

Skepticism, Faith, and Freedom

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The Heartland Institute
19 South LaSalle Street #903
Chicago, Illinois 60603
phone 312/377-4000
fax 312/377-5000
www.heartland.org

The Acton Institute
161 Ottawa NW #301
Grand Rapids, MI 49503
phone 616/454-3080
fax 616/454-9454
www.acton.org

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Preface

The Heartland Institute hosted its 22nd Anniversary Benefit Dinner on October 5, 2006. Nearly 500 people gathered in the Grand Ballroom of the Hilton Chicago Hotel to hear outstanding presentations delivered by two remarkable individuals.

The theme was “Skepticism, Faith, and Freedom.” The speakers were Prof. Richard Epstein and Fr. Robert Sirico. Their presentations, transcribed and very lightly edited, are presented in this booklet.

The goal of the program was to showcase two different defenses of classical liberalism, one arguing from the skeptic’s view of “how the world really is,” and the other from a faith-based view of “how the world should be.” Classical liberalism is the political philosophy of the Founding Fathers. It calls for maximum individual freedom, respect for private property rights, and limited government.

Epstein and Sirico agreed to deliver four alternating 15-minute talks, rather than two 30-minute speeches. The unorthodox format seemed to work: Everyone I talked to that night said they found both speakers to be fascinating. One guest wrote to me after the dinner, “I honestly felt smarter at the evening’s end.”

Drinking from a Fire Hose

The first speaker, Richard Epstein, is one of the world’s most brilliant legal thinkers. A professor of law at the University of Chicago Law School, he is the author of many books describing and defending the principles of classical liberal thought. It was one

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of his books, in fact, that inspired the theme for this event: *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago, 2003).

Listening to Richard Epstein, it has been said, is like trying to drink from a fire hose. His delivery is rapid and flawless, with nary a single wasted word, unrelated thought, or vocalized pause. One often sits in amazement when listening to Epstein, realizing that every sentence and every word conveys important information. Listening is *hard work* because he compacts into seconds what others require minutes to express, and into 30 minutes what others may take hours to say.

When I invited Epstein to speak, I expressed concern that he would talk “over the head” of the audience, as I recalled him doing when he last addressed a Heartland audience a decade ago. “I speak slower now,” he assured me. If that is true, I didn’t notice it on the evening of October 5.

Wisdom, Not Syllogisms

Who, I wondered, could compete with the eloquence and pure intellectual muscle of Richard Epstein and deliver the complementary, but also inevitably contrary, case for classical liberalism from a religious perspective? Only one person came to mind: Fr. Robert Sirico, a Catholic priest and cofounder and president of the Acton Institute. He graciously accepted my invitation to speak and exceeded my already-high expectations.

While many priests and pastors seem content to identify social and economic problems and then call for governments to solve them, Sirico explains how voluntary and market-based initiatives often do a much better job solving problems than do government programs. More than that, he identifies Christianity as being the

wellspring of freedom in Western civilization. Christianity and freedom are not merely compatible, Sirico says, but are historically and culturally inseparable.

While Epstein and Sirico agreed on many things, the contrast between their defenses of classical liberalism could hardly have been any sharper. Epstein made classical liberalism sound like the unavoidable logical conclusion of a series of carefully considered questions about and investigations into the human condition. No need to call upon God or natural law, according to Epstein.

Sirico, though, said Epstein's approach "may give us a kind of satisfying sequence of syllogisms, but it doesn't necessarily yield wisdom. I think the question here is the question of human meaning, the question of human nature, the question of wisdom." He warned that a defense of freedom that rests merely on logic and consequentialist considerations would not withstand temptations of power or the certainty of those who think they know the truth.

Winning the Debate

It wasn't, of course, a real debate. The winners were members of the audience, who heard two of the most succinct and compelling defenses of classical liberalism ever made in the space of 60 minutes.

If you enjoy these essays, I hope you will consider passing along this booklet to friends and neighbors ... and perhaps clergymen ... who you think may benefit from their messages. A little booklet like this can be more persuasive than a lengthy book, or even a long and passionate conversation or debate.

Ultimately, the survival of liberty depends on persuading people, one at a time, that classical liberal ideas are as relevant as

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they were in 1776, and perhaps never more important than they are today. I hope this little booklet becomes a useful tool in that effort.

Joseph Bast
President, The Heartland Institute
November 3, 2006

First Presentation

The Classical Liberal Model

By Richard Epstein¹

I think this is really quite an extraordinary occasion because this exchange is by design completely unrehearsed. We do not know whether we are going to reinforce or disagree with each other on any of the points that we're about to discuss. Father Sirico has not the foggiest idea of what I'm going to say, and I have to tell you I will reciprocate, because I have no idea what he's going to talk about either.

My first set of remarks is about freedom. I noticed about this topic a peculiar tension in the room. In front of me on my podium is a sign that says "skepticism," in front of him is the sign that says "faith." Freedom is supposed to be on the program, but it is nowhere present on the platform. What we have to do under these circumstances is to figure out, by an amalgamation of our two particular world views, how we can restore freedom to the program.

Now, my point of view is in fact a secular one that makes no

¹ Richard Epstein is the Distinguished Service Professor of Law at the University of Chicago Law School and a Senior Fellow at the Hoover Institution.

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appeal to religion at all. I'm not so good in the faith department. Indeed, sometimes I'm sufficiently cynical about faith, even in my own beliefs, that I go back to the old definition of faith, which is "believing in what you know ain't true." So I will start with skepticism, and see how it relates to freedom.

The Skeptical Approach to Social Order

People with a limited-government perspective have generally approached questions of law and political economy in one of two ways. First, there are those who come from a fairly strong, deductive tradition, from natural law, who believe that either through divine origin or through the incredible regularities of nature, the world operates on certain kinds of immutable and inescapable truths. Our job is simply to find them, and realize that, once we find them, they're forever true and never changing.

