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SUBVERSIVE THOUGHTS ON FREEDOM AND THE COMMON GOOD

Larry Alexander*
and Maimon Schwarzschild**

PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD. By *Richard A. Epstein*. Reading, Mass.: Perseus Books. 1998. Pp. xii, 360. \$30.

Richard Epstein¹ is a rare and forceful voice against the conventional academic wisdom of our time. Legal scholarship of the past few decades overwhelmingly supports more government regulation and more power for the courts, partly in order to control businesses for environmental and other reasons, but more broadly in hopes of achieving egalitarian outcomes along the famous lines of race, gender, and class. Epstein is deeply skeptical that any of this is the shining path to a better world. Epstein's moral criterion for evaluating social policy is to look at how fully it allows individual human beings to satisfy their preferences in life, and he argues that the best policy is individual liberty and a large degree of laissez faire. More and bigger government, as Epstein relentlessly illustrates, often leads to unintended and unwanted consequences. In *Principles for a Free Society*, the argument is cogent and specific, drawing on Epstein's enormous economic, philosophical, and legal erudition.

Although skeptical of many of the trends of recent decades, *Principles for a Free Society* is an optimistic book. Epstein's optimistic view is that utility (the common good), natural law (principles of liberty), and the Anglo-American common law tradition all agree on fundamental laissez-faire ideas. The theme of the book is that, far from confronting tragic choices, citizens can enjoy both liberty and the common good; the two are really one, and apparently conflicting philosophical outlooks like utilitarianism and natural law ultimately converge on laissez-faire principles.

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I. PRINCIPLES OF FREEDOM AND THE COMMON GOOD

Epstein's root principles are individual autonomy, private property, and voluntary exchange. Individual moral autonomy is basic for Epstein. He doesn't really argue for it, nor does he need to: it is the foundation of any kind of liberalism. It is also the foundation of almost any moral theory: without free choice you are not responsible for your actions. Even Marxists, feminists, or communitarians, who might denounce autonomy ("individualism") rhetorically, would not really give it up in their own lives; and as a matter of moral theory, they cannot completely repudiate it however much they might want to hedge it in.

Private property — and what goes along with it, voluntary exchange — is, at least to some extent, a practical prerequisite for the exercise of individual autonomy. Private property gives you a degree of moral independence from other people, establishing separate domains that enable you to live side by side with others in peace. It is also an indispensable counterweight to government power and the force of social conformity, as it gives you a basis for resisting the influence of other people's political (or religious) orthodoxies. In the nature of private property, some people will have more of it than others, but in a society without property rights there will be no climate of individual autonomy at all. Private property also provides a spur to economic productivity, by guaranteeing to producers that others will not expropriate the fruits of their labors.²

Classic libertarianism therefore says that government power should be exercised only to restrain violence and fraud to person and property, and to enforce the contracts through which people undertake voluntary exchanges. Safeguarding fundamental principles requires only that much government; more government threatens these principles, and tends to violate human autonomy. This sort of libertarianism is easy to criticize as dogmatic: it insists on its principles, even when people would be better off under different arrangements (for instance, with a more active government).

Epstein takes his fundamental principles seriously, but he is not a fundamentalist about them. He supports government regulation — unlike the stereotypical libertarian — whenever regulation serves the common good. But the common good, says Epstein, must not be abstracted from the sum of the good of each and every person. A regulation is for the common good when it is to the advantage of all: when all (or more realistically, almost all) are better off with the particular regulation than they would be without it (pp.

2. Epstein's argument for private property draws, of course, on Friedrich Hayek's writings. See, e.g., FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (1944).

4, 127-28). This is a call for "Pareto superiority," a very stringent standard: most regulation, and practically any program for redistribution, will fail to satisfy it.

When it comes to government regulation or redistribution, in other words, Epstein insists on a higher threshold of justification than a mere utilitarian balancing of costs and benefits, or being satisfied with greater good for a greater number. But Epstein is often a utilitarian about other things. Market competition, or free speech for that matter, leaves some people worse off than they might otherwise be; but Epstein supports these things, as we shall see, because the benefits exceed the costs on the whole. The inconsistency might seem to cast doubt on his whole argument: Why does Epstein not accept the sort of utilitarian case for regulation that he might accept for anything else?

