SIMPLE RULES FOR A COMPLEX WORLD

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Harvard University Press
Cambridge, Massachusetts
London, England

Printed in the United States of America

Fourth printing, 1997

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA
Epstein, Richard Allen, 1943–
Simple rules for a complex world / Richard A. Epstein.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-80820-7 (cloth)
ISBN 0-674-80821-5 (pbk.)
1. Law—Economic aspects—United States. 2. Adversary system (Law)—United States. 3. Lawyers—United States. 4. Social justice. 5. Simplicity (Philosophy). I. Title.
KF385.E67 1995
340'.1—dc20 94-40364
CIP

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To the memory of Walter J. Blum,
friend and colleague, for whom, in law,
95 percent was perfection

Preface

The topic of this book has been a dominant theme in my legal research since I first started teaching law in 1968. Over that period of time I have taught or written in a large number of areas of public and private law. The particular plots and characters change quickly as one moves from subject to subject. Mastering these subjects requires the academic lawyer, like his practicing counterpart, to have a detailed working knowledge of a large number of cases, statutes, regulations, and practices. Without that level of knowledge, it is not possible to authoritatively answer any discrete legal problem. If my goal in this book were to exhaustively examine any single area of law, then, owing to the complexity of the law, it would be a far fatter book than it is, and far more limited in its choice of topics. I would be obliged to include in the book the full extensive scholarly apparatus of statutes and regulations, citations and quotations, notes and cross references. But that, quite simply, is not the goal of this volume. Instead I hope to act as an intellectual middle man between two cultures, and 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. To make the book as readable as possible, I have largely suppressed the usual scholarly apparatus, citing only a few key references to the broader literature on specific topics.

The book is also written with a single strong message. There is too much law and too many lawyers. But it is not written as a breathless accusatory exposé of individual treachery or greed. It is a book about legal doctrine, and about social structures and the incentives that these legal doctrines help create. It does little good for one company, union, religious association, or charitable institution to abandon its lawyers if the organization will be beaten down by the lawyers who are hired by others. Yet if others are foolish enough to let down their guard by not engaging lawyers skilled in the art of litigation and persuasion,

then these same organizations will do better to hire their own. We thus have yet another illustration of the now famous Prisoner's Dilemma game in which the ideal cooperative solution (fewer lawyers) cannot be obtained by isolated moves by individual social actors. Some collective method of control must take place. But what?

Here the nub of the problem is that the level of aspiration for law in the United States, and increasingly throughout the rest of the world, is simply too high. Ask most men or women on the street what the most important social problem today is, and they will answer that it is violence on the street, violence in the schools, and the loss of the sense of security that it entails. But how seriously can one take a legal system that devotes more of its intellectual ingenuity to identifying and correcting market failures resulting from asymmetrical and imperfect information in employment than to containing violence on the street? No one likes violence, and thus agreement on that issue tends to lead us to move on to more subtle questions that challenge and puzzle the intellect. But in so doing we then invent other situations which call for government intervention. We try to solve more and more problems by legal rules and fewer through voluntary accommodation. Often we do so because we are seduced by the dramatic forms of anecdotal jurisprudence: the ability to put before the camera the worker who is fired, the accident victim who is uncompensated under the current legal system. The implication is always that some new right has to be created to redress the evident hardship just portrayed.

Using law as an instrument for achieving perfect justice suffers from several major drawbacks. First, it diverts resources from the major questions of social order, and fritters away our precious moral authority on causes of far less weight and consequence. Second, focusing too much on the unhappy anecdote ignores the hidden benefits that voluntary transactions might have in other cases that produce not moving stories but inconspicuous successes. Third, the emphasis on law and regulation ignores the cumulative impact of independent systems of regulation on a single social institution. The employment contract may be able to survive minimum wage or maximum hour regulation, or discrimination and wrongful discharge suits, or health and safety regulation, or Social Security and Medicare taxes, or handicap access and the uncapping of mandatory retirement, or family leave and workplace safety, or unionization and collective bargaining. But is there any reason to think that real wages and job opportunities can

rise in the face of all these regulations together, or that each new form of regulation can be justified without taking into account the regulations already in place?

By degrees, therefore, our extensive level of social ambition leads us to a very complex set of legal rules, one which only lawyers can understand and navigate, and then at very stiff fees. The virtue of simplicity, around which this book is organized, is never explicitly deprecated, but it does suffer from insufficient respect and appreciation. By degrees we find that private and public actors all must resort to the use of lawyers, or to administrators steeped in the law, in order to solve their individual problems—thereby creating additional problems for others. Yet it is hard to identify some discrete point that marks the triumph of legal complexity, much less to state how its triumph might be reversed.