And then there are folks like myself who are attracted to the deductive methodology, but are a little suspicious of its rigidity. Writers in this school think that, really, what you have to do is to begin with some appreciation of what people are like in their basic human nature, as the older theories would do, and then ask, in a more purposive or instrumental fashion, exactly what it is that we need to do in order to create a world in which this set of people with various temperaments and traits do not kill each other, which is the first requirement, and, from time to time, actually cooperate with each other, which turns out to be the second requirement for social prosperity.

So what do we know about the nature of human beings? Well, the first thing we know is how *little* we know about them in a certain sense. I've been married for a very long time, and there are certain preferences that my wife has that are perfectly apparent to

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me, but there are other things that I find utterly mysterious. Sometimes I am astonished at how little I know of the preferences of those whom I hold most dear.

When it comes to dealing with strangers, of course, I often do not have a clue as to how much they value one thing as opposed to another. Therefore, I have to be very suspicious of my own ability to impose my preferences upon them, and, at the same time, I must be sufficiently insistent that they do not impose their preferences on me.

So what we must confront is this terrible problem. We have this fundamental sort of awareness of our ignorance of the preference structures of other individuals, and yet we have to make some kind of collective and common judgment as to how we organize society, knowing full well what we don't know. How is it that we start to do this?

Two Features that Shape Human Nature

I think the first move we make in any kind of enquiry of this type is to ask what—either by evolution or by natural disposition, however acquired—is going to be the basic, formative, psychological framework of individuals? And here I think there are two features that are so pervasive in the world that it is difficult to escape them in trying to formulate any political theory.

The first of these is the problem of scarcity. Abundance is a temporary and transient state. Scarcity is the long-term condition of mankind. The definition of scarcity for these purposes is really quite simple: it's a universe in which it turns out that the number of total demands exceeds the number of material and social resources that are available, which means that no matter how you allocate them, some degree of resentment and disappointment is a

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necessary part of human experience. There is no way that you can please, as it were, all the people all the time, no matter what form of social organization is in place.

Given the fact that there's this external scarcity, you have to ask, "What pressures will that constant condition put on character formation?" What kinds of individuals are going to develop in light of that scarcity?

And the answer turns out to be, I think, best expressed by the classical philosophers. What you find is a situation in which there will be a powerful strand of self-interest coupled with what David Hume termed "confined generosity." Now, self-interest here is a funny little term, and what I mean by that is not narrow egotism in which each person cares only for that person and nobody else. What it means, in effect, is that people care a great deal about those who are near and dear to them—family, children, spouses, friends—and relatively less about the thousands or, indeed, millions of other people out there in the universe with whom they could, and perhaps should, have some degree of interaction.

Putting together the rules for a workable society requires us to recognize this basic mental framework of its members, which is, as the classical philosophers wrote, their human nature. Now, what kinds of rules do you have, and how can they be implemented?

Rules of Property

To organize this system we must start with rules of property—that is, how you acquire things, either in your own person, or in external things and how you protect them. Only then can you switch to a universe in which you start to deal with rules of contract—how it is that you cooperate with others.

Property rules don't bring us together. These are the rules that

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keep us apart. These are the rules that prevent people from killing one another. And the first question you have to ask is, “What kind of universe do we want to live in?”

Now, I’m just going to give you the two stark choices. One is a free-for-all in which everybody can take a bop at anybody else at any time, and the other is a situation in which all agree to renounce the use of force, and the threat of force, against all strangers whom they don’t know.

Each of these rules has the benefit of a certain kind of equality. This equality, we should note, is extremely important to putting together a social system, because the moment you start to admit gradations among strangers, you’re not going to have to only calibrate them for each pair of individuals—you’re going to have to figure out what the special deals are for two hundred million or two billion people on the face of the globe. No one can do the mental or the physical accounting to make these differentials both well-ordered and knowable. So essentially the basic postulate of equality amongst persons is a necessity in order to be able to keep our human accounts straight.

The second property we want in a set of property rules is that they be what modern economists call “scalable.” We want the rules to be basically the same regardless of the number of people who happen to exist in a given location at any time. It would be almost impossible in dealing with strangers to say, “Oh, the city of Chicago now has 5 percent more people than it used to have. Therefore, the rules of property are going to change.” People migrate, people emigrate, people die, and people are born: The property rules have to survive all of those transformations.

So which of our two extremes do we want? We have one—a world in which everybody tries to kill everyone else, and life is, as Thomas Hobbes wrote, solitary, poor, nasty, brutish, and short. Or

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we can have a set of rules in which there's this universal forbearance, everybody keeps their hands to themselves, nobody messes around with anybody else. In effect what we can do with this particular system is to create the kinds of separate spaces that make it possible for people to have a chance to live peaceful and prosperous lives. And so when you start sorting out entitlements as a matter of political theory, this notion of universal forbearance is what gets you to the desired position.

Well, somebody will say, "You believe in freedom of contract, Professor Epstein. Why don't you have contracts from the state of nature, which allows everyone to escape this free-for-all and receive by agreement the stability we all crave, without insisting on the need for any government whatsoever?" The answer comes from Ronald Coase. It is the problem of high transaction costs.

If you actually try to figure out the number of bilateral—that is, two-party—contracts that are necessary to keep peace in the world, you get into the trillions very quickly. The cost of running the system is too high to be feasible. What we do instead therefore is substitute for this contractual nightmare a property rule, a uniform contract imposed by society on all its members in order to create this fundamental separation.

