

# Richard A. Epstein

## *Against redress*

One of the hardy perennials of political theory asks how, if at all, one might justify the inequality of wealth and opportunity that is so manifest in society. The issue has been with us from the earliest times, but it seems to have gained renewed urgency in the past decade or so as economic inequality in the United States, if not in the rest of the world, seems to have become more extreme with the rise of technology.

In his essay “Beyond Compassion,” Orlando Patterson captures something of the current anger over inequality when he laments the perverse distribution of wealth that allows the CEO of a large corporation to pull down wages and stock options that exceed the wages and benefits of a thousand line employ-

ees. He condemns the society that offers nothing but small handouts to mothers who raise small children but awards fortunes to go-go dancers.

It is easy to recite statistics to show that an ever-greater percentage of wealth is concentrated in – take your pick – the top 1, 5, or 10 percent of the income distribution in the United States. Public discomfort with the current situation is only magnified because this economic divide between rich and poor often tracks profound and enduring racial cleavages.

In our multiracial society, it is an oversimplification to treat the inequality of income and wealth as a racial problem. But, that said, there is ample evidence to support the proposition that whites as a group are blessed with both greater wealth and higher income than their black counterparts. In many quarters, the combination of these two dominant features raises twin concerns about political stability and racial and economic justice.

In light of this sorry state of affairs, it is perhaps too easy for Patterson to conclude that the market is a “moral non-starter.” But denunciation is not quite the same as argumentation. The current distribution of wealth in America is not just the product of the market. It is also

---

*Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School and Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, has been a Fellow of the American Academy since 1985. He has written extensively in many legal areas and played an especially prominent role in the field of law and economics. His most recent books include “Principles for a Free Society: Reconciling Individual Liberty with the Common Good” (1998) and “Mortal Peril: Our Inalienable Right to Health Care?” (1997).*

---

the product of the crazy-quilt pattern of regulation and taxation that seeps into every area of life. It is therefore necessary to disentangle the consequences that flow from regulation from those that flow from the market, which in return requires some theory of what a society based on the market looks like.

Frederich von Hayek's claim that local knowledge in a decentralized system will outperform the handiwork of state ministers (many of whom control literally tens of thousands of times the wealth of ordinary peasants) remains unrefuted by history, so much so that virtually all systems of regulation, wise or foolish, treat the market almost by default as the starting place for analysis. Labor statutes do not prohibit negotiations between management and labor to set wages and working conditions. They just institute a system of collective bargaining. Antidiscrimination laws do not shut down private employment markets. They only specify certain grounds on which employers are not allowed to base their hiring decisions. One can attack or defend these institutions for the consequences that follow in their wake, but the simple and inescapable truth today is that when it comes to the provision of goods and services, nothing beats the market.

Like it or not – and “moral” or not – with the demise of central planning, the market *is* our starting point.

It hardly follows, however, that the market is both the starting *and* the ending point of the analysis. Questions of both social and economic inequality remain with us still. Today's sorry state of affairs, which finds prosperity tempered with poverty, surely invites some wholesale reform. Obviously, as a political matter, it is hazardous to argue that, even if we keep our market institutions, the redress of inequalities within the

United States does not, and should not, rank high on the list of legislative priorities for the social and economic reforms of the next generation.

It is nevertheless this hazardous position that I wish to defend.

In order to show why the redress of inequalities should not rank on our list of legislative priorities, I shall first try to outline a sensible theory that helps explain both the uses and the limitations of the market. The theory here is rightly described as libertarian in its orientation, but it makes no pretense that the market can discharge all social functions or indeed operate on its own resources without the assistance of the state. Rather, it argues that state intervention is needed to supply all individuals with protection against force, fraud, and monopoly.

Once this benchmark is established, I shall then sketch out in general terms two separate lines of argument used to justify government intervention to redress economic and social inequality, and then indicate why both of these fall short of their intended goal. These are arguments about restitution and redistribution, respectively.

