The Education of George Priest

Owen Fiss[†]

I tried. George began his legal career at the University of Chicago in the fall of 1969 and was then assigned to my section of the required first-year property course. That course focused on a number of prominent judicial decisions aimed at curbing what was then called "slumlordism." These rulings were rendered in eviction proceedings that had been brought against tenants who, in response to the failure of the landlord to provide heat, hot water, or other basic amenities, had refused to pay their rent. The question raised was whether a warranty of habitability should be read into the leases governing their occupancy, on the assumption that a breach of the warranty would justify withholding their rent.

I tended to favor the tenants. Due either to the views I expressed or quite possibly to his own restlessness, at the end of his first year George took a leave of absence from the law school and sought to get another, more pragmatic perspective on property rights. He decided to go homesteading in Alaska with his young family. He traveled to Alaska and soon enough reached the forest that limited his access to the land available. Unable, however, to cut a path through the brush, he turned back and eventually gave up on the idea of homesteading. He returned to Chicago and in the fall of 1971 resumed his legal studies there.

Over the next two years, I found George in a number of the other courses that I had offered. One was on injunctions, which appeared on the surface as a course on advanced civil procedure, though in truth its larger purpose was to expose students to the searing civil rights litigation of the early 1960s. The second course also dealt with race, but from a more pronounced historical perspective. It was a seminar on the law of slavery. I taught that seminar with Harry Kalven and Stanley Katz. Kalven was the preeminent First Amendment scholar of his day; Stanley Katz was a historian of American law who had recently joined the Chicago faculty.

Tried as I may have, George soon became increasingly captivated by another branch of the faculty at Chicago, then at its zenith, which was devoted to using economic principles to analyze legal issues. This group included George Stigler from the business school and Gary Becker from the economics department, who were both regular and vital participants in the industrial organization workshop then held at the law school. This branch of the faculty also included Harold Demsetz, another economist, who had

† Sterling Professor Emeritus of Law, Yale Law School.

a joint appointment at both the business school and the law school. Still another economist, Ronald Coase, who like Stigler and Becker eventually won a Nobel Prize, had a full-time appointment at the law school.

Richard Posner was also on the Chicago law faculty at that time. He had started teaching law at Stanford in September 1968 but was not destined to remain there. In the spring of 1969, Aaron Director, an economist and Coase's predecessor at Chicago, happened to be in California and befriended, maybe even enchanted Posner, who then decided to leave Stanford and to join the Chicago faculty, just as George began his legal career there. In 1973, as George neared the end of his studies at Chicago, Posner published his soon to be famous book, *The Economic Analysis of Law*.

George never had much taste for the "law as efficiency" thesis that Posner advanced in that book, as well as in countless articles published before and after the appearance of that book. According to that thesis, each and every field of law could be explained, as a purely descriptive and near-scientific matter, as an attempt by judges or legislators to maximize the aggregate satisfaction of preferences. Yet, as George later pointed out, Posner and his followers failed to identify any plausible mechanism or dynamic to explain such a persistent—and for them, salutary—result, and thus could not give credence to their scientific aspirations.[1]

As a normative matter, however, George was of another mind. Like Posner, George had great faith in the market, either because of its emphasis on individual choice or because of its promise to reward people according to their contributions to society. He favored bilateral exchanges among economic actors and assumed that competition among these actors, not state edicts, should regulate business practices. In much the spirit of Posner, George was skeptical of government regulation, though he fully acknowledged the need for the state to define property rights and enforce contracts and, on top of that, to prohibit practices, such as price-fixing, that would destroy competition. He was always a big fan of antitrust laws, though he favored the minimalist understanding of them advanced by Richard Posner throughout the 1970s and then adopted by the Supreme Court.[2]

While at Chicago, Posner became a mentor of George's, as did Ronald Coase. Although Coase did not specialize in antitrust doctrine, he was relentless in his devotion to the market and pursued that interest in broad and sometimes surprising ways. In the early 1960s, Coase published "The Problem of Social Cost," which, in effect, undermined the argument—premised on the need to internalize social costs—that had traditionally