In light of this situation, it occurred to me that to write a book that makes simplicity the hub of the wheel might help explain how we have come to the present impasse and what we can do to escape from its implications. In dealing with these issues, I have examined many of the detailed scholarly studies in these various areas, but have relied more on my sense of the field, acquired over twenty-five years of teaching and through innumerable meetings, conferences, workshops, classes, and, above all, lunches with colleagues and friends. The views expressed here rest as much on judgment as they do on precise empirical demonstrations. I hope that the arguments I have advanced are both accessible and plausible, and will lead my readers to reexamine some of their more cherished assumptions about the relationship between legal rules and social progress. I have for the most part tended to deal with subjects, such as property rights, employment relations, product liability, corporate liability, and environmental protection, that lie pretty close to the common law roots with which I began my own legal studies, and on which I continue to rely.

The proposals that I make are in many senses radical (perhaps too radical, or if not too radical then too reactionary, for most people) and heavily depend on the perception that cooperative ventures between individuals are better left to private ordering than to public control. One of the major intangibles that must be taken into account in organizing any legal system is the distribution and use of information. Quite simply, I believe that most people know their own preferences better than other people do. Accordingly, people are better able to act

in order to protect themselves and advance their own interests if given the legal power to do so. The complexity of legal rules tends to place the power of decision in the hands of other people who lack the necessary information and whose own self-interest leads them to use the information that they do have in socially destructive ways. I am far from advocating a move to a system utterly devoid of legal constraints on individual conduct, although some might wish to describe my views in so uncharitable a light. But it should be clear that while I support innovation in technology and business, I think that permanence and stability are the cardinal virtues of the legal rules that make private innovation and public progress possible. To my mind there is no doubt that a legal regime that embraces private property and freedom of contract is the only one that in practice can offer that permanence and stability. Simplicity is yet another argument in favor of strong private rights and limited government.

In reaching this conclusion, I have been heavily influenced by the work of Friedrich Hayek, in particular his important manifesto, *The Road to Serfdom*. Hayek's book first appeared in 1944, and has continued to be actively read and discussed in the half-century that has elapsed since its publication. Hayek's major target was central planning, which in the context of the socialist calculation debates of his time addressed the question of whether government officials could ever acquire the information routinely imparted by prices to organize product and labor markets. Today there is little general sentiment in the United States or abroad in favor of the collective ownership of the means of production that bore the brunt of Hayek's withering criticism. Instead the newer pattern is to preach the virtue of markets in the abstract, and then to insist that government regulation of private enterprises is necessary to correct the legion of supposed specific market failures that arise in complex modern institutions. Just such a tempting argument might lead to the government domination of health care in the United States.

In one sense I view this book as a reply to the argument that regulation is normally desirable even in circumstances where government ownership of the means of production is not. In my view there is no sharp dichotomy between government regulation of wages and prices, on the one hand, and government ownership, on the other. Rather, regulation takes certain elements from the owner's bundle of rights and transfers them to the state, where they again fall prey to the same

difficulties that arose when central planning was defended on a grand scale. If the downfall of socialism comes from the inherent gaps in information available to public officials and from the inability of legal rules to constrain their self-interested behavior, the forms of modern regulation attacked in this book are subject to the same criticism. Hayek may well have been wrong, or at least incautious, when he insisted that markets could "spontaneously" evolve without the assistance of the state, but he surely was correct in noting the massive defects that pervade state planning. The government works best when it establishes the rules of the road, not when it seeks to determine the composition of the traffic. It is the vice of the Federal Communications Commission that it attacks the second task when it could confine itself to the deserved obscurity sufficient to discharge the first.

The philosophical roots for this book run deep, but the more proximate stimuli reflect change, circumstance, and good fortune more than any author should be happy to admit. Although simplicity has always been a theme in my legal writing, it first became prominent in a column I wrote for the *Wall Street Journal* with the title "Simple Rules for a Complex World" that appeared in June 1985. I did little more explicit work on this theme until I was approached by two people, Penelope Brook Cowen on behalf of the New Zealand Business Roundtable (and its indefatigable director, Roger Kerr) and N. Ray Evans on behalf of the Western Mining Company (and its president, Hugh Morgan), to make a speaking tour of Australia and New Zealand in order to talk about issues of liability and law reform that were of concern there. In particular they asked me to address questions of labor reform and tort liability. On a whirlwind tour of both countries in July 1990, I delivered a number of addresses, often hastily composed, on the topics covered in this book.

