Response to Symposiasts

DAVID GORDON
Ludwig von Mises Institute

WANJIRU NJOYA
University of Exeter

The contributors to the symposium on *Economic Freedom and Social Justice: The Classical Ideal of Equality in Contexts of Racial Diversity* (*Economic Freedom*) have highlighted some of the conceptual difficulties that arise in analysing the interplay between equality and justice. This response does not attempt to treat exhaustively all the excellent points raised by the contributors, which shed light on these debates from different perspectives. Rather than attempt to clarify all the disputed points, which would require a more extended analysis than is possible within the confines of this reply, we aim instead to address the essential issues raised by the comments.

Our response treats the comments thematically, addressing four important ideas: the concept of moral autonomy (Frank Furedi), the tension between value-relativism and objective truth (Bruce Pardy), the interplay between free markets and antidiscrimination legislation (Simon Deakin) and how to defend liberty firmly and robustly without succumbing to the cowardly compromises of a pinko commie (Walter Block).

It is worth observing at the outset that *Economic Freedom* did not set out to be a philosophical treatise. It set out to explore the meaning of equality in classical liberal thought and how that has influenced equality legislation in liberal market democracies. Nevertheless by challenging the dominant egalitarian theories of justice the book exposed some of the deeper moral and ethical contestations underlying the legislative framework of "equity" and "social justice". While the book cannot claim to have resolved any these debates, that it has exposed these fault lines is sufficient to cast serious doubt on the complacent pronouncements of egalitarians who declare that "all reasonable people" agree with the egalitarian worldview. *Economic Freedom* shows, at least, that there is no such consensus on the key issues underpinning the legal framework.

1. MORAL AUTONOMY, FREE WILL AND VOLUNTARY ACTION

The premise in *Economic Freedom* is that we have "freedom and ability to make choices, to exercise free will, to exercise individual agency or autonomy in ordering our own lives" (p. 53). Furedi highlights the importance of moral autonomy in defending individual liberty, including free speech. He draws attention to the growing influence of critiques inspired by Marcuse and Becker. These critiques emphasise the practical obstacles and constraints that many face in exercising their freedom, and insist that the presence of such

obstacles means we should promote equality, not liberty. Furedi argues that the correct response to practical constraints is "to overcome those obstacles, rather than give up on freedom." Furedi therefore defends the importance of freedom, including "the significance of moral independence". He differs, however, from the line of analysis in *Economic Freedom* in that he illustrates these principles by reference to the theories of autonomy advanced by Dworkin and Raz.

While Dworkin's defence of free speech indeed accords primacy to moral autonomy within the legal order, *Economic Freedom* is critical of Dworkin's approach because Dworkin's prioritisation of equality within his philosophical framework leads to precisely the threat to freedom with which we are concerned. For example, Levin (2009, p. 357) argues that "if Dworkin is to take equality as seriously as he claims to, then, by his own lights, he must back away from an unrestricted freedom of expression, in light of these distinctly contemporary challenges of the harms of systemic racism and sexism".

It soon becomes apparent that any attempt to defend liberty while prioritising equality eventually ends up in precisely the morass we are trying to escape. *Economic Freedom* therefore seeks a different way to understand the meaning of liberty, treating liberty not as a path to equality but as an emanation of self-ownership. Rothbard (1998, p. 31) argues that liberty, in its most basic sense, is the idea that no man can own another:

> The individual man, in introspecting the fact of his own consciousness, also discovers the primordial natural fact of his freedom: his freedom to choose, his freedom to use or not use his reason about any given subject. In short, the natural fact of his "free will". He also discovers the natural fact of his mind's command over his body and its actions: that is, of his natural ownership over his self.

It is on that basis that individual autonomy is depicted in *Economic Freedom* as an essential component of liberty (pp. 56, 57). This is not to say that anybody opposed to egalitarian edicts must treat self-ownership as the only correct basis for understanding liberty. For example, Kukathas differs from Rothbard in viewing self-ownership as an idea that is culturally determined rather than a universal human value. Kukathas argues that:

> there is no core notion of property to which appeal can be made and that, to this extent, we are left only with the option of engaging with those whose views of the matter differ from our own and seeking some accommodation or compromise (2019, p. 86).

Nevertheless self-ownership is widely defended in the broader classical liberal tradition, where self-ownership is understood as "the natural or inalienable right from which all other rights flow" (Epstein 1992, p. 20).

In that light the principles of free speech, freedom of contract and freedom of association may be said to flow from self-ownership as the foundation for individual autonomy. While the book did not specifically set out to offer an extensive analysis of self-ownership, a matter to which we turn in our forthcoming book (Gordon and Njoya 2023) nevertheless it treats the idea of self-ownership as the essential rationale for the various freedoms flowing from individual liberty as understood within the common law framework of private law. The argument then is that self-ownership, and thus moral autonomy, inheres equally in all human beings thereby making each person equal to others in the eyes of the law. This in turn constitutes the reason for defending the rights of each person from encroachment or control by others.

