

Seven simple rules – a libertarian hierarchy of needs

Psychological stepped models such as Maslow's hierarchy (physiological, safety, social, esteem, self-actualisation) of human needs can be attractively simple and clear. Contractarian models of behaviour are not so readily or universally accepted. Many people embrace libertarian axioms of consent and non-coercion in principle, but go on to argue that the model is unrealistic and unworkable in practice. The real world requires various compromises and trade-offs, or so they say. So a sequential concept-model of how we might have progressed from a 'state of nature' may even help in showing how and where, in a modern liberal democracy, government has become undesirably excessive.

Richard A Epstein develops an interesting expression of libertarian principles in his book *Simple Rules for a Complex World*. His theme is that, like government ownership, regulation of the means of production involves transfer of some parts of the owner's bundle of rights to the state, where they fall prey to the same difficulties as with socialist central planning. He seeks simplified legal rules to constrain self-interested behaviour by public officials. He does not pluck the rules out of thin air, but derives them mainly from generic aspects of how the common law developed in various countries.

His first four rules aim to create a system of strong individual rights in person and property and to facilitate voluntary exchanges that leave all parties better off than before. They cover individual self-ownership, acquisition of property by first possession, exchange by voluntary contract, and a system to prevent violence against people or property. This represents a strong libertarian position imposing obligations on individuals only for wrongful conduct such as aggression or promise-breaking.

1 Property rights in persons – the rule of individual self-ownership, or autonomy

This rule picks one person to be the owner of each person's natural talent – that very person, who almost always tends to value those assets the most. To many, this is obvious and a moral necessity, and few prefer the extreme alternative of slavery. As John Locke said, 'every man has a property in his own person'. But some do see a larger role for state control over both human and natural resources, and some may even prefer John Rawls' proposition that the 'morally arbitrary' distribution of natural talents and abilities is 'a collective asset, so that the more fortunate are to benefit only in ways that help those who have lost out'.

2 Acquisition of property – the rule of first possession

This rule – you take what you can get – assumes a mythical original position where nobody owns anything external to the self, and all would perish from hunger, so a swift and unilateral transition from non-ownership to ownership takes place as individuals acquire things (land and chattels). In a perfect world, all subsequent transactions will be in accord with the rules of the game. But the first-possession rule does not guarantee its own enforcement in a world filled with private violence and political corruption, so the chain of title is often broken beyond recognition. Thus, to stabilise relations for the future, a complete legal system must be able to rectify past wrongs. Typically, after an error has been committed, statutes of limitation force the wronged party to speak up or forever hold his peace. Also, unless and until the wronged party comes forward, the present possessor is endowed with all the attributes of an owner as against the rest of the world.

These two rules create order by giving people control of their own lives and assigning each external thing an owner. They 'set the original position against which all subsequent voluntary and forced exchanges should be measured'. The idea is that one should be very reluctant to abandon these foundational rules when tackling conceptually-later problems.

3 Acquisition of property – the rule of voluntary exchange

The basic mechanism of contract involves you choosing to part with something you value in exchange for something you value even more. This rule of voluntary contractual exchanges – of gains through trade – is capable of infinite repetition. Such exchanges level out some of the apparent ‘playing field’ imbalances of a system of first possession. In a world of scarce resources and unlimited human wants, the positive-sum game of voluntary exchange makes both sides better off, unlike the negative-sum game of theft.

4 Protecting what you have against aggression – the rule of “keep off”

This rule of keeping your hands to yourself is the basis of the law of tort (private injury to person or property). It describes much of the common-law focus on preventing trespass, larceny, murder, rape, and interference with the exchange relationship (contract) between parties. It allows people to use what they own without others imposing their will on them, and thus to live in peace with each other, if not in harmony. It deals with redress and compensation for harm inflicted on others.

These four rules establish, says Epstein, what some might call a libertarian synthesis. They describe a world with strong and well-defined rights in persons and property, complete freedom of exchange, and powerful protection against external threats.

In principle, such a world could exist without even the minimal coercive and taxing state which prompts the next two rules. Robert Nozick explored in *Anarchy, State, and Utopia* how the fourth rule might be administered in a libertarian anarchy by private agencies competing to provide law and order. On the other hand, a libertarian minarchist would accept the need to empower a taxing government to handle rule four – which immediately raises the problem of how to prevent governmental excess.