In the months that followed I reworked some of the transcripts of these talks into a group of articles that were published in Australia and New Zealand. It was suggested that I then compile the separate essays into a book on simple rules. The task has proved far more daunting than I had originally thought, and the book that follows has been substantially expanded and thoroughly revised at every point. In the early stages of the process, I was assisted by Penelope Brook Cowen, who undertook to make sense of the transcripts of the lectures that I delivered in New Zealand, and Roger Pilon of the Cato Insti-

tute, who read and annotated an earlier draft of the manuscript and pointed out in exquisite detail just how much work remained to convert a set of isolated lectures into a coherent volume.

Since that time I have talked about various aspects of the subject in lectures throughout the United States. In addition to giving talks at the University of Chicago, I have spoken on the issue of legal simplicity at the American Law and Economics Association, the Cato Institute, the Cumberland Law School in Samford University, the University of Kansas School of Law, the University of Michigan Law School, and the Yale Law School. I have also benefited from close and detailed readings of the manuscript from Robert C. Ellickson, Victor Goldberg, Lawrence L. Lessig, Fred S. McChesney, Richard A. Posner, and Mark Ramseyer. I owe a large debt of thanks to my three tireless research assistants who carefully corrected the various drafts of the book: Donna Coté, P. J. Karafiol, and Jay Wright. As usual I am grateful to my secretary, Katheryn Kepchar, for keeping up with the many revisions of the manuscript. I also want to give a word of thanks to Michael Aronson, Senior Editor in the Social Sciences at Harvard University Press, for spurring me on yet again toward publication, and to Nancy Clemente, Senior Editor at Harvard University Press, for the care and attention that she gave to editing the manuscript. Finally, over the years I have received financial support and moral encouragement from the John M. Olin Foundation, and its Executive Director, James Piereson, on this and on many other projects. To them a special note of thanks for help and support that extends over many years.

Chicago
August 15, 1994

Simple Rules for a Complex World

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Introduction

Too Many Lawyers, Too Much Law

The popular image of lawyers has not been favorable even in the best of times. However much the public at large rejoices in the transcendental value of the rule of law, it has never viewed the rule of lawyers with benevolence. Most people rightly have immense respect for their own lawyers, but distance from members of that profession does not make the heart grow fonder. As a group, lawyers are often condemned as greedy and opportunistic individuals who prey on the misery and misfortunes of others or as hired guns paid to perform wondrous deeds for the powerful, rich, and famous, while wreaking havoc on the public as a whole.

In recent years, casual empiricism senses an intensification of that sentiment: there are still more lawyers, too many lawyers, and suspicion and resentment of them. Perhaps we have not quite reached the level of anticommunist jokes: Q: What is the difference between capitalism and communism? A: In the former man exploits man; in the latter the reverse is true. But lawyer jokes must come in a close second. How else can one explain the raft of bad lawyer jokes that made the rounds even in my son Elliot's fourth-grade group at MacWillies Day Camp: Q: Why didn't the shark eat the lawyer? A: Professional courtesy. Or: Q: What are five lawyers at the bottom of the sea? A: A good start. Or: Q: What is your favorite law firm? A: Dewey, Cheatham & Howe. And what about the crude Miller Lite commercial where the determined rodeo cowboy lassoes and trusses up the "fat, rich tax

lawyer," to the evident satisfaction of knowing beer drinkers and the painful dissatisfaction of the state bar associations.

Lawyers do not like being the butt of popular jokes; nor should they (or is it we?). Just recently the American Bar Association has earmarked $700,000 to counter the negative image of lawyers; and Harvey Saferstein, the president of the California Bar Association, has undertaken a personal campaign against the jokes, which he believes have intensified over the past several years, only to be attacked as a defender of special privilege and a threat to the first amendment.[1] Yet campaigns will have no more effect than King Canute's efforts to hold back the tide. Failure to sway public opinion is one thing, but why are the popular perceptions so strong? Here the most disquieting answer is best: lawyers do a good job in serving the interests of their clients. The showboat trial lawyer who recovers a million-dollar verdict from the tire company for his drunk-driving client may receive a bad press; yet he does receive the approbation of the one person who really counts: his own client—who will recommend him to friends in a similar fix. Individual clients will rightly insist that lawyers take advantage of whatever opportunities the law gives them, and the entire canon of legal ethics requires the lawyer to do no less. When the legal system gives lawyers the room to wheel and deal, why should anyone be surprised that they take full advantage of it?