Free will as an element of self-ownership also explains the importance of voluntary decision-making that underpins freedom of contract and freedom of association. In the private sphere there ought not to be any restrictions on voluntary arrangements. *Economic Freedom* draws upon Furedi's work to highlight the distinction between private and public life and to emphasise the value of full autonomy within the private sphere: the right freely to choose one's friends, family, or other associates without restriction. Collectivism

in public life is a more complex issue. The book did not attempt to deal with issues such as trade unions or trade cartels, though we may observe here that the principle of freedom of association must also apply in public life subject to not infringing the rights and freedoms of others. So, there is nothing wrong with voluntary collectivism (a point adverted to by Walter Block in his comment) for those who choose to form themselves into a group for any reason that is meaningful to its members so long as nobody is coerced into joining. Indeed *Economic Freedom* highlights the importance of voluntary transactions: for example "there would be nothing wrong with make-believe equality derived through voluntary transactions" (p. 4) nor with charitable gifts to a cause of one's free choice. Freedom of association, being voluntary, may be invoked to whatever end participants desire within the law.

2. EGALITARIANISM, CLASSICAL LIBERALISM AND LIBERTARIANISM

Economic Freedom draws upon a wide range of classical liberal perspectives which all accord priority to individual liberty but disagree on whether there ought to be exceptions to that priority and, if so, what those exceptions would be. The book did not set out to resolve these disagreements, nor even explicitly to offer a systematic treatment of the ideal of equality within the different schools of classical liberal thought. The discussion was instead devoted to the more specific task of considering how the classical ideal of equality might be upheld in the context of contemporary "racial justice" debates, with specific reference to equality and antidiscrimination legislation. The book was therefore at pains to leave diversity *outside* the frame of law, in its effort to argue against egalitarians who view diversity as central to the idea of promoting "social justice" which they regard, following Rawls, as central to the function of law.

Few, if any, of the arguments discussed in *Economic Freedom* can be said to apply to *all* scholars writing in the classical liberal tradition, and it is this tension which Block addresses in distinguishing between four levels of classical liberalism: anarcho-capitalism, minarchism, constitutionalism and what is often referred to as "neoliberalism" (though Block does not use that term). Block has highlighted the deep tensions between these different philosophical perspectives. He agrees with that 99% of *Economic Freedom* which contests egalitarianism, but disagrees with that 1% which he regards as something in the nature of an Achilles heel in the defence of liberty.

Anarcho-Capitalism, Classical Liberalism and Compromise

Economic Freedom set out to explore the implications of Rothbard's argument that egalitarianism is illiberal, unethical, and antihuman. The stated aim was to show that the progressive quest for equality devalues and seeks to eradicate the essential diversity of human nature. The aim was not, of course, to set out anything like a complete theory of justice, but simply to show that the claims made by egalitarians about public consensus on "social justice" are wrong. In that sense the book joins issue with contemporary public debates between progressives and classical liberals, rather than joining issue with the distinction between classical liberals and libertarians.

Block focuses on the libertarian versus classical liberal battleground due, presumably, to an overriding concern with the perils of philosophical compromise. His point about Richard Epstein, a classical liberal, "giving away the store in an attempt to find common cause with Rawls, of all people" may be read in that light, as may his disagreement with the role of the welfare state in meeting "basic needs such as education and health." In the dispute between classical liberals and libertarians as to whether the state is a hero or a vampire Block is right to caution that if one sees the state as a vampire then "to urge limited vampirism, shows a serious lack of proportion" (Block and Epstein 2004, p. 1161). *Economic Freedom* did not set out to engage with the anarchist/minarchist versus classical liberal debate, though it is true that if we did not have such strong state intervention in the first place (or, a fortiori, *any* state at all) we would not be here now, debating the validity of costly and harmful antidiscrimination legislation.

The book draws upon classical liberal perspectives not in an attempt to endorse the welfare state but simply to delineate the scope of its own inquiry in joining the "equality" debate and, in this sense, it admittedly sweeps up the fallen leaves rather than cutting down the statist tree. Block did not find merit in that approach. Part of the difficulty here is that the banner of "classical liberalism" under which the discussion in *Economic Freedom* unfolds is not a sharply defined or unified theory with a common response to egalitarianism. Although classical liberalism encompasses a wide range of different perspectives, it may be defined as "the great political and intellectual movement" that ushered in modern civilization by fostering the free market economy, limited government and individual freedom" (Mises 2005, p. vi). Classical liberalism therefore includes both deontological natural law perspectives as well as consequentialist utilitarian perspectives some of which lack any theory or concept of justice. Block points out that this confusion surrounding the demands of justice does not infiltrate the sphere of hardcore libertarianism. Anarcho-capitalists, for example, are very clear on what they regard as the meaning and content of justice: the defence of self-ownership based on the principles of non-aggression and the protection of private property. "Justice is to give every man his own" as the Romans said. But many classical liberals would add to that a host of other "essentials" with which anarcho-capitalists would not agree, such as a minimal role for the state.

The ensuing philosophical tensions are the subject of much debate. As Richard Epstein (2018, p. 279) has framed this debate:

> Hence the major opposition between the libertarian position and the classical liberal position attaches to the role of forced exchanges. Hard-line libertarians regard them as a core violation of individual autonomy. Classical liberals take the opposite view on such key issues as privilege (as with private necessity) and in the public arena with taxation and exercises of the eminent domain power.

