RICHARD A. EPSTEIN

SKEPTICISM *and* FREEDOM

A Modern Case for CLASSICAL LIBERALISM

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THIS BOOK HAS HAD A LONG PERIOD OF GESTATION. It contains ideas that have evolved slowly in my mind over the past twenty-five years. My intellectual odyssey has been from a staunch libertarian who distrusted consequentialist explanations to a classical liberal who embraces these explanations. The transformation of self almost always takes place in gradual stages and it is quite impossible to pin down the one single moment that marks either its inception or its completion. I only wish it were possible to thank by name the many people who over the years have aided my intellectual journey, first as a student at Oxford and Yale, where I did my legal studies, then as a member of the faculty at the University of Southern California, and for the last thirty years at the University of Chicago Law School. I shall mention here only Robert Nozick, whose own work in *Anarchy, State, and Utopia* made me realize the close connections between political theory and legal thought.

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CONTENTS

INTRODUCTION

Why Classical Liberalism?

The Positive Case for a Negative Book

THIS VOLUME IS MY THIRD, and perhaps last, in a series of books written about the intersection of law and political theory. The first two were *Simple Rules for a Complex World* (1995), and *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (1998). In both those works, my purpose was to defend a version of what has been variously described as libertarian theory, laissez-faire economics, or classical liberalism. I included the words "classical liberalism" in the title of this book in order to emphasize that I do not think that "free markets," let alone "capitalism," supply the answer to all the questions of social organization—a connotation that is sometimes attached to the terms "laissez-faire" and "libertarianism" by their most ardent defenders.[1] I also have consciously inserted the word "modern" in the title to indicate that methodological approaches that I use to defend this outcome are of recent origin. I use the word "classical" to indicate that I use modern techniques to reaffirm traditional rules and outlooks, which were often—and still are—defended on very different grounds.

To many the views adopted here will be regarded as extreme, but I write without apology because I do not think that this charge should be accepted. My version of classical liberalism sees a large place for the operation of voluntary markets under legal protection. Yet at the same time, it is clear that markets do not operate in a void, but, as Hernando de Soto, among others, so forcefully reminds us, also depend on a social infrastructure that often only the state can create. The market depends even—make that *especially*—on such mundane but critical acts as the creation of a consistent and accurate record of land titles and a published set of addresses to facilitate quintessential private acts, such as the purchase or mortgage of real property.[2] Markets depend on governments; governments of course depend on markets. The key question is not to exclude one or the other from the mix, but to assign to each its proper role.

Classical liberal theories, by whatever name, seek to maintain that proper balance. Evaluated for their similarities and not their differences,

classical liberalism, libertarianism, or laissez-faire lay out a small set of powerful principles to guide ordinary social interaction. The relevant rules respect the autonomy of the individual. They account for the emergence of a strong system of private property by allowing land and movables to be reduced to private ownership by occupation, and animals by a rule of capture. They provide voluntary exchange as the one means for people to sell their labor or possessions to others who might value it more highly. Finally, to ensure the supremacy of the voluntary transfer of ownership of labor and property, the legal rules contain a strong prohibition against the use of force or fraud as means for altering the balance of entitlements and obligations in interpersonal relations.

The simplicity and generality of these rules should not conceal the complexity of the relationships that their consistent application facilitates. The autonomy rule provides a near-costless way to assign the labor of each person to the one who values it most—himself. The first possession rule represents an inexpensive way to remove things from the state of nature to private ownership, without extended political deliberations. These rights can then be brought together in endless combinations through voluntary exchanges that embody win-win transactions, which have the further virtue of setting the stage for subsequent voluntary arrangements that produce similar improvements. At the same time, the prohibitions against force and fraud prevent win-lose situations, where regrettably the losses routinely exceed, even dwarf, the gains. For most individuals, conformity with these principles in their daily lives goes largely unnoticed, which is why the natural lawyers often regarded their work as descriptive and not normative—a close observation and documentation of the standard rules that in an unreflective fashion organized social exchange and cooperation. But, noticed or not, these principles organize the routine transactions on which human prosperity and, indeed, bodily integrity depend.

It would be nice to say that these four rules are the end of the story. And for some ardent libertarians of a natural law bent, perhaps they are. But any examination of real-world institutions and practices makes it painfully clear that embracing these four rules leaves two intellectual tasks largely ignored. The first is to articulate a principled justification for these rules. The second is to identify a place for justified legal coercion. It is useful to say a few words about each at the outset.

