the world according to the classical imagery is an ideology which plays a social role in legitimating as natural or necessary the rank caste structure of our social life.

The problem with classical law is not formalism, because the mistakes of the classical approach are not epistemological mistakes in the theory of knowledge, mistaking mental categories for categories of material existence. They are rather pieces of social mythology and ideology that play particular social roles in relations between people. In other words, the problem of the public/private distinction is not simply that it is indefensible after taking seriously the work of realists like Pound and Hale and Felix Cohen; the problem is that it is a false and inauthentic representation of our lives as sharply divided by on the one hand a private realm where we are truly ourselves, somewhere, at home, or in total isolation from others and their influence, and on the other hand, another realm where we are not ourselves, where we have to play publicly-imposed roles, where we are somehow coerced, putting on masks and playing out roles that appear to have no social agency. This classical categorization of the social world seems to me simultaneously to be the very definition of social alienation—the sense that it is normal to believe that we do not collectively create both ourselves as individuals and our social roles, that we are either alone and free from social influence or with others but robbed of our subjective identify.

The myth structure of classical law ideology plays a particular political role, by translating as free and normal the social alienation and powerlessness people feel at work and in their public lives generally. If we believe this mythology, that the social roles we play as teachers and students, as managers and workers, and as men and women, are either public and therefore coercive but necessary, or private, and therefore simply the result of individual free choice, then we do not see them as open to social change, by us working together imagining new, more fulfilling ways to be together. In short, the classical ideology is the message that we are powerless to change the world together, to recover the sense in social life that we can create and recreate the world in which we live.