So, in a strategic retreat from the above ‘strong libertarianism’, Epstein’s next two rules assume that there are some other socially desirable outcomes (‘public goods’) which would not occur without overcoming difficulties such as the free-rider problem, and for which government is needed. The necessity rule addresses coordination and compensation, and the take-and-pay rule enables expropriation (tax or property) with full compensation to the expropriated individual. One implication of this last rule is that taxes must be used to provide services to those taxpayers, not redistributed to some other group.

5 Limited privilege for cases of private necessity – the rule of take and pay

As well as controlling aggression, there is a need to coordinate individuals where one party in a situational monopoly can hold out against the other for a huge portion of the potential gains from any contract. This rule recognises that basic rules of property may have to be suspended in dire necessity, where imminent peril threatens life or property. Necessity may upend the normal relationship between owner and stranger, so a man dying of thirst may use force to commandeer water from its owner, and a storm-bound ship’s crew may forcibly take refuge at a dock. There is a clear reciprocal obligation to provide just compensation to the owner, so the rule is “take now *and* pay later”.

6 Takings of property for public use on payment of just compensation – the rule of take and pay

Often a government needs to obtain material resources from individuals to provide services to the general public. So the sixth rule applies to the state and its power to take, regulate and tax property for public purposes. Holdouts and coordination problems may prevent consensus, so this problem is best tackled by government taking (expropriating) with payment of just compensation. Compensation may be implicit or ‘in kind’, as when all of a nation’s landowners surrendered their overflying

rights to allow the free air traffic from which all benefit. Compensation may be explicit, as when nearby landowners significantly disadvantaged by a busy airport are specifically compensated for their loss. As with private necessity, the aim is not to minimise the required compensation, but to leave the individual citizen indifferent to the loss because of the compensation paid, while the public at large (including that citizen) reaps the benefit of state action.

The case for using the just-compensation principle to restrict state regulation applies equally to tax. Almost everywhere at present, taxation is needed because it is never possible to gain unanimous consent about funding allegedly-needed public services. Taxes ought to make everybody better off so each taxpayer should receive, in exchange, government benefits worth more than the tax paid. A regime of flat taxes (proportionate with income, wealth or consumption) rather than progressive taxes reduces the general appetite for larger government and complex taxes paid by 'other people'.

In a sense this completes the system of simple rules. Personal and property rights enable work, resource-use and trade. Contract and protection ensure that property ownership does not harm neighbours. The principles of necessity and just compensation allow a sensible social response to the co-ordination problem without excessively violating the rights of unconsenting citizens. No system can avoid generating complex cases, but simple rules seem better than complex rules.

In *Simple Rules for a Complex World*, Epstein explores many facets of how these rules apply or have been violated. Recognising that modern governments have embraced social democratic and welfare-state systems which cannot be unwound swiftly, he discusses how the rules might assist in rectifying current injustices.

He also notes that Nozick's libertarian theory fails to justify the existence of the state; viewing all entitlements as absolute, it rules all forced exchanges out of bounds, regardless of their terms. On the other hand, it was not even clear to Rawls whether his *Theory of Justice* even tolerates the private ownership of productive property, and (as opposed to Locke's simple view) it does give each person a lien upon the product of every other person. The 'eminent domain' or take-and-pay approach appears to provide a more realistic yet principled approach to the realities of modern governance and human nature.

7 All redistributive programs should be financed by flat taxes

Recognising the powerful theme of modern social life to redistribute income and wealth through state action, Epstein then notes that the six simple rules are not designed to redistribute income or wealth from rich to poor, or indeed along any other axis, such as from city-dwellers to farmers. So he offers an additional simple rule that assumes some level of redistribution is socially appropriate and seeks to limit the damage. Special taxes on certain groups or activities divorce political control from financial responsibility. So the rule is conditional, saying that if there must be public redistribution, then it must be financed (by flat taxes) out of general revenues collected from the same group of individuals that votes the program into place.

When considering any particular government measure, Epstein's approach involves evaluating its likely administrative costs and incentive effects. The least objectionable measure would be easily applicable at low cost to bring general benefits with little or no disincentive effect on individuals (other than criminals). A good example would be policing to discourage murder and theft. A bad example would be policing to discourage smoking and types of consensual sex on private property.

While the simple rules would restrict uncompensated expropriation and discriminatory redistribution, they would not in themselves limit the size of government. Such limitation may need general under-

standing of how size (of any government) affects liberty and prosperity. Likewise the simple rules would not in themselves limit the range of victimless behaviours that a government attempts to control in response to the perceived and changing will of the electorate.

References

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