Moreover, the existing distribution of things may be unjust and should not have morally privileged standing.³ The existing distribution is certainly unjust if justice is believed to mean equal distribution. Even if one does not believe justice means that, one can question a distribution that results so heavily from luck or ancestral competitive success. What is wrong with government redistribution to redress injustice (or bad luck), even if it imposes costs on some for the benefit of others?

As for Epstein's inconsistency, it is more apparent than real: Epstein's central theme is that the benefits of regulation might exceed the costs in the short run, but that a climate of regulation and redistribution will create perverse incentives and social costs which will be worse on the whole in the longer run.⁴ Government is unique: its monopoly of legitimate force makes it uniquely dangerous and susceptible to corruption in ways that Epstein colorfully illustrates. And as to injustice, Epstein does not make any strong argument for the justice of the status quo.⁵ He implicitly accepts a degree of injustice as less bad — and ultimately, even less unjust — than the redistributionist alternative, which puts property rights perpetually up for grabs in a zero-sum (or negative-sum) political tug of war.

3. Professor Cass Sunstein frequently makes this point in support of government redistribution. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 43 (1998); CASS R. SUNSTEIN, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

4. Epstein's utilitarianism is indirect: people will be better off, he says, if government follows his principles — and "simple rules" — rather than weighing costs and benefits case by case or day by day. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995). But see Steven Walt, Book Review, 109 ETHICS 193 (1998) (reviewing *SIMPLE RULES FOR A COMPLEX WORLD*).

5. In earlier works, Epstein did try to make a case for the justice of property by first possession. See, e.g., RICHARD A. EPSTEIN, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

Above and beyond the libertarian prevention of force and fraud and enforcement of contracts, when do all (or almost all) citizens benefit from regulation instead of leaving things to purely voluntary arrangements? Everyone benefits from compulsory regulation when (as economists would say) there are hold-out or coordination problems. If one person can stand in the way of a desirable project or policy, then a purely voluntary arrangement allows that person to command a monopoly price in exchange for cooperation. And a coordination problem (or "prisoner's dilemma") arises when all would be better off if all cooperate, but each will not be better off by cooperating if each cannot be sure that others will cooperate. In these situations, government regulation makes everyone (or almost everyone) better off, and we have a principled basis for restraining liberty, property, and freedom of contract.

This is the way Epstein would understand John Stuart Mill's idea that a person's liberty should only be regulated to prevent harm to others.⁶ The obvious objection to Mill is that every imaginable regulation, however inimical to freedom, is designed to prevent some harm to someone, even if only to someone's feelings or moral sensibilities.⁷ Epstein would measure harm by a utilitarian calculation of gains and losses — to all concerned, including third parties — from the activity to be regulated. Monopoly, as well as force and fraud, should therefore be regulated: almost no one other than the perpetrator gains from these activities, and many people lose. But economic competition and free speech should not be suppressed. Of course, this will mean that some people get hurt: the losers in the competition and those offended by the ideas. But the gains, including "positive externalities" to third parties, outweigh the losses as society is enriched economically by competition and intellectually by the free flow of ideas. Environmental regulations ought to be looked at in the same way: an environmental harm should be suppressed when the overall loss it causes outweighs the gain, but not otherwise.⁸

Epstein's essential point is that a great deal of today's government regulation is not really justified by hold-out or coordination problems, and does not in fact serve the common good: "[J]ust call-

6. See JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett Publ. Co. 1978) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

7. There is no such thing as a victimless crime in the sense that people who are offended at the very thought of the crime are hurt whenever they know it is being committed. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 60 (R.J. White ed., Univ. of Chicago Press 1991) (1873) (a muscular Victorian rebuttal of Mill).

8. Any change or development causes some harm, says Epstein, but much development is beneficial on the whole. Epstein says a good way to test environmental regulations is to see whether society is prepared to pay for forbearance by the would-be developer rather than merely to decree it. See pp. 98-102.

