
SKEPTICISM AND FREEDOM:

A MODERN CASE FOR CLASSICAL LIBERALISM BY RICHARD A. EPSTEIN

BY ROBERT LEVY

Some years ago, I first heard Richard Epstein sermonize on the majesty of a free society. Prepped by an Epstein buff, I was geared up to hear the master “speak in full pages, not just sentences, without notes, ready for publication.” Later, I had to edit a transcribed version of an Epstein talk before the Federalist Society. Alas, he, like other mortals, needed polishing. Still, an Epstein lecture is a listener’s delight and the written product is a reader’s feast.

Now comes the capstone of the Epstein trilogy, *Skepticism and Freedom*, which purports to answer objections to classical liberalism raised by economists, philosophers, and socio-biologists. Regrettably, that places chunks of the book beyond the grasp of many lawyers. But there’s plenty of meat left for even the hungriest carnivore.

Volume 1 of the trilogy, *Simple Rules for a Complex World* (1995), established the principles: self-ownership or autonomy, first possession, voluntary exchange, and protection against aggression. Those mandates could be breached only in carefully defined and narrow circumstances - like private emergencies or public necessity - and then only with compensation to aggrieved parties.

Volume 2, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (1998), embraced a mostly *laissez-faire* government, relying on social norms and customs, delineating private and common property rights in water and telecommunications, and promoting private altruism over public redistributionism. Epstein’s foundation was natural law, but defended on consequentialist rather than deontological or self-evident grounds.

In Volume 3, while acknowledging that his intellectual path over the decades has led him to endorse a somewhat enlarged role for the state, Epstein nonetheless reinforces his case for libertarian fundamentals accompanied by a limited set of forced exchanges. His dual goals: first, to defend classical liberalism against skeptics who posit that “no moral judgment about the shape of political institutions is better than any other”; and second, to address the main objection of some psychologists and behavioral economists - that humans are not entirely rational, and the assumption of *homo economicus* is too sweeping to justify the classical liberal exaltation of private ordering.

Epstein begins with this assertion: All important legal propositions rest not on deductive imperatives but on observable regularities of human conduct. He does not advance that thesis as a rejection of natural law. To the contrary, natural law tends to track customary practices. In other words, “things ought to be as they commonly are” -

not because of a *necessary* connection between *is* and *ought*, but because things that work are apt to endure. Epstein’s aim is to combine custom and reason - to derive coherent principles that are responsive to the practical needs of individuals while, at the same time, addressing the moral concerns of philosophers and the efficiency concerns of economists.

That aim dictates a limited role for government. Epstein defends state provision of public goods, including infrastructure. He suggests that autonomy may be compromised to permit a draft in time of war. The rule of first possession may be modified to protect against exhaustion of the common pool (e.g., endangered species regulation). The principle of voluntary exchange may be altered to accommodate a minimalist form of antitrust law.

In nearly all other areas, cautions Epstein, the state does not know enough about what people want - surely too little to tell them what they ought to have. Knowing that it does not know, government must limit itself to establishing a framework that maximizes individual choice. Yes, Epstein is skeptical about the ability of any individual to know fully the preferences of other individuals. But he is more skeptical about the ability of government to substitute its judgment on such matters. And his skepticism does not extend to the epistemological proposition that we, as a society, are unable to develop rudimentary social and moral truths to shape our legal system.

Hayek would have agreed. Although the regulators cannot commandeer sufficient information to dictate the terms of exchange, the market can convert private knowledge into collective wisdom. Along the way, common law rules evolve - superior to the ill-informed commands of the regulatory state.

By contrast, Holmes would have trusted the legislature, not the market. His skepticism, says Epstein, gets the argument exactly backward. Holmes was wrong when he said in *Lochner* that “[A] Constitution is not intended to embody a particular economic theory.” As Epstein observes, “*Our Constitution* . . . most emphatically [embodies] a theory of limited government and vested individual rights.” Because the legislature is not privy to the opportunities and costs of private transactors, it is ill-equipped to override their judgment.

A third, albeit related, view comes from Richard Posner, apostle of law and economics. Posnerians are legal positivists who believe that law and morals are separate. To be sure, legal rules will be influenced by moral concerns, but

the existence of law is one thing, its merit or demerit is another. Epstein, to his credit, rejects that genre of moral relativism with the curt observation that “Nazi law, even if law, can be condemned on independent moral grounds.”

For his part, Epstein commends a middle approach. On average, we know enough about human behavior to structure a set of broad but non-intrusive rules that work – i.e., a set that yields better consequences (in a Paretian or at least Kaldor-Hicks sense) than alternative rules. Essentially, Epstein aspires to a legal system that produces real and material benefits for humans in ordinary social contexts. He is not content merely with the law as it exists, or solely with the immutable reason-based truths of the natural law.

Epstein’s consequentialism serves as a guide to both the easy cases and the tough cases like private necessity and duty to rescue. Yet he still gives libertarians almost all of what they want. Bear in mind, notes Epstein, that the hard cases usually have an importance inversely proportional to the effort required for their just resolution. The world is better understood by first grasping the easy, but frequent, cases that dominate. Nevertheless, Epstein is willing to tackle the nettlesome issues, and he is not reluctant to take on a few classical liberal shibboleths in the process. Libertarianism, in Epstein’s view, is an improvement over the state of nature, but libertarianism can itself be improved.