So the basic libertarian instincts of liberty on the one hand and property on the other are, I think, born of the appreciation that we cannot devote huge amounts of emotional energy to taking care of strangers. Yet at the same time, we recognize the overarching imperative to find a way to keep those who wish to be kept apart, separated.

Rules of Contract

Now, what is wrong with a world in which we have only property rules, without also having families, businesses, or other kinds of voluntary associations? The answer to that question is stunningly simple: It turns out a system of property may guarantee you survival, but it will not guarantee you prosperity, because property rules do not, standing alone, provide for a way to have cooperation amongst individuals.

Cooperation can take place in two forms. Sometimes just two people putting their shoulder to the wheel allows it to move, where if only one person did so that wheel would sit in a rut. So I will help you push your wheel, then you will help me push my wheel. I will help build your barn, you help build my barn. And we both get to share some gains.

In other cases, the gains are even more pronounced, because, as Adam Smith said when he wrote *The Wealth of Nations*, trade is what makes possible the gains from specialization and the division of labor. The key intuition about contract which makes it differ so much from property is that contracts are unique two- (or few-) party relationships that each of us chooses to enter into. In every case, we all choose the person or persons we want to deal with. We then negotiate and massage the details of our agreements in a world in which our property rights have already been protected.

The Eleventh Commandment, one I think that Father Sirico will agree with, says “all contracts produce mutual gains amongst the parties.” To the extent that you have that, the major task that remains is to allow people to sort out whom they want to deal with and then to reduce the transactional complexities, one way or another, in order to make sure that cooperation for mutual gain takes place as often and as rapidly as possible.

So the basic intuition is that a strong system of property rights

and a system of relatively high-velocity voluntary transactions will allow you first to get security and then to get prosperity through cooperation. And so if you wanted a very short version of what the libertarian or classical liberal theory is, that is what it would essentially require.

Problems with Libertarianism

Now, the question is, where does this theory start to break down, and what are some of the difficulties associated with it? Let me mention one real difficulty which raises some genuine complexities, and then one imagined difficulty which ought to raise no complexity at all, but in fact raises immense difficulties in practical applications.

The real difficulty is: What's the definition of coercion?

The situation that I've talked about thus far has to do with the threat of the use of force by one person against another. There are some people of a philosophical bent who try to generalize from this, and say really the threat or use of force is simply representative of some broader "harm principle" which says any time you do something which harms another individual, they're entitled to some form of redress.

That is a very dangerous trap which we must learn to avoid. The reason we have to avoid it is that if you allow harm to be unhinged from the notion of force or the threat of force, it will quickly include situations where you have very strong disapproval of the actions of other individuals, or take offense at what they do. If you wanted a recipe for intolerance, this would be it.

That broad harm principle invites the following descent into totalitarian behavior. If somebody else does something I don't like and I don't care, then since I don't care, I'm not harmed, and he

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can go ahead and do it. But then I think to myself, “Really, I know better for this fellow than he knows for himself. I’d like to be able to stop him.” What’s the way in which to do it? Under the harm principle, it is to become truly indignant, absolutely outraged, and the madder you get, the greater your right to tell other people what they may or may not do. Nobody in his right mind could think that this form of escalation is an appropriate way to encourage cooperation.

If you want to apply the harm principle sensibly, I think you also must marry it to a principle of toleration. And that principle says, categorically, across the board, you never have a warrant to interfere in the activities of others, because otherwise others can interfere in your activities, and in the end it turns out that the world is filled with so many offended and offensive people that the entire system simply chokes on its own definitional confusions. So the basic element of the “harm” principle is “no offense.”

The real difficulty comes from another quarter. And that’s the quarter which will not be relevant, I think, to the question of faith, but is relevant to the question of social organization. Namely, what do we do in a circumstance where either nature or the law creates a single supplier of a good?

Generally speaking, in competitive markets, where there are lots of sellers and lots of buyers, the refusal to deal is what moves price up or down, and allows the law of supply and demand to allocate goods efficiently. But if it turns out, to use the medieval example, you own the only inn on the road from London to Oxford, and if you refuse to take in a passer-by, he or she will be killed by brigands in the night, then all of a sudden the lack of choice and the adverse consequences of refusal take on a far more serious coloration.

So the hard part of the classical liberal system is, in effect, to

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figure out when it is that the libertarian model fails, and why it is that some forms of state coercion are going to be required. And that in turn requires you develop a theory of monopoly power, a theory of regulated industries, a theory of rates of return, and so forth.

The second difficulty, on which I will spend a grand total of fifty seconds, because time is running short, has to do with how you finance this wonderful system of property and contract rights. The classical libertarian theory, without a system of forced exchanges, cannot account for taxation, which creates the state monopoly, which allows you to enforce property rights and contract rights.

So the last thing you have to do is to figure out a system of taxation, and the classical response which I strongly endorse has always been to say, if it's a particular function being done for a particular person, use user fees wherever possible. In contrast, if it's general revenues that you need to raise, do it by a flat tax proportionate to income.

And if you put all of these pieces together, it's a relatively simple society that you have: Strong property rights to keep people apart, voluntary associations to bring people together, some regulation of monopoly or essential facilities, and a system of general taxes to fund the operation.

Second Presentation

Christianity and Freedom

By Fr. Robert Sirico²

When we began the planning of this evening, I proposed that we reverse this debate: That I stand over there in skepticism and Richard Epstein stand over here in faith—his faith in human beings, and the necessity for them to have liberty, and the shared skepticism that I have, with Richard, of the state, and its coercive and deleterious effect on human life in society.

It was Karl Marx that warned about the anesthetizing effects of religion. He called it the opiate of the people. His thought was that Christianity or religion in general would cause people to be complacent in the face of social difficulties and class conflicts and that this would impede the revolutionary impulse. That religion was too “out-there” focused and not sufficiently “here-and-now” focused.