Natural Justice and Consequentialist Thought

It is possible to insist that "natural" rules of conduct rest on immutable principles of justice or self-evident truths. It is, in the deontological tradi-

tion, "just wrong" to break promises, take property, or harm other people. But those dogmatic explanations, even when offered by lawyers as influential as William Blackstone or philosophers as great as Immanuel Kant, fall on barren ground today. Blackstone could write, without embarrassment: "When he [God] created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws."[3] That protestation of faith will not cut it today. There is simply too much dispute over the proper foundations of a just legal order for claims of natural justice or natural law to carry the day by fiat.

One aim of my earlier writings has been to explain how a coherent consequentialist theory avoids the *ipse dixit* of traditional theories. The trick here is to avoid the pitfalls of crude utilitarian thought, which posits some indefinable entity that is separate and apart from the desires and aspirations of the individuals that compose it. Yet at the same time it becomes important to offer strong functional justifications for these traditional legal rules, and to oppose many common forms of regulation that sought, for example, to reject or cripple the principle of freedom of contract. The natural law theorists did us the great service of isolating the core *presumptions* of a working legal system, without indicating why they continue to hold sway and when or how they could be rebutted. It is only when these presumptions are treated as a first step in an exercise of successive approximations to some desirable social objective that their full place can be understood. The sensible form of consequentialism recognizes that the deontological imperatives form the first step in that journey, but do not complete the task. The prohibition against the use of force must make room for a privilege of self-defense. The obligation to honor promises must excuse people from having to perform in full when the other party is in breach. A comprehensive theory of liberty must work out these limitations in order to be true to its own premises.

Modern welfarist theories often posit some abstract goal of utility or wealth maximization in a wide range of institutional settings without the foggiest notion of how to achieve them. Thus in their recent study *Fairness versus Welfare,*[4] Louis Kaplow and Steven Shavell offer a comprehensive description of what counts as individual well-being in their effort to explain why matters of fairness should always be regarded as subordinate to claims of utility. The root of their claim is one that I have also defended in the works mentioned above: it is not possible to articulate any acceptable principle of social justice or fairness that explains why it is that in a two-

person society if A and B both prefer alternative 1 to alternative 2, they should be required in the name of justice or fairness to accept alternative 2 over alternative 1. Any effort to force them into paths that they do not like will only result in a state of affairs that leaves both worse off than they would otherwise be. The principle generalizes to any number of individuals, no matter how complicated its application might become.

At one level, the strength of this welfarist insight explains why no system of deontological reasoning can survive this one consequentialist challenge. The claim seems clearly right insofar as it establishes a criterion by which to evaluate various social rules and practices. Why would anyone oppose making someone better off if it did not make anyone else worse off? But in order to make this claim convincing, what is needed is more than an abstract justification for how this system would work in practice, for ordinary individuals are deeply suspicious of large overarching claims that cut against the ordinary habits of mind and moral intuitions of their daily life. People have used terms like "justice" and "fairness" all their lives, and they are not about to rip them out of their vocabulary because learned lawyers and economists have concluded that they are either otiose on the one hand, or subsumed in more sophisticated accounts of welfare on the other.

In order to ease the gap between ordinary discourse and sophisticated thought, therefore, what is needed is a strong translation mechanism that links ordinary sensibilities to a more systematic theory. Typically none is supplied. Indeed much of the history of legal thought is defined by the inability to breach this gap. The tale really begins as early as Roman law. Gaius, like Justinian after him, begins his discussion of law by noting that each nation is governed by both "its own peculiar law and . . . the common law of mankind."[5] The former, described by him as the *ius civile,* includes special procedures and forms, for example, the formalities for a contract or conveyance, such as oaths or recordation, that can and do vary from nation to nation. But at the same time, Gaius is equally insistent in noting an opposition between the *ius civile* and the *ius naturale:* "while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called the *ius gentium* (law of nations, or law of all people), as being the law observed by all mankind."[6] In effect Gaius points to some elusive notion of "natural reason" that is yoked with the idea that these laws are the ones that are in common use in all civilizations. This invites the obvious response that slavery was (in the ancient law) both common on the one hand and in opposition to natural reason on the other. Justinian acknowledges the conflict by observing:

"Slavery . . . is an institution of the law of all peoples; it makes a man the property of another, contrary to the law of nature."[7] The necessary correspondence between common practice and natural reason is shattered in a single sentence.

