

CHAPTER FOUR

Libertarianism
and
Character*Richard A. Epstein***Political Rights and Moral Theory**

The topic of this chapter is the relationship between libertarian theory and the development of individual character. To set the stage very quickly, I note at the outset that the general principles of Libertarian thought are powerful because of their simplicity: respect individual autonomy, enforce property rights, respect private contract. Classical liberal theories conceive of a somewhat larger role for the state, which has the power to impose taxes, condemn property, manage common pool resources, and limit the power of monopoly. For the purposes of this chapter, however, the differences between these two theories are relatively unimportant because the focus is on those personal obligations that individuals have to their fellow citizens, not on the legal mechanisms of the enforcement of those obligations.¹ Hence, although these differences will be noted when relevant, I shall only

My thanks to Eric Murphy for his usual redoubtable research assistance.

1. For a more detailed discussion of my views, see Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (Chicago: University of Chicago, 2003), 1–8.

stress the similarities between the two schools of thought. For convenience's sake, I therefore use these two terms interchangeably, unless otherwise noted.

Libertarian thought, broadly conceived, has little to say about the character and motivations of ordinary human beings. To be sure, libertarian thought develops a moral system insofar as it works with concepts of justice and injustice, right and wrong. But as a moral theory, its sole office is to establish the proper set of legal relationships between individuals. It is not, in any sense, an effort to identify the mainsprings of human conduct, to guide individual choices, or to prescribe whether people can be generous or stingy, gregarious or taciturn, impulsive or reflective. Indeed, it would be a mistake of major proportions to assume that legal rules are a dominant force in shaping individual character; family, school, and church are much more likely to be powerful influences. The people who run these institutions will use their influence to advance whatever conceptions of the good they hold, no matter what the state of the law. The generous person will continue to be generous even (and perhaps because) the law does not impose an obligation of generosity.

Within this large set of social and personal influences, libertarian thought sets rules that, in many ways, moral theorists would treat, at most, as moral minimums. The legal enterprise sets some outer boundaries on individual choice and then lets each person decide what moral principles to follow within those bounds. Keep your promises, don't assault your neighbor, and don't trespass on your neighbor's property are not standards that exhaust the list of behaviors that anyone would attribute to those individuals who are worthy of our admiration and respect. Public service, compassion, integrity, spirituality, conviction, imagination, patience, moderation, understanding, helpfulness, and a thousand other traits seem to gain widespread moral approbation and show the hollowness of insisting that efforts to treat various forms of moral judgment are invariably subjective or arbitrary. Any stress on legal theory should not, however, be used to conceal

the importance of these characteristics in forging stable communities and organizations. In some cases, lawyers and economists do try to understand how these elements work. One notable example in this direction is Truman Bewley's perceptive study of workplace morale.² But, in general, the purpose of libertarian theory is to identify the proper rules for social organization, which leads libertarians to stress economic arguments about legal arrangements.

Great legal thinkers have often been criticized because of their unwillingness to plumb the depths of human emotion—that is the heart of John Stuart Mill's critique of Jeremy Bentham in his famous essay.³ But there is, I think, a certain cold logic that holds that some separation of law from morals works on both sides of the relationship. To be sure, the basic prohibitions against murder, theft, and trespass rest on a strong sense of right and wrong conduct of the sort that requires the backing of legal sanctions. For huge areas of human inquiry, however, it is possible to identify other vital issues in which decisions cannot be reduced to workable legal standards. Here is one quick example: A look at the qualifications for the office of president under the U.S. Constitution reveals that the president (today) must be born a citizen of the United States, must be at least thirty-five years of age, and must have resided in the United States for fourteen years.⁴ Clearly, these requirements are groping, in some loose way, at issues of loyalty, maturity, and familiarity with the United States. But the Constitution sets out weak conditions relative to the seriousness of the inquiry. Everyone who thinks about choosing the president of the United States asks tough questions about health, age, leadership, knowledge, stamina, and a thousand other qualities. Yet no one thinks that these should be treated as formal requirements of the job subject

2. Truman Bewley, *Why Wages Don't Fall in a Recession* (New Haven, CT: Yale University Press, 1999).

3. John Stuart Mill, "Bentham," in *Essays on Politics and Culture*, ed. Gertrude Himmelfarb (Garden City, NJ: Doubleday, 1962), 85, 106–13.

4. U.S. Const. art. II, § 1.

to either administrative or judicial review. The Constitution's great genius lies in its minimalist view that the political judgment of electors must, in the end, guide the selection process, a point that holds even though the electoral college has never really functioned as a deliberative body.

So if the basic libertarian rules have little directly to say about character, why bother investigate the issue at all? The investigation is important because the rules of everyday life influence the characters of everyone, including ordinary citizens, the captains of industry, and public servants. That influence can be exercised in two distinct ways: First, the rules create subtle *incentives* toward the development of character traits that flourish within the system. Whatever kinds of behavior are rewarded will appear in greater abundance. Second, and of equal importance, the rules exert a powerful *selection effect*—those individuals who inherently have the traits most compatible with the legal regime are the ones who assume positions of influence and power within the system.