Finally, I shall indicate briefly a general strategy for social reform that could, and should, be adopted to achieve a more just society, without the costly and unneeded by-products of government intervention. Rather than add more layers of taxation and regulation, the best tonic for a healthy society is to free up entry into a host of markets by removing the plethora of taxes and regulations already in place. The emphasis should be on self-sufficiency, not transfer; it should be on making the economic pie greater, not trying fitfully to use government action to put more goods in the hands of those who need them the most.

The question of economic and racial inequalities plays itself out on a vast canvas. But as with so many large problems, it is best attacked by breaking it down into smaller problems that may prove amenable to legal solutions that satisfy our best moral and political instincts. Before attempting to understand the role of state power in dealing with claims between groups, it is far easier to ask when the state should back a claim for compensation or support brought by one individual against another.

The first place to turn is the theory of corrective justice that has dominated our view of human interactions since Aristotle. It takes little imagination to award compensation to the person who is either physically attacked or duped by another.

As an initial matter, it is hard to deny the proposition that the (indiscriminate) use of force or fraud seriously diminishes the overall welfare of society. The individual who takes from another always gains, but that gain pales into insignificance beside the loss inflicted on the other person. This reduction in overall wealth and utility (for in this context the two go hand-in-hand) moreover has adverse consequences on third parties, who perceive themselves as at risk when force and fraud are allowed unabated.

At the same time, Aristotelian, Kantian, and utilitarian moral theories are all hard-pressed to condemn any form of vigorous economic competition that involves neither force nor fraud. The routine business transactions of everyday life produce a common good – economic gains for all parties to the transactions. That increased wealth in turn creates still greater opportunities to produce more goods for trade through third parties. Insofar as this is true, we do not need to know whether one party

to the transaction is rich and the other poor, because the voluntary transaction will improve the position of both, regardless of their initial endowments of wealth.

This is why a market analysis is, emphatically, a *moral starter* for social theory.

The standard libertarian theory therefore has ample grounds to draw a sharp line between aggression and deceit, which it condemns, and competition, which it praises. Competition expands the size of the pie, and of each of its slices; coercion reduces the size of the overall pie, and forces some individuals to bear a disproportionate share of the loss.

Many Marxist or left-wing theorists dispute this result by insisting that ordinary market transactions are contaminated by exploitation, which is, when all is said and done, a form of theft.

The term “exploitation” requires, of course, some explication. Clearly, no one is particularly upset when it is said that a skillful halfback exploited an opening in the defense in order to run for a touchdown. Taking advantage of opportunities made available within the context of the rules is often a good, not a bad, thing. And the firm that exploits an opening in the market to introduce a new widget that displaces its creakier rival deserves our thanks, not our condemnation.

To the determined Marxist or his modern sympathizers, however, exploitation often carries the more cynical connotation that one side of the transaction is left worse off than he would have been if he had never entered it at all.

But this view of exploitation offers no explanation as to why someone down on his luck would choose to make a contract that left him poorer than before. Many contracts are performed on a

repetitive basis: the ordinary worker can quit at any time and yet frequently will return to work day after day. He obviously does so because he thinks that this opportunity is better than any of his alternatives, and it would be an odd form of assistance to ban him from that line of work altogether.

In some cases, the charges of exploitation are refined so that they concede the point of mutual gain by contract, but insist that the worker is exploited because the firm has obtained a disproportionate share of the joint profit from the transaction. Why they presume the asymmetrical division of this unobserved gain remains something of a mystery. Their intuition is that minimum wage laws, for example, can boost the least fortunate worker's share of the gain to a larger, and more just, proportion.

But the imposition of any such rule of division does more than alter shares enjoyed by current players. It also changes the entire landscape. The higher minimum wage will induce some employers to reduce their workforces, others to change nonwage terms of the contract. It will narrow the gap between lower- and higher-skilled employees and thus reduce worker incentives to invest in their own human capital.

Yet, ironically, the one effect that is not likely is a reduction in the employer's share of the surplus, for the higher the minimum wage, the more likely that some firms will exit from the market.