The debate between Epstein and Block shows that a classical liberal might, on utilitarian grounds, justify forced exchange where it leaves society better off whereas most libertarian perspectives would justify force only in self-defence and in defence of one's property.

Thus some of the concerns regarded by libertarians as having primary importance in understanding the meaning of justice would be of little interest to a utilitarian, and vice versa. For example it is easy enough to see why the fact that blackmail is universally regarded as "sneaky and dirty" would be relevant to a utilitarian analysis of whether blackmail should be prohibited; it is similarly readily apparent why such considerations would be of no relevance to an anarcho-capitalist (Block and Gordon 1985). The same applies to the different approaches to property rights, particularly the role property rights in a theory of justice: utilitarians do not treat property rights as central to justice (Rothbard 2014, p. 52).

For purposes of understanding the validity of equality legislation, *Economic Freedom* confined itself to showing that the role of the state in implementing justice is contested by different schools of thought. The role of the state is not necessarily as significant in one school of liberalism as another, but it plays a hugely important role in Rawlsian progressivism. Although debates concerning, for example, the veil of ignorance, often proceed without explicit justification of the role of the state Rawls nevertheless explicitly sets forward various stages by which the state is to carry out the principles of justice. This is, of course, a matter of great concern to libertarians who regard the state as inherently coercive, and therefore necessarily unjust, even when it purports to serve the common good.

A related point is the significant divergence regarding the interaction with the market, which *Economic Freedom* addressed in some detail. Progressives accord to the state a central role in promoting socio-economic goals. Classical liberals would in principle minimise the role of the state as far as possible, but have different views on where the appropriate boundaries ought to lie. To radical libertarians the state is inherently hostile to liberty so conceding even what might seem to be one single thread in defending state encroachment on individual liberty may cause the entire tapestry of liberty to unravel.

Why then draw upon such a wide range of perspectives? Is that not in itself the revealing hallmark of a pinko?

The justification for drawing upon such a wide range of perspectives was a pragmatic, though in retrospect perhaps in parts unwise, desire to demonstrate the broad range of anti-egalitarian opinion in the scholarly literature, and to show that the principles that bind classical liberals are perhaps more important in responding to the progressive egalitarian case than the points on which we differ. As Epstein writes:

> Whatever one can say about the differences between Locke and Hume, or between Blackstone and Bentham, they are very much peas from the same pod in comparison to the Marxists, socialists, communitarians, republicans and feminists of our day" (1989, p. 716).

With that in mind, the argument in *Economic Freedom* may perhaps be more clearly stated in the following way. The issue for legislative and public policy is not whether the adherents of a particular school of liberalism would agree amongst themselves on the meaning of justice, but whether *all* liberal strands taken together could ever agree on the liberal meaning of justice: to which the answer is clearly no. This is because the broader philosophical landscape of liberalism exhibits strong disagreement on how to define liberalism and how to understand justice in the liberal sense: as Thomas Sowell observed, "Adam Smith and John Rawls each said that justice was the prime virtue of a society, and yet they said it in such different senses that they meant nearly opposite things" (1999, p. 29). In the context of equality legislation, the disputed meaning of justice poses a difficult challenge precisely because egalitarians depict their version of "justice as equality" as one with which *all* liberals, and indeed all reasonable people, do or should agree, when in truth no such consensus pertains.

Thus the book aims to illustrate a simple point: that within the scope of liberalism broadly construed there is no consensus on the value of egalitarian principles. That point may seem so simple as to be trite. Surely we all know that we do not all agree on the meaning of justice? The lack of consensus within the family of liberal thought may seem obvious.

But the implications of this point in evaluating the validity and rationale of equality legislation are tremendous and often go unremarked upon. Liberal market democracies wrongly suppose the goals of egalitarianism to be, in Rawlsian terms, an essentially uncontested matter of reasonable "overlapping consensus". Egalitarians do not claim that we all agree on all points *within* that consensus; they claim that we agree on the bounds of 'reasonableness' in this context (i.e. we have a range of different reasonable responses) and that equality and social justice are a core part of what we all reasonably regard as essential to the pursuit of fairness even though we may disagree on how to achieve those goals. Therefore, as the book explicates, in practice the very definition of "public reason" in the dominant liberal discourse excludes all but egalitarian perspectives from the purview of what is regarded as the reasonable boundaries of debate. Libertarians, especially the hardcore amongst us, are all but excluded from the academic citadel. The impression is thereby given that "we all agree" with egalitarian goals. The message of *Economic Freedom* is a simple but important one: not so.

Some Further Clarifications

At several points Block examines the text with an eye so keen to detect any potential "surrender to the forces of political correctness" that he treats some arguments as possibly making exactly the opposite point from that which they are in fact making. For example Sowell is accused of "denying that IQ plays any role whatsoever in economic accomplishments." Various terminological questions are raised about the meaning of words like "slavery", "ignoring", "harm", "cosmic justice", etc. Grammatical infelicities ("*a* worker exercising *their* free will") are imbued with political significance (does Block's radar detect a hint of gender politics in the ungrammatical use of pronouns?)

There is a fair point to be taken from Block's scrutiny, concerning the need to deploy language carefully and wisely in order not inadvertently to seem to endorse claims with which one does not in fact agree, and which would undermine the very foundations of liberty. But unless we are to descend into pedantry there is also a case to be made for giving words and phrases their natural and ordinary meaning and deriving, where appropriate, the meaning that best fits the context rather than construing words in any way that they could conceivably be construed.