I have little doubt that there is a natural distribution of endowments in talents and temperaments that looks very much like that for height or lactose tolerance. People have different proclivities toward breaking promises, using force, lying, or helping the sick, just as they do for anything else. In dealing with both natural and social selection, it is the variance around the mean that matters. The choice of legal rules, therefore, is important because these selection effects tend to minimize the psychological dissonance between what people are asked or allowed to do in order to succeed and their comfort level in doing it. Quite simply, people who have the personality traits that match the legal norms are more likely to succeed at the business of life. This element of fit is perfectly evident with respect to occupational sorting in general and explains why my career as a bench scientist (no, talking is not a laboratory skill) aborted as soon as it began. The same forces that lead kids who enjoy math to become scientists or kids who like poetry to write jingles work as much in this context as they do in

any other. In effect, the reward structures set up by the legal rules lead to shifts in relative fortunes in the short run, which in turn sets up a dynamic that works itself back into child rearing and education in the long run.

In dealing with this subject, it is important not to be utopian about the positive influences that libertarian rules of legal conduct have on individuals. There is a long tradition within the law that attacks the system because of its stubborn refusal to bridge the gap between moral and legal duties. To give but two examples: The common law has long taken the position that individuals have no duty to rescue strangers (as opposed to individuals with whom one is bound by status, such as parent and child, or contract, such as counselor and camper) who are in condition of imminent peril, even if the individuals could do so at little inconvenience or risk to themselves.⁵ This position has been attacked on repeated occasions as revolting and barbaric and as promoting an excessive form of individualism inconsistent with social life. There are, without question, instances where the charges ring true, as in the famous case of Kitty Genovese, who was stabbed to death on a public street while several dozen people looked on, none of whom bothered to call the police because of fear of getting involved.

In the face of this grim example, the institutional defense of this rule starts with the position that when the conditions for easy rescue are satisfied, we can find few instances of individuals who will not lend a hand. Thus, most people will be more likely to assist in legal rescues if they know their own conduct will not be subject to legal challenges after the fact. It is worth noting that the legal system contains provisions that allow individuals to obtain restitution for their expenses in effectuating a rescue if they do so without the intention

5. See, for example, *Buch v. Armory*, 44 A. 809 (N.H. 1897), for the common-law view. For one of many critiques, see William L. Prosser, *The Law of Torts*, 4th ed. (St. Paul, MN: West, 1971), 341. "Such decisions are revolting to any moral sense," *ibid.*, 341.

of conferring a gift.⁶ Oddly enough, however, the case law offers virtually no instances of individuals seeking recompense under that provision, just as it offers, ironically, virtually no instances of lawsuits by people who have not been rescued in the few jurisdictions that have changed the common-law rule by statute. The risks of character deformation are real, but there is no clean way to remove them without creating other (and greater) complications.

In similar fashion, virtually all legal systems refuse to enforce gift promises, even when made with the greatest of solemnity.⁷ In general, it is required that the promise be part of a bargain or be evidenced by a deed or some other form of writing. Yet, in most cases, these promises are respected; when they are not, it is often because of a change in background conditions (e.g., a rapid change in financial fortune) that might well excuse the performance of a gratuitous promise. Here again, one could chide the libertarian system of being neglectful of moral duties; but, in fact, the practical difficulties of implementation have proved sufficiently weighty that few jurisdictions have abandoned this basic rule, notwithstanding the enormous expansion of liability in other areas of contract law. As with the failure to rescue, the legal system appears to do enough for the moral issues simply by recognizing that both moral and legal duties exist, even as it does not seek to bridge the gap between them. No doubt, parents can teach their children the importance of helping those in need and keeping promises, all in the absence of legal compulsion. Indeed, the clear implication of these decisions is that the legal order depends heavily on social sanctions to enforce these moral obligations. After all, the very use of the phrases “imperfect obligation” or “moral duty” is an explicit rejection of any form of moral relativism with respect to rescue or promise keeping.

6. Restatement of Restitution, § 118.

7. See, for example, *Mills v. Wyman*, 3 Pick. 207 (Mass. 1825), defending the view that these promises should be a species of “imperfect obligations” not backed by the force of law.

Two Rival Frameworks

With these caveats in mind, it is important to take a more systematic view of the overall legal system in order to contrast the set of personality and character traits that are fostered in a libertarian universe with those that are fostered in the modern welfare state. It is useful to set out, in brief compass, what I think to be the hallmarks of the two systems in terms of the direct application of each to ordinary life.

Libertarian Entitlements

It is useful to elaborate on the key elements of the libertarian view (with classical liberal overtones allowing for the use of taxation and eminent domain powers) mentioned briefly in the introduction. All individuals have personal autonomy so long as they are of full age and competence. That autonomy carries with it the right to do as they please with their own bodies and natural talents, to enter into what associations they think fit, to choose what occupations and careers they desire, to marry (a term that carries a lot more freight today than it did a decade ago), and to raise and care for children. It also implies the right to acquire property—at least that property regarded as unowned in the state of nature—for their own use based on a legal regime that follows the strict principle of “prior in time is higher in right.” It also denies a duty to rescue strangers, as noted earlier.

By the same token, the overall framework is more classical liberal than libertarian. It allows for the recognition of stable forms of common property, such as those developed for rivers and highways, and limitations on access to certain common pool resources, such as game and fish. It also allows for the collection of (proportionate) taxes and the enforcement of some antimonopoly legislation. The standard forms of private property are, in general, freely alienable, subject only to those restraints on alienation that are voluntarily assumed as part

of the basic transaction. This same freedom also applies to transactions involving individual labor, in which the general rule is just as Hobbes stated it: the value of any good or service in exchange is that which the appetite of the buyer is content to give. Low transaction costs and the high velocity of transactions are crucial to the success of these voluntary markets.