1. George Priest, *The New Scientism in Legal Scholarship*, 90 YALE L.J. 1284 (1981).

2. For the account of the triumph of the Chicago School on Supreme Court doctrine, see GEORGE PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY 89 (2020). For Posner's account of this development, see Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-28 (1979).

been used to justify state regulation of business activity.[3] In the 1970s, Coase took his belief in the promise of market exchanges to new lengths, by contesting the widely assumed view about the need for public ownership of lighthouses.[4]

George never studied for a doctorate, but much in keeping with his pioneering spirit, arguably cultivated by his roots in Colorado, he learned economics on his own, with ample guidance from the masters. At Chicago, George took all the courses that Coase and Posner offered and worked as a research assistant for Posner. George graduated from the University of Chicago Law School in 1973, and he returned to the law school in 1975 to serve, until 1977, as a research fellow in the Law & Economics Program that Coase headed.

In 1974, I moved from Chicago to Yale. At roughly the same time, George began his teaching career. He started at Puget Sound, soon moved to Buffalo, and then joined the UCLA faculty. In 1980, George joined the Yale faculty, first as a visitor and then as a professor. Soon enough, our friendship deepened. Our families became intertwined (his younger son, now an accomplished professor of evolutionary biology, though then just an idle teenager, served as my "chief gardener"). Our academic interests also began to converge.

The Debate at *La Bolsa*

In June 1985, I traveled to Argentina to consult and advise the government in its prosecution of the three juntas who had brutally ruled the country from 1976 to 1983. In the course of that trip, I developed a close personal and professional relationship with Carlos Nino, an advisor to the president of Argentina on issues of human rights and democracy. Nino was a man of great warmth and exuberance and a philosopher of enormous distinction. He soon became a regular visiting professor at the Yale Law School, and in that setting, an intellectual friendship developed between George and Nino. George was always clear about his commitment to human rights, and also to democracy, although Nino feared, as I did, that the inequalities inevitably generated by the market tend to impair the operation of the democratic political system.

During the 1980s, the World Bank and the International Monetary Fund formulated a new blueprint for economic development. It was known as "the Washington Consensus" and, much in keeping with the policies of President Ronald Reagan of the United States and Prime Minister Margaret Thatcher of the United Kingdom, called for the institutionalization of a robust set of principles associated with capitalism: the privatization of state-owned industries, the near-eradication of state regulation of business,

3. 3 J.L. & ECON. 1 (1960).
4. Ronald Coase, *The Lighthouse in Economics*, 17 J. L. & ECON. 357 (1974).

and free trade.[5] Such proposed reforms were sharply contested by many in the developing world and, thanks to an invitation secured by Carlos Nino, in June 1989 George and I traveled to Argentina to air our disagreement about the merits of the Washington Consensus. The debate was sponsored by the Buenos Aires stock exchange (La Bolsa).

In this debate, George defended privatization and the end of state ownership. He was careful to insist, however, that privatization should not be viewed as a measure to eliminate the budget deficits that had been generated by state-owned enterprises, which in the case of the Argentine railroads was of staggering proportions. George instead argued that privatization should be viewed solely as a means to restore the competition needed to keep businessmen on their toes. In turn, I doubted the adequacy of the self-regulatory nature of the market and defended the need for state intervention to protect public values that I feared would not be furthered by the market.

In making my presentation, I chose as my starting point a new and widely proclaimed book, *The Other Path*, by Hernando de Soto, which defended free market principles as essential for the economic and social development of Peru. In speaking of "the other path," De Soto was attempting to draw a contrast with what Sendero Luminoso (Shining Path), founded in 1980, offered: a communist utopia that was to be ushered in by a reign of terror, including bombings and assassinations, that had become a scourge of Peru. In making his case, De Soto focused on the informal residential settlements that had been formed by squatters from the Andes who had occupied largely vacant tracts of land ringing Lima. He sought to capture their energy and determination.