Hence, the one confident prediction we can make is this: any effort to tilt by legislation the contractual wage balance in competitive markets will block voluntary transactions, leaving both sides worse off than before. The Marxist conception of exploitation is in the end undermined by the unjust consequences that its application in practice will produce.

This does not mean, however, that exploitation is an empty concept. It receives its best definition from classical economic theory, which condemns (as some hard-core libertarians do not) monopoly, even if it grows out of voluntary combination and not government (or private) coercion.

For the purposes of this essay, I shall accept the standard efficiency-based economic theory that in general seeks to regulate or outlaw monopoly for the resource losses that it imposes on society as a whole. Hence it may in principle make sense to regulate the rates charged by natural monopolies (i.e., traditional water, power, and light companies) that cannot be divided without fatal losses in efficiency. And it may in principle be possible to prevent the formation of voluntary cartels that seek to divide markets or to rig prices.

But if this theory allows the use of government force to break up or limit monopoly power, by the same token it takes a very grim view of any state barriers to entry into various economic or social markets. The state that imposes a protective tariff may benefit some local industry, but that interference with trade places a far greater burden on those other individuals who are blocked from choosing their trading partners.

Within this general framework, the state also commits a wrong against its own citizens when it imposes restrictions against their entering into some trade or business, unless that restriction is clearly calibrated, as most occupational restrictions are not, to prevent the practice of fraud on hapless customers.

We are now in a position to outline the relationship between this general theory of individual rights and the larger issues of economic and racial inequality. One way to frame the issue is to ask

whether poor people generally, or black people specifically, have a claim for restitution from society at large.

To state the question in this way requires us to observe at least two important caveats. The first is that we cannot predicate sound theories of restitution on bad theories of social justice. The case here cannot rest therefore on undifferentiated charges of exploitation but must be tied to a demonstration that these individuals have been the group victims of force and fraud, including the imposition of barriers to entry, by other members of society.

The second caveat is that in principle the question of restitution is not restricted solely to the position of African Americans, but could in fact be asked in connection with American Indian tribes, with Chinese and Japanese immigrants, or indeed with any group that claims to have suffered injustice at the hands of others. But for these purposes at least, I shall concentrate on the black experience precisely because the answer to the question of whether restitution should be provided may seem to be self-evidently in the affirmative.

After all, there is little question that the institution of slavery as practiced in the United States before the Civil War and the racial restrictions that lay at the heart of Jim Crow and the black codes were wholly indefensible when measured against a basic theory of libertarian rights. Excluding blacks from participation in the political and social life of that time constitutes one of the great stains on our history, made still worse by the countless acts of private violence and intimidation to which the state turned a blind eye.

Yet it is one thing to recognize the commission of these past serious wrongs, and quite another to conclude that they support claims for restitution

today to the descendants of the victims of state and private violence.

Critical problems arise on both sides of the line. Who should receive restitution? And who should be made to pay for it? Let us take these two elements in order.

First, who counts as a victim? That question was easy to answer in 1865 when huge portions of the African American population in the United States had just been released from the bonds of slavery. But it is far harder to afford victim status, over 135 years later, to their descendants. No one alive today suffered the cruelties of past regimes.

The point here is especially true when claims for restitution are pressed on a limited basis. For over twenty years, for example, black parents in Kansas City, Missouri, have pressed claims for restitution by claiming that black children in the city had been victims of the vestiges of segregation that survived after the 1954 Supreme Court decision in *Brown v. Board of Education*. But no remedy here can fit the ostensible wrong, for today's schoolchildren in the district bear no relationship to the black children in that district whom segregation might have shortchanged two generations ago. Quite simply, the program forces vast amounts of state tax revenue into lavish expenditures in one school district, while the educational needs of other children, black and white alike, suffer from comparative neglect.

The difficulties are, if anything, greater in considering who should pay these claims for restitution. Here the nub of the difficulty is that the state is not just some disembodied entity with a heart and mind of its own. Even more than the private corporation, it is a composite of huge numbers of individuals who bring to this sprawling nation their own distinctive pasts. Any program of

restitution, however, contemplates the use of tax dollars to benefit some subclass of the population at the expense of everyone else. In all cases, this approach necessarily results in risks of overinclusion.