Space precludes a detailed treatment of all the infelicities highlighted by Block. Suffice it to say that *Economic Freedom* is in no way "indicting the free enterprise system for wealth divergences," nor defending "unequal bargaining power" or restrictions on police stop and search powers. What the book *does* attempt to do is to take seriously the claims made by progressivists in support of egalitarian schemes, for example the progressive claim that some people are "vulnerable" while others are "privileged", that shunning people for their race is "very bad behaviour" and that employment legislation is needed to address "unequal bargaining power". The context should make it clear that the book is addressing those claims and perceptions in order to refute the egalitarian argument that some sort of legislative intervention is required. For example Sowell (1995, pp. 32, 33) does not argue that IQ plays no role in explaining economic disparities. On the contrary, he writes:

> Herrnstein and Murray establish their basic case that intelligence test scores are highly correlated with important social phenomena from academic success to infant mortality…even the differing educational backgrounds or socioeconomic levels of families in which individuals were raised are not as good predictors of future income, academic success, job performance ratings, or even divorce rates, as IQ scores are.

Sowell also treats the issue of IQ extensively in *Intellectuals and Race* (2013). *Economic Freedom* follows Sowell on this issue.

Nor does the book endorse restrictions on personal choices to discriminate. It observes (p. 230) that there are many reasons why it may be rational to discriminate even based on prohibited grounds in particular circumstances. Even the legislation itself does not purport to ban discrimination absolutely with no exceptions or justifications permitted. This point is addressed in some detail by Epstein (1992) although as David Gordon points out (2017, p. 9) Epstein's utilitarian analysis leaves the moral question open; as Gordon asks: "What about those who contend that discrimination is morally wrong, even in cases where it is economically rational?"

On Block's query about slavery, the idea of subjecting one man to the dominion of another (Servitus est constitutio iuris gentium qua quis dominio alieno contra naturam subicitur) arose in the Roman law not from voluntary agreement but from violent capture ("servi, ut servati, and thus both names, servus and mancipium, are derived from capture in war": Buckland 1908, p. 1). While not all slavery involved dominion or violence, to describe accurately the type of consensual domination to which Block adverts (such as might be chosen for example by those who find it thrilling to be dominated or who calculate that submission to slavery might be beneficial to them for whatever reason) would require different concepts and terminology from the law of slavery.

The book's engagement with these debates and perspectives therefore ought not to be "read between the lines" as evidence of agreeing with the very claims being refuted although, given the dominance of these orthodoxies, we must concede that more effort to clarify the points Block raises might certainly have helped to avoid the appearance of treachery.

3. OBJECTIVE TRUTH AND COERCION

The essential premise of *Economic Freedom* is rooted in the natural law tradition which holds certain principles to be objectively true. Pardy regards that normative claim as obscure, as he takes it to imply that "adherence to objective truth is a feature of classical liberalism" or as an implicit claim that the natural law tradition ought to be upheld by all classical liberals. Pardy suggests that more ought therefore to have been said to clarify the normative claims of the book. While this reply is not the right platform to advance a theory of truth as defined in the natural law tradition the following remarks may help to clarify the normative argument set out in the book.

The normative claims of natural law

The book set out to show that egalitarian perspectives do not reflect the unanimous view of all who are concerned with justice, in the sense that disagreeing with egalitarian schemes does not in itself mean that the dissenter cares nothing for justice. The book observed that Rothbard's theory of justice, which offers reasons to dissent from egalitarianism, prioritizes the quest for truth over the quest for equality. Having observed that some egalitarians regard truth as a subjective value (your truth, my truth) and treat moral ideals as mere preferences, the book then made the comment with which Pardy takes issue: "ideological claims, moral values, and social visions must be evaluated by reference to whether they are based on objective truth" (p. 48).

Pardy offers two different reasons for rejecting moral objectivity. One of these is found in this remark: "But ideologies, moral values, and social visions are not the kinds of things that can be proven to be true or false. No one knows for sure what is good, right, or just, and if they think that they do, they cannot prove it, which comes out to the same thing." According to this position, one cannot prove claims about what is good, right, or just. But it does not follow from this that there is no such thing as objective truth about these matters. It is a coherent view to hold that there are things that are either true or false but cannot be proved to be either one. Some people, for example, think that whether God exists is an issue of this kind.

Pardy then distinguishes between facts that can be objectively proved and mere preferences; he worries about those who endeavour coercively to impose a preferred "version of reality" on others. In this view, moral claims are personal preferences that are neither true nor false. If you think abortion is morally permissible, for example, that is just a matter of how you "feel" about the issue, or simply your personal, subjective opinion, and it does not make sense to say that your view is either true or false. If this view is correct, then it is no wonder people cannot prove their moral claims: it would not make sense to do. To reiterate, though, one could adopt the first view outlined above, namely that moral claims cannot be proved, without believing that these claims are mere preferences.