This system also recognizes certain powerful universal duties *roughly* captured by Mill's harm principle,⁸ which must be understood, quite consciously, as something narrower than a rule that treats one individual as harmed if he perceives himself as worse off by virtue of what another individual has done. In fact, the system embraces some exceptions that prove necessary for the idea of liberty (and the ownership of property) to survive at all. The moral intuition is that the definition of "harm" cannot be so broad as to allow the subjective offense taken by A to block the actions of B. This aggressive view of the harm principle replicates the most unattractive features of the Rawlsian minimax principle on a transaction-by-transaction basis. This principle states that legal changes should be made to improve the position of the worst off. If this is so, then, as applied to specific disputes, it gives a veto power to the person who thinks worst of what is about to happen. Every action could lower the happiness of another person (such as his worst enemy), but the liberty of any individual person cannot survive if judged solely in reference to the sensitivities of the one individual who is most upset with the action. This version of the harm principle is a recipe for social paralysis. Lawyers are at their commonsense best when they won't let this principle happen in practice. Thus, there is much sense in the common-law nuisance rule that holds that the extrasensitive plaintiff cannot shut down a church bell that has been in operation for a long time and has not bothered the community at large.⁹ Much of the troublesome litigation under

8. John Stuart Mill, *On Liberty*, ed. Gertrude Himmelfarb (New York: Penguin Books, 1974) [1859].

9. See *Rogers v. Elliot*, 1 N.E. 768 (Mass. 1888).

the establishment clause, such as that over the use of the words “under God” in the Pledge of Allegiance, arises precisely because the one person most hostile to religion often dictates the pattern of behavior in public schools that is acceptable.¹⁰ This outcome represents yet another example of the kind of interest group brokering that takes place in all public affairs, often on the somewhat overstated claims of “coercion” said to be imposed on those who choose not to participate in the particular activity.¹¹

As these cases illustrate, the general fear that liberty will disappear beneath the harm principle leads to three basic qualifications of the principle, which I set out, but do not defend, here. The first is the principle that competitive injury does not count as harm, even if various unfair forms of competition (e.g., passing off and trade libel) do count because they involve the use of fraud and, occasionally, force. Second, new construction blocking a neighbor’s view does not count as a harm to the neighboring owner. Finally, the mere fact that one takes offense to the conduct of another individual does not count as harm, no matter how distasteful the practice. This last principle does not require the state to limit certain forms of conduct in public places (e.g., nudity). These three harms, which are not counted in the harm principle, are routine occurrences, associated with greater gains on average to other individuals. I doubt whether a systematic social decision to ignore these harms counts as a Pareto improvement over a world in which each harm is duly recorded. Nonetheless, I suspect that summed over all times and all particular goods, the legal rule approaches that result: that is, I cannot conceive of anyone who is likely to be better off under any legal system that categorically treats these harms as actionable instead of irrelevant. But even if that stringent condition is not met, I have little doubt that the current regime offers huge net gains over a world that refused to accept these qual-

10. See Richard A. Epstein, *Toleration—The Lost Virtue, The Responsive Community* (forthcoming 2004).

11. *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004).

ifications to the harm principle. For our purposes, I do not wish to emphasize the important differences between the libertarian and the classical liberal perspective; but I do insist that for this discussion the anarcho-libertarian position is off the table.

The Welfarist Position

It is also necessary to give a brief account of the welfarist position, which stands in opposition to the classical liberal view of the world. The word “opposition” is a tad strong, however, because there is little question that just as Franklin Roosevelt intended to save capitalism, so it is that the modern defender of the welfare state is not a hard-line Socialist who agrees with Prodhoun that all property is theft. Rather, in the usual formulation, modern welfarists accept large portions of the classical liberal system as a plausible point of departure for their own prescriptions. Stated otherwise, the position has a comprehensive theory of market failures that go far beyond the usual problems of pollution and public goods. Following are the key points of difference.

On matters of individual autonomy, the modern welfarists dispute the Lockean position that all individuals are entitled to the exclusive use of their own labor because the arbitrary distribution of natural talents cries out for some equalization of wealth, typically through a decidedly progressive tax. On matters of property acquisition, the welfarists express an uneasiness with the rules of occupation for land and capture for animals because of the arbitrary nature of the higher-in-time rule. On matters of contractual liberty, they do not think that the usual grounds of duress, fraud, nondisclosure, and incompetence exhaust the legitimate reasons for state intervention. They are willing to block voluntary transactions because of the alleged inequality of bargaining power between the parties and because of their deep conviction that strong informational asymmetries upset the contractual process.