There are many such concerns about religion in general, and many of these same concerns might be applied to anyone, theist or not, who makes a claim to know truth.

I had an exchange with a friend and a person I admire whose

² **Rev. Robert A. Sirico** is president of the Acton Institute for the Study of Religion and Liberty.

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name I will not mention, but I'm sure everyone here would know who it was—it wasn't Richard Epstein—who said that what I fear is people who claim to know the truth. And I think that this fear is what animates, in some cases, the skepticism of religion, and religion's role in public society.

Yet consider the alternative: That we are to be epistemological agnostics, that man cannot apprehend the truth, to which one might reply, "Is that assertion true?" It's self-contradictory.

Religion's Threat to Freedom

I don't wish to too easily dismiss the potential negative effects of religion or faith, that it has had historically, that it may still have on society, and the threat that religion or faith can pose. But the question for me is, "What kind of faith? What kind of religion?" I reject the notion of fideism that simply conjures up a belief when one doesn't have sufficient data to make an assertion.

The kind of faith, the kind of religion, that I speak on behalf of tonight is not an arbitrary claim to know truth, but a religion that is firmly rooted in history, the particular history of a people, the Jewish people, who I consider, as a Christian, our elder brothers in the faith. I speak on behalf of Christianity—and as a Catholic priest in particular—in Christianity's defense of reason.

In Europe today, it is a strange phenomenon that the sons and daughters of the Enlightenment are precisely those who denounce the capacity of man's mind to know truth, and it is that age-old heart of darkness, that ancient force of coercion, the Roman Church, that is the clear defender of reason in Europe at this moment.

Let me answer at the outset the thoughts that I detect bubbling in some minds here tonight. Here I stand before you, a priest of the

Roman Church. An incantation would suffice to dismiss my right to be on this platform: Galileo, Inquisition, Crusade. I do not deny these sad moments in my tradition's past. Rather, I repent of them, as John Paul the Great repented of these and other sins at the outset of the liturgical season of Lent in the year 2000.

But I also take into consideration that the very matter by which we may judge the errors of the actions of Christians in the past form the core of Christian moral understanding. That is, the morality with which we denounce coercive activity that would bend, or attempt to bend, the conscience of man at the behest of some ruler, autocrat, or theocrat, is at the heart of the Judeo-Christian religion. Christian morality forms the base of that which gives us the capacity to denounce the errors of Christianity itself.

Christian Anthropology and Freedom

The kind of truth of which I speak is a truth, or a faith, that is rooted, as I say, in history. It is a history that sees the creation of the world as fundamentally good. That the material world comes from a good God, who situates the human family in the context of scarcity, thereby giving rise to the very concept of property.

The anthropology which is pre-supposed on those first pages of the Bible, are what will come to inspire, down through the ages, the institutions that will protect the dignity of that human person who bears the *imago dei*, the image of God. This anthropology will also undergird and allow to develop a concept of the dignity and value of the individual person, whose rights are not merely derived from tribe or family or nation, much less state, but who, by the very nature of his or her existence, is a rights-bearer.

This anthropological vision that I think comes to great fruition

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in Christianity sees every human being who comes into existence as having a nature and a dignity that transcends all collectives, all states. This person does not derive his rights to exist from the state or the family, but has those rights simply because he or she exists, from the first moment of his existence, until his natural death. And in this concept, those rights can only be violated, but can never ultimately be legitimately alienated from such a person.

Christianity's Skepticism of Power

This tradition, and the Old Testament in particular, identifies the skepticism of ruling monarchs, as we see when Israel asked for a king, and God himself said, “Beware. If I appoint you a king, he will send you to war. He will cause your daughters and your sons to be slaves.”

The skepticism that runs through that, and that resulted in a kind of civil court system that was independent of the state, is a kind of skepticism of political power that is seen in the simple yet elegant words of Jesus Christ himself—words that might have gone forgotten, but today we are reminded of their importance, the distinction between authority and power, when Jesus said, “Render unto Caesar what is Caesar’s, and unto God what is God’s.”

Power, Robert Nesbit tells us, like authority, is a form of constraint, but it is a form of constraint external to the person, whereas authority is a form of constraint that is internal, that which we acquiesce to because we basically buy the values, the mores, the traditions, the culture. That distinction comes from the mouth of Jesus: the legitimacy of a public, secular sphere, as well as the legitimacy of a spiritual or religious sphere.

This tradition which I am outlining was a subversive commitment, living under the Roman invasion of Palestine. It was

a tradition that caused Christianity to be a subversive religion, because it did not see Caesar as a god to be worshiped. It would obey the legitimate laws of Caesar, but would give to God what is God's. This tradition, this anthropology, would emerge in the Middle Ages, to actually be the foundation of scientific economics.

Christianity and Economics

Long before Adam Smith there were the scholastics of the sixteenth century, in Salamanca in particular, but elsewhere, who began as moral theologians, and then began to develop scientific economics. This is not a theological contention. I'm basically quoting to you the second chapter of Joseph Schumpeter's book, *History of Economic Analysis*, where he identifies the schoolmen as disciples of Saint Thomas Aquinas, as those who first systematize and organize systems of economics that would later be expounded on by Adam Smith and von Mises and Hayek and others.

The institution of the university, the institution and universalization of the institution of charity, these come from the Judeo-Christian inspiration. The concept and institutions of property and contract, as Rodney Stark most recently has delineated in his book, *Victories of Reason*, all are the inheritance of the Judeo-Christian faith.

And it is this faith, this anthropological presupposition, that undergirds the sacred calling of business. The merchant, in the Christian and Jewish tradition, is one who is responding to a vocation as a result of the nature imposed upon their reality by the God who created them. And this vocation tells us that each human being is entrusted with certain talents, certain gifts, which they have the responsibility to use, and to use wisely, to use generously,

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to use creatively and productively.

