HUMAN RIGHTS

and

Anti-discrimination Legislation

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NEW ZEALAND BUSINESS ROUNDTABLE

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His books include *Bargaining With the State* (Princeton, 1993); *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard, 1992); *Cases and Materials on Torts* (Little, Brown, 5th ed, 1990); *Takings: Private Property and the Power of Eminent Domain* (Harvard, 1985); and *Modern Products Liability Law* (Greenwood Press, 1980).

Professor Epstein has written numerous articles on a wide range of legal and interdisciplinary subjects and taught courses in contracts, criminal law, health law and policy, legal history, property, real estate development and finance, jurisprudence and taxation, torts, and workers' compensation.

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HUMAN RIGHTS AND ANTI-DISCRIMINATION LEGISLATION

Human Rights Without Human Duties

It is easy to find strong similarities between the New Zealand Human Rights Act 1993 and the so-called anti-discrimination laws in the United States. Indeed, laws of this type are increasingly popular elsewhere in western democracies, and perhaps throughout the world, so that a comparison of these two systems carries with it wider implications. If I were to sum up my attitude to such laws in a single phrase, I would borrow the words originally used by Thomas Macaulay, perhaps inaccurately, in speaking about the US constitution—"all sail and no keel". Macaulay meant that the constitution pulled people powerfully along, but lacked any countervailing forces to provide it with stability. If we run a boat on all sail and no keel, we put ourselves in peril. Human rights laws of the type now in force in New Zealand expose us dangerously to this problem—so much so that, in my view, the entire statutory apparatus should be scrapped.

The imbalance inherent in the New Zealand Human Rights Act 1993 begins with its very title. As political rhetoric the title is a master stroke: not many people are likely to oppose a statute ostensibly designed to protect human rights. Each of us is an individual. The rights we are trying to protect are only those belonging to ourselves. And rights matter: we cannot argue that the premise of the statute is fundamentally misconceived by claiming perversely that there are no human rights. On the other hand, once we actually examine the contents of the Human

Rights Act 1993, some very troublesome questions arise. Three difficulties in particular are implicit in the Act's general organisation and operation.

First, while it establishes many ideals and rights on a variety of subjects, nobody claims that the entire corpus of New Zealand law dealing with rights enjoyed by individuals is contained in the Act. People possess many other rights, such as rights of conscience, rights of religion, rights of free speech, various rights of association, and even rights over one's own person and property. These rights have generally been regarded as having high importance. Yet why are these rights seen as important if they do not qualify for inclusion in a statute enumerating 'human rights'? And if we do not regard them as human rights, how should we then classify them?

It is salutary to compare the New Zealand Human Rights Act 1993 with a famous civil rights statute in the United States—not the 1964 Civil Rights Act, but the 1866 statute of the same name which came after the long Civil War over slavery. The earlier Civil Rights Act has absolutely nothing in common with the lists of rights in either of the two modern statutes. The 1866 statute gave to all individuals rights such as the right to contract, to hold property, to convey real estate, to testify in court, and to sue or be sued. It essentially guaranteed civil capacity—the right to participate in a social order organised under the law of property, contract and tort. Yet none of these rights are affirmed or even mentioned in the New Zealand Human Rights Act 1993. The concept of a right must be very plastic indeed if it can undergo so great a transformation that the items on today's list of human rights turn out to be completely different from those appearing on a similar list prepared after a major conflict ostensibly over fundamental human rights 125 years ago. Humankind has not changed enough in the interim to bring about any major revolution in fundamental beliefs. Indeed much of the most important self-understandings in America date to the original Bill of Rights which was appended to the Constitution in 1791.

My second point follows on closely from the first. There is a very

sharp difference in emphasis between the American Civil Rights Act of 1866 and the New Zealand Human Rights Act 1993. The 1866 statute is universal with respect to the rights that it affirms in all individuals. It says that every person shall have the right to contract, to dispose of property, and so forth. There is nothing in the statute that limits its benefits to some classes of individuals. Nor does it favour any side of a relationship by giving protection to one party and not to the other. It does not favour landlord over tenant, or employer over employee, or vice versa.

In this sense, the New Zealand Human Rights Act 1993 and the 1964 American Civil Rights Act are anything but human rights statutes—despite being labelled as such. In these Acts, only certain individuals, occupying certain roles, can claim the protection of the statute, while other individuals, occupying other roles, are unambiguously subjected by law to certain correlative duties. The 1964 Civil Rights Act starts out by declaring it to be unlawful for an employer to engage in certain forms of discrimination. This places a limitation on an employer. There is no correlative duty or limitation placed on an employee: he or she can still discriminate in the choice of employer on the basis of any of the characteristics that are ruled out of bounds when it comes to an employer choosing an employee. This strongly suggests that the appropriate level of generality is found not in the modern statutes but in the 1866 statute. A meaningful human rights statute will surely protect all individuals equally, and equal protection of the laws (to refer to one clause of the Fourteenth Amendment adopted in 1868 in large part to give Constitutional grounding to the 1866 Act) can only be afforded through some system of formal equality such as the 1866 Act provides.