Pardy is correct to highlight that the ability to test and to question the truth of any principle is a core tenet of classical liberalism. As Hayek (1949, p. 431) writes:

> Orthodoxy of any kind, any pretense that a system of ideas is final and must be unquestioningly accepted as a whole, is the one view which of necessity antagonizes all intellectuals, whatever their views on particular issues. Any system which judges men by the completeness of their conformity to a fixed set of opinions, by their "soundness" or the extent to which they can be relied upon to hold approved views on all points, deprives itself of a support without which no set of ideas can maintain its influence in modern society. The ability to criticize accepted views, to explore new vistas and to experience with new conceptions, provides the atmosphere without which the intellectual cannot breathe.

Similarly, Pardy prefers to uphold the "freedom to determine one's own moral truths and values", and is correct to observe that "adherence to objective truth" is not "a feature of classical liberalism". Classical

liberalism within the legal tradition, as most (though not all) its adherents understand it, agrees on the importance of life, liberty and property but does not hold a unified view on what truth is or whether there is such a thing as objective truth. Some utilitarian perspectives, for example, are not based on questions of what is "right or wrong" in an objective or moral sense but upon cost-benefit analysis, and would reject the claims of natural law: "Jeremy Bentham, for example, regarded himself as the mortal adversary of the lawyer Blackstone, so much so that natural law was in his view not only 'nonsense, but nonsense on stilts'" (Epstein 1989, p. 715).

Therefore the natural law argument advanced by the book is not an attempt to characterize the essence of classical liberalism, along the lines of "classical liberals favour the free market." The claim advanced by *Economic Freedom* is a claim that moral assertions make truth claims, but this is a different issue from whether moral objectivity is part of the definition of classical liberalism or is entailed by it.

The aim in clarifying this view of objective truth at the outset was not to imply that it is an essential component of classical liberalism, but rather to establish the theoretical premise of the analysis. The intention was to make explicitly clear the ethical and moral judgments underlying the central argument against equality legislation and in particular to distinguish the approach of the book from that offered by conceptions of subjective relative "truths".

In sum, the argument advanced in favour of Rothbard's interpretation of natural law is that true principles are not just true "in my opinion" or "in my belief", nor are they mere personal preferences nor even democratically-approved majority preferences. In the natural law the truth of a principle may be ascertained through reason. Thus, a legal or moral principle may be empirically or analytically true in a universal sense:

> By natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always … Natural right is that right which has everywhere the same power and does not owe its validity to human enactment (Leo Strauss; discussed in Epstein 1989, p. 714).

Coercion and Crusades

It may be that what really concerns Pardy is that people who are convinced that they know the moral truth may attempt to force others to conform to the truth, as they see it, and if they realized that their moral convictions are just preferences then they would not do so. Maybe they would not: that is an empirical question, but it does not resolve the issue of moral objectivity. Maybe Pardy means that people should not impose their moral preferences on others: it is wrong to make others conform to what is just a preference. If this is his view, the question would arise, what is meant by "wrong" here? Is it more than a preference? That is, is Pardy saying that it is objectively wrong to force others to conform to your preferences? If this is what he means, then there is at least one thing that is objectively wrong, and the view is inconsistent with the claim that all moral claims are preferences that are not objectively true or false. But if to escape this, he says the claim that it is wrong to force others to conform to your preferences is itself a preference, he avoids inconsistency, but he pays a high price for doing so: those who prefer to impose their preferences on others have not been offered a reason not to do so. It is characteristic of the egalitarians whose views we seek to challenge that they consider their preferences to be enforceable upon others in exercise of the democratic will of the people ascertained through "public reason".

In questioning the normative claims of natural law Pardy echoes the scepticism to which Maritain (1961, p. 17) referred when he observed:

> If each one of them endeavored to impose his own convictions and the truth in which he believes on all his co-citizens, would not living together become impossible? That's obviously right. Well, it is easy, too easy, to go a step further, and to ask: if each one sticks to his own convictions, will not

> each one endeavor to impose his own convictions on all others? So that, as a result, living together will become impossible if any citizen whatever sticks to his own convictions and believes in a given truth?

Maritain argues that it does not follow, if one believes a principle to be "unshakeably true," that one would or should inevitably embark on a "crusade" coercively to impose that truth on others. Indeed Maritain sees "the most intolerant people" as those who believe that, there being no objective truth, this belief (ie the belief that there is no objective truth) must be violently imposed on others: he calls this "the fanaticism of doubt". Nor is it necessary, in order to avoid embarking on a fanatical crusade, to abandon all claim to objective truth. Objective truth may be the subject of persuasion, not coercion, in the same way as opinions.

Therefore acknowledging the existence of objective truth does not require that everyone be compelled to observe that truth in making personal choices. It is not argued that upon ethical and moral judgments being made explicit it is incumbent on others to accept them, nor would it follow that if certain precepts are true others ought to be coerced into accepting them. Such a result is sometimes thought to follow automatically from establishing the truth of a premise; as David Gordon asks, stating the premise of people who think this, "would not advocates of [the truth] be justified in imposing their conception of the good on those of us less enlightened than they?" But this would not follow. In Murray Rothbard's version of libertarianism, for example, it is objectively true that people ought to have a sphere of personal freedom, which means freedom to make the "wrong" decision and freedom to believe things that are objectively untrue as long as they do not trample on the rights of others.