ing a social state of affairs a prisoner's dilemma game does not make it so" (p. 69). Sometimes, to be sure, the cost of defection from social norms — such as the norm against violence — is too high not to restrain by legal compulsion. This is where the social contract is more efficient than the state of nature, as Locke (and Hobbes) observed.⁹ But good social norms, such as fair treatment for handicapped employees or decent behavior by landlords and tenants, are often better enforced by informal social sanctions and may actually be undermined by legal regulation. Federal regulations under the Americans with Disabilities Act,¹⁰ for example, and municipal rent control laws in various cities, are widely recognized to be inflexible and bureaucratic, and often foster adversarial and unreasonable behavior. Social sanctions may work imperfectly in these areas, but they are apt to work more sensibly than regulation: informal norms mean that people can sense "when too much of a good thing becomes a bad thing."¹¹

Government programs for redistribution and compulsory cross-subsidization also do not benefit all (or almost all) and hence should not pass muster, says Epstein. He cites the "collateral and indirect costs of massive government intervention: the enormous political struggles to decide which Bs have to subsidize which As, and to what extent; the increased moral hazard of risky conduct [for which] others will pay the price" (p. 97). Acknowledging that the debate about the effects of federal welfare spending is immensely complex, Epstein cites evidence showing that rates of poverty in America did not fall during the periods of greatest welfare spending in the past thirty years, although the rates did fall in earlier years when welfare spending increased much more slowly. Social pathology such as illegitimate births, on the other hand, increased massively during the decades of growing federal welfare support. Increased public support led to increases in unwanted behavior: "[t]he fears of the nineteenth-century moralists have come home to roost" (p. 182).

9. See generally THOMAS HOBBES, *LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1984) (1651); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (J.W. Gough ed., Basil Blackwell 1966) (1690).

10. 42 U.S.C. §§ 12101-12213 (1994).

11. P. 61. Epstein cannot guarantee, of course, that some people will not have a taste for discrimination, or for rent gouging. But he has the economist's optimism that most people will not persist in discriminating or gouging if doing these things puts them at a competitive disadvantage. This comes out more extensively in Epstein's book on employment discrimination. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992). Perhaps Epstein underestimates the herd impulse or people's lazy tendency to stick with false stereotypes. But Epstein's claim, once again, is that a high level of regulation is liable to be even worse in the long run. Government regulators, after all, are not free of their own stereotypes and irrationalities; and unlike market participants, regulators have the monopoly power of the state in their hands.

Compulsory redistribution does not merely offend an abstract principle of property rights, says Epstein; it damages democracy. If property can be confiscated by legislative fiat, public debate will tend to be "shrill and impoverished" (p. 156), an exercise in finding ways "whereby legislative powers can be used to advance the interests of one's own group, typically defined by race, sex, and ethnicity in this age of identity politics" (p. 9). If no majority (or majority coalition) in society can enact the confiscation of property from other groups, on the other hand, people will vote more cautiously about public projects. There will be more incentive for public discourse to consider the common good: "One makes a more dispassionate assessment of alternatives when one pays and receives instead of just receiving" (p. 157).

Epstein argues that the principles he lays down — individual autonomy, private property, and free exchange, tempered by regulation for the good of all — not only have good individual and social consequences ("utility"), they also conform to the traditions of Anglo-American common law and to the natural law tradition of social thought.

II. A HARMONY OF THEORIES?

Modern-day arguments for economic laissez faire are usually couched in utilitarian or consequentialist terms: market economics might not thrill the soul, so the thought seems to run, but markets make more people better off than alternative economic and social arrangements do. The theme of *Principles for a Free Society* is that freedom — including market freedom — is not only the best way to social happiness, but also that such freedom is commended by natural law ideals and the common law as well. If true, this convergence would tend to corroborate Epstein's ideas. It might also, of course, reduce the need for people to choose among incompatible social goals.

To what extent are the principles in this book in fact utilitarian, commended by natural law, and consistent with the common law tradition?

Utility

The debate over whether freedom — including economic freedom — makes for the greatest good for the greatest number has been a central debate of twentieth century politics in much of the world. In the United States, where political democracy is largely taken for granted, the debate is over how much government regulation and how much market freedom there ought to be. But lurking behind Epstein's support for smaller government, and for free markets, is his feeling for the tragedy of tyrannical government in

the twentieth century. The Nazi regime grasped for control over most aspects of life, including "coordination" (*Gleichschaltung*) of the economy.¹² The Communist regimes were based on political monopoly of all economic activity — at a catastrophic cost in broken lives, mass death, and general impoverishment.¹³ Epstein has a visceral sense that no political culture is really immune to the temptations that can lead in these evil directions.