The reverberations are felt all the way down the line. These finely honed skills generate large fees that in turn translate into high salaries and partnership income—over $1,000,000 per partner in some firms.[2] Once the keys to success are clear, lawyers within the profession will retool or risk the loss of business; and young college graduates will decide whether their own personalities and temperaments suit the brisk practice of law. The ever increasing number of burnouts who complain about the pace will be replaced by fresh young legions eager for battle. The global uneasiness, the bad jokes, will do little to alter the shape and practices of the profession. The forces impelling lawyers and their clients to do the best they can *for themselves* within the rules of the game are too powerful for anyone to resist on an individual level. It is the rules of the game—the complex rules that undergird the modern legal culture—that should be the proper subject of public wrath.

Taken individually, many of these laws command wide public support, notwithstanding the larger intrusions to which they in part con-

tribute. But the cumulative and interactive effects of these laws are hard to understand. Hence it is also hard to understand why these laws are wrong, and tempting to assume that tinkering at the edges—another paperwork reduction act here, another good government commission there—will leave us with the core of the modern regulatory state *shorn of* its excesses. But public patience on that score is wearing thin. Lawyers' humor, like gallows humor, is born of both resentment and impotence. It shows how difficult it is to quell the public nervousness about the rising influence of lawyers throughout the land.

The concern starts at the top: our current President and his wife are graduates of the Yale Law School; our Congress, state legislative bodies, and administrative agencies at all levels are populated with lawyers. All this is true: indeed 42 percent of the members of our House of Representatives are lawyers, as are 61 percent of our senators, compared with about 18 percent of the members of comparable bodies in other industrial countries.[3] But the increase in lawyers is everywhere, and in one sense at least the numbers do tell the story.[4] Between 1900 and 1970, lawyers as a percentage of the population were roughly constant at around 1.3 per thousand of population, a figure slightly below the number of doctors for that same period, 1.8 per thousand. After 1970 the percentage for both professions started to rise, but the increase for lawyers outstripped that for physicians, even though much of the increase in physicians could be explained by the increasing amount of subsidized care delivered through the Medicare and Medicaid systems. By 1980 lawyers and doctors were in a dead heat, at about 2.5 practitioners per thousand. By 1987 the lawyers had inched ahead and stood at 2.9 per thousand, compared with 2.76 per thousand for doctors. By 1990 lawyers stood at 3.0 per thousand and the percentage is still climbing. The overall effects are perhaps best summarized by two revealing statistics. Between 1960 and 1985 the population of the United States grew by 30 percent, while the number of lawyers increased by 130 percent.[5] More instructive, perhaps, between 1972 and 1987 the number of *Washington* lawyers increased fourfold, from 11,000 to 45,000.[6] The clear implication is that the internal composition of lawyers' work is changing as well, away from commercial transactions (which produce wealth) to politics (which transfers and diminishes wealth simultaneously).

There is one telling explanation for the continued entry of the ablest

young Americans into the legal profession. The sharp increase in the number of lawyers has not been matched by any decline in the average income of lawyers. In fact in the years from 1960 to 1987, the average lawyer's income moved up and down in a band between $50,000 to $65,000 (in constant 1987 dollars) without any systematic direction. This stability of wages is notable given the enormous increase in the number of lawyers entering the profession after 1970. More striking perhaps, the mix within the pool of lawyers has changed in at least two ways. First, time has brought a steady sharp increase in the number of female lawyers in the pool (from about 1,000 graduates per year in 1970 to about 14,000 in 1985), while male graduates moved from about 15,000 in 1970 to a peak of about 25,000 in 1977, declining to about 22,000 in 1985. On average female lawyers have lower incomes than their male compatriots, most probably because of their greater commitment to family and children, although other explanations surely play a role. A breakdown of male wages before and after the shift suggests that the real earnings of lawyers are quite strong even with an increased supply of lawyers. Second, the average number of years of experience within the profession has declined sharply, going down from twenty-five years in the late 1960s to around thirteen or fourteen years in 1977–78, as a reflection of the huge influx, male and female, into the market in the preceding ten years. That number increased somewhat in the 1980s, but the wages retained much of their strength even though for individual lawyers earnings tended to peak at around twenty-seven years of experience and decline gradually thereafter.

It may well be that these heady numbers will not last forever, since the greater reliance on in-house lawyers for routine tasks promises, at least in the short run, to take salaries down a notch from the high levels that they reached in the late 1980s and early 1990s. Lawyers are out hunting for business, and are far more flexible and open about fee structures than they were even five years ago: straight hourly billing is less common, and a lower hourly fee in exchange for a piece of the money recovered is a common arrangement that admits of infinite variation. Younger associates now find that their probation periods are shorter than they were a decade or even five years ago, and even partners in this new competitive environment find themselves unceremoniously left without a job if they do not maintain their full quota of billable hours, usually in excess of two thousand per year. But even