There is a third, equally troublesome, feature of the modern statutes. Classical jurisprudence always insisted that human rights came with human duties, which were correlative to the rights created. Rights were never free goods; we always held a right against somebody else. To the extent that one person's liberty of action is expanded, the liberty of action of other individuals is necessarily limited. In designing a system of rights,

the advantages that we conceive of and create for certain individuals should more than offset the disadvantages thereby imposed upon others. Any comprehensive system of rights should thus be couched within a framework of correlative duties. A neutral presentation of the Human Rights Act 1993 would entitle it the 'Human Rights and Duties Act', the consequences of which suddenly sound much less unambiguously positive. Opponents of the Act might even prefer to call it the 'Human Duties Act'—a title which does not draw our attention to the benefits associated with the statute, while wrongly suggesting that the Act merely sets out the duties of various individuals. Such a title would be no more misleading than the title 'Human Rights Act'.

Once one recognises these three difficulties with the New Zealand statute, certain other conclusions quickly follow. In particular, if we do not recognise—explicitly and publicly—the duties associated with rights, there will be an inherent tendency to ignore the associated costs. We will have the happy illusion that the constraints of scarcity do not really matter—that we will be able to magnify those rights without limitation while nobody need pay the cost either directly or indirectly. That is, of course, a fantasy.

How can such a fantasy take hold? Partly, I believe, through employing the following technique. Instead of talking in terms of human beings on both sides of the rights-duties divide, we impersonalise the nature of the entities on whom the duties are imposed. Individual people receive the benefits created by the statute, but its burdens are imposed on abstract entities such as corporations, unions, universities and other organisations. This mental conjuring trick cannot, of course, be justified. The collectives on which we impose duties are comprised of individuals. Organisations do not act themselves; they act through individuals and for individuals, be they shareholders, union members or faculty and students. Consequently, in analysing the impact of the statute we must always follow a postulate of methodological individualism. We cannot simply externalise human rights to a set of correlative duties on abstract bodies. We must trace the implications of the statute through the entity to the particular

individuals on whom those duties will be imposed. In politics the same principle applies. It is meaningless to say that the government has a 'duty' to supply benefits to its citizens. Any benefits created by the government must necessarily be backed by regulation, taxation or the imposition of liability on other individuals. Those burdens must be recognised and weighed against the benefits, if an appropriate balance is to be obtained. And we can be sure that this balance will not be obtained if public rhetoric suppresses the relevant trade-offs.

Moreover, when the cost elements of a modern human rights statute are allowed to enter into any equation, they are never placed on the same footing as the rights side. It is characteristic of these statutes that the rights are put, so to speak, in bold 16 point type at the top of the page while underneath and on one side in barely legible 8 point type are the costs. If the costs turn out to be too great, they may not even feature at all. The almost universal tendency is thus to underestimate the costs, because they do not enter simultaneously into the calculations as an inescapable correlative duty. Instead, they are superimposed upon the general system only as an afterthought. We can have 'rights' that are extraordinarily costly for other individuals, and instead of treating them as infringements of ordinary liberties we treat them as the price that must be paid to enforce some outcome which is seen as self-evidently desirable.

There is a further paradox associated with modern human rights legislation. If the specified rights are those most fundamental to human liberties, why have they taken so long in historical terms to come on to the forefront of the legislative agenda? Their introduction dates only from the 1960s. They are not the issues over which wars were fought back in the thirteenth century. Nor are they the factors most people would regard as truly fundamental for their own well-being and security. If I were asked to choose, for example, between the protection of the New Zealand Human Rights Act 1993, with its various prohibitions on discrimination, and the common law prohibition against the use of force against other individuals, I have no doubts whatsoever as to which set of rights I would discard. I would allow people to refuse to deal with

me in situations such as employment, so long as I believed that the state was around to protect my bodily integrity. I doubt that in any real world setting one could find even a single person who would choose differently. Nobody would prefer the risk of being killed—no matter how 'non-discriminatory' the slaughter—to a general rule prohibiting the use of force. Such a rule promotes the security of us all, even at the expense of some liberty which we would all willingly sacrifice for the gains we obtain.

An Alternative Approach to Civil Rights

This gives us a strong clue as to what an alternative concept of human rights might look like. Here I reveal myself as an unabashed and unashamed classical liberal who believes the modern definition of human rights is a rhetorical ploy and a mistake. Any soundly based system of rights must have the appropriate level of universality and must recognise the dual nature of rights and obligations. I am confident that the difficulties found with the New Zealand Human Rights Act 1993 can all be overcome in an alternative statute.

In my own formulation, all individuals are owners of their own selves, and of those resources they can acquire either through original possession or through contract and exchange with other individuals. There is nothing people care about which cannot fall under the class of either labour or property, including the crucial right to associate with other individuals. This gives us a broad definition untroubled by the ambiguity of modern statutes.

Such a system meets our first concern, because it is general and comprehensive. Nor is this system merely a form of class legislation disguised under the veneer of human rights. This is not a statute that guarantees rights to employees against employers, tenants against landlords, buyers against sellers, or customers against their banks and insurance companies. It merely gives all individuals the right to dispose of and control their own labour—which is their personal liberty—and their own property in any way, and under any circumstances, that they see fit. It

guarantees a degree of formal equality. Formal equality will never guarantee perfect social equality. But it is a dangerous illusion to think we guarantee social equality by a statute which systematically violates the requirements of formal equality. We are better advised to promote liberty, without attempting to introduce class legislation. It gives us a system that is self-contained and universal in the safeguards it provides to all individuals.