In utilitarian terms, Epstein argues that voluntary exchanges (and the fairly limited forced exchanges he supports that truly benefit all) are win-win transactions: "they create positive-sum games from which everyone benefits" (p. 320). Bigger, interventionist, redistribution-minded government, on the other hand, "all too often [creates] negative-sum games in which the targets of state force sacrifice far more than the winners obtain. Far from creating public goods that expand the social pie, systems of coerced redistribution usually shrink it, to the long-term detriment of us all" (p. 320).

Almost no one disputes nowadays that markets are indispensable for productivity and prosperity, and that freer markets (regulated, as Epstein believes they ought to be, against fraud and monopoly) are generally more efficient than more restricted markets subject to state intervention and control.¹⁴ And there is surely an important relationship between prosperity and social happiness. Prosperity means not only greater comfort, after all, but also a greater range of human choice: resources that allow more people more readily to pursue their ideas of a good life.

The trouble with economic freedom, of course, is that it makes for unequal outcomes in life. Free markets also lead to relentless change, and hence to insecurity — personal, social, and even cultural. These are felt to be disutilities, at least by many people. Quite simply, many people object to dramatic disparities in wealth and to the idea of leaving the poor and the uninsurably ill and disabled to the mercy of private philanthropy. Many people are also offended by what seems to them a shallow, commercialized culture. What is more, economic freedom is not apt to produce the level of environmental conservation that many people favor.¹⁵

12. See, e.g., AVRAHAM BARKAI, *NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY* (Ruth Hadass-Vashitz trans., Berg Publishers 1990) (1988).

13. See, e.g., ROBERT CONQUEST, *THE GREAT TERROR* (1968) (documenting Stalin's methods and the death toll during his years in power).

14. The contrary claim — that socialist planning would be far more efficient than the "anarchy" of markets — was once a centerpiece of "progressive" polemics. See, e.g., GEORGE BERNARD SHAW, *THE INTELLIGENT WOMAN'S GUIDE TO SOCIALISM AND CAPITALISM* (1928); SIDNEY WEBB & BEATRICE WEBB, *SOVIET COMMUNISM: A NEW CIVILISATION* (1936).

15. These sorts of reservations about economic freedom are cognate to more theoretical difficulties about utilitarianism, or at least about Epstein's version of it. For example, it might be felt that children, the feeble-minded, future generations, even animals, all have

In almost all democracies, therefore, majorities tend to vote for a degree of government regulation above and beyond what Epstein would accept, intending to sacrifice some efficiency and productivity for greater equality, security, or environmental protection than market forces would produce.

A key question is whether this political bargain is tenable in the longer run. The alternative to *laissez faire*, after all, is political command and control.¹⁶ Unlike the decentralized decisions made by numerous market participants, government decisions are fewer, more centralized, more a matter of social planning. A regulator trying to act in the broad social interest needs more sheer knowledge than a market participant pursuing mere self-interest. Good regulation therefore requires wise, disinterested, and benevolent regulators. Epstein would presumably concede that there are historical moments, times of crisis or of public spiritedness, when regulators try hard to live up to these ideals. But over time, there is surely a tendency for politics to invite rentseeking and interest-group pressures. The broader the scope of politics — the more regulation and redistribution there is — the greater the scope for such pressures. These pressures ultimately may lead to regulation that creates new (albeit nonmarket) inequalities and insecurities, not only impeding productivity, but also undermining the very goals that justified regulation in the first place. In many countries in the world, surely, government regulation is synonymous with corruption, favoritism, and abuse of power. "Large and powerful forces," as Epstein puts it, always "lie ready to convert state power to their private benefit" (p. 321).

Are the social consequences better when markets are freer or when they are subject to greater government control? The least that can be said is that there is a stronger utilitarian case for economic freedom than many professional academics and other intellectuals (outside the specialty of economics) might be inclined to believe.

moral standing, and that their welfare should be taken into account. Yet, on Epstein's principles, their interests are protected, if at all, only insofar as they figure in the preferences of human adults — only these preferences count in the utilitarian calculus. Moreover, Epstein's utilitarianism is generally indiscriminating about people's preferences: it takes preferences as they are. Yet people's preferences might be altruistic or misanthropic or sadistic; they might reflect misinformation or irrationality. Epstein scarcely considers the problem of irrational preferences, but these are prevalent enough that they are, or ought to be, a theoretical and practical concern for utilitarians.