In sum, while Pardy is correct to observe that truth cannot always be conclusively proved, we would go further to observe that even if it were it possible to prove a principle to be objectively true it would not follow that others must be forced to adopt that principle. The converse also remains true. As David Gordon has argued, "From the fact that one should not force people to accept the truth, as one conceives it, it does not follow that there is no universally valid truth." It is precisely because people hold different conceptions of the truth, and different moral and social values, that equality legislation ought *not* to bind everyone to the egalitarian worldview.

4. FREEDOM OF CONTRACT, MARKETS AND EQUALITY LEGISLATION

Economic Freedom focuses on the employment relationship as a case study in understanding the implications of equality legislation. The book draws upon the analysis of Richard Epstein (1992) that:

> Employment markets are largely competitive and hence regulation is not justified as a means to control monopoly or to protect workers against unwise choices made under conditions of necessity…there is no adequate theoretical foundation or practical justification for the employment discrimination laws" (p. xii).

Epstein argues that "the fundamental challenge to the civil rights legislation is whether the centralized system of employment relations is superior to a decentralized system of market control" (pp. xiv, xv). The theoretical justification offered by Epstein for freedom of contract and private property is that these rights "are easily made universal, and can be held simultaneously by all persons. There is no effort to form separate codes of conduct for particular trades, professions or businesses" (p. 3) The underlying principle in Epstein's analysis is that of equality before the law. In his comment Deakin takes issue with that analysis; his key concerns are as follows.

Axioms, ideology and empirical evidence

Deakin depicts Epstein's approach as an ideological defence of the free market that is not supported by empirical evidence. In his comment on *Economic Freedom* Deakin writes:

> The position defended by Epstein and Njoya requires us to put our faith in certain legal institutions, property and contract, without any further inquiry being needed. They are not offering any empirical evidence to back up their claim that these legal mechanisms are sufficient for the operation of the free market. Nor did Hayek offer any such evidence for his arguments against labour laws, or indeed for anything else he wrote.

One may reverse Deakin's argument. Deakin has shown that the British economic system never conformed fully to the specifications of Hayek's account of the free market. That is no doubt true, but Hayek never argued to the contrary. Indeed, the fact that a regime of laissez-faire was never fully in effect is a historical commonplace, but this does not show that Hayek is wrong in what he says. Deakin might respond that Hayek's account of how the free market works is refuted by empirical evidence that shows the market is unstable. But the historical examples of instability have occurred in regimes that feature considerable state intervention in the economy. Did the Great Depression occur because of faults of the "free market", or did interference with the free market bring it about? To answer that question requires resort to theory, and Deakin's dichotomy between "ideological theory" and "the empirical facts" will not do. Murray Rothbard's *America's Great Depression* shows how an outstanding defender of the Austrian theory of the business cycle would respond to the charge of free-market instability. If Deakin thinks the Austrian theory wrong, he would need to show this: it is not enough to point to "history." No historical interpretation is apodictically true: "statistics and history are useless in economics unless accompanied by a basic *deductive* understanding of the facts" (Hazlitt 1979, p. 54).

It is not the case, as Deakin implies, that defenders of equality before the law must supply empirical evidence for their claim that formal equality is essential to the rule of law. Neither have defenders of legislative interventions which diminish equality by reallocating rights based on racial preferences supplied any empirical evidence that the benefits of such interventions outweigh the costs. Instead, as Epstein highlights, what prevails is an "unchallenged social acceptance of the antidiscrimination principle" (p. 3) so that the evolution of new forms of protection, such as equity, have become "a dominant theme within our legal culture" (p. 2) with no challenge to the underlying theoretical justifications for the antidiscrimination principle.

Deakin says, "Every system of thought needs a founding dogma, an assertion deemed to be self-evident, but it is important not to confuse norms and facts" and that "Libertarianism elevates norms over facts." In response we would contend that identifying the relevance of a historical claim to a claim about how things would work under very different conditions ought not to be conflated with a mere distinction between a norm, "what should be the case," and a fact, "what is the case." Deakin also says that capitalism is bound to produce unjust results: is this not also a "founding dogma"?

Subordination of workers

Economic Freedom questions the rationale underlying the statutory framework of employment rights, that rationale being "the need to redress the unequal bargaining power between employer and employee" (p. 182). In defending freedom of contract and voluntary transactions in the context of employment the book observes that "Workers are not invariably in a weaker bargaining position than their employer". The book is critical of the tendency to presume without evidence that workers are in a vulnerable position:

> courts are accustomed to observing, almost in passing as if the matter is self-evident, that employees lack any choice or control over whether and for whom to work or the terms and conditions of their work. The premise underlying the reasoning in employment disputes is that socio-economic vulnerability is altogether incompatible with contractual freedom and economic liberty (p. 206).

Deakin is critical of that approach, arguing that inequality of bargaining power inherently subordinates workers to their employers. On this point Deakin draws upon Adam Smith's assertion in the *Wealth of Nations* (1776, 1.viii.11-12: 83-84):

> It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. ... In all such disputes, the masters can hold out much longer. A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks, which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year, without employment.