For example, the claim for restitution brought against the German state after World War II necessarily fell with equal weight on resistance fighters and the most ardent Nazis. Even so, the state ran the risk of overinclusion because of the immediacy and enormity of the wrong; it adopted a two-pronged approach that compensated survivors of the Holocaust and their descendants, and then, generally, the state of Israel.

It is hard to see how one could devise any similar program of restitution for the descendants of former slaves in America. Too much time has passed to have any confidence that the brunt of these payments will be borne by individuals who had any connection, direct or indirect, with the wrongs of a previous generation. Many Americans today descend from those individuals who gave their lives during the Civil War to free the slaves. Millions of people have migrated to our shores from just about every point on the globe, often to escape the physical danger and economic oppression of their own lands. By what right do we ask these immigrants and their children to compensate blacks whose ancestors have been injured by others when they have done nothing wrong themselves?

We could, of course, bite the bullet and conclude that some substantial transfer payment should be made from general resources nonetheless. But even here, we have to consider the complications that remain.

Claims for restitution today do not occur in a vacuum. The same country that saw Jim Crow was able to redirect

its moral compass and provide extensive programs that were designed to remedy some of the past conditions of slavery. We have had extensive affirmative-action programs; we have had programs that targeted the educational shortfalls on inner-city youth, predominantly black; we have extensive welfare programs that benefit disproportionate numbers of African Americans.

As a matter of social cohesion, I believe that we would do far better keeping some general programs in place that help those at the bottom than trying to find ways to pay restitution to blacks rich and poor alike. Owing to the complexities involved, my great fear is that any program of restitution will emerge as a twisted jumble of preferences that heaps a second set of injustices on the first.

Having examined the claims for restitution made by African Americans today, I shall next briefly address the question of the best social response to inequalities of wealth.

Much of the wind would be taken from the sails of the current restitution movement if the average income of black citizens were equal to that of whites. But while claims of economic inequality only lurk behind restitution claims, they become the centerpiece of any claim for the redistribution of income and wealth.

This claim of course runs smack into the libertarian prohibitions on the use of force and fraud, for it honors claims for redistribution even when the poor person concedes that he has no corrective justice claim to the wealth of the rich person. The question is whether these inequalities of wealth justify some action for redress when the wealth is acquired, and accumulated, through industry, thrift, and invention.

Perhaps the easiest way to make the case for *some* redistributive action is to appeal to the diminishing marginal utility of wealth. The point here is that the value of the additional dollar drops the more dollars that a given person has. A perfect system of wealth transfer between persons could presumably improve aggregate social utility by taking dollars from the persons who need them the least, giving them to the persons who need them most. The total number of dollars could, in some ideal world, remain constant after the transfer. Does greater satisfaction from these (redistributed) dollars justify the coercive transfer?

One conceptual obstacle to this argument is that it is fanciful at best and mischievous at worst to purport to make these interpersonal comparisons of wealth. Clearly no social ruler (pun intended) lets us know with certainty that wealth is worth more in the hands of a poor person than in the hands of a rich person, so the determined economist can shipwreck the case for wealth transfers from the start by denying the possibilities of interpersonal comparisons of utility. I can assert that wealth is worth more to the poor person than to the rich person; you can deny that proposition. The rich person might use the next dollar to complete work on an invention that will improve the lives of others. The poor person might squander it on a drinking binge. We have no way of knowing if wealth is more useful to a poor than a rich person.

Still, this hard-edged argument has bite only insofar as it cautions us against the easy assumption that the marginal dollar is *always* worth more in the hands of the poor person than in the hands of the rich person. But it does not in my view show that *in general* these comparisons are ill conceived. Homeless people

on the edge of starvation *do* on average need that next dollar more than the fashionable elites choosing between vintage wines. The entire enterprise of charitable activities, through churches, hospitals, and schools, would be largely unintelligible if in fact the marginal dollar of wealth were, and were perceived to be, worth as much in the hands of the rich as in the hands of the poor. Who would choose to fund soup kitchens, childhood vaccinations, and scholarships under those circumstances?