16. The claim is sometimes made that there is a "third way" in political economy, independent of *laissez faire* and centralized government regulation; but it is debatable what the precise substance of the "third way" would be, or even whether such a "third way" can actually exist. See TONY BLAIR, *THE THIRD WAY: NEW POLITICS FOR THE NEW CENTURY* (1998) (a somewhat nebulous manifesto by Prime Minister Blair).

Common Law

Common law evolved over the centuries in England, but the high-water mark of common law, at least in the United States, was the nineteenth century — a time before the “age of statutes” (and of administrative regulations) changed the role of the courts in law-making. If the nineteenth century was the great age of American common law, it was also preeminently the age of laissez-faire thinking. Not surprisingly, common law in the age of laissez faire tended to reflect laissez-faire principles, and, not surprisingly again, common law tends to be congenial to Epstein. Epstein knows common law well, thinks that common law judgments and reasoning were generally wise, and illustrates his argument with common law examples. His book is rich in common law learning, not only on broad principles of property and remedies, and in major areas like common carriers, but also on a variety of more eccentric topics: lateral support, spite fences, cattle trespass, and whaling litigation.

Epstein shows that even conflicting lines of common law cases tended to reflect the principles that Epstein recommends. For example, farm laborers in New England were typically hired for the season on contracts providing for payment only if the laborer worked for the full term. Suppose the worker left before the end of the contract term. The majority rule enforced the contract as written: no partial payment to the laborer.¹⁷ The minority rule granted *quantum meruit* payment for the work actually done.¹⁸ But the majority rule made an exception if the employer, through “unkind treatment,” had acted to drive away the laborer before the end of the term. And the minority rule permitted the employer to set off his actual losses, caused by the early departure, against the worker’s *quantum meruit* recovery. Epstein’s point is that both employer and worker had an interest in the contract as written: the worker in a steady job even in slack periods, the employer in not being left in the lurch during busy periods. Majority and minority rule alike were alert to the risk that each party might try to weasel out of his obligations while trying to hold the other side to his. What the conflicting common law rules shared was their taking seriously the individual responsibility of all parties to live up to their agreements — rightly in Epstein’s view, both from the moral and the economic standpoints (pp. 161-66).

Epstein’s enthusiasm for common law is understandable in light of his (and its) predisposition to laissez faire. Common law judges were neither economists nor theoretical utilitarians, but their intuitions (and the accumulated experience distilled in their precedents)

17. See pp. 162-64 (discussing *Stark v. Parker*, 19 Mass. 267 (1824)).

18. See pp. 164-65 (discussing *Britton v. Turner*, 6 N.H. 481 (1834)).

tended to point to the same results that economists or utilitarians would reach.

Epstein, in fact, has a general Burkean appreciation for customary practice. This gives a deeper dimension to his support for common law, since common law, as a system grounded in precedent, has a strong customary component. Custom, by definition, evolves through trial and error over time. It reflects the wisdom and experience of numerous people, not unlike the way markets reflect the sum of myriad decentralized choices. Custom also tends to evolve through repeat transactions — similar to encounters among “repeat players” — which create powerful incentives to develop rules that are efficient for the participants.¹⁹ Efficiency is the utilitarian grail, of course. But customs, blessed by time if by nothing else, often have the additional force of seeming natural and right: an example, says Epstein, of the convergence of utility with natural law.

Natural Law

The idea of natural law, or the law of reason, has a long history, although it is most closely associated with mediaeval social thought. Ancient writers, including Aristotle and Justinian, distinguished “the law that natural reason establishes [which] is followed by all peoples alike”²⁰ from the legal forms that are peculiar to one or other state or society. Thomas Aquinas distinguished natural law, which is accepted by all rational people, from divinely revealed law, which is accepted only by people of faith.²¹ Natural law theorists today hark back to the Thomist tradition and argue that norms of natural law have objective, rational force — that moral law lays down imperatives that transcend people’s shifting preferences or whims.²²

Natural law writings do tend to be more emphatic that there is such a thing as natural law than specific about what the law is.²³ And natural law has an ambiguous relationship to utilitarianism. To some degree, natural law reflects utility: what reason com-

19. Not all customs are efficient, of course: some merely reflect entrenched prejudice or the interests of “insiders” imposing costs on weaker “outsiders.” Epstein would not accept all customs indiscriminately; his ultimate criterion is whether a custom is efficient in meeting social needs. Pp. 31-39.