When we come to the question of how correlative duties are to be incorporated, my classical liberal system also compares well with its modern competitor. For any given right, the obligations on the other side are clearly defined. To the extent that individuals exercise their personal liberties, they must refrain from taking actions that interfere with other individuals. This applies to the way in which they run their own lives, enter into voluntary exchanges, and utilise or dispose of their property. My system must pass the test as to whether, under these circumstances, the security we each gain from the protection of our rights over our own person and property is worth more to us than the ability to restrict those liberties when they are vested in other people.

The answer under these circumstances is unambiguous. To the extent that we create individual rights over persons and property, we have given an initial set of endowments to the people who most value and know how to use them. No Human Rights Commission can dictate what is relevant to my own preferences, or to the way in which I think and act in the world. It is a vast mistake to assume that I—or anybody else—has a schedule of legitimate information that allows me, or you, to set the preferences and control the choices of other individuals. Something is of value to an individual if it enhances his or her utility, which is subjectively determined. In my system, the protection given to other individuals is a powerful one: if they do not agree with my conceptions of value they can choose to trade with other individuals. They can leave me alone, just as I can leave them alone. Under this model there is a series of initial entitlements which, in a series of voluntary exchanges, people can use and combine in any number of mutually advantageous

ways. We can then have an indefinite number of such exchanges. Under this system of free contracting we get the best division of labour, and the best redeployment of human and natural resources. In the long run such a system will greatly outperform any system of command and control in which people are told what they can do and how they can do it.

A Short, Sensible Civil Rights Statute

Not only do I believe this system will work better than the system in the Human Rights Act 1993, but it can be implemented far more cheaply. Indeed it is perfectly possible to draft on a single page a statute giving a comprehensive definition of all rights and duties for all individuals. Such a statute can be understood by anyone of ordinary intelligence in a relatively short time. Unlike the New Zealand Human Rights Act 1993, it requires no special administrative agencies or elaborate tribunals to enforce its rules, nor do those rules have the hopelessly *ad hoc* quality of those in the Human Rights Act 1993.

Human Rights Act, Revised

S1. Every individual and group shall, in the disposition of property or labour, have the right to contract or otherwise do business with any other individual or group whom they choose on whatever terms and conditions they see fit.

S2. Every individual and group may choose or refuse to contract or otherwise discriminate for or against any other group or individual for whatever reasons they see fit, including without limitation, race, creed, sex, religion, age, disability, marital status, or sexual orientation.

S3. (a) Every individual or group may ask of any other individual or group any question they see fit, no matter how offensive, impertinent, illegitimate, superficial or irrelevant.

(b) Every individual or group may refuse to answer any question, however tactful, pertinent, legitimate, insightful, or relevant.

S4. (a) Every agreement or contract shall be construed in accordance with the ordinary meanings of its terms, as informed by custom and common usage within the relevant trade or industry.

(b) No construction or interpretation of any agreement or contract shall be made or influenced by principles of unconscionability, adhesion, inequality of bargaining power, *contra proferentem,* or any other rule that presumes one party to the agreement or contract enjoys a protected or preferred social status relative to the other.

S5. Any application for offering transportation or other services for hire on the public highway or waterways, or in the public airspace, shall be granted on the ground that its approval advances the public interest, convenience and necessity.

S6. All actions brought to enforce rights under any contract or agreement shall be commenced in the High Court. The Human Rights Commission, the Employment Court, the . . . , the . . . , and the . . . are hereby abolished.

The Two Approaches Compared

To illustrate the differences between my approach and that of the Human Rights Commission, I will examine two aspects of the work of the Commission, and see how they compare with my alternative conceptual framework. By using New Zealand examples, I am not implying that human rights legislation in this country is particularly bad compared with the United States. Our own anti-discrimination laws give rise to problems at least as grave as those found in New Zealand. The American laws have been in place for longer, and our administrative apparatus has grown in power and influence at every level and layer of government.

To facilitate our comparison, consider first how information will be generated and transmitted in any market. In my own proposed model the process is quite simple. One person can ask another person any question at all. That party can decline to answer, and thus refuse to give the information that the questioner seeks and believes is relevant. If the questioner receives no reply, she is faced with a choice: she can simply

accept that she does not have that information, or she can put the same question to somebody else who may be willing to answer it. By these simple interplays between individuals, the right amount of information will tend to be generated about factors that are relevant to certain long-term contracts, whether they be for employment or for the sale of property. In this system there is no external measure of relevance: there is simply an interchange between two parties to decide what they care about and how it will be provided.

This system deals much more powerfully than alternative systems with one of the major criticisms of markets which are used to justify state action. It is often said that people cannot make rational choices where there is incomplete information. But the Human Rights Act 1993 has the state taking exactly the wrong approach with respect to information. The Act is the complete opposite to a full disclosure statute such as we have in securities law (which I also believe to be a mistake because of its mandatory nature). The Human Rights Act 1993 is a comprehensive non-disclosure Act. The 'informed choices' that we prefer people to make become 'uninformed choices', because the Act deprives people of information they would regard as relevant. The conclusion from standard theory on markets and information is that the factors regarded by the Human Rights Commission as irrelevant for decision making are in fact highly relevant, indeed critical. The New Zealand statute is heading full bore in the wrong direction.