So one conceptual objection to redistribution fails to deliver a knockout blow. How then does one continue to dislodge demands for state-mandated redistributions of wealth?

A more promising line of argument seeks to demystify the state by treating it merely as the agent for those individuals who in any given situation benefit from its actions. Hence the question of whether the state can take wealth from A and give it to B can be reposed: can B demand some part of A's wealth, solely because B needs it more?

At this point, the hard-core libertarian will dismiss B's claim as mere theft – a coercive seizure of private property. The state, therefore, is no better than the Robin Hood who takes from A and gives to B.

This argument looks too glib to be wholly convincing. There are marked differences between an organized system of state redistribution and the isolated actions of a brigand. State action can proceed through the ordinary channels of taxation and thus does not present the same threat to peace and social order as the actions of the ordinary thief. In addition, the social levies in question are not concentrated against one person on a whim, but are part of a comprehensive social plan that asks *all* of the more fortunate among us to con-

tribute something to the support of those who are least fortunate. This web of institutional constraint surely makes state action less of a threat than that individual action.

Or does it?

In reply, one could argue that it would be odd to sanction individual thefts on the grounds that the thief took only some predetermined amounts of wealth from those individuals who were in a position to pay for it. The interposition of political majorities does not necessarily insulate the state's decision from all criticism. As James Madison reminds us, political factions often act and vote in ways that allow them to line their own pockets. It hardly counts as a tribute to the democratic process if a minority of wealthy persons is consistently outvoted and outmuscled by those who enjoy the advantage of greater numbers, namely, the poor.

The objection of theft may not be a showstopper, but it can hardly be dismissed on the grounds that the processes of deliberative democracy insulate all of its decisions from substantive attack. The owners of private property are entitled to nothing more than the protections that deliberative democracy wishes to confer upon them. Outright confiscation is not cleansed simply because it is authorized by a majority, or even supermajority, vote. Progressive taxation is not cut from the same cloth as those forms of collective action that raise the standards of wealth and happiness for all, which is what the state tries to do by supplying certain standard public goods – military defense, a judicial system, police protection, public infrastructure – to all its citizens.

This last observation is fortified when one looks more closely at the unhappiness created by individual acts of theft. Here a proponent of redistribution

might argue that whenever the thief has more use for the stolen goods than their owner does, the theft helps to advance happiness. But that shortsighted calculation ignores the broader dynamics of theft.

If the state were to legalize individual theft, the scope of these activities would sharply increase, as many individuals would forsake productive activities for what once passed as a life of crime. In response, property holders would be forced to hire more armed guards to protect their possessions. Worse, they might avoid theft by prematurely consuming goods that they would otherwise save, thereby depleting the social store of wealth over time. And if consumption is not possible, a property holder can always choose to invest resources in bricks and mortar, which are harder to steal than money.

Theft is therefore a losing proposition on both sides of the ledger. The proper social response is to make it illegal – both for individuals and for the state.

The hard social question is how many resources should be devoted to its elimination. Here the idealist might be tempted to hold that the state simply has a moral and social duty to eradicate *all* forms of theft, including taxation. For our purposes, the critical point is that the destructive cycle wrought by individual theft may be mirrored when the state uses coercive means to redistribute wealth.

Thus the wise citizens of Hong Kong, fearful of expropriation after the Chinese takeover in 1997, invested large sums of free cash into their new local airport, where it was relatively insulated from expropriation. Allowing the state to steal from the wealthy alters the full range of productive and consumptive activities – generally for the worse.

Here again, a note of caution is need-

ed. I have no doubt that the strong sense that motivates private charitable transfers affords some political margin of error against certain state-mandated transfers designed to help those in dire need. Most people who are taxed would be prepared to devote for religious or moral reasons some fraction of their wealth to the alleviation of poverty and misery. Once the state undertakes that role, private citizens can reduce their amount of private giving to offset the state exaction. Hence the public system of support displaces the ordinary system of private charity, but meets with relatively little resistance so long as the reductions in private giving are available.