20. JUSTINIAN, *INSTITUTES* (J.B. Moyle trans., 5th ed. 1913), Book I, Title II.

21. See THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, qu. 91 in AQUINAS: *SELECTED POLITICAL WRITINGS* 113-17 (J.G. Dawson trans., A.P. d’Entrèves ed., 1965) [hereinafter AQUINAS, *SUMMA THEOLOGICA*].

22. See, e.g., Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 377-79 (1985).

23. Thomas Aquinas, for example, says that natural law lays down general principles, such as “debts must be repaid.” But he acknowledges that “the more we get down to particular cases,” the more exceptions there might properly be to the general principles. AQUINAS, *SUMMA THEOLOGICA*, *supra* note 21, pt. I-II, qu. 94, art. 5, at 125.

mends, and what all peoples do, is apt to be what yields (or is thought to yield) good results for people. To this extent, natural law does not compete with utility; it is not independent of it. But natural law, insofar as it claims to represent an objective morality, cannot just boil down to what people subjectively happen to want. (Majorities of people sometimes want genocide — they derive utility from it.) Sometimes, then, natural law condemns what makes people happy.²⁴ Still, to the extent that natural law merely reflects utility, natural law principles — even when you can say what they are — are not independent corroboration for the rightness of utilitarian principles.

Epstein nonetheless makes a fair claim that natural law ideas offer some support for his principles. It may not be exactly compelling that Locke and Blackstone, who are closest to Epstein's laissez-faire views, sometimes use the language of natural law: in fairness, natural law thought, with its mediaeval associations, was peripheral to Locke's liberal political theory and to Blackstone's common law scholarship. But Thomas Aquinas, at the heart of the natural law tradition, also stipulates for private property: "The possession of material things is natural to man,"²⁵ or at least "private property is not opposed to natural law, but is an addition to it, devised by the human reason."²⁶ And after all, there is private property under every known legal system, and the correlative prohibition of theft.²⁷ It is true that legal systems vary somewhat in the bundle of rights attributed to property; still, as an institution substantially "followed by all peoples alike,"²⁸ private property can plausibly claim the sanction of natural law.²⁹

Individual autonomy as natural law is more of a stretch, at least historically. Aquinas, for example, was equivocal. He does not reject it outright: Christian salvation is ultimately an individual matter. And Aquinas acknowledges the right to resist tyrannical government, which certainly means a degree of moral autonomy. But tyranny is unjust, according to Aquinas, precisely because it is directed to the individual satisfaction of the ruler rather than the

24. See Steven D. Smith, *Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AM. J. JURIS. 299, 308-10 (1997) (discussing natural law as an alternative to utilitarian calculus).

25. AQUINAS, *SUMMA THEOLOGICA*, *supra* note 21, pt. II-II, qu. 66, art. 1, at 169.

26. *Id.* art. 2, at 171. Characteristically, Aquinas cites Aristotle as authority. *Id.* at 169.

27. See, e.g., *Exodus* 20:15 (the Eighth Commandment).

28. JUSTINIAN, *supra* note 20.

29. Communist legal systems, such as they were, did try to eliminate most private property. There was broad popular resistance, especially by peasants resisting collectivization of their lands, and widespread feeling that collectivization violated natural rights. Peasant resistance was crushed through holocausts in the Ukraine and elsewhere. See, e.g., ROBERT CONQUEST, *THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE* (1986).

benefit of the community.³⁰ Aquinas's emphasis, at least, is more on the collective than on the individual: "[I]ndividual well-being cannot exist without the welfare of the family, or city, or realm."³¹

