

## BEYOND EFFICIENCY: A COMMENT

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The role of the critic is always enjoyable when it affords an opportunity to set the record straight. I am afraid, however, that no such opportunity is afforded here, for Professor Wagner has himself set the record very straight indeed. He has written an excellent paper, exploding any number of all-but-sacred myths that have surrounded the American Social Security experiment from the start. His discussion, for example, of the ultimate impossibility of efficient public funding, due to the absence of the requisite knowledge and incentive, is especially illuminating. And his arguments against even private funding, when it is made compulsory, are nothing if not refreshing.

Accordingly, because I find so little in this paper to criticize, I shall understand my assignment as affording an opportunity rather more to build upon Professor Wagner's arguments than to criticize them. In particular, I want to try to draw out a few of the normative features of the critique of Social Security that Professor Wagner has only touched upon, which will enable me to sharpen somewhat the distinction between these normative features and the efficiency or economic features of the critique that constitute the core of his argument.

Before I begin, however, I need to dissociate the administration I serve from anything I say here. I feel a little like David Hume in this, when he argued, before a group of his philosophical colleagues, that causality is a contingent, not a necessary feature of the world, and that just because a man falling out of a window fell downward on every previous occasion, it did not follow, with logical necessity, that he would fall downward on the next occasion. At that, one of Hume's colleagues is said to have pointed to the window, inviting the philosopher to leap, whereupon Hume replied: "But I distinguish my philosophical from my practical life." In that spirit, the

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views I express here are my own, not necessarily those of the Reagan administration or the Office of Personnel Management. Any congruence between the two should be seen, therefore, as coincidental—albeit a happy coincidence, I should add.

Turning then to Professor Wagner's discussion, he begins by distinguishing between the insurance and the welfare elements in the Social Security program, after which he explores, at considerable length, some of the central properties of collective and private alternatives for the provision of the retirement insurance component. Although he does not say so in so many words, he concludes with the disarmingly radical proposal—radical in contrast to the conventional wisdom—that we eliminate the compulsory insurance element of Social Security—whether private or public—and permit instead whatever voluntary, private arrangements might arise; for nothing but a voluntary, private arrangement would be efficient or, as he notes in his final remarks, would yield personal characteristics conducive to a liberal society. Once again, I entirely agree with Professor Wagner's conclusions and with his cogent arguments in support of them. What I want to add is simply this, that not only would a voluntary, private arrangement be more *efficient* than any alternative arrangement, but nothing but a voluntary, private arrangement would be *just*, would respect the rights of individuals to freely provide for their own security, to provide for the security of others—or, indeed, to refrain from so doing, if that is what they chose.

On two fundamentally different grounds, then, from considerations of economic efficiency as well as from a consideration of moral rights, the Social Security program is flawed. First, as Professor Wagner and many others have made clear, the system is a monumentally inefficient and, indeed, a failing program for addressing the problem of financial security in retirement. Second, even if it were the very model of economic efficiency, by virtue of its elements of forced association and transfer, the system violates fundamental rights of property, association, and contract and so is unjust.

These conclusions from ethics are rather easier to state, of course, than they are to defend. Certainly in the scope of this comment I will be able to do little more than make a few points related to their defense. In order to do even that, however, it would be well first to return to Professor Wagner's paper by way of further sharpening the distinction I have just drawn. In particular, I want to try to elucidate the following point: That while there are moral or evaluative implications of the efficiency considerations Professor Wagner focuses upon—moral implications that properly operate in the political decision-making context—these value issues should be clearly dis-

tinguished from the rights issues I have just mentioned. Rights and values are *not* the same kinds of moral notions: Most particularly, rights are not simply values or interests that rise to a certain level of importance, at which point they become rights. Indeed, we hold rights quite apart from whether we may or may not value the objects of those rights.<sup>1</sup>

Returning then to Professor Wagner's thesis, when he talks about incentives for capital dissipation, or the likely effects should government become the dominant supplier of funds in the credit markets, or the tendency of the paternal state to corrode self-reliance, we should notice precisely what it is he is doing. Strictly speaking, he is not really trying to *justify* his conclusions. Rather, he is engaged in an *explanatory* undertaking: Given certain incentives, that is, or certain changes in incentives, he is explaining and predicting what behavior or behavioral changes and what income and distributive effects we are likely to see. Not that he is necessarily evaluatively neutral about that behavior or those effects: Indeed, if put to the test, I rather think I know where he would come out in any particular case, in any particular value choice. But strictly speaking, as a positive economist, he can stay above the moral fray; he need not succumb, that is, to the Posnerian temptation to get right down there in the wealth-maximization mud, but instead can remain above it all, in a kind of austere, Stiglerian splendor, telling the legislators "Here is what you will get if you do what you propose to do; I am not here to say whether what you will get is good or bad; I am just telling you what effects your proposed legislation is likely to produce."<sup>2</sup>

In order to move from the explanatory to the justificatory mode, then, Professor Wagner would have to start evaluating the ends and means before him on some evaluative criterion. Again, as a careful economist, what little of this he does is done rather more by implication than in any explicit way. He observes, for example, that pay-as-you-go systems actually *reduce* security. Or he speaks of the socially wasteful effects of even compulsory *private* annuities and of the transfers such annuities would entail, leaving it to us to infer that he is not in favor of reduced security or social waste or transfers. Such inferences, however, are no part of his explanatory work as a positive economist. Indeed, there are economists who support certain measures

<sup>1</sup>See H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (April 1955): 186.