Age is a good example. Nobody can doubt that age is relevant to certain decisions as to whether or not to hire a person for a certain job. We think about age when we contemplate marriage, for all the obvious reasons. Similar obvious reasons apply with respect to jobs. An organisation hiring individuals is not just hiring them for the immediate period to which the initial contract of employment applies. It is attempting to hire people who will also be with the organisation years—or even decades—down the track. In so doing, it will be attempting to amortise the costs of hiring and training a person over the expected period of the employment relationship. If we are hiring somebody in the context of

a 20-year timeframe, a 57-year old person will clearly expose us to much greater retirement risk and mortality risk than a much younger person. We will be less likely to recover our investment over the life of the contract. We act rationally when we decide that this particular position should be awarded to someone else.

In many circumstances, then, rational decisions about the use of human capital and long-term employment contracts necessarily require information about age. When statutes here and in the United States lay down that age is irrelevant and prevent mandatory retirement, they are effectively saying that somebody in the government knows so much about the workings of business that they can tell every firm adopting a contrary practice that they are wrong-headed. The implicit proposition is that all of these firms have failed to understand some hidden moral imperative or practical economic argument in structuring their employment arrangements. It is one thing merely to be wrong in particular cases. No system functions perfectly, no matter what the incentive structure. But it is quite another thing to be wrong system-wide, without possibility of correction, which is what happens when the statute asserts a monopoly over wisdom, and forces everybody else to follow its dictates against their own better judgment.

It would be a mistake to assume that older workers are always harmed by discriminatory policies. It is easy to identify other reasons why firms may want to discriminate by age—reasons that run in the opposite direction. A firm may wish to hire people with experience, or people of a certain age, because they will be more compatible with the firm's customer base. Under some circumstances, the person aged 35 may be unsuitable to the job and the person aged 57 highly desirable. It is mistaken for the Human Rights Act 1993 to assume that, if people acquire information on age, they will always use it toward the same end. The Act assumes that the intention is to discriminate against old people, or against young people. The reality is entirely more nuanced and complex. What people are looking for has nothing to do with discrimination in the invidious sense, but with fit. If individuals are allowed to

pair up on that basis we will see higher employment and output, because the matching of people to jobs will be more appropriate to the tastes and temperaments of individuals. The more one understands about human resource economics, the more apparent it becomes that every single characteristic regarded as irrelevant under the Human Rights Act 1993 may in some settings be absolutely critical for the intelligent deployment of resources. One cannot have a 100 percent error rate by chance. Results that bad come only when the initial premise is itself faulty.

I have thus far argued that the Human Rights Act 1993 is so misconceived that it is pointing in precisely the wrong direction. Relaxing the prohibition on age would not be an attempt to switch the advantage from old to young, or from young to old. It would be a move designed to achieve a better fit between jobs and the people who fill them. Anyone who works in management will tell you that fit, morale and cohesiveness are critical to the culture of an organisation. Yet these 'soft' features—so important to the operation of markets—are ignored by a blunderbuss statute that paradoxically takes a highly atomistic view of an employee's 'merit' that is routinely rejected in market settings. That truncated view of fit survives only on the false premise that some omniscient being knows how every institution should run, from a small shop to a large manufacturing corporation. The statute is an example of the one-suit-fits-all mentality that is so destructive of productive human relationships.

The second element which is wrong with the New Zealand human rights legislation relates to the tendency of the Commission to worry so little about costs relative to benefits. One of the Commission's most controversial decisions has been the Stagecoach case, where it ruled that Wellington's bus company needed to make its buses accessible to people in wheelchairs. I have read two accounts of this case. One account was the opinion put out by the Commission in response to the complaint and the other was an article in *The Dominion* by the journalist Rosemary McLeod. The accounts offer wildly different estimations of the costs and benefits associated with the Commission's ruling. Instructively, it was Rosemary McLeod who offered by far the most specific information

about the choices involved, the types of adjustments that would need to be made to implement the ruling, and the impact of these changes on the rest of the clientele of the company.

The most astonishing thing about the decision was the Commission's claim that the managing director of Stagecoach was unaware of the benefits to his operation of following its recommended practice. This seemed incredible. It is simply not plausible to assume that a person who is involved full time in a business, with incentives to examine every conceivable option to make the business run better, can overlook measures which would be to the advantage of his own company, while somebody who looks at it from the outside, without any financial responsibility whatsoever, and with all sorts of implicit biases based upon a different institutional agenda, will get it right. We should all ask ourselves the following very simple question. Assume there are two companies in which we can invest. One is Stagecoach Wellington, which will operate under the supervision of the Human Rights Commission. The other is a firm which is identical in all respects except that it will not be subject to the supervision of the Human Rights Commission. Which company would we choose to invest in, if it was our own money at stake? I, and, I dare say, Ms Jefferies (Human Rights Commissioner), and everyone else would place our money with the unregulated firm. I am not arguing that firms are always right and regulators always wrong. I am arguing that it is absurd to suggest that a regulator second-guessing the commercial decisions of a company will do that task as well, over the long run, as the company itself. We should play the sensible odds.

In conclusion, I believe that my own one-page statute meets, at least as a first approximation, the requirements of a human rights law in a much simpler and cheaper fashion than the current system. If somebody does not like this statute, can they improve upon it? Can they justify the hundreds of millions of dollars in forgone economic efficiency that will be required to run an alternative system? I think not. It is important, too, to understand what my alternative statute really means. It does not say that we like, invite, encourage or celebrate stupid, ignorant, foolish,

invasive and impertinent questions. Rather, it effectively says that if we allow individuals to choose the questions they are legally entitled to ask, the incentives they face will lead them to ask the most relevant types of questions. They will tend to discriminate in ways that are productive rather than invidious. This is not a statute which says we have no moral sense and no social conscience. It merely says that our legal rules should be those that are relatively lean with respect to what we require of other individuals, and that the set of social sanctions which are informally developed and articulated can, at far lower cost, deal with repugnant forms of conduct. Any contest between the alternative package and my single page is like a battle between a 1942 vacuum tube special and today's integrated circuits on a chip, in terms of their capacity to deliver services relative to the cost of the product.