I agreed with De Soto when he criticized those exercises of state power—he characterized them as a form of mercantilism—that had been used to exclude residents of these informal settlements from the formal Peruvian economy. On the other hand, I stressed, over George's objection, the need for the state to provide public services such as electricity, clean water, and education, and also to protect the Andean migrants from the abuse and discrimination they would most likely encounter as they entered the formal economy.

This debate at La Bolsa occurred in the evening. It was an after-work event and was memorialized, at least for us, by a journey we took the very next day, to the north. It was our first trip together. Our destination was Iguazú, a world-famous waterfall bounded by Argentina, Paraguay, and Brazil. Always driven by an unquenchable thirst for adventure, George led me (actually by the hand) on a wooden walkway which extended over the

5. The term "Washington Consensus" was coined by John Williamson in 1989. *See* John Williamson, *The Washington Consensus and Beyond*, 38 ECON. & POL. WKLY. 1475, 1745 (2003); John Williamson, *The Strange History of the Washington Consensus*, 27 J. POST KEYNESIAN ECON. 195, 195-96 (2004).

top of the waterfall and which enabled him (my eyes were closed) to peer down into La Garganta del Diablo—the dark, cavernous crash of the falls, more than 250 feet below, sending up to the crest extended columns of mist.

Given the prominence of De Soto's book at the La Bolsa debate, it was only natural that George and I would soon be invited to a repeat performance in Peru. In the early 1990s, we traveled together to Lima for a seminar sponsored by "Indecopi," a government agency that was set up during the presidency of Alberto Fujimori.[6] After a bitter runoff in 1990 with the novelist Mario Vargas Llosa, Fujimori quickly abandoned his populism and embarked on a program, similar to the one that Vargas Llosa proposed, to promote market-oriented reforms including private ownership of the mines and utilities. In the same vein, Fujimori established Indecopi in the name of consumer protection. In the course of our visit to Peru, George and I toured the informal settlements that were the focus of De Soto's book. On another occasion, George was taken on a private tour of those very same settlements by Fujimori himself, long before he suspended the National Congress (his auto-coup) and long before his human rights crimes came to light.

Some time later, George and I, extending our involvement in Latin America, traveled to Brazil and exchanged views at a conference sponsored by the Law Faculty at the Universidade de São Paulo, which was decidedly more skeptical about the market than our hosts in Peru. After our meetings, George and I, together with our wives and Susana Nino, Carlos's widow (he died in August 1993), journeyed to Bahia, once the port of entry for the Atlantic slave trade, now the center of Black culture in Brazil.

Teaching Together

The debate at La Bolsa that first took George to Latin America occurred in June 1989. At the same time, seismic rumblings had already begun in Europe. In November of that year, the Berlin Wall collapsed, and that event set into motion a chain of events that included the disintegration of the Soviet empire, the liberation of Poland, Hungary, Czechoslovakia, as well as other countries in Central and Eastern Europe, the absorption of East Germany (the German Democratic Republic) by West Germany, and eventually, in 1991, the dissolution of the Soviet Union itself. Although these events were of special interest to George—who, long before he entered law school, had been a Russia buff—they were of world historic significance and naturally enough had the effect of shaping both of our academic interests.

6. "Indecopi" is an acronym for the agency, the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual.

In the spring of 1990, in the midst of these tumultuous events, George and I decided to launch a seminar at Yale entitled "Democracy or Capitalism?" It was to be taught in the spring of the following academic year and was described in the law school catalogue in these terms:

> Democracy or Capitalism? The recent revolutions in Eastern Europe and the closely similar developments in areas as diverse as the Soviet Union and Latin America have been interpreted by some as the ultimate triumph of democracy and by others as the ultimate triumph of capitalism. It remains an open question whether democracy can survive and flourish unless it is built upon the base of a market economy.