Most concretely, modern welfarists tend to favor the full range of

laws that limit individual freedom in employment by imposing rules that call for minimum wages or collective bargaining or that prevent people from refusing to hire or promote on grounds of race, sex, ethnicity, national origin, or increasingly, sexual orientation. Their definition of harm is likewise expanded—bad views or unpleasant neighbors become harms that are easily cognizable under the zoning law. Fair trade statutes may properly provide strong protection against effective economic competition. Ironically, it appears that the first-in-time rule, to which they are skeptical with respect to the acquisition of property, has some claim for the prior acquisition of market position—that is, the right to do business with other people—at least if the claimants are individuals or firms within the jurisdiction. Likewise, *selective* forms of offense justify public intervention, such as the revulsion at racial discrimination but not, of course, same-sex marriages. It is obviously dangerous to generalize across the entire legal world, because these new grounds for intervention are often resisted in individual cases. Some zoning laws are thought to discriminate against members of minority groups. In addition, free trade in the international arena has received an admirable boost from, for example, the *New York Times*, which has yet to see a welfare or education program that it is unwilling to expand. But even so, this snapshot summary does capture a good deal of what goes on. How then do these two worldviews translate into differences in character development?

Character Formation as a Response to Legal Rules

As noted earlier, the basic incentive mechanism of legal norms is that individual character traits that receive positive payoffs from the norms will tend to grow relative to those that do not. People will develop those traits that promise positive returns. At the same time, a social form of Darwinian selection will favor individuals whose personality types reduce the stress between how they think and feel and the

behaviors to which the legal system attaches positive (or negative) payoffs. Point by point, how does this all play out?

Autonomy and Redistribution

The standard libertarian position treats individuals as the owners of their own labor, which they can use as they like, as long as they do not interfere with the like liberty of others. The willingness to work at one's productive peak is necessarily enhanced by the knowledge that one can keep what he has earned, without being forced to share it with strangers. In turn, those strangers no longer have an incentive to hold back from doing work of their own in the hope that their passivity will create some entitlement against their more productive peers. The willingness to sluff off will often require individuals to conceal their true intentions so that dissimulation becomes a private advantage even though it is a public liability.

Note that this observation is *not* an argument against all taxation, only against taxes that are heavily and overtly redistributive. In contrast, under the libertarian (or at least classical liberal) view of the world, the taxes imposed under the benefit theory should neither reduce the incentive to engage in hard labor nor create envy or resentment between neighbors. The taxes in question are all designed to provide individuals with goods that they could not acquire in voluntary transactions. Properly executed, the benefit received from the taxes paid is worth more than the taxes paid for each person. In effect, therefore, every worker in the tax world has a *better* incentive to create than anyone who goes without these needed public goods. Without the tax, a person's return from labor could be X . With the taxation, it is $X - T + B$, which is a higher return on labor so long as $B > T$. The proportionate tax requirement used to make the benefit theory operational counters the ability of any faction to tilt the incidence of taxation toward other groups and away from its own. The strong requirement that the taxes go to public goods limits the ability to skew the benefit and, with it, openings for factional advantage. The

form of the tax, however, does not limit the total level of public expenditures, which could be set as high or as low as the fundamental purposes required by the state—protection against force and fraud and the creation of infrastructure. People now have strong incentives to make honest revelations of their positions and to debate public issues candidly, knowing that they can benefit themselves only by helping others equally. The rules reward hard labor and honest labor. By creating win/win situations, no longer is there reason to engage in divisive rhetoric that attacks success as though it were greed, or worse. Public dialogue is improved because the gains from demagoguery are reduced. Thus, the proper legal rules, including those on taxation, create an optimal incentive structure for productive labor.

Once the welfarist's view that all individuals' talents should be treated as shared goods is accepted, the entire system of public discourse is altered for the worse. Each person is viewed as having an inchoate lien on the labor of everyone else, so that it nows pays to cut back production and plead poverty. In this environment, the tax system does not enhance individual productivity; instead, it becomes a powerful and serious barrier against the system's development. As long as the prospect of having others take care of a person exists, it reduces the need and the willingness for family members to take care of each other. Not only is there less production, but also family structure becomes more fragile. Pervasive state support allows individuals to turn aside pleas for personal assistance on the ground that these are properly addressed, not to them as a matter of charity but to the state as a matter of obligation. The constant stress on redistribution spurs attacks on the rich on the ground that the earnings of the rich are illegitimate. Taxation is seen as a way to impose punishment on those who escaped their "fair share" of the tax burden, even if, as is probably the case, the flat tax redistributes wealth away from persons with very high income. The net effect is to encourage people to advance themselves by tearing down the achievements of others: a zero-sum game. This corrosive effect on public discourse breeds and

rewards cynicism. It is a mistake to assume that classical liberal thought is indifferent to questions of public discourse and morale. These ideas matter enormously, but typically they are best achieved by creating a sensible economic and political framework that rewards people for their successes and penalizes them for pretending to be victims.

Property

The rules for the acquisition of property count among the most controversial in the libertarian worldview. Why does the winner of the race to possession garner the property, to the exclusion of the rest of the world? The answer in part is that, systematically, we care less about who owns the property than about the fact that “*everything ought to have an owner.*”¹² All property should be subject to an owner who is able to develop, consume, or trade the resource, that is, to use the resource in the most value-maximizing way. The legal rules are meant to establish a single owner with a minimum of fuss and bother. But what kinds of character does this rule reward?