In the debate to which Deakin refers in his comment, Epstein disagreed with Adam Smith on that point, regarding it as erroneous to presume that voluntary exchange in the context of employment is rendered exploitative by unequal bargaining power. Epstein argued:

> I think that we have to say that Smith erred. One constant theme of the labour literature is the worker who threatens to walk off the job when the crops are ready to be harvested unless he receives a fat wage increase…Short-term hold-up problems are not a function of wealth, but of the level of disruption that a strategically-designed walk-out can effectuate (2002, p. 62).

In that debate Epstein further observed that the relative bargaining power of workers and employers had evolved since the time of Smith's writing:

> Nor does Smith's argument take into account the change in relative positions brought about by the greater prosperity of modern times"; factors such as "higher wage levels", "access to credit", the two-income household and "improved capital markets", as well as new pressures on the employers' side, mean that "it is a hard world out there for all players on both sides of the market (2002, p. 63).

Deakin seems to be so aghast at Epstein's assertion that Smith was wrong that he questions Epstein's commitment to Enlightenment values. We might ask: why is one required to accept Smith as canonical in order to count as a defender of the Enlightenment? Not only has economic theory progressed since Smith's time, so that the relative ability of employers and workers to form combinations no longer resembles the conditions in Smith's time when workers' combinations were unlawful, but even in Smith's time the theoretical case that employers in a free market would exercise monopsony power over laborers was weak.

Particularly useful here are the works of William Hutt, beginning with his *Theory of Collective Bargaining* (1954) in which he questions the theory of unequal bargaining power which presumes labour always to be at a disadvantage. Hutt locates the roots of the theory of labour's disadvantage in the "subsistence theory" with which Smith explained the power of employers to suppress wages. Hutt describes the theory of labour's disadvantage as "the emptiest of sophisms…sometimes Smith's moderate dictum about the relative urgencies of the master's and the workman's necessities is exaggerated into the statement that the latter must take whatever the employer offers or starve" (pp. 63, 64).

Hutt suggests that Smith's dictum does not support the role it has come to play in worker subordination theories. Smith "seems to have assumed that *how* [the employer's ability to form combinations and to hold out longer than workers] gave the employers this remarkable power [to suppress wages] was self-evident, for

no further explanation of them was given" (1954, p. 46). Yet such an explanation would be required for wage variations even in Smith's time. Hutt's analysis shows that wage levels were often justified on grounds other than subsistence, being set for instance at a level "consistent with common humanity" or influenced by the common sense acknowledgement that they needed the input of labour for their enterprise: "The labourer… is at no disadvantage in bargaining with the employer, who is tied to his machines, which he must keep fully employed, or perish financially" (p. 61; citing Cree 1892). In addition, Hutt points out that "in practice wages were often considerably higher than subsistence level" (p. 47). Moreover, Smith acknowledged "exceptional" cases where an "increase of revenue or stock" might "give labourers an advantage and enable them to raise their wages" as their labour became more valuable to the employer, which suggests that Smith did not regard the theory of labour's disadvantage as set in stone (1954, p. 47). Many historians have contested the ubiquity of employers' "tacit" combinations or their ability to act in concert in suppressing wages.

Yet the theory of labour's disadvantage continues to be treated as a self-evident justification for regulations designed to enhance workers' bargaining power. As Hutt observes: "the ideas about the employer's advantage and his power to force down wages indefinitely and the workman's corresponding disadvantage which originated thus have persisted right through to the present day, although the basis on which Adam Smith himself had founded them had been tacitly renounced" (p. 48). The idea that employers could always outlast workers in holding out for a better bargain "was held by Smith as a sort of appurtenance to and amplification of his subsistence theory which, as has already been shown, was quite erroneous and, moreover, apparently given up by himself … The theory was kept alive in a general way by the Socialists, whose "exploitation theory" may have been the source from which the idea was so strongly reinforced in the late "sixties" (p. 60). Thus long after Smith's subsistence theory of wages had been superseded, the theory of labour's disadvantage which was rooted in that theory continued to serve as the justification for regulatory intervention.

Legislative interventions

In questioning the interplay between market ordering and antidiscrimination, *Economic Freedom* understands this interplay as one aspect of a broader inquiry into the relationship between free markets and legislation. In defending anti-discrimination law Deakin is right that legislation often speeds up the process of judge-made law, but he does not show that the "statutory torts" of the UK's Equality Act are actual torts. The problem is not that the courts were going too slowly, but rather that the case has to be made that being discriminated against, as the Act characterizes it, is a genuine injury. Epstein does, as Deakin says, defend strict liability laws in tort law, but this hardly commits him to accepting the view that discrimination is a tort. Moreover if, as Deakin says, the government in the nineteenth century often intervened on the side of employers, that is not an instance of the free market in action.

As Leoni argues, while it is not the case that legislation is *never* appropriate, there is too little awareness of its potentially harmful effects and its tendency to encroach upon economic freedom: "it is also paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation" (p. 23). The starting point should therefore be that legislative interventions call to be questioned and justified - the onus is on interventionists to justify encroachments on freedom, not on defenders of liberty to justify the case for non-intervention. The presumption ought to be that legislation should not intervene unless necessary, not that legislation should intervene unless a reason is supplied for non-intervention.