To help answer this question, we once again turned to Hernando de Soto and *The Other Path*. We also read Lawrence Wechsler's *A Miracle, a Universe* on the transition to democracy in Brazil in the 1980s. On the promise and limitations of capitalism, we turned to classics written by Europeans in the early 1940s, one by Friedrich Hayek, *The Road to Serfdom*, and another by Karl Polanyi, *The Great Transformation*. Hayek and Polanyi's question—capitalism or socialism?—was not ours. George and I assumed, in the face of the collapse of the Soviet Union and its empire, that socialism was not a viable alternative.[7] Our quest was instead to identify and examine the threats to democratic values posed by capitalism and the attack on the exercise of state power contained in the then-current demands for privatization and deregulation.

We read Hayek and Polanyi with that question in mind and also included on the reading list many of the articles and books by scholars then actively working on the issue. Some, like Jeffrey Sachs, championed "shock therapy" in Russia and Eastern Europe. Others, like Samuel Bowles & Herbert Gintis, John Gray, Adam Przeworski, Dani Rodrik, and Jeffrey Herbst, had a wider sweep, intellectually and geographically (Rodrik was a specialist on East Asia; Herbst wrote about Ghana). Although the discussions provoked by these works were spirited and challenging, we also decided to invite, perhaps to add a little fuel to the fire, a number of guests to the seminar.

One guest was László Sólyom. He had participated in the roundtable that led to Hungary's break with the Soviet Union and served as president of the country from 2005-2010. At the time of his visit to our seminar, Sólyom was the president of the Constitutional Court of Hungary and responsible for a series of decisions that established the rules in Hungary governing property rights in the transition from communism to democracy. Another guest was Hans Jorg Geiger, who at the time of his visit was second-in-command of the commission that had been established by Germany to govern public access to the secret files maintained by the security agency of East Germany. Known as the Stasi and made famous by the 2006 movie *The Lives of Others*, that agency had recruited neighbors, friends, relatives,

7. Owen Fiss, *Capitalism and Democracy*, 13 MICH. J. INT'L L. 908 (1992).

and even in some cases, spouses, to spy on one another. The dossiers it had maintained were so extensive, Geiger recounted, that if these files were placed one after another, they would stretch from New Haven to Texas.

Spiros Simitis, a professor of law at Frankfurt (and like Nino, once a regular visiting professor at Yale), helped recruit these visitors and also brought to the seminar his experience in trying to incorporate academics from East Germany into the new unified Germany. We also benefited from long conversations with Franco Romani, an economist on the law faculty of the University of Rome (La Sapienza), who was yet another frequent visitor to Yale during this period. He kept up with what was happening in the seminar and, like Simitis, during long conversations outside the classroom, deepened our understanding of the social democratic tradition in Europe.

The seminar was primarily driven by our disagreement over the need and appropriateness of state regulation. George was not a Friedrich Hayek or a Milton Friedman. Indeed, George was one of the least doctrinaire scholars I have ever known. George believed not in unrestrained capitalism but rather in "mature capitalism," a term he increasingly used as the "Democracy or Capitalism?" seminar unfolded. Laissez-faire was not for George to be presumed as though it were the apotheosis of the forces of nature, but rather a measured strategy designed to serve specific public purposes.

Although our disagreement in the seminar and various public settings played out over a wide range of issues, perhaps the most prominent and persistent exchange occurred over state regulation of campaign finance. In a 1987 Harvard Law Review article entitled "Why the State?" I called for the state regulation of campaign finance in order to further democratic values.[8] George had just the opposite perspective. He argued for unregulated campaign contributions and expenditures—the free use of money generated by the market—as a corrective for what he perceived to be the "systemic failures" of the political order.

In a 2022 workshop paper distributed to the Yale Law faculty, George succinctly summarized the "systematic failings" that he had spoken about in our exchanges in the seminar and also in conferences that were held during this period in Lima and São Paulo. One "systemic failure," according to George, arose from the time elapsing between elections; a second was the practice of tying the vote to residence within a geographic area; a third was majority rule, which George felt diminished the significance of minority votes; the fourth was the rule requiring equality of votes (one person, one vote) which, George complained, masked the intensity of preferences among voters; and the fifth was persistent low voter turnout.