Response by Pamela Jefferies, Human Rights Commissioner

THOSE OF US WHO WERE RAISED ON THE BIBLE and in various Christian churches will know the text saying that we should love our neighbours as ourselves, which is the shortest and briefest human rights law that I know. It is even shorter than Professor Epstein's single page. Some of us who were raised by Victorian grandmothers were told to do unto others as we would have them do unto us, which is the slightly longer version of the biblical injunction. And I have sometimes wondered what has gone wrong with New Zealand society that in 1993 we should need legislation of 153 clauses saying that, in some very selective circumstances and narrow aspects of our lives, we shall treat each other with fairness, justice and equity—which is the purpose behind the Human Rights Act 1993.

I do not have time to go through Professor Epstein's arguments step by step, but I do wish to stress two or three matters. First, our New Zealand human rights legislation, from the time of the original Human Rights Commission Act 1977, has been a reciprocator of community standards. The 1977 legislation was put in place because a large number of New Zealanders were saying that imbalances of power—including imbalances between employers and employees—were not producing fairness, justice and equity. The united womens' conventions of the 1970s made it clear that those participating were looking for a firm statement about the role of women in our society and their right to be treated equitably. Out of that came the Human Rights Commission Act 1977. There were also strong international currents at that time. There

is a link between the ratification by New Zealand of the convention on elimination of discrimination against women—which followed on fairly quickly after that first Act—and the way in which its ideas were incorporated in the New Zealand Bill of Rights Act 1990. There was also a link between the setting up of the Commissioner for Children and the ratification of the convention on children. And again there was a link between the convention on the elimination of racial discrimination and the former Race Relations Act 1971.

There have thus been a number of influences at play which have resulted in the introduction of human rights legislation, broadly defined. I will be the first to admit that this legislation should reflect the social attitudes and community standards of the times. I believe that this is one of the reasons why the Human Rights Commission exists as a commission, and not as some form of judicial body applying a very narrow interpretation of the law to a particular set of circumstances. Issues that come before the Human Rights Commission are dealt with by a body of people selected for their expertise and experience in the community, so that the interpretation of human rights law reflects the standards and wishes of that community in a wider and more liberal way.

I believe that one of the truly fundamental things covered by our human rights law is access to employment. If people were asked whether they wished to be protected against the use of force by a foreign invader, or whether they wanted to have access to employment, I am sure that access to employment would rank very high. The fundamental principle behind the anti-discrimination provisions of the Human Rights Act 1993 is the prohibition of differential treatment of people on the grounds of personal characteristics that are—and should be—irrelevant, particularly in the fields of accommodation, employment, and the supply of goods and services. It requires landlords, employers and suppliers of goods and services to consider people as individuals. It asks them not to draw conclusions on the basis of membership of a class defined by age, race, sex, disability and so on.

Does it work? Well, I have had a unique experience in the human rights field, in that after the 1977 Act I spent 10 years on the Equal Opportunities Tribunal. Many of the early definitional cases came in front of me, and I believe that experience is relevant in my role in administering the Human Rights Act 1993. It is worth reminding ourselves what New Zealand society was like prior to the Human Rights Commission Act 1977. It was quite legitimate for an employer to say to an individual: "We will not train you for this particular job because you are a woman. This career is not available to you." It was equally acceptable for an employer to operate a business with a rule to the effect that no one under 21 could be a supervisor, regardless of whether a person was incompetent at 21 or competent at 19. We can see how our society has changed. When I went to train as an accountant I was the sole girl in my year. Today women comprise more than 50 percent of the enrolments in both law schools and accounting schools. That change has come about in large part in response to changing community attitudes, which have been reinforced by human rights legislation.

One current issue that Professor Epstein has touched on is access to employment by people with a disability. I will not talk specifically about the Stagecoach case, because it is *sub judice* at the moment. But the issues surrounding disability are important ones for the community. One might well argue that in a completely free environment people with disabilities, with a one page statement of their human rights, could go out and attempt to access employment. But as a community we have two choices. We can allow them to stay on social welfare benefits and bear the costs of disability in that way, or we can respond to the desire of these people to be treated like the rest of us and give them access to employment. Do we place some reasonable costs on a firm which can then pass them on to the wider community through its pricing structure, or do we just leave people with disabilities to rot? I would suggest to you that our human rights law is responsive to community desires to run the fair, just and equitable society New Zealand prides itself on.

Questions

My son is the trustee of a superannuation scheme of which I am the sole beneficiary. He received in the mail yesterday a letter from our government actuary, who supervises superannuation schemes registered in New Zealand. The actuary wanted to know, on behalf of the Human Rights Commissioner, whether, having taken independent—and presumably expensive—legal advice, my son was satisfied that the scheme was being administered with due respect to human rights. The answer to this rather omnibus question was expected to be 'yes' or 'no'. The answer would be referred to the Commissioner for such attention as it required—which I took to be a threat. I will find your Act extremely useful for my son when he composes an answer to a very stupid enquiry.