Market freedom is Epstein's most controversial principle, and the hardest for which to claim the blessing of natural law. This should not be surprising, given the association of the natural law tradition with mediaeval or at least premodern social thought. Free trade is a modern, Enlightenment idea. Premodern attitudes to commerce were much more ambivalent, and this is what the classic natural law writings reflect. Aquinas, for example, permits selling a thing at a higher price than was paid for it.³² He acknowledges the dicta of Church Fathers who seem to prohibit all sale for profit, and tries to reconcile these with his own view. But Aquinas accepts the mediaeval doctrine of the "just price," which considers value to be a matter of the intrinsic worth of things, not the ebb and flow of supply and demand. Selling for more (or at least very much more) than the just price is wrongful. So "moderate" profits may be acceptable, but not immoderate ones; and from one sentence to the next Aquinas veers from permitting trade (if it has "some honest or necessary object") to suggesting that trade is debased by its very nature.³³ As to finance at interest, and hence any sort of free market in capital, Aquinas categorically forbids it, in accordance with the long-standing Christian (and Jewish) prohibition on usury.³⁴

The older natural law writers, in short, tended to associate free exchange with greed; they were leery of the instability and change fomented by trade; and they were attached to the idea that life should mostly be directed by princes, or by religion, or perhaps by custom, but not by free markets.

Today, by contrast, the principles that Epstein urges — not only private property and personal autonomy, but also at least a large degree of freedom of contract — might seem natural and right to many people, perhaps even to most. And what comes to seem natural and right does have some of the feel of natural law. But the natural law tradition, as such, offers fairly shaky support for libertarian principles, especially for economic laissez faire.

30. See AQUINAS, *SUMMA THEOLOGICA*, *supra* note 21, pt. II-II, qu. 42, art. 2, at 161.

31. *Id.* qu. 47, art. 10. Aquinas quotes Augustine's *Confessions*: "All parts are base which do not fit or harmonise with their whole." *Id.* The Jewish tradition has much the same ambivalence about individualism as Aquinas. See, e.g., *THE MISHNAH*, Abot 1:14 (Herbert Danby trans., Oxford Univ. Press 1933) (containing the famous Talmudic saying, "If I am not for myself who is for me? and being for mine own self what am I?").

32. See AQUINAS, *SUMMA THEOLOGICA*, *supra* note 21, pt. II-II, qu. 77, art. 4, at 171-73.

33. See *id.* at 173. The Jewish tradition's ideas about natural law are embodied in the "Laws of the Sons of Noah" (laws binding all human beings, not only Jews). These laws forbid "overcharging," with an implicit endorsement of the idea of a "just price," as opposed to a market price. See AARON LICHTENSTEIN, *THE SEVEN LAWS OF NOAH* 23-24 (1981).

34. See AQUINAS, *SUMMA THEOLOGICA*, *supra* note 21, pt. II-II, qu. 78, art. 1, at 173-75.

III. CAN LIBERTY AND MARKETS SUSTAIN THEMSELVES?

That the natural law tradition does not really endorse *laissez faire* is more than just a niggles about the history of ideas. It suggests that apparently conflicting philosophical outlooks like natural law and utilitarianism really do conflict, or rather that various ideas about the Good may reinforce each other to some extent but are also irreconcilable with each other beyond a certain point. Thus, there is a strong utilitarian case for a large degree of economic freedom: both as a path to prosperity and as a basis for other sorts of freedom, including political liberty. The natural law tradition offers some support — for private property, certainly; perhaps for personal autonomy; considerably less so for freedom of contract. But the natural law tradition also embraces values that are at odds with free markets: stability; solidarity; equality, or at least charity as a public principle; and even religion and religious law.

Practically as well as philosophically, there is real tension between freedom and equality; between markets, as a relentless force for change, and the desire for stability and security.³⁵ There is a general tension between market and nonmarket values. Many people have religious commitments, for example, that they feel to be outside the market realm — likewise their values in personal relations, and even their tastes in art, architecture, or music.³⁶ Epstein would say that economic freedom affords people the resources and the liberty to live by these values if they choose. There is a lot of truth in Epstein's response: more, surely, than many people with a reflexive distaste for economic freedom might like to admit. Still, it is not clear how well these nonmarket values would thrive in the longer run in a political community with an unmixed public commitment to the market. Social critics commonly say that consumerism, for example, tends to coarsen people, and to crowd out nonmarket values.³⁷

And market values themselves — the values we associate with trade, productivity, and the sanctity of contracts — paradoxically, have important premarket and even antimarket sources. *The Protestant Ethic and the Spirit of Capitalism* makes the familiar point

35. See KARL MARX & FRIEDRICH ENGELS, *MANIFESTO OF THE COMMUNIST PARTY* 12 (International Publishers 1933) (1848) ("Constant revolutionizing of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones."). The Communist Manifesto is remarkably ambivalent about capitalism, admiring its dynamism and productivity while prophesying its doom.