8. Owen Fiss, *Why the State*, 100 HARV. L. REV. 781 (1987). See also two books I published during the period, Liberalism Divided: Freedom of Speech and the Many Uses of State Power (1996) and The Irony of Free Speech (1996).

In his approach to campaign finance, George flipped on its head the mode of analysis typically used by the practitioners of law and economics. While the lawyer-economist usually turns to the state to correct for market failures, George looked to the market to correct for the failures of the political order. As he formulated it in the very same 2022 working paper, he aimed "to show how the market order can help in the realization of the basic ambition of the political order: the expression of the full political feelings of the populace."

I found George's ambition and method entirely admirable but took issue with his litany of the "systemic failures" of the political order, such as residency requirements for voting and his tendency to downplay the full panoply of strategies—for example protest, coverage in the news, conferences—that might be used for holding elected officials accountable between periods of elections or to make them responsive to the voters who turned out not to be in the majority. Likewise, I took issue with George's complaint, long voiced by economists,[9] based on the failure of the vote to register intensities of preferences.

For consumers, the information about the intensity of preferences is socially useful. It helps producers decide what sorts of goods and services they will offer and how much they can charge. It is hard, however, to understand the social value or benefit gained by a system that would abolish any limits on campaign contributions or expenditures in the name of allowing voters to express the intensity of their preferences. The amount of money an individual spends depends not only on the strength of his desire, but also on how much money he or she has.

The rule requiring the equality of votes should not, to my mind, be seen as a "systemic failure" of the electoral system, but rather a source of its moral appeal. Democracy grants to those who are ruled the power to choose their rulers, and in so doing, it confers a freedom—political freedom—on the people, as a people. By voting as equals, the individuals who constitute the "people" generate and partake in the freedom that belongs to that community.[10]

In contrast to George's characterization of the rule requiring the equality of votes, I agreed with him that low voter turnout—a common feature of elections in the United States—is indeed a "systemic failure" of the political system. Enlarging the electorate and having all eligible voters actually vote strengthens the democratic mandate of those elected to rule and thus enhances the freedom that democracy promises. We differed on the question of remedy.

9. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

10. OWEN FISS, WHY WE VOTE (2024).

Some remedies are wholly unobjectionable—increasing the number of polling sites, extending the period of voting, using absentee ballots, and linking the registration to vote to everyday practices, such as obtaining a driver's license.[11] I failed, however, to understand how deregulation might be a corrective for low voter turnout. In fact, it seemed to me that the absence of any limits on contributions or expenditures might even be a cause of low voter turnout.[12] The absence of regulation would enhance the ability of wealthy donors to control the content of electoral campaigns and the choice of candidates and thus leave the poor with little interest in participating in elections or voting. None of the candidates spoke to their urgent concerns.

SELA and MELSS

The energy and excitement generated by the "Democracy or Capitalism?" seminar did not and probably could not last forever. The seminar was in significant part driven by the state-building experiences required by the collapse of the Berlin Wall in 1989 and the overthrow in the 1980s of the dictatorships in Argentina, Chile, and Brazil. As these events faded in urgency, the interest of students and maybe ours too began to shift. By spring 2002, the syllabus of "Democracy or Capitalism?" turned away from development and transitions and emphasized human rights and immigration control.

Once we dropped the joint seminar, George continued to offer, on his own, a course on "Capitalism." I turned to the War on Terror. George was the first person to call me on the morning of September 11, 2001, as soon as I had arrived in my office, to inform me of what he was watching on TV at home—the tragedy then unfolding at the World Trade Center. We also participated in two international seminars, one devoted to Latin America, the other to the Middle East. Both are sponsored by the Yale Law School and involve a number of the Yale faculty, some students, and a large number of scholars and practitioners from each region.