Yet the margin for error in this scenario is not infinite. Raise the level of transfer payments for public services too high, and the private adaptive response will be less charity – such that it will no longer be able to offset the increased burden of public taxation. Matters only get worse if the transfer payments in question have, as is so often the case, little to do with the alleviation of poverty and hardship in our midst.

At this point, Madison's warning about factions becomes pertinent. How taxes are spent generally depends on the kind of bare-knuckled political struggle that makes Washington politics so ugly today. Losers from proposed legislation can lobby furiously against it. But lobbying is always a two-way street that allows well-organized beneficiaries to mount a political campaign in response.

Once the government halls are open for business, anyone can apply for grants. Farmers can obtain their special subsidies; small-business men can opt for theirs; corporate welfare can enrich well-heeled stockholders; senior citizens can cash in on a rich set of retirement and medical benefits denied to

their younger and poorer brethren. Public cynicism can mount, as it has mounted, in response to the transparent efforts to make it appear as though every giveaway on the map should be extolled in the name of the public good.

Why believe that the total sum of state and federal redistributive activities provides any net benefit to the poor, who pay through the nose for every major subsidy only to receive relatively paltry welfare benefits in exchange?

In the struggle between different political factions over transfer payments, as with individual theft, two sides are engaged in either blocking or securing wealth transfers. Their combined activities result in a net diminution of wealth across the board, whether peanut farmers or tobacco farmers win their vaunted subsidies.

The parallel to individual theft goes one step further. Once wealth redistribution is fair game, people will alter their patterns of consumption and investment. They will leave less to the next generation out of fear that the estate tax will gobble up their bequests. And they will hire the finest lawyers and planners to navigate their private fortunes safely through the arcane niceties of the tax code.

My conclusion is simple: any effort to secure redistribution necessarily reduces the total stock of wealth. And it is not likely to result in transferring wealth to the poor.

**I**f, as I believe, restitution and redistribution are more often than not misguided, even dangerous, strategies for social reform, what alternatives exist?

I can think of two underappreciated lines of inquiry. The first of these is the use of charitable contributions to assist the poor, even through faith-based initiatives *without* direct government sup-

port. Smaller amounts of state-sponsored redistribution could give families stronger incentives to take care of their wayward members. In addition, any charitable dollar is likely to do more good than a government dollar because voluntary contributors have at least some incentive to monitor how their funds are spent. Finally, reducing government transfers is likely to increase overall wealth, which in turn reduces the demands on the welfare system. Evaluated by its systematic returns, increased charitable spending is no panacea, but it has none of the drawbacks of coercive government programs.

The second line of action comes from a different quarter. The statute books are littered with laws that impose indefensible barriers to entry into product and labor markets. It is easy to find all sorts of regulations that exclude individuals from driving jitneys, braiding hair, or practicing law and medicine. Why is it that Sears, Roebuck can sell lawn mowers but not legal services if it is prepared to stand behind both?

The political forces behind the status quo are formidable. It may well be the case that entrenched interests will block any quick and sudden shift in political fortunes that would block the operation of competitive markets. But however

vexed these transitional issues, the intellectual program is clear: remove barriers to entry in the trades and professions. Removing these obstacles costs the government nothing in direct expenditures. Indeed, it reduces administrative bloat and, through it, tax burdens. In addition, it increases the total level of production in society. In the midst of all the clamor for redistribution, we should not forget our initial point of departure: that ordinary contracts produce gains from trade that are shared by all parties. The lower the level of transactions costs, the higher the velocity of exchanges that move resources from lower- to higher-valued uses. Open entry and freedom of contract expand the opportunity set across the board, and are prey to none of the destructive consequences that mark resort to faction or theft. The nineteenth-century program of trade and labor liberalization makes as much sense in today's Internet age as it did in an era dominated by iron and steel.

John F. Kennedy had it right when he said that a rising tide lifts all boats. And that tide will only rise when we put aside our preoccupation with redress and redistribution – and agree instead to unleash the productive capacities of all our citizens.