Ultimately the issue is whether markets call for "corrective" or "facilitative" legislative interventions. It does not follow, from the fact that markets are imperfect, that legislative intervention is presumptively justified. *Economic Freedom* follows Walter Williams (2011, p. 5) in arguing that "free-market resource allocation, as opposed to allocation on political grounds, is in the interests of minorities and/or less-preferred individuals". Williams is concerned with understanding causal relations, and he emphasises that in evaluating responses to social problems it is not sufficient to observe that discrimination "exists"—we must

go further to understand the causes and effects of social problems without presuming that the very existence of discrimination supplies the causal explanation for economic outcomes. Thus the issue addressed in *Economic Freedom* is not whether there is a pro-market case for the antidiscrimination principle, or a pro-market case for equality legislation, but whether market allocation produces superior economic outcomes to allocation through antidiscrimination legislation.

This raises a more fundamental issue dealt with in other chapters of the book, namely whether the antidiscrimination principle is an allocative principle whose ultimate aim is to redistribute wealth (in which case Williams's observation answers this point) or whether it is a broader principle of justice which may be justified on various grounds including pro-market grounds. Our claim is not that market allocation would lead to *equal* outcomes, nor indeed that it would or should always lead to more equal outcomes compared to state allocation: on the contrary, as Rothbard (2000, p. v) argues, "The egalitarian world would necessarily be a world of horror fiction—a world of faceless and identical creatures, devoid of all individuality, variety, or special creativity." That free market societies tend also to be more equal is a secondary issue which is not altogether unimportant in promoting social cohesion, but it is also true that productivity in a free market society increases at a rate which makes concerns about inequality immaterial.

The ultimate aim of classical liberalism is to investigate the requirements for people to live free and to flourish in society. Our quest, then, is not for how best to support or facilitate free markets, for the sake purely of promoting markets, but rather to identify the most promising path to human flourishing. The argument is not that markets are "sufficient" (how would we measure "sufficient"?) but that they are the best available path to peace and prosperity given all the workable options. In free societies market participation plays the dominant role in shaping socio-economic outcomes, and society as a whole benefits from encouraging cooperation through voluntary exchange.

Economic Freedom did not set out to be a philosophical or economic treatise. It set out to explore the justification for equality legislation. Nevertheless, as shown by the comments, the book raises serious questions about the philosophical underpinning of "equity" and "social justice" that merit further inquiry.

REFERENCES

Walter Block and Richard A. Epstein. 2005. Debate on Eminent Domain. *NYU Journal of Law and Liberty* Vol. 1(3): 1144.

Cree. T. S. 1892. A Criticism of the Theory of Trades' Unions. Glasgow: Bell & Bain.

Epstein. Richard A. 1989. The Utilitarian Foundations of Natural Law. *Harvard Journal of Law and Public Policy* 12: 711.

_____. 1992. Forbidden Grounds: The Case Against Employment Discrimination Laws. Cambridge, MA: Harvard University Press.

_____. 2002. Equal Opportunity or More Opportunity: The Good Thing About Discrimination. Commentary by Simon Deakin. *Civitas*.

_____. 2016. How Classical Liberal Principles Address Cultural, Social, and Economic Issues: Richard Epstein's Reply. *Law & Liberty* (February 1). http://www.civitas.org.uk/pdf/cs18.pdf

_____. 2018. Meeting the Fundamental Objections to Classical Liberalism. *The Cambridge Handbook of Classical Liberal Thought*. Cambridge: Cambridge University Press.

Gordon, D. 2017. *An Austro-Libertarian View: Essays by David Gordon. Vol. II: Political Theory*. Auburn: Ludwig von Mises Institute.

Gordon, David and Njoya, Wanjiru. 2023. *Advancing Equality: Self-Ownership, Property and Global Justice*. Cham: Palgrave Macmillan.

Hayek, Friedrich. 1949. The Intellectuals and Socialism. *University of Chicago Law Review* Vol. 16 (3): 417.

Hazlitt, Henry. 1979. *Economics in One Lesson*. New York: Random House.

Hutt, William H. 1954. *Theory of Collective Bargaining*. Glencoe: The Free Press.

Kukathas, Chandran. 2019. Libertarianism without Self-Ownership. *Social Philosophy and Policy* Vol. 36 (2): 71-93.

Levin, A. 2009. Pornography, Hate Speech, and their Challenge to Dworkin's Egalitarian Liberalism. *Public Affairs Quarterly* Vol. 23(4): 357.

Maritain, Jacques. 1961. *On The Use of Philosophy: Three Essays*. Princeton: Princeton University Press.

Mises, Ludwig von. 2005 [1927]. *Liberalism: The Classical Tradition* (B. B. Greaves, ed.). Indianapolis: Liberty Fund.

Rothbard, Murray N. 1979. Conceived in Liberty. New York: Arlington House Publishers.

_____. 2000 [1974]. *Egalitarianism as a Revolt Against Nature and Other Essays*. Auburn: Ludwig von Mises Institute.

_____. 2014 [1998]. *The Ethics of Liberty*. New York: New York University Press.
Sowell, Thomas. 1999. *The Quest for Cosmic Justice*. New York: Touchstone.
_____. 1995. Ethnicity and IQ. *American Spectator*, Vol. 28: 32-37.
Williams, Walter E. 2011. *Race and Economics: How Much Can Be Blamed on Discrimination?* Stanford: Hoover Institution Press.