These gifts that have been entrusted to the human person have often been inhibited by those who own the means of coercion, by the state, by those who have been tempted by the corrupting influences of power, as distinct from authority. To the extent that the state inhibits this entrepreneurial calling and vocation is to precisely that extent that the state violates the dignity of human beings, and the very order of the universe and its nature.

Authority Instead of Power

Men and women need to be governed not by the edicts and legislation of capitols and parliaments, but by a reign that exists within the hearts of men and women. A reign, a rulership, an authority that will govern us, not because we are forced, but because we are internally compelled, because we have come to a belief in human dignity that understands that each one who stands before our eyes has a destiny beyond this world, which no legislator or military or government dare touch; that we, as human beings, have a vocation to find that destiny, and that we can only do so under the context of liberty.

Liberty is not a virtue in itself. It is the context in which virtue or vice can be enacted. This is a contrary vision to the Marxist notion of class struggle and class warfare. It is rather Bastiat's vision of economic harmonies. And it was no economist who identified it so well, but rather a simple nun who lived in the slums of Calcutta, when she said that we ought not to condemn or judge the rich. We do not believe in class conflict, but in class *encounter*, where the rich save the poor, and the poor save the rich.

Third Presentation

**Classical Liberalism and
the Protection and
Delineation of Faith**

By Richard Epstein

Now that I have had the benefit of Father Sirico's excellent presentation, I don't think this dialogue is going to become a debate. Nonetheless, let me see if I can find at least one point of difference between us before I enter more treacherous waters by talking about how our overlapping frameworks actually apply to questions of faith as opposed to questions of political order.

Father Sirico said the institutions of property and the institutions of contract are very much an integral part of the Jewish and the Christian tradition, which is surely correct. I myself actually started my law studies as a Roman lawyer, which probably explains why I have never been in step with my fellow American Constitutional lawyers.

Meanings of Private Property

The most striking feature about legal systems, when you study comparative law, is that the basic institutions I've talked

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about—and often the rationales that are put forward for them by serious thinkers—are remarkably constant in every legal tradition of which I’m aware. We have a kind of universalism with respect to these ideals, at least in early and primitive times, of the dominance of property born of scarcity, as Father Sirico said, and then of contract born of choice, which is the way in which we start to fulfill our human capabilities and lend dignity to our lives.

What I want to do here is to go back over the social framework that I talked about before and ask, “How do a system of religious liberty and a system of liberal faith on matters of religion fit into that basic framework?”

Our first topic was the institution of property. Once you actually instantiate what “property” means, it turns out that the Roman definition is the one still used in modern times. It gives one individual, with respect to a particular parcel of land or some chattel, or perhaps some other kind of tangible object, the right to exclude everybody else in the world, no exceptions, and to have the right to use and to dispose of that property without regard to the consent of others. So there’s a strong sense in which one individual is allowed to make all these choices, and everybody else in the universe is forced to stand aside and to allow them to do what they want within their limited space.

How far are they allowed to do what they want? The rights of property have never meant you can do whatever you wish with your property, because the torts of trespass and nuisance essentially say that the “harm” constraint, which we also talked about, applies to the utilization of property, just as it applies with respect to the utilization of your fists. So what happens is we have exclusive use within a perimeter of rights, so long as you respect the like rights of other individuals to use their property in their spaces. Who gets this right? It’s a single owner. How does that

single owner then proceed? He or she decides whom to admit to that property, and what ventures to engage in.

Property and Religion

One of the ventures that people might wish to do with respect to property is form a church or otherwise engage in religious activity. To the extent that one can develop a set of rules in which the ability to establish a church or a temple or a school is something which can then unilaterally be done by an owner, without the consent of anybody else in the world, you've guaranteed, in a sense, a position of free entry, in which multiple religions can compete one with another. Each can try to attract a following or a flock, nobody else can block them.

So what you've managed to do with the basic rules of property and contract is create multiple points of power, each within its own circumscribed boundary, each of which is independent of all of the others who are around it. This in effect means that these notions of property rights, which have often been conceived of as a form of possessive individualism, in fact function in exactly the opposite way. By virtue of your ability to include—that is, by agreement to selectively allow to enter into the property that you hold those people of like inclination and organization—it turns out that property becomes the basis on which various forms of consensual and cooperative behavior take place, including the establishment of various kinds of religious organizations.

Contracts and Religion

Now, when I talked about contract before, you should be aware of

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the fact that I did not mean so only in the sense of simple, bilateral transactions, like buying and selling a good in a store through a merchant. There is a second class of contracts every bit as important, and those are contracts that start to create enduring relationships amongst multiple individuals, each of which may well have a governing structure of its own, like various kinds of churches do.

If you are a Congregationalist, it turns out that you believe in a bottoms-up kind of rule generation, in which the congregation determines the rule. If you're a Roman Catholic, it's a more hierarchical situation with greater control from the center. All these forms of organization are allowed to flourish amongst themselves.

The key feature about the world of contract is it allows you to choose with whom you're going to associate. Property allows you to decide whom you're going to admit, and you can then start to form those kinds of organizations and unities which are most likely to promote the greatest harmony and goodwill amongst their members.

One of the reasons we have to worry about forced associations is, when you put together people of fundamentally different beliefs, their ability to agree on solutions that are mutually satisfactory is going to be very limited. One of the reasons why we want to have a small government generally dedicated to the preservation of order is the moment you start to have a state which has more extensive functions, the heterogeneity of taste amongst its citizens is such that they will have an ever-harder time figuring out what to do. It becomes dangerous to make large, ill-defined claims about the importance of (one single) community.