I helped form both seminars in the mid-1990s while we were teaching "Democracy or Capitalism?" and they continue to this day. George was a prominent and important participant in each and, in fact, until his death in December 2024, he attended, with rare exception, all of the sessions of these seminars that were held over the last thirty years. He also opened his home, for a sumptuous and convivial dinner, to the Middle East seminar when it was first founded and again in July 2024, when it convened to address the ongoing war in Gaza. That seminar was formally entitled the Middle East Legal Studies Seminar, known as MELSS. The Latin American

11. George did not pause to consider a technique used by many other democracies: the enactment of a law making voting mandatory.

12. Owen Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997).

seminar was in part prompted by the death in 1993 of our good friend Carlos Nino, and began with an emphasis on the issues arising from the restoration of democracy in the region. It was entitled the Seminario en Latinoamérica de Teoría Constitucional y Política, known as SELA.

The annual meeting of SELA created another opportunity for George and me to stay in touch with many Yale graduates from the region, including those who had taken the "Democracy or Capitalism?" seminar. In time, George became a greatly revered mentor to a number of young Peruvian scholars who had been inspired by De Soto's book and eventually studied law at Yale. They sought to bring the American brand of law and economics – as refracted by George – to their country. Many of these graduates worked at Indecopi on projects promoting consumer welfare. Others embarked on a large-scale project to provide formal legal titles to Andean migrants who lived in the informal towns of squatters that ringed Lima. A number also helped found the Universidad Peruana de Ciencias Aplicadas (UPC), which, in 2003, proudly conferred an honorary degree on George.

Launched as it was in the mid-1990s, MELSS was in part inspired by the breakthrough achieved in the Oslo negotiations about the Israeli-Palestinian conflict and, for many years, it examined the prospects for the so-called two-state solution—one state for Israel, one for Palestine. The seminar was not in any way confined to examining this conflict. We also addressed the developmental issues that confronted the region taken as a whole and as a result continued pursuing topics that were addressed at SELA and, even before that, in the "Democracy or Capitalism?" seminar at Yale: Would economic transformations and the institution of capitalist principles further or impede the realization of democratic values?

At the time of the founding of SELA, the dictatorships of Argentina, Chile, and Brazil had come to an end. For the most part, this seminar unfolded when most of the region—Venezuela and Cuba were notable exceptions—was at least formally committed to democracy. The situation in MELSS was quite different. Dictatorship was the rule in the region, not the exception. Over the life of that seminar, some of the most notorious dictators in the region—Saddam Hussein in Iraq, Muammar Gaddafi in Libya, Zine El Abidine Ben Ali in Tunisia, and Hosni Mubarak in Egypt were deposed or removed, sometimes by foreign military intervention, sometimes by popular uprisings. Unfortunately, sometimes the end of these dictatorships led to the collapse of the states, while in others the deposed leader was succeeded by a new despot.

George's response to this pattern was clear. I vividly recall one instance in the 2023 MELSS meeting when we were discussing the developmental plans of Mohammed bin Salman (MBS), the new Crown Prince of Saudi Arabia. A Princeton scholar extolled these developmental plans, and that presentation prompted an intervention by George—almost an outburst of moral outrage. In no uncertain terms, George condemned MBS for the then-recent assassination and ghoulish dismemberment of Jamal

Kashoggi in the Saudi Embassy in Istanbul. Khashoggi, a critic of the Saudi regime, was a columnist for the *Post* who had been living in Washington, D.C., when he was lured to the Saudi embassy in Istanbul to fill out paperwork needed for his forthcoming marriage.

In tone, this intervention by George was unusual. Most of his interventions in MELSS and SELA and, for that matter, in "Democracy or Capitalism?" had an entirely different character. George typically began his comments in all these settings with an acknowledgement of our long-standing friendship ("my good friend Owen …"). Then, in a low-key, good-humored manner, he would continue by speaking of the need to correct an error I had made in either ignoring or misapplying some elementary economic principle. Although I always had plenty of opportunity to respond, on a good number of occasions I chose not to do so, simply because I felt that what we shared was far greater than what divided us. I feared that an off-the-cuff, in-the-heat-of-argument response might diminish the significance of what we held in common. For slightly more than a half century, George Priest and I were the best of friends and colleagues, and untiring teachers of each other.