What is needed in their stead is a way to coordinate these twin impulses of natural reason and common practice. Slavery to one side, the use of common practice often *does* point the way to what a sensible system of abstract norms would require. Justinian seeks to fill the gap by noting, however briefly, that "nature" instills a respect for these laws in all creatures, not only man, and then observes, "From it [the law of nature] comes intercourse between male and female, which we call marriage; also the bearing and bringing up of children." He thus makes an early, if feeble, effort to link the emergence of social laws to biological imperatives, a task that, when explored in connection with modern sociobiology, yields substantial dividends. After all, the basic institutions of property, contract, and tort that Gaius does describe have managed to survive more or less intact down to the present time because they have worked well to organize the daily affairs of most individuals most of the time. Slavery represents an odious practice that the ins impose on the outs, but most customs that relate to contract and tort both bind and benefit members of the in group in roughly equal proportions. At this point the survival of these laws, norms, and practices are grist for the intellectual mill that no serious consequentialist should ignore. Often it is better to presume the soundness of instincts that survive, even if one does not quite understand why they flourish. Learning does not take place only from the top down. It also takes place from the bottom up, so that in the end the best results are likely to be achieved by having top-down theory and bottom-up experience meet somewhere in the middle. Hopefully, as the knowledge base grows the two will converge, or so I shall argue here.

The Legitimate Uses of Coercion

The second difficulty with the four core legal rules of ordinary life is that, even after these emendations are made, they offer an incomplete account of the necessary features of any sustainable political order. No matter how one combines notions of autonomy, property, contract, and tort, they *cannot* independently provide for the social infrastructure and public goods that secure the very rights they are meant to recognize and protect. It is easy to imagine that individuals could form voluntary protective associations, and that these could interact with one another in ways that produce some stable threat positions, one against another. That mech-

anism surely works to some degree in international situations, where in the simplest models territorial boundaries may prove stable when each nation has enough force to block attacks by the other but insufficient force to mount such attacks by themselves, except if they are intent upon a Pyhrric victory. But it is almost inconceivable in practice that informal alliances of individuals who mingle with each other on a daily basis would be sufficient to police everything from petty street crime to strong-arm warlords, especially if tensions are exacerbated by serious racial or religious differences. The void at the center would lead to one gang's proving itself stronger than the others, taking control over the social landscape, and decreeing itself into a state. In this somber sense, some form of government is always with us. The key is to make sure that we choose it, so that it is not imposed by conquest. A complete legal system, therefore, must go outside the narrow parameters of private property and voluntary exchange in order to sustain its own operation as a sociological fact.

Critics of all forms of laissez-faire repeatedly urge this position by noting that markets require government backup for their operation. The social critic on the Left takes as his motivation the desire to demonstrate how it is impossible to find any way to erect a coherent theory of limited government that stops short of the modern social welfare state. That same observation also has been made with a different intention by thoughtful defenders of limited government and classical liberalism. The conscious shift from "contract" to "social contract" in the theory of political organization could be (mis)read as a desperate effort to rely on fictional consent across the generations even when the bare rudiments of offer and acceptance are wholly absent. As such, it could not explain how millions of people, both alive and unborn, could have reached and sustained such an agreement. But there is a better way to think about the issue. The "social contract" language is better understood as having the opposite meaning, namely, as a signal that ordinary voluntary contracts among citizens cannot provide the social and legal infrastructure that allows for the state protection of autonomy and property or the enforcement of voluntary contracts. The transactional barriers to unanimous, voluntary agreements are too great to be overcome so long as a tiny fraction of self-interested individuals are prepared to hold out against some cooperative solution—as, lamentably, they always are. The force of the word "social" in the phrase "social contract" signals the use of state *coercion* with the intention to produce a set of outcomes that meets the test of ordinary contracts—the win-win arrangements for all individuals who are part of the social system.

In this view, one main task of political and legal theory is to explain the public use of coercion—coercion is *justified* on the ground that it allows all individuals to achieve a higher state of well-being than they could do by their own efforts, either as individuals or as portions of small voluntary groups that are formed under rules that meet the test for creating ordinary contracts. A fuller theory of political obligation requires that individual consent for political obligation yield to a principle that justifies the state's use of force so long as it both supplies compensation to the individual against whom coercion is used and offers them a fair division of the social surplus that is created by public action. Elsewhere I have argued that these principles are more or less embedded in our constitutional order by a consistent interpretation of the Takings Clause: "Nor shall private property be taken for public use, without just compensation."[8] These principles can explain why a system of proportionate taxation allows the state to obtain whatever resources it needs (in peace or in war) to discharge its central mission, without altering the balance of advantage among individuals in whose service it works. It also explains why the state, through regulation and taxation, should normally acquire property through the payment of just compensation, not by confiscation. And it explains why the state need supply no compensation at all when it invokes state force to prevent various forms of aggression (such as the creation of pollution) by one or more citizens against another.