If you want to have an open society, as I do, if you want to have lots of immigration, lots of people from different

backgrounds, it becomes harder to get common faith through government, it becomes much more important to have private faith through religion and other forms of voluntary organization.

So if you look at what's happening here, what do the property laws do? They allow religious groups to exclude. What do the contract laws do? They allow them to create much denser networks of arrangements in which admission no longer depends simply on being a citizen, simply having a birthright—now it depends on there being a genuine agreement with respect to belief, so that all of you wish to come together with respect to the common religion, in which you have a part.

Religion on the Offensive

Now, the second feature that one has to worry about is religion not on the defensive, trying to keep the rest of the world out, but religion going on the offensive, and trying to take over other individuals. And as Father Sirico said, there is oftentimes a very sorry side to religion, in which there are Inquisitions and intolerance toward others. How does somebody of a basic libertarian faith start to deal with these people and try to figure out what should be done in these circumstances?

Here the basic intuition starts with how we aggregate rights. Every time you organize a voluntary organization, what you do is you sum up and recombine the rights that all individuals have vis a vis each other—but you cannot, through that organization, increase the rights that any of your members have against anybody who is not a party to the voluntary arrangement that you put together. This principle of a conservation of the rights of strangers against voluntary organization is in fact one of the fundamental principles of civilization.

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If we had a rule in which Mr. A and Mr. B could get together and vote Ms. C out of her property, then, in effect, private contract would become the greatest device for exploitation known to mankind. For this reason it has always been flatly illegal to form a conspiracy to steal from other individuals, and the reason why we fear contract under those circumstances is the gains that people get from trade are now more dangerous, because the object of the conspiracy is to deprive other individuals of their like liberties. Two people working together can do more harm than working separately, so we must attack negative synergies just as we support positive ones.

Well, this constraint applies to religious organizations just as it applies to anybody else. If it turns out that you can get 90 percent of a population to agree with your religion, if you follow this appropriately, it means that you can do nothing whatsoever to the other 10 percent that disagrees with you. They still preserve all their rights to form their own church, or to be in no church whatsoever. So the theory that protects religion from aggression from others also ensures in an appropriate fashion that no religion can engage in aggressive activities against people with other religious beliefs or no professed beliefs.

It seems to me that once you understand the rules that govern this interplay among persons, you now have the appropriate way to understand what religions can and cannot do. They cannot, in effect, bind the unfaithful, but what they can do is exert control over their membership, and use any sanction, including excommunication, to the extent that they, by agreement or by rule, have decided that certain kinds of activities are inconsistent with the faith they have.

Freedom and Anti-Discrimination

Now how does this start to square up with some of the modern established legal principles? In many cases, as the state gets larger, legal complexities often get much greater. Let me give you just a couple examples.

Start with the case of anti-discrimination laws, which generally are thought to say that ordinary individuals (at least in some roles, like employers) are not allowed to discriminate against other people in entering into certain kinds of arrangements, employment or otherwise, based upon race, religion, nationality, or anything of the sort.

I wrote a book some years ago, called *Forbidden Grounds*, in which I took strong exception to the anti-discrimination laws insofar as they apply to competitive industries of one kind or another. My argument in this context is that a norm against discrimination is necessarily a part of the problem that we talked about early with respect to monopolies and common carriers. You've got to take everybody on, regardless of whether they are Jewish or Christian, if you have the only inn or the only railroad.

But if it turns out that you're running churches, concern over monopoly or common carriers ought not to apply and the principle of freedom of association ought to prevail. Nevertheless, this position is challenged all the time in modern litigation. For example, can anti-discrimination law be used to compel the Catholic Church to ordain women priests?

Well, it seems to me that, at that point, you can see that the laws in question have this very powerful totalitarian instinct, because now what they're designed to do is to tell various people how they ought to run their activities. Most of our legislators often slight the basic principle of freedom of association, and their compromise of that principle sets a very bad precedent. They sense

the tension here. But instead of thinking through their first premise anew, they agree to carve out ad hoc exemptions for religious leaders.

But then suppose it turns out that you want to run a comprehensive school or workplace in which everybody participates in religious activities. Can you demand the same membership and loyalty requirement of your janitors and custodial staff and your mailroom people that you can of your priests and of your teachers? And on that particular point, we often find cases in which the law says that you cannot. But it seems to me that the principle of the freedom of association under these circumstances is sufficiently powerful that we should be aware of the real dangers for totalitarianism that come from thinking the state should define the boundaries of religious associations.

In a free society, there should be no principle that makes organization A or organization B hire a particular person. That applies generally, and hence to religious organizations without further ado. Given that there are huge numbers of individuals with varying and unknown preferences, the state should not seek to match them up with institutions, groups, and firms that meet their tastes. Almost invariably—if you have no state on the ledger, forcing or pushing you in one direction or another—the voluntary sorting in competitive markets, whether you're dealing with religious activities or with other kinds of activities, will work fine. It will allow people to reduce tensions by going their separate ways, without having to battle on matters of first principle with folks with whom they fundamentally disagree.

Freedom and Marriage

Another question that has been extremely important to religious organizations is the institution of marriage. Marriage licenses

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began around 1880 or 1890 in the United States, but marriage as a social institution began and was organized prior to the creation of the state, as an unregulated institution. Well, what form ought marriage to take today, and how ought we to think about it?

In general, it seems to me that the basic conceptual model of marriage is one of voluntary association for the purpose of procreation, raising children, or, indeed, anything else at all. The one common theme is that marriage involves some sexual activity. How those arrangements are made is not something for the state to decide. The licensing function, therefore, has to be sharply limited to the kinds of things that the state could coerce people not to do, like transmit infectious diseases.