On balance, it rewards those who are quick to spot opportunities and respond quickly to them. But it would be a mistake, I think, to regard this as a kind of character defect. Any individual who takes possession of land need not do so for himself but can do so in the name of a family, clan, or partnership.¹³ The rules look much less egoistical in context of the overall framework than they do when standing alone. The rule in question does not have the same bedrock quality as do the rules that govern trade and harm. The clear recognition that possessory regimes can lead to the exhaustion of common pool resources often tempers the first possession rule by limiting what can be taken and how. If the overconsumption issue is solved by external constraint, then the traits of preparation, speed, and deter-

12. Henry Maine, *Ancient Law* (London: Oxford University Press, 1861), 213.

13. *Ibid.*, 213–14.

mination, which determine success in individual races, are robbed of their negative associations. Indeed, we can say, more generally, that having to share common resources while recognizing the equal rights of access in others has exactly the opposite quality: it teaches people to work for private advantage within an overall common framework. The full panoply of rights is a mix of private and common property. It thus requires people to learn how to share the use of a sidewalk at the same time they tend to their own gardens.

I am hard-pressed to see any consistent set of character traits that emerge out of the rules governing the acquisition of private property through a system of first occupation, particularly today when the amount of unowned property that is subject to this rule is so small. The one large exception to this rule is the law of patents and copyrights, which strongly favors inventive and creative individuals by allowing them to garner rewards for their social contributions.

Contract

The impact on individual character (and social climate) of the legal rules that govern exchange is, on balance, much more profound. If the acquisition of unowned property is a rare and occasional event in modern society, then trade at all levels is an everyday occurrence. The parties in question are free to choose their trading partners and thus have strong incentives to develop reputations for reliability in order to induce others to do business with them. The larger the organization, the greater the risk that a single untoward incident could undo the power of the name or the brand, and the more diligent the steps that are taken to preserve them both. The long process of acculturation of new workers into firms is, in large measure, an effort to make sure that they understand how business is done by this or that firm. Internal to the firm is the constant mantra that X Company does not wish to get close to the line or be enmeshed in litigation for fear of what it will do to future business. The positive implications of these reputational sanctions do not require much elaboration.

Of course, more than reputation is at stake. One constant concern with contracting goes to the presumed level of competence of individuals who enter into transactions. The libertarian position identifies definable classes of individuals—the very young, the infirm, the insane—who suffer from transactional weaknesses that may require the appointment of a guardian with fiduciary duties to act on their behalf. But apart from this small but vital class of cases, it is evident that the practical competence of individuals of “full age and capacity” differs strongly across individuals. Yet nothing whatsoever is done to make the legal rules track the gradations in ability, be they large or small.

This stony indifference to matters of degree is the correct response because of the adaptive behavior it induces in ordinary individuals. It is a mistake of massive proportions to assume that the levels of transactional competence are invariant to the legal regime that governs trade. If individuals are told that they will always be relieved from their mistakes, they are that much more likely to make mistakes in the short run and that much less likely to take steps to improve their own competence in the long run. The prophecy of transactional incompetence becomes self-fulfilling. The entrenched set of low expectations leads to lower performance levels, which only intensify the pressure to introduce new measures of protection. The resulting vicious cycle retards individual self-improvement.

The situation, moreover, is made worse because social judgments of individual competence can never be made in a vacuum. All trades involve two parties, and any willingness to allow for the incompetence of one individual necessarily redounds to the inconvenience of the other, whose risks are necessarily increased. In the simplest model, suppose that we grant an option to any person who can claim incompetence or error to pull out of the deal before the other side has expended resources on it. Functionally, that rule is the equivalent of a free option (for a skillful trader perhaps) to one party that shifts but does not increase the value in the deal. These effects are felt not only

after the deal is entered into. They will also be understood before so that any party with that “free” option will receive less by way of consideration than it could have received if able to bind itself in advance, which, however, the legal rules do not allow. If the losses exceed the potential gains from trade, the deal will simply collapse. Worse still, if both sides are given the statutory out, the risk of failure is still greater. The creation of these options, in effect, makes contracts more complex than they ought to be, which imposes greater burdens on those who are, in fact, less competent than others. It also gives incentives for people to feign incompetence because it works to their own legal advantage, which will increase the incidence of fraud and the propensity of people to commit it. Thus, the fraud will only drive honest people from the marketplace.

The standard legal response that holds parties to the “objective” meaning of contractual provisions represents one important way to stop this advantage-taking. This response has the added effect of making people be more explicit about their private intentions. It takes a certain degree of character to be up front with one’s intentions, to honor one’s promises, and to learn, without protest, from one’s mistakes. But in the long run, doing so leads people to act with higher levels of competence than before so that the overall rate of contractual breakdown declines. This tough attitude toward business need not translate into situations where people are always in over their heads. It is possible for people to be competent about the limits of their competence and to hire agents to represent them. Just as it is easier to tell a good singer from a bad one than it is to sing, so it is easier to watch voluntary agents perform than it is to duplicate their efforts. Much of the elaborate system of the securities laws, for example, could be bypassed by the simple expedient of market segmentation: rather than have elaborate rules on full disclosure, tell people to buy into mutual funds that specialize in operating in an arm’s-length world. Any rules that might work for amateurs only gum up the business for professionals. Once again, the demands of the unregulated (as to

price and quantity) marketplace lead to the emergence of people with the self-knowledge and the character to respond to them.