The missing, or at least suppressed, element of many classical libertarian theories is that they do not offer a comprehensive explanation of the role of *forced exchanges* in structuring a political system. The principle of autonomy never permits a draft in times of war.[9] The principle of first possession does not respond to the exhaustion of the common pool. The principle of freedom of contract cannot distinguish between an ordinary sale and a cartel arrangement. A categorical prohibition against taking does not recognize any privilege to take property of others in time of necessity. The stripped-down libertarian theories, with their extreme voluntaristic orientation, precludes the use of taxation, condemnation, and the state provision of infrastructure. These practices were part and parcel of government action long before the rise of the modern welfare state. Figuring out why these institutions are needed and how they should be designed and funded requires a major correction to the starker versions of libertarian theory, which is what the classical liberal approach seeks to supply.

Yet by the same token, the effort to respond to these difficulties does not require us to abandon the vision of limited government and fall into

the deadly embrace of the welfare state. Even after all these adaptations are made, government would occupy a far smaller place than it holds under contemporary political theory and constitutional law. The dominant modern sentiment, held on both the Left and the Right, is that finely spun political theories are just the thing that legislatures should consider in deciding what laws to pass, but that notions of liberty and property are also subordinate to the political institutions of the state. To reach this result, they place an enormous stress on the importance of deliberative democracy, but often give no clue as to the proper subjects of deliberation, nor the arguments that should carry the day in these deliberations.

No one can argue in response that deliberation is irrelevant to the success of social institutions. Private associations, regardless of their purpose, build deliberative structures into the ground floor. Directors and trustees are encouraged to speak. The communication is of value not only to those who speak but also to those who listen, which is why the right to speak is not auctioned off to the highest bidder. But the secret of private deliberation is that it is focused on those issues that are common to the enterprise, and not to the private affairs of the individual members of the corporation or private organization. By analogy, deliberation in the political context is directed to the wrong target when it decides the wages that firms can pay workers or the prices at which firms should buy and sell goods. In contrast, public deliberation is needed to decide the size of a national budget or whether to form alliances with foreign nations, or to declare war against them. No general discussion of political theory can state how these political decisions should be decided in the abstract; nor do rules on deliberation guarantee that any nation has in place the leaders who are able to meet the challenges that lie before them. What that theory *can* do is to indicate which decisions fall outside political deliberation, to be decided by individual citizens on their own behalf, and which decisions only the government can undertake, such as securing the rights of citizens, either to a set of initial liberties or to compensation for their deprivation. The real question here is the distribution of decisions between private and public bodies. One task of this book is to place limits on the scope of public deliberation by showing that a theory of limited government can be defended against any and all its critics.

Taking on All Comers

To achieve that end, I first summarize the positive case for the positions that I have adopted. Accordingly, chapter 1 defends the proposition that all important legal propositions rest not on deductive necessities, but on

powerful empirical regularities of human conduct, which explains why the same basic set of principles have received such widespread attention from so many different writers and in so many different social settings. In one sense, this is an effort to make good Justinian's cryptic suggestion of how biological demands shape legal institutions. In another sense, it suggests that the key object of comparative law is to show how the similarities across legal systems dominate the differences. From this account emerges, I believe, an understanding of the relationship between skepticism and freedom—the topic to which this book is devoted. I argue for a form of skepticism that rightly shuns a priori argument on the one hand but refuses to fall prey to the delusive trap that no moral judgment about the shape of political institutions is better than any other. In order to achieve this end, it is not sufficient to argue abstractly in defense of a rational legal order. Instead, it is necessary to build on that wise skepticism that exhibits two virtues. First, it refuses to claim that any person knows the intensity and preferences of other individuals. Second, it uses social awareness of that systematic ignorance to shape a set of legal rules that maximizes the overall sphere on human choice. We may not know the shape of individual preferences, but we can grasp the great Humean insight about how the nature of ordinary individuals—limited self-interest in a world of scarcity—shapes the central questions of political organization.[10]

Chapter 2 sets out that affirmative case by articulating the rules needed to develop a system of liberty and its relationship to the legal and political infrastructure of a political order. It rests on a form of naïve assumptions, which, while not universal truths, do wear well with time. The first of these concerns human preferences and behavior, and assumes that these preferences by and large are well ordered, even if they cannot be fully communicated to or measured by other individuals. From these building blocks it organizes the domains of individual choice with those for collectively supplied social institutions on which they depend. I defend a position that I have taken before that seeks to merge the strong protection of individual liberties with the state provision of key public goods, including the infrastructure needed to make this system work.