If we look back on our history we find that polygamy is an important illustration of the kind of practice that meets all of the consensual norms, was practiced by recognized religions, and yet was banned by the state, in particular Utah, which ban was upheld by our Supreme Court in a case called *Reynolds v. the United States* in the late 1870s. The upshot of this decision was that polygamists were branded as criminals and their property was forfeited to the state and transferred to their political opponents.

I think we have to recognize, if we believe in a tradition of liberty, how we must deal with that issue. We know that a power to license puts the state in a terrifically powerful situation because it enables the state to create monopolies. We also want to make sure that, to the extent that people have fundamental disagreements with one another, licenses are not used to skew political power one way or another.

So my own view about it is: If you want a polygamous marriage, you don't have to invite me to the wedding. And if invited, I might not choose to attend. But don't use state coercion in order to stop the particular arrangement from taking place.

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At the same time, we want to make sure on the other side that if there are religions that have strong antipathies with respect to these sorts of practices, we do not use the state power to impose on them, with an anti-discrimination law, an obligation to take in individuals whose sexual behaviors meet with church disapproval.

It seems to me that this approach also applies today to the great issue of gay marriage. In dealing with this problem, this middle position is the solution that I would offer. It turns out that those religions that choose not to recognize these unions are free to organize their own affairs, those that wish to do it are free to organize their affairs. The role of the state is to remain neutral between these two practices, and it is a matter of political and moral and social discourse as to whether or not we do or do not approve.

The great mistake in this debate, as in any other, is to assume that when you're dealing with matters of coercion, this ought to be a question of majority will. On this Father Sirico is indeed right: The dignity of human beings is maximized by maximizing the scope of individual choice.

Fourth Presentation

Religion Is the Root of Freedom

By Fr. Robert Sirico

There is much on a practical level and what we might call a contractarian level that Richard and I agree on. But I suppose we're here at least in part to pretend we're having a row, and in the interest of trying to do that, let me try and identify what I think the real disagreement is here, other than the "God" question, which is not the debate tonight. That would be a very interesting conversation, but it would take up more than a night to do it.

I think what we're getting to is the question of nature. And I am not persuaded that simply a sequence of data satisfies, a sequence of arguments does not ultimately satisfy the universal quest for the meaning of things.

Syllogisms Are Not Wisdom

I agree with Richard that the first question in a civil society with its legitimate autonomy from any kind of religious institution is to make sure that there is peace, that people don't kill each other, and that this then creates the context in which people will have an

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incentive to cooperate with each other. But I don't think that gets to the thing in itself. It may give us a kind of satisfying sequence of syllogisms, but it doesn't necessarily yield wisdom.

I think the question here is the question of human meaning, the question of human nature, the question of wisdom. I don't think, while I like the mode of the argument, and the sequence of the argument with regard to marriage, I don't think for a moment that those who began with a quest for tolerance are going to be very tolerant very long.

We see those who claimed the right of free speech in, for instance, parts of Europe, now arresting pastors—I believe it was in Sweden, or maybe it was Norway—for preaching a very traditional message with regard to homosexual activity. So, an understanding of what tolerance is has to go to not just the argument for cooperation, but to the nature of human beings.

I think that economic truth is true. But it is not the whole truth of who human beings are. It tells us certain truths about our condition, but economism does not account for the totality of human existence.

The Good Society

I think the Judeo-Christian anthropology gives a better starting place, in understanding that the human being is simultaneously corporeal and transcendent—and, in addition to that, has a dimension which is autonomous and yet always in relationship. These two categories—the autonomy and cooperative or social nature of the human person, and the corporeal and transcendent nature of the human person—account for a basis, a set of presuppositions, on which I think we can build a society which is not merely free, but is also good.

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It is not merely justice that we seek in society—that is a rather necessary but meager necessity. What we want is also a society that can inspire charity, that can raise up armies of men and women who, at great sacrifice to themselves, are prepared to go and tend to those who are vulnerable. We need a society that accounts for human vulnerability and that can inspire men and women to confront that, for reasons that transcend their own comfort or their own interest.

It is true that we need security. It is true that we need prosperity, and we must work vigorously, especially at this moment in our history, to protect the institutions that have given us this, as Lord Acton calls it, “the delicate fruit of a mature civilization.” That’s what he called liberty. We must work strenuously to safeguard these necessities of security and prosperity.

Problems of Secularism

But what happens when we have our prosperity and lose our meaning? What then happens, if we don’t have a sense of ourselves as transcendent beings, of beauty, as a cultural reality? How vulnerable do we become to the always-present passions of totalitarianism? How easily tolerance is converted into intolerance.

The document of the Second Vatican Council, *Dignatus Humanae*—“On Human Dignity”—says very clearly that Christian truth is not coercive. That was in the 1960s. It makes a very definite effort to disassociate itself with any claim of truth that would assume the right to coerce the conscience of man. Most recently, you have seen that subject raised again, by Pope Benedict XVI in his address at the University in Regensburg. Not so much on his citation of a fifteenth-century emperor that got all the

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publicity, but the very theme of his talk, which was on reason, and on the necessity of reason in the free society. That was his talk. And if there was a criticism of anything, it was the secularism of Europe that is now turning into such an intolerant religion in and of itself.

I suggest that by understanding our nature more profoundly, we have a more sure safeguard, a more radical commitment to the dignity of the human person, that does not only limit what the state can do in these amalgams of society broken into different religious communities or different social units, but would also limit what the church itself can do to its adherents, to its faithful.

This is a thing that a lot of people don't understand about the Christian religion, as distinct from some other forms of religion, that give the family, for instance, complete control over the child. You know very well that, in some parts of the world, young children, young women, girls, are forced to undergo clitorectomies—female circumcision—in the name of religion, or honor killings, if a girl disgraces her family by perhaps choosing to marry outside the religion or the clan.