Richard Epstein

There is actually something very instructive here. Ms Jefferies talks about a morality of aspiration, one with religious overtones. I worry much more about a morality of implication and of implementation. I do not wish to be vicious, mean or nasty to other people. That is not the object of any of us. But the legal system can have certain degrees of parity and social systems have others. Typically we start off with some programme that looks noble and lofty, but by the time we appreciate all of its implications we have descended to some form of Orwellian madness. The unanticipated friction and dislocation that takes place as a result of the statute means that the aspirations are never realised, but rather the opposite occurs.

Let us talk about disability. The idea that anyone would want to leave people at home to rot is crazy. It is implementation that matters. There are two ways to handle the disability issue. First, in any job market some employers will be niche firms which will specialise purely in hiring people with disabilities. Before the United States adopted its anti-discrimination legislation, some employers acquired certain types of facilities such as ramps or reading machines (depending on the disability they were dealing with), amortised them across large numbers of employees with disabilities and traded profitably in specialised markets. In addition, the government can provide a subsidy to firms for hiring workers with certain types of disabilities. There is no need to use coercion when there are other ways to handle the issue.

Ms Jefferies is also creating a problem that should be avoided. A basic aim should be to prevent as many people as possible from becoming handicapped. One important way to do that is to raise the general standard of living so that more people will have the resources to keep out of harm's way. But we won't raise standards of living with an economically damaging human rights statute: by raising production costs and distorting business decisions it lowers per capita incomes and makes a major indirect contribution to the very problem Ms Jefferies is concerned about. We should not be fooled by an abstract argument that we need such a statute for a just, kind, and compassionate society. All of us can be just, kind and compassionate without governmental instruction. And as the questioner said, there is a constant threat behind the benevolence. It is not the people Ms Jefferies is talking *for* who are frightened, but the people she is talking *to*. They only see a whip, because that is how it all eventually works—through coercion. And we must question whether that coercion is justified, and to do that we must explain what is wrong with the subsidy alternative.

Pamela Jefferies

There is nothing wrong with the subsidy alternative but there are a variety of ways in which costs can be shared across society. It is entirely possible to spread the cost in that way using government funds. But the govern-

ment has no money except what taxpayers give it. In New Zealand that is not the way things are currently done. Grants from the government are anathema to supporters of the free market.

Richard Epstein

They are not anathema. Taxation is an explicit, overt burden which can be quantified. Regulations are hidden and unquantifiable, but they are often a larger tax. If we are forcing employers to hire workers with disabilities we are taxing right now. The whole Human Rights Act 1993 is a huge tax. The question is whether taxation should be overt or concealed. The academic literature on taxation and regulation and their substitute relationship has been well established for the last 25 years. It is only in a political context that the two are treated as if they are in different moral domains. If we understand regulation as imposing a burden upon one person for the benefit of another, we can duplicate that by taxing the first person and transferring the wealth to the second. We can choose either to quantify the costs publicly and expose them for responsible political debate or to bury them in a form of regulation overblown by a rhetoric of rights.

Professor Epstein, your analysis reminded me of the old saying that economics is a dismal science. It seems a pity for human rights and other aspects of law to be dismal as well. I do not share your belief in the perfection of the market and in the view that we are all governed by self-interest. An economic analysis of human rights legislation is valid as far as it goes, but it is just one tool. The fallacy of people who adopt it as their sole tool is that they close their eyes to more fundamental issues and moral values. Anatole France said last century that "the Law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread". We have moved on from that, and you would no doubt favour a paraphase to the effect that the law in its majestic equality permits rich and poor alike to sleep under bridges, beg in the streets or steal bread. What is wrong with going one step further, and—to take just one human right—saying there should be freedom from poverty?

Richard Epstein

First of all, you said that I believed markets are perfect. I did not say that: markets are imperfect institutions, and legislation is also imperfect. We must make an assessment of the relative size of the imperfections, given the incentives under which people operate in both settings. To the extent that individuals have both self-interest and information about themselves, they are correspondingly better judges of their desires, and better judges of the types of alternatives they are willing to sacrifice in order to obtain those desires. Any system of regulation with compassion must be able to provide people with what they want. How can regulators know what people want? Legislation ostensibly designed to benefit one group can end up harming another. For example, curb cuts will help people in wheelchairs, but make it harder for people who are blind. We need to be very aware of the situation on both sides before we can be sure whether we are helping individuals.

You also raised the question of self-interest. Often self-interest is a destructive force and often it is immensely creative. Which force dominates will generally depend on the incentive structure that surrounds the self-interest. It is very easy to talk about such things as market failures, monopoly and information problems, but it is equally important to recognise the failures of democratic systems. The political process is subject to capture, faction, intrigue and special interest. We have to decide which problem is likely to be larger in any particular circumstances, and how failures can be minimised. Your analysis assumes away the public choice difficulties and the perverse outcomes that can flow from these statutes. We have not heard any defence of the age discrimination rule. No homily in the Bible about treating other people the way we would want to be treated justifies the statutory prohibition on mandatory retirement—which was in fact the universal 'do unto others as you would have them do unto you' type of rule.