From Epstein’s perspective - less so from mine - one of the hard cases is antitrust. Epstein believes that there is a role for antitrust because the gains to monopolists who raise price or restrict output are smaller than the welfare loss inflicted on the rest of us. Perhaps so, but antitrust laws debase the notion of private property; they are fluid, non-objective, and often retroactive; and they are exploited by rent-seeking businessmen and their allies in the political arena.

Moreover, welfare gains can arise only when the monopolist is correctly identified. Otherwise, the costs of false positives could swallow the benefits of restoring competition. Fair enough, says Epstein, but antitrust could be limited to passive non-enforcement when parties cheat on contracts in restraint of trade. Yet much mischief can be spawned if the state declares one form of voluntary contractual arrangement null and void absent a demonstrated violation of third-party rights.

No doubt, the problem of private monopoly will continue to be a thorn in the side of classical liberals. But there are other challenging questions, less widely discussed, including the psychological and behavioral attacks on the *laissez-faire* model that Epstein examines in the second half of *Skepticism and Freedom*.

First, say the critics, individual preferences are inconsistent and malleable, and thus cannot be the basis for

legal rules or social institutions. Epstein responds that concerns about preferences are overblown relative to crucial state goals like preventing force and fraud and supplying public goods. In any event, he adds, private adjustments will be more effective and less risky than public solutions. A public regulator faces all the measurement problems that private parties face, and he lacks the subjective information that each person applies in making his own choices. Besides, legal interventions cost money and open new avenues for abuse, including excesses by government officials in pursuit of personal agendas.

Second, Epstein analyzes the prisoners’ dilemma - a variation on the problem of prohibitive transactions costs and imperfect information - where parties reach sub-optimal solutions because they are unable to bargain or share information with one another. P-D situations, warns Epstein, do not always justify a grant of power to politicians, whose own preference structures - as we know from public choice theory - are not beyond reproach. Still, Epstein concedes that a limited system of forced exchanges may occasionally be necessary to stop especially destructive P-D games like over-consumption of public goods. Sometimes, the cure will be worse than the disease. Much will depend on the size of the social loss and the cost of remedying a perceived shortfall.

Finally, Epstein looks at behavioral imperfections - irrational acts and cognitive biases that could yield inefficient outcomes when private transactions are wholly unregulated. For example, private parties tend toward over-optimism when evaluating a business venture; they consider sunk costs although the only relevant costs are those yet to be incurred; and they assign higher value to things owned than to things to be acquired - a so-called endowment effect which, to the extent true, diminishes the power of the Coase theorem on which many legal rules depend. Epstein’s answers are straightforward: Markets, but not government, have a feedback mechanism that helps self-correct for those biases. Experienced professional dealers, who dominate many markets, are less prone to such behavior. And no system of legal rules eliminates all biases; the classical liberal order, quite simply, is better than the alternatives.

Actually, those answers tell us that Epstein’s professed apostasy from pristine libertarianism is somewhat exaggerated. First, he creates a straw man of the libertarian absolutist, inextricably bound up in deontological rules. Second, he poses his own alternative: presumptions favoring those same rules, but rebuttable under narrowly defined circumstances. In fact, thoughtful libertarian legal scholars insist on no more than rebuttable presumptions. State intrusions on individual liberty are not impermissible, but as an initial matter they are presumptively invalid. The burden, then, is on government to show that there is a compelling reason for the intrusion and the goal, however justifiable,

could not have been attained by less intrusive means.

Like Epstein, even libertarians of the purist strain have to tolerate some ambiguity. Even when there's virtually no dispute about the foundational principles, disagreements will arise over specific questions. To illustrate: Not all libertarians share the same views regarding parental rights (e.g., the Elian Gonzales matter), or capital punishment. We differ on nuisance law (what behavior violates the rights of your neighbor?), endangerment (what safety regulations may the government impose *ex ante* on, say, nuclear power plants?), remedies (what redress is appropriate for various crimes?), and enforcement (what is the proper tradeoff between security and civil liberties?). Those disagreements on concrete issues are important, but not nearly so important as agreement on the underlying principles: limited government, private property, free markets, and the indispensable ingredient of the American experience, personal liberty.

At the extreme, anarchists opt for no government. They claim that markets can solve all the problems of social interaction. But mainstream libertarians categorically reject that notion. Instead, they advocate limited government to establish the rule of law and a social infrastructure - preconditions of markets. Because markets cannot exist without legal rules, markets cannot solve the problems associated with establishing such rules.

Those views are congruent with *Skepticism and Freedom*. In Richard Epstein, we libertarians have found our paladin and he has not deserted us. At least not yet. He may be inclined to grant government slightly more power than some of us like. That just means we have to check periodically to certify that the slope of his consequentialism hasn't become too slippery. The touchstone for libertarian devotees of Epstein is *doveryai no proveryai*, trust but verify. Meanwhile, learn and enjoy.