As big a supporter of the sanctity of the family as the church is, the church does not believe that the family or the church can coerce the conscience of a girl, or a boy for that matter. Because of the nature of the person, there are some limits that the church itself has to observe, and the point that Benedict was making in his speech in Regensburg is that God binds himself to reason itself.

And that's why the lack of reason, the renunciation of reason, in this understanding of God, is antithetical to the Jewish-Christian world. Tolerance and truth are concepts that we do not understand well in this society because we have lost a sense of ourselves.

I think that to a very great extent, the whole debate about marriage is a debate that's going on because we've lost a sense of

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what marriage once meant to us as a society—the self-giving, the self-prediction of one man and one woman for life, with an openness to new life. That was the entire world's, or at least the Judeo-Christian world's, understanding of what marriage was roughly at the beginning of the twentieth century.

It is because we have lost the sense of who we are, and a confidence in the principles that built our civilization, that we find ourselves in such a confusing and incoherent dilemma at this moment as a culture, as a society, as societies where our freedom is so deeply threatened.

Faith Is the Root of Freedom

I would like to close with a metaphor that occurred to me a few years ago. I live in a religious community in Kalamazoo—the Acton Institute is in Grand Rapids, but I commute to Grand Rapids. I actually live in Kalamazoo. And when we moved into this house, there was a tree very close to the side of the house and I looked up at it. Being from Brooklyn, I had only seen a tree before once, passing by. As I recall, it had graffiti on it.

So I will admit to you, I don't know a lot about trees. But I saw this big, beautiful tree, and only part of it was blossoming. There were only leaves on part of it. Part of it was dying. I soon discovered that there's such a thing as a tree doctor. So I called the tree doctor, and he came. I expected this man to come with a black leather bag, but he didn't; he arrived in a pickup truck.

And he looked around, picked some bark off the tree, looked at the ground, looked at the tree, and said, "The tree's dead." And I said, "How is the tree dead? It's blossoming!" He said, "No, no. That's the residue of the sap that is flowing through the trunk of the tree. In another season or two, that'll stop."

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“But,” he said, “You will have to take this tree down now, because it’s been very weakened, and a good wind could come, and it could fall on the house.” And so we removed that tree.

I often think of that image when I think of the dilemma we are in as a culture, both here in the United States and in Europe, where Western civilization was built along with all of these marvelous institutions that are designed to protect our liberties. I think that we have forgotten our roots. It seems that the tree is still blossoming, because the stock market occasionally does well, and we make little advances for liberty here even while we’re losing them there.

But I suggest to you that we must return to an understanding of our roots of who we are as a people, and have the confidence to say who we are as a people, a people who had room and still has room for people of a wide variety of faiths, because it is Western civilization that gives rise to the notion of tolerance, which is not moral agnosticism. It’s quite the opposite.

Tolerance is not agreement. Tolerance is precisely the willingness to restrain from the use of coercion. When you see something you don’t like, you tolerate precisely what you judge to be unacceptable or wrong or sinful.

I suggest that as a people we need to reconsider the nature of things—things in themselves, and not just this sequence of arguments—to get to the root of the matter, so as to know how to preserve this delicate fruit of a mature civilization.

Speaker Biographies

Richard Epstein is the Distinguished Service Professor of Law at the University of Chicago Law School and a senior fellow at the Hoover Institution. He received a B.A. in philosophy *summa cum laude* from Columbia in 1964, a B.A. in law with first class honors from Oxford University in 1966, and an LL.B., *cum laude*, from the Yale Law School in 1968.

Upon his graduation he joined the faculty at the University of Southern California, where he taught until 1972. In 1972, he visited the University of Chicago, and he became a regular member of the faculty the next year. He was named James Parker Hall Professor in 1982 and Distinguished Service Professor in 1988. He has also been the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution since 2000.

Epstein's books include such libertarian classics as *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books, 1998); *Simple Rules for a Complex World* (Harvard, 1995); *Takings: Private Property and the Power of Eminent Domain* (Harvard, 1985); and *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago, 2003).

From 1981 to 1991, Epstein was editor of the *Journal of Legal Studies*. Since 1991, he has been an editor of the *Journal of Law & Economics*. He was elected a fellow of the American Academy of Arts and Sciences in 1985. He served as interim dean of the Law School from February to June of 2001.

Rev. Robert A. Sirico is president of the Acton Institute for the Study of Religion and Liberty. Fr. Sirico received his Master of Divinity degree from the Catholic University of America,

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following undergraduate study at the University of Southern California and the University of London.

During his studies and early ministry, Fr. Sirico experienced a growing concern over the lack of training religious studies students receive in fundamental economic principles, leaving them poorly equipped to understand and address today's social problems. As a result of these concerns, Fr. Sirico co-founded the Acton Institute with Kris Alan Mauren in 1990.

As president of the Acton Institute, Fr. Sirico lectures at colleges, universities, and business organizations throughout the U.S. and abroad. His writings on religious, political, economic, and social matters are seen in a variety of publications, including: *The New York Times*, *Wall Street Journal*, *Forbes*, *London Financial Times*, *Washington Times*, *Detroit News*, and *National Review*. Fr. Sirico is often called upon by members of the broadcast media for statements regarding economics, civil rights, and issues of religious concern, and he has provided commentary for CNN, ABC, the BBC, NPR, and CBS' *60 Minutes*, among others.

In April 1999, Fr. Sirico was awarded an honorary doctorate in Christian ethics from the Franciscan University of Steubenville, and in May 2001, Universidad Francisco Marroquin awarded him an honorary doctorate in social sciences. He is currently pastor of St. Mary Catholic Church in Kalamazoo, Michigan.



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