From this point forward, my intention is to beat back the manifold arguments from different quarters that have been advanced to show either the incoherence or downright confusion of the classical liberal order that I have sought to defend. For these purposes, these attacks come in three different types: moral, conceptual, and psychological. Each type in its own ways seeks to show that one pillar of the classical liberal synthesis has to

fall. Moral theories become arbitrary. Conceptual distinctions become arid, pointless, or confused. Behavioral profiles of individual psychology undermine the orderliness, stability, and rationality of human preference on which individual choice turns. Chapters 3–10 address these claims in turn.

Chapter 3 begins the inquiry by confronting the claim of skepticism directly, and argues that our inability to gauge the preferences of others counts as one of the strongest reasons to respect their liberty of choice with respect to their own lives. It also attacks those more aggressive forms of skepticism, closely associated with Oliver Wendell Holmes and, more recently, Richard Posner, that purport to establish on pragmatic grounds that moral relativism becomes the order of the day because of the deep-seated inability to prove even the most rudimentary social and moral truths.

Chapter 4 then develops in a systematic way the method of presumptions making it possible, by successive approximations, to show the close connection between the generalized propositions of ordinary life and the more precise requirements of a consequentialist theory. In so doing, it becomes critical to begin with the easy cases of ordinary life and only then address the more difficult cases of "necessity," dealing with such matters as abortion and rescue, which receive so much attention in the legal and philosophical literature.

Next, chapter 5 addresses the conceptual and terminological objections raised against classical liberal theory. At its root this approach depends on the ability to articulate general commands. It is not possible to form systems of constitutional governance if freedom and coercion can be yoked together as though they shared a single meaning. Yet it is just this approach that conceptual critics of classical liberalism such as Robert Lee Hale and Gerald Cohen seek to achieve. But a more patient analysis helps explain why it is coherent to speak of voluntary choices in competitive markets, and recognizes the need for distinct legal responses to the power that a monopolist can enjoy over those with whom he deals.

Chapter 6 then offers a bridge between the previous conceptual discussion and the behavioral issues that follow. The key behavioral element of the classical liberal system depends on the ability of individuals to organize their preferences over time. Indeed, without this ability it is doubtful that any organism could be able to stay the course that allows it to raise its own offspring to their maturity. Yet one common attack on the classical liberal order, mounted by Jon Elster and Amartya Sen, is that individual preferences are so inconsistent or malleable, or both, that they do not serve as a sensible basis for crafting legal rules or social

institutions. Chapter 7 then extends that inquiry by studying the extent to which Prisoner's Dilemma games frustrate the emergence of a classical liberal order. The short answer to the descriptive claims is that they seem to be largely wrong. But even if they have a grain of truth, these difficulties in the formation and expression of preferences in no event justify the grant of extensive powers to state officials, whose own internal preference structures cannot be considered beyond reproach.

Chapters 8 and 9 turn to the newer developments of behavioral economics, which purport to establish the empirical foundations for the claims about the instability of preferences and the inability of people to adopt rational means to achieve their own ends. Chapter 9 turns specifically to an examination of problems of cognitive bias, especially as they relate to issues of decisionmaking under uncertainty in financial and nonfinancial markets. In so doing, these critiques are meant to undermine the neoclassical economic assumption that, in a world of scarce resources, most individuals act in roughly rational fashion to protect themselves and their loved ones. Accordingly many modern writers argue that individual preferences do not have the stability or internal rationality that classical liberalism presupposes, or that individuals suffer from systematic behavioral quirks and anomalies that make it foolhardy to assume that strong property rights and freedom of contract will yield optimal social results.

In both cases, the opposition is overdrawn. The first line of defense of classical theories is that it is dangerous to attach too much weight to the anomalies of human behavior founded on experimental research with naïve subjects. Real-world markets are not simulations, and they create institutional mechanisms that shape expectations and correct the mistakes so frequent to experimental subjects. While these biases may come into play in a few extreme cases, they are not widespread enough to warrant any revision in the basic rules. The second line of defense argues that, to the extent that these behavioral anomalies and cognitive biases do exist, they strengthen the case for the classical legal order. Simple rules are more immune to these errors, and thus should be one major objective of public order. Similarly, the decentralized decisionmaking associated with private ordering creates a form of redundancy, which works to the relative advantage of those individuals, groups, and firms that are most resistant to these irrational tendencies. No system of legal rules and private precaution can eliminate all biases in human behavior. But the classical liberal order does better than its rivals.

In dealing with these moral, conceptual, and psychological critiques, I seek to examine and criticize in detail the strongest statements of the position I disagree with. My hope is to learn from them in ways that allow us