All this is a far cry from the impact of government regulation on voluntary transactions. Let me begin with simple two-party contracts—employment, service, rental, or whatever—where the libertarian principle rightly announces that people have the right to choose their trading partners and to trade with them on whatever terms and conditions they see fit. The import of this proposition is that the state has to have strong reasons to either block or to require an ordinary transaction. In the absence of strong monopoly power, this proposition negates the appropriateness of *any* generalized antidiscrimination rule that forbids parties from trading on certain grounds. In this case, the key insight of the libertarian position is that relationships of trust can only emerge from transactions that are voluntary at their inception. Frequently, the choice of trading partners is, in practice, more important to the success of a deal than the particular terms of the engagement. A high level of trust reduces the need for contractual detail or contractual monitoring. In a successful relationship, neither side becomes reluctant to depart from the basic understanding because each fears losing the hefty long-term gains from a continuing relationship. Indeed, if each side gains some affection for the other, then loyalty cements relationships that self-interest has created. Contract formation breeds contract formation. Even at-will relationships are stabilizing via this bonding mechanism. Each side knows, moreover, that pushing too hard on the deal might induce the other side to walk, as the element of parity and trust dissolves.

The legal system backs up these cooperative sentiments by a swift and sure enforcement of basic terms and by awarding legal sanctions against various forms of fraud or opportunistic behavior. Contract terminations are purely social and business decisions; contract breaches are not. The interplay of nonlegal and legal sanctions helps the parties work in harmony for long periods, even in the face of unforeseen contingencies.

This model of trust, and the character development it encourages, will not work when the state limits the choice of trading partners so that the deal itself is perceived as a win/lose relationship from the outset. One vivid illustration arises under rent control statutes, in which the tenant is entitled by law to remain in possession under a lease (whose terms are set by the state at a below-market rate) even after its expiration. Under this regime, landlords and tenants alike have enormous incentives to game the system by noncooperative behavior. Tenants can damage common areas or be uncooperative in other ways because they do not fear being tossed out at the end of the lease, or even for cause during its term. Landlords often will take drastic action—including the disruption of water, electricity, and heat—to drive tenants out. New York City teems with stories of landlords hiring derelicts to haunt their buildings to persuade their tenants to vacate. The New York rental market has an embedded culture of pitched battles between landlords and tenants, driven by the two mechanisms of character formation mentioned earlier. Any reasonable landlord will be played for a patsy. Prospective entrepreneurs who have no stomach for rough tactics choose another line of business. Neither of these selection traits are at work in Chicago, where leases turn over peacefully and without incident twice a year. The rents are always close to market value, so there is no huge prize from misconduct equal to the capitalized value of the difference between the market and statutory rents. Chicago has no landlord/tenant horror stories. Far from wanting to throw tenants out, most landlords are happy to renew leases at market rates to avoid the costs of reletting, with its attendant uncertainties, and to extend small favors (letting servicemen in, fixing drains, etc.) to preserve a relationship that both sides want.

There is a lesson here: The common view that strong protection of property and contract leads to some form of “possessive individualism” under which greed is paramount gets the story exactly backward. Voluntary transactions require one to woo others with promises,

not to intimidate them with threats. The mutual ability to withdraw from negotiations introduces a level of cooperation on both sides. The ability to divide gains from long-term voluntary arrangements depends on this cooperation. The ability to succeed in a rent-controlled world depends on the opposite traits.

Thus far, I have stressed the protection that rent control affords sitting tenants in the renewal of leases. But suppose some unit falls vacant so that the system now operates as a standard form of price control that sets rents below market rates. The standard economic theory duly predicts that the resulting shortages will induce hordes of disgruntled customers to resort to bribes, connections, and guile to surge to the head of the queue. To be blunt, price (and wage) regulations are incubators of institutionalized fraud, as individuals recharacterize their transactions to avoid the sting, issue phony receipts, or rely on kickbacks or side payments. Once again, the maneuvering in this regulatory environment is uncongenial to people who like open and aboveboard arrangements. Again, one of two things happens: either the virtuous exit the field as persons of more dubious temperaments stream in or the virtuous master the devious ways of the underground economy to survive and thus lose their virtuous qualities.

The same regrettable patterns of behavior emerge when legal regulations suspend the ordinary right to hire and fire so that termination must be “for cause” and never be at will. Here, of course, private parties are free to use for-cause arrangements; but usually they do not, preferring to adopt rules that preserve the right to terminate that is perhaps conditional on some lump-sum payments. But state regulators and judges are often drawn to for-cause rules for unjust dismissal as a nifty way of preserving markets on the one hand—they are less intrusive than rent control laws—while countering egregious or irrational conduct on the other. Chief among these rules are the antidiscrimination laws that preclude employment decisions—hiring, firing, promotion, wages—based on the race, sex, ethnicity, age, disability,

or sexual orientation of workers. Similar rules under the National Labor Relations Act prohibit dismissal or lesser sanctions made with antiunion animus. These rules do *not* require continued business, as rent control statutes do, because they allow employers to refuse to do business with employees for legitimate reasons.