Now we come to the question of moral values. One thing we discover about moral values in legal discourse, as opposed to my own utilitarian analysis, is that they end up becoming an empty residual

category. In other words, any concept like equity that you may want to introduce can be put into a framework which looks at the impacts on the fortunes and welfare of all individuals, subject to legal regulations, in the economic manner that I have employed. Typically people say that they can identify a moral value out there which is important. Then when you ask them to specify how it operates and how it interacts with the other elements in the picture, you find that the distinctive moral feature of the claim is just air. It is not that we do not have moral instincts. But I would ask you to consider this: If we have two legal regimes, one of which advances everybody in a subjectively conceived fashion to the level of 10 and the other which advances everybody to the level of 8, where do we find the offsetting moral value that makes us all collectively poorer but somehow happier? I do not believe we can discover it. In defending market competition we are defending Pareto optimality, a cardinal welfare standard.

Finally, let us come to Anatole France. Rich and poor people are allowed the same rights. Suppose we decided to change the rule on formal equality and do things in another way. For example, suppose we instead had a selective rule which said that rich people are allowed to make contracts to sell their labour as they see fit, but that poor people are not allowed to do that. What would we say about that statute? Presumably you would think it a lot worse than a rule which gave people formal equality but where there was simply disparate willingness to use the rights so granted. Yet that is exactly what we have done in the United States and in most other countries. If I am a skilled worker who can earn ten, fifty or a hundred dollars an hour, the minimum wage does not bind me. But it is very different for some less fortunate unskilled person who cannot earn the hourly minimum of, say, $4.25, the level currently mandated by the US government. The law is telling them they can not offer their labour. It harms the very people we are surely working to help, and this restriction of their alternatives is trumpeted as a human right. If we create formal equality, there may not be equal access to all rights. But if the regime is rightly conceived we will do better by all

individuals than any selective system.

Let me ask a question on behalf of Anatole France. Suppose we have a statute that allows all individuals to sleep at night under bridges. You are now in charge of the legislative reform commission. How do you wish to modify that statute?

Not that statute.

Yes that statute. That is the statute you gave. That is the statute I want you to modify. Can you do it?

That is not the question.

That *was* the question. If you think your illustration is an outrage to all liberal societies, there must be some alternative system that will improve on it. I could actually give you an argument regarding begging. I could argue that beggars in some sense start off being friendly and end up being coercive, and it might be that under certain circumstances we decide to limit their freedom. That is a plausible argument. But when I wanted to know what you would change in response to Anatole France's illustration, it seems it is all a metaphor. It is not a metaphor. It seemed powerful because it was an example. And the reply is powerful because there is no alternative statute.

I will respond to that, but not in direct answer to your question. You argue that we should go back to eighteenth century laissez-faire economic rights which are supported by the Chicago school. I am not arguing that we should abolish the right to sleep under bridges and replace it with something else. We should keep our economic rights. They are fundamental, although in some areas they are curtailed more than some people would like. I am saying we have moved on from there. After two world wars we started to think more seriously about fundamental values and we came up with the Declaration of Human Rights. Those rights are also worth fighting for and enforcing.

I think that is dead wrong. You cannot argue that there is no inconsistency in keeping the classical rights of property and free exchange while simultaneously embracing these modern 'rights'. My standard rule allows everybody to choose their trading partners. When we then prohibit certain grounds for a market exchange, we do not just have the single consequence of creating new rights. We limit others. Rights are like economic resources: they are scarce. We can only have so many of them that are consistent with each other. When we add new ones we take away others. The correlative duties apply on both sides. The question is whether we will get more housing when everybody has a 'right' to housing, or whether we will get more housing when everybody has a right to buy a house providing they find somebody to sell it to them. The experience of socialism is clear: when we define rights in terms of end states rather than processes, we end up with grey, dreary, standard housing, with everyone poorly housed. We are far better advised to opt for the wealth-creating properties of a competitive housing market.

Laissez faire is accused of being a system without compassion. Yet the level of charitable giving and concern for our fellow citizens was far higher in 1890 in the United States than it is today. The University of Chicago was not founded by a government, it was founded by John D Rockefeller. Barnard was founded by Mr Barnard, Vasser was founded by Mr Vasser, and so on down the line. Today we have destroyed or undercut many of those charitable impulses. When we demand that the state undertakes the duties of ostensible benevolence, this ensures that the money does not come through benevolence at all. We kill off the opportunity for private benevolence. We end up with a far more narrow and egotistical society under the rubric of welfare rights than under a system where we can go to another individual and say: "Look, Joe, the people there are hungry. If you don't help them nobody else will." We can look him in the eye and ask him whether he will say 'no'. Under state welfare most of those impulses are lost. We would do better with the nineteenth century model than we do today. There was nothing

about laissez faire which said people had to be greedy. It simply recognised that the ability to make choices about the use of one's talents and resources was very important. It relied on the fact that if there were five individuals who were thoroughly selfish and greedy, there were 95 who were not. We are better off relying on their individual initiative rather than attempting to rope in the other 5 per cent through coercive mechanisms such as the Human Rights Act 1993 which are a huge drain on general welfare.

How neutral are the basic entitlements that people start with? The distribution of property, and what people get from exchange, is not ideologically neutral.

Richard Epstein

It is one thing to say that we have no neutral baseline. It is much harder for people who deny the old baselines to put forward a better alternative. The type of exchange which the two sides tend to have is quite instructive. I, for instance, am articulating a fairly precise and detailed account of my preferred legal regime. That system has a high degree of completeness (though I have ignored some minor variations which are not relevant here). And the alternative amounts simply to an argument to the effect that, since we really do not know what the appropriate answer is, we might as well be socialist. That does not follow at all.