36. See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) (arguing that many areas of life are best insulated from free-market transactions).

37. See, e.g., JULES HENRY, *CULTURE AGAINST MAN* (1963); ROBERT KUTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* (1997); JOHN O'NEILL, *THE MARKET: ETHICS, KNOWLEDGE, AND POLITICS* (1998).

that successful capitalism is built on values with religious sources.³⁸ These values include asceticism, hard work in your calling, sobriety, rationality, neutrality, acceptance of the rule of law, and even individualism. Weber found the source of these values, at least in the West, in Calvinism and the Protestant Reformation: despite, or perhaps because, Calvinism itself favored strict regulation and subordination of commerce to religious concerns. It is at least plausible that the continuing success of liberty and of the market economy requires the continuing renewal of these nonmarket, "Puritan ethic," values.

Once a successful market democracy is under way, perhaps these values can be renewed under public principles of *laissez faire*. Epstein makes a good case, for example, that family solidarity, a form of "selective altruism," will thrive under market conditions and that markets do better than government in diffusing the factional pressures that family and other group solidarities can generate (pp. 138-49). But it is debatable how well "Puritan ethic" values have been renewed in recent generations in the developed, market democracies. There is some evidence of degradation in democratic values themselves over time. (A comparison of contemporary American public discourse with, say, the Lincoln-Douglas debates is surely unfair, if irresistible.) Epstein's books themselves are evidence that libertarian values do not self-renew: otherwise, in a society which has — or at least had — a fair degree of economic freedom, his books would fill no need.

Illogically enough, then, a fundamentally libertarian society may need some nonlibertarian elements to keep it going. Renewing the values needed for a successful market may require public policy beyond the reach of the market.³⁹ Educational curriculum is an obvious area for such policy. Many economic insights for example — such as the Coase Theorem, or the advantages of free trade — are counterintuitive to most people and need to be taught: they are not readily learned in the university of hard knocks.

It may not be just a question of education. Libertarianism and the free market are themselves a cooperative solution to a prisoner's dilemma. And cooperation requires trust, even some idealism. There may be no invisible hand to keep alive the necessary idealism and social solidarity without some help from public insti-

38. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1958).

39. It is a familiar argument in liberal theory that a liberal society must deliberately inculcate specific virtues in order to survive as a liberal society, and that individualist, market institutions work somewhat at cross-purposes with the inculcation of the necessary virtues. See, e.g., WILLIAM GALSTON, *LIBERAL PURPOSES* 213-37 (1991); STEPHEN MACEDO, *LIBERAL VIRTUES* 254-85 (1990); Thomas A. Spragens, Jr., *Reconstructing Liberal Theory: Reason and Liberal Culture*, in *LIBERALS ON LIBERALISM* 34 (Alphonse J. Damico ed., 1986).

tutions. Social solidarity probably means some degree of public redistribution — despite the very real dangers of idealistic and redistributionary government which Epstein rightly warns against. A truly pessimistic thought is that modern governments, racked by interest-group pressures, can no longer foster the necessary values, even though these values might not be sufficiently renewable without some government fostering.

Epstein is surely too optimistic in thinking that the public good, natural right, and the law of reason all converge perfectly on *laissez faire* principles. There are inescapably hard choices between liberty and other values. And, some illogical mix of liberty and other values may be necessary in order to preserve either. As Isaiah Berlin famously insisted, all good things are not the same good thing, nor necessarily consistent with one another: you have to make messy compromises.⁴⁰

But Epstein makes a very strong case that economic freedom is an important part of personal and political freedom; that free principles can appeal to people's sense of what is right, and also promote happy social consequences; and that the altruism of big government is often a sham altruism, driven by factions angling for power and spoils, corrosive both to freedom and to longer-term social welfare. In reaching the compromises that a market democracy must reach, Epstein's principles — and what animates his principles, his optimism without illusions about the world — deserve more consideration than they often get, especially in academic circles. A step in the right direction would be to read this fine book.

40. This is the *leitmotiv* of Berlin's writings. For perhaps the most famous, see Isaiah Berlin, *The Hedgehog and the Fox*, in *RUSSIAN THINKERS* 22 (1978).