The proponents of for-cause rules start from a moral base of ruling out hateful motives that have no place in commercial life. The hope is that these legal rules will induce people to put aside their biases and preconceptions in dealing with others. But the approach routinely fails. First, it overestimates the ability to determine which actions are done with improper motives. All too often, employers are unable to articulate their valid reasons to outsiders who lack situational knowledge. Second, the rule underestimates the ability of workers to identify with more favorable employers, which is only hampered by the implicit barriers to entry that the antidiscrimination laws supply. Third, the entire system encourages a culture of victimhood in which people find that they can improve their legal position by loudly announcing their inability to succeed on the strength of self-reliance. This defeatist attitude sends exactly the wrong signal to young people entering the workforce by understating their chances for success in an open market. This wrong information, in turn, could lead them to lower their expectations or their investments in human capital, leading to a reduction in long-term economic growth and personal well-being. Fourth, the for-cause regime violates the liberal principle of mutual advantage through trade. In unregulated labor markets, individuals on the social periphery have two effective means of getting a foot in the door: they can offer their services at bargain rates, or, as still happens in many jobs, they can start out as unpaid interns. The untrammelled ability to fire workers if they do not work out increases the odds of someone being hired in the first place. The whole emphasis is on lowering barriers to entry, not in setting up protections that will entrench the first workers to make it over the barriers. The sorting mechanism allows for rapid advancement of high-performance work-

ers because no employer has the incentive to retain the weak workers in this high-risk group.

For-cause rules and antidiscrimination norms usher in manifest changes. The latter rules make it hard for high-risk candidates to underbid their rivals. The employer is now in the unhappy situation of having to pay the same wages to two candidates who differ on some important particular that is observable to him but not to the regulator. To overtly offer, say, a high-risk black candidate a lower wage than a low-risk white candidate is asking for trouble, even if an employer could offer differential wages to two candidates of the same race. The result is, therefore, either evasion to avoid hiring the unwanted worker or entering into a relationship from which the employer does not expect to profit. At this point, the employer's major goal is to find ways to cut back surreptitiously on his commitment in order to induce a "voluntary" quit by an unwanted worker. Incidents of underhanded conduct, in turn, give rise to the stronger enforcement of the law, which only further complicates matters. But turnabout is fair play, for the employee who is in a quasi civil service position has strong incentive to shirk on the job, knowing that the availability of legal remedy will deter dismissal or demotion. Employers look for pretexts to refuse to hire or to dismiss unwanted workers. Some workers go so far as to set up wrongful dismissal actions, by acting in covert ways that irritate an employer but that will not be seen to justify discharge. Each side has ample incentive to game the other because the relationship would not be viable in the absence of external constraints. To make matters worse, all employers must document dismissals or lesser sanctions with defamatory material. No one wants to say that all relationships are tainted by these extrinsic situations, when obviously most employment relationships are voluntary even under the current law; but the legal rules lead to forced associations that offer reasons for dissimulation that are not built into voluntary arrangements.

To be sure, no one doubts that for-cause rules could do some

good in some cases of arbitrary dismissal. The net benefit is likely to be small, however, given the vital countervailing force that employers have little incentive to hurt themselves in order to hurt their employees. At the very least, cold-blooded self-interest limits the dangers of caprice, and any dislocation is mitigated by the greater ease of recontracting under an at-will system. The for-cause and the antidiscrimination regimes are different from the at-will situation in that not only do they tolerate various forms of opportunism, but also they literally invite it. Because the contracts that are formed under state compulsion are unwanted, it leads some tough-minded employers to practice covert discrimination in which they would not engage under an open-market system. To repeat, the successful contract requires a system of voluntary cooperation, which in turn brings out the ability to cooperate in the people who work under it. Any system that forces association has built-in incentives for various forms of fraud and social intrigues. Once again, the new rules encourage employers to be more devious and suspicious, and the people that thrive in the long run under this system are the ones with these negative traits. Thus, the legal rule shapes the character of the regulated parties.

Harms

The definition of “harm” used by the tort system also affects character formation. The prohibitions of the libertarian system are against aggression and deceit. In contrast, the broader definitions of “harm” that operate in the modern legal system have more or less the same consequences. Treating competitive harm as an actionable wrong has the unfortunate trait of encouraging people to rail against foreigners for stealing American jobs, often with racist overtones that would be intolerable in the domestic context. Similar hostilities arise in organizing campaigns in domestic labor markets. Epithets such as “scab” and “yellow dog” show the depth of the anticompetitive sentiment against foreigners in domestic labor markets. This sentiment is not remedied by rules that require forced association. Competitive harms

are ubiquitous, and the willingness to treat these as legitimate grievances helps people who prefer vilification and intrigue over productive labor. At root, the demand to be rid of competition is merely a disguised claim for redistribution through regulation, with the same consequences as redistribution through taxation.

Similar patterns of behavior exist in connection with the second form of harm: the blockage of view or, indeed, any loss of ostensible neighborhood amenities. These harms transcend the common law of nuisance, with its emphasis on physical invasions, as supplemented by reciprocal obligations of lateral support between neighbors. All too often, zoning boards are lobbied to restrict land use by fiat, even though the benefited landowners would never consider purchasing that needed protection by voluntary restrictive covenant. As with labor competition, it is commonplace for outsiders, especially foreigners, to be most vulnerable to local political intrigue—"Want a permit for the site, then sell to a local." Of course, people develop the character traits to match the new set of opportunities; bigotry and jealousy have broader areas in which to flourish. The sensible form of land use regulation typically requires individuals to bear the same burdens as they wish to impose on their neighbors or to pay compensation for any disparity. In that case, the emphasis would be on an accurate assessment of losses that is internalized either through the operation of the rule or the payment of compensation. There would be no incentive for intrigue under a robust system of property rights.