Your question was about how we get these entitlements. The first thing to remember is that all rights have correlative duties. We can conduct a hypothetical experiment by considering all the alternative rights designations that can be created in the original position, and asking how they will play out. The preferred alternative will be that which dominates the other by the Paretian standard.

Let us start with individual autonomy. We can have the following rule: 50 percent of us will be masters and 50 percent of us slaves, with the decision as to who will be which made by the flip of a coin. Alternatively, we could have the rule of individual self-ownership. Which do you want? We all know the answer: you believe in autonomy. In

the case of property there is an inherent trade-off. If we have a system of exclusive rights, those who are excluded will lose by virtue of that exclusion. But on the other hand they will win through their ability to have exchanges with well-defined owners. If we have common rights, there is no exclusion. Then we have major coordination problems as to how the resource will be governed, because we have created a miniature political society. That is the trade-off.

But a person who does not own property, and who is not allowed to sleep on the streets, has nowhere to go.

I do not agree. The classical answer given to that objection by Locke and by Adam Smith is correct. There are two parts to it. First, all persons have property in their own labour. This is an endowment of enormous positive value: through exchanging our labour, we can acquire tangible assets. And if you doubt whether that acquisition right through exchange is worth anything, I can pose you the familiar desert island question. You can be given an endowment of unowned bricks and mortar and rocks and rubble, and you can be the autonomous owner of it all, or you can be set down in the middle of Auckland with no assets at all save the right to exchange your labour services and proceed that way to advance yourself. My immediate forebears came to the United States without the shirt on their back. They had only their labour, and it took them less than one generation to run their children through college and medical school. I do not regard the ownership of labour as a trivial matter.

Secondly, the rule on ownership is not a rule of centralised control by government. A first possession rule with respect to land says that everybody can go out and buy land. This will give us diffuse ownership out of the initial position. If we have government ownership, we will have state monopolies. If you think that makes no difference, remember the way the issue played itself out in the first part of the twentieth century with respect to the radio spectrum. One system said that the government could own the spectrum and then could dole it out by licence.

Governments spent a fortune deciding who received the licence, and ended up with major political censorship and incredible levels of intrigue and a suppression of minority viewpoints over the air. The older rules said that once somebody had started to broadcast on a frequency, other parties could be excluded by ordinary common law actions. This was overridden by the state.

The allocation consequences of the two systems are vastly different. In a world of telecommunications and broadcasting, the performance of a common law property system, if allowed to operate, would dominate the alternative system of state licensure. These are cases where private solutions, protected by government rules against broadcast interference, work.

Another example is the water in rivers, lakes and oceans. Here the common law systems never evolved exclusive systems of property rights, because the cost of exclusion was too high relative to the cost of governance. If we go through the optimisation process of minimising the sum of these two costs, different solutions will emerge for different resources. It is simply not true that somebody with my economic framework must be remorselessly in favour of private property. Common property does quite well—but usually in the areas where it was recognised by the classical common and, as the point is instructive, civil law as well.

Pamela Jefferies

I would make one final comment. Having been an accountant and coming from that background, I do not think it is difficult to add up, on one side of the equation, the direct costs of running the Human Rights Commission, which are about $1.25 per New Zealander. It is not difficult either to add up the indirect costs, which might be the costs of the settlements that we achieve. Nor is it difficult in an economic sense to add on the fiscal risks. We could add all these together and derive an indicative estimate of the cost of running a human rights legal environment in New Zealand.

On the other side are the very tangible benefits which need to be taken into account. Under the laissez-faire system promoted by Professor

Epstein, over a period of generations we may indeed get some balancing up between the more powerful interests on one side and the more vulnerable and disadvantaged and short-changed people on the other side. But from my perspective there are some groups in New Zealand who have not been prepared to wait that length of time for balance to emerge. That was the case with women in the 1970s, and it appears to be the case with many in the disability community today. They are simply not prepared to wait. So in any assessment, we must take into account what has been achieved for these groups, as well as the costs on the other side. There is more than one way of transferring benefits between groups. One is taxation and subsidy, one is laissez faire—which takes time—and one is the system we have.

Richard Epstein

Let me just make three points. I am confident that I could put together, purely out of private funds, a coalition that would pension off everybody in the Human Rights Commission. The true cost of the New Zealand statute consists of the opportunity costs: the alternative ways in which scarce economic resources could be used. These are huge because of the distortion to incentives. It is very cheap, for example, for the Commission to enforce the rule disallowing mandatory retirement. But the consequences of that rule are catastrophic for the vitality and organisation of firms. It is the indirect opportunity costs that are so important. That is the difference between the perspective of an accountant and an economist: the latter emphasises the importance of opportunity costs.

Ms Jefferies also mentioned waiting. In fact markets—which are just people transacting with one another rather than through the political system—move very fast, while government statutes often turn out to be absolutely glacial in their responses to change of any kind.

My final comment is that one system destroys and consumes wealth while the other produces wealth. It is a great delusion to assume that we can redistribute wealth in such a way that the benefits of any new pattern of distribution outweigh the loss in production occasioned by the redistribution itself. The production effects will swamp the redistribution

effects. When that is appreciated, we will never attempt the task. It is doomed to failure. In the case of the Human Rights Act 1993, I predict that in five years time New Zealanders will wake up and discover the chaos it has created.