This same pattern applies, even more so, with respect to any legal system that recognizes the subjective offense taken to the actions of others as a cognizable source of harm. Yet, if personal offense triggers a legitimate individual or group response, all bets are off. To the libertarian, mere offense never generates an entitlement to stop the activities of a person. The rational response to maximize private welfare is to be more tolerant of what others do. You know that you have no right to stop them, so just relax. Or if agitated, try to persuade individuals, one by one, to avoid the practices of which you disap-

prove. Legal rules cannot stop or slow down certain forms of action that are nonetheless amenable to social pressure. It is all relatively civilized. However, if the category of harms *contra bones mores* becomes a legitimate ground for public intervention, then the incentives are reversed. To be indifferent as to whether X wears a headpiece, or engages in premarital or homosexual or polygamous arrangements, diminishes your right to control the conduct of others. But working yourself up into a white heat only helps justify criminal sanctions or the denial of state licenses.

The game, of course, is one that both sides can play. Hence, one of the common justifications for the antidiscrimination laws is a different version of the principle of *contra bones mores*—namely, that “I don’t want to live in a society in which individuals can discriminate on the basis of race or pay below some minimum wage, and so on.” It is on this point, without question, that one finds the sharpest disagreement between the libertarians on the one hand and the traditional conservatives on the other. This gap can be bridged, at least in part, by traditional conservatives, who urge their position from their pulpits and platforms without seeking to institute their beliefs on moral questions as a matter of law. In some cases, however, the opposite takes place, as with the current efforts to pass a Family Marriage Act, which reads as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

My concern here is not with the difficult questions that remain with respect to the religious recognition of same-sex units or the payment of various forms of federal, state, and employer benefits. Rather, it is with the basic conception that deep offense offers sufficient normative warrant for the use of coercion against others. My concern

here runs in both directions, because the opposite set of moral beliefs has led many to favor the use of state coercion to make sure that religious organizations accept gay groups into their activities, notwithstanding the tension with the organizations' Biblical beliefs. It is not my purpose to arbitrate the moral dispute between the two sides; instead, I argue against the articulation of inconsistent, all-purpose moral agendas that invite pitched public battles as to the rights and wrongs of conduct. There is real danger in anyone using any extended version of Mill's harm principle to impose his or her visions of the world on those who disagree. In so doing, the imposer spawns the kinds of hatreds and resentments that can lead to genuine cultural wars and make it harder to hew to the grand principle of live-and-let-live. The libertarian definitions of harm do not make individuals of perfect virtue, but they do hem in various forms of rhetorical excess, which raises the influence of the contentious among us.

Regulation

In closing, I want to mention one other area in which the modern welfarist solutions have contributed to the breakdown of civic discourse and character development. I am referring to the interaction between the weak eminent domain law and the strong protections for freedom of speech that defines U.S. Supreme Court doctrine. The fundamental source of weakness in the takings law lies in the sharp discontinuity between outright physical dispossession, which purports to supply full compensation, and "mere" restrictions on land use, which call for no compensation because they leave the owner in possession. I ignore all complications about consequential damages, such as the costs of conducting the move or any loss of good will, which are not covered in the physical takings cases.

Think of a simple grid in the shape of a tic-tac-toe board in which the eight squares along the rim have been built up: what activities should take place on the center square, which is privately owned? If the proposal is to purchase that plot for use as a park, at least a

majority of the surrounding blocks will conclude that the enhanced value of their own lands because of the park is greater than the taxes needed to acquire it. The only speech that will be welcomed by the outer eight is that which contains truthful information about the trade-off. The likely outcome is that the property will be condemned only if the cost of the government action, including the costs of its administration, is less than the value received. There are no gains from hyperbole, and there is a stubborn resistance to its use.

This debate will follow different lines if the only point at issue is whether the owner of the central tract will be restricted in his development rights at little or no cost to the other eight owners. In this case, free speech will contribute to the downward cycle, for it is easy to form winning alliances by stressing the value to those who take while ignoring or belittling any losses to the owner whose property is taken. The wrong prices established under the takings law now shape the dialogue in ways that work antithetical to the overall good. The situation gets no better when the example is made more concrete. The target of land use restrictions may be singled out in the heat of battle, thereby increasing the risk of imposing differential regulations on members of racial or ethnic minorities. The price constraint embodied in the just compensation requirement works as an antidote to these exaggerated statements, which should improve the overall character of public discourse. The feedback mechanism found in compensation should increase sober deliberation, which in turn increases the fraction of responsible individuals in public debate.

Conclusion

One central element of the welfarist position is that even if systems of strong property rights and limited government fare well on narrow economic grounds, they do much worse on other criteria that stress the formation of individual character, social cohesion, and individual rights. This conclusion is false. Forcing private individuals to go to

the market and forcing the state to use its eminent domain power introduce a level of discipline that helps form self-reliant individuals and promote honest public debate. Dispensing with these constraints, however, creates a different mix: it substitutes self-pity for self-reliance; it encourages a culture of excuses; it invites dissimulation and distrust; it spawns factional struggle by encouraging factional intrigue as a substitute for honest labor. Everyone wants to get something for nothing. A political culture that lends respect to this attitude induces the wrong kinds of conduct on matters of markets or morals. The libertarian cannot figure out ways to make people wise or generous; people must find this for themselves. But sound political institutions can find ways to shield honest and generous persons from the machinations of others, thereby increasing the odds that desirable character traits will prove successful in the grubby business of life. And in law, as in medicine, an old refrain gains new urgency: *primum non nocere*—first do no harm.