<sup>2</sup>See Richard Posner, "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies* 8 (January 1979):103-40. I have criticized these views in my article "On Moral and Legal Justification," *Southwestern University Law Review* 11, no. 4 (1979): 1334-38.

precisely *because* they entail their favored sorts of transfers, notwithstanding the implications of such measures for social wealth.

Where those justificatory arguments *do* come to the fore, of course, is in the political decision-making context. Legislators in particular will make explicit their taste or distaste for such consequences as Professor Wagner has pointed to. More precisely, when legislators attempt to justify particular enactments, they will do so in one or both of two ways: They will point to the ends or consequences the legislation seeks to bring about; or they will point to the process by which the legislation was enacted. Thus, they might point to the need for universal financial security for the retired by way of justifying compulsory private annuities, valuing this end more highly than they disvalue the attendant transfers and social waste. Or they might point to the democratic process by which such a tradeoff was determined. In the first case they would justify their policy or program by reference to the *consequences* or *net good* the policy or program was expected to yield. This would be a consequentialist justification, based upon the values they placed upon the various consequences of the policy or program. In the second case, they would justify their policy or program by reference to the *process* by which it came about—presuming, by implication, the Nozickian insight that just processes yield just results.<sup>3</sup> This, then, would be a rights-based justification.

Now against these kinds of justificatory claims, rejoinders from considerations of economic efficiency will not avail. For the issue is not, as with the straightforward Social Security case, that the stated ends of the legislature will not be achieved by the legislative means chosen, which the economist can easily demonstrate. Rather, the stated end, universal financial security for the retired, *will* be achieved by compulsory private annuities, albeit not by the most efficient or just means. In order to achieve their objective, that is, the legislators have simply elected a less efficient and just policy than they otherwise might have done.

If we are to show, then, that compulsory private annuities are unjustified—or indeed that *any* enactment that entails forced transfers and hence takings of liberty and property are unjustified—it will not do to proceed from considerations of consequences, including economic efficiency as but one among many such consequences. For the legislature, in the case at hand, has already done its consequentialist calculation and has decided against efficiency as the dominant

<sup>3</sup>See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 149–60.

consideration. What we need to do instead, then, is leave the consequentialist mode of justification altogether—which has been fraught with insurmountable difficulties since Bentham first set about the development of a utilitarian calculus—and turn instead to the rights-based, process mode of justification as sketched by Locke, as understood intuitively by Jefferson, and as developed more fully by Kant and, more recently, by Nozick and other contemporary philosophers.<sup>4</sup>

Continuing, for example, with the case before us—namely, a statute compelling private annuities—an indirect rights-based rejoinder might begin by going straight to the political jugular, to the political decision-making process itself, including the democratic decision-making process. Now before I inveigh against so hallowed an institution as democracy, let me try to avail myself of what protection I can find in the observation that I follow a long tradition here, stemming at least from Plato and Aristotle, although the arguments I will barely be able to mention are of substantially more recent vintage. There are first the arguments from decision theory that show that rarely if ever do we get majoritarian preferences from majoritarian processes.<sup>5</sup> So compelling are these arguments that they simply cut the factual floor out from under the democratic assumptions. But even if the majoritarian process did yield majoritarian preferences, absent some primordial unanimous consent, which has ever been a myth, much less a consent that binds heirs, that process can hardly address the fundamental question of political theory: By what right does one man have authority over another?<sup>6</sup> So compelling are the moral arguments from theoretical anarchism, that is, that not even the recent and brilliant work of Nozick has succeeded in overcoming them.<sup>7</sup> Not that I am calling for anarchism, mind you. With Hume, again, I distinguish my philosophical from my practical life—and, I might add, from my political life. But I do mean to point to the fundamental air of illegitimacy that has ever surrounded the collectivist engine, whether driven by a majoritarian or by any other preference save unanimity. And I would hope that an appreciation of that

<sup>4</sup>See, e.g., Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978); Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977); Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978).

<sup>5</sup>See William H. Riker, "Implications from the Disequilibrium of Majority Rule for the Study of Institutions," *American Political Science Review* 74 (1980): 432–46.

<sup>6</sup>See Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970).

<sup>7</sup>See Nozick, part I. I have criticized these arguments in "A Theory of Rights: Toward Limited Government" (Ph.D. diss., University of Chicago, 1979), chap. 4.

air of illegitimacy might serve as a brake upon state action—and in particular upon trying to do “good” through state action.

But what, after all, is the Social Security program if not just that—an attempt to do good through state action? Like most other legislative measures—certainly most 20th-century measures—it joins individuals, many of them unwilling participants, in the collective pursuit of some “social good.” In so doing, it violates the fundamental rights of property, liberty, and association of the unwilling participants. The direct rights-based rejoinder, then, proceeds not simply from a dispositive critique of the democratic process but from the affirmative theory of individual rights. It is a long and detailed undertaking of many parts, aimed ultimately at supplying the justificatory foundations for the conclusions set forth in the Declaration of Independence and the Bill of Rights, and aimed as well at dispatching Franklin Delano Roosevelt’s “second Bill of Rights”—his “security rights,” so called.<sup>8</sup> For if the classical rights of individual liberty and private property are justified, they allow no room for these “security rights,” except insofar as such rights are created through voluntary processes, which alone are consistent with rights of liberty and property. Once again, however, none of this affirmative theory can be developed here.<sup>9</sup>

In summary, then, Professor Wagner’s paper has set forth a number of important arguments aimed at demonstrating the untenability not simply of the Social Security program but of any compulsory retirement security program. In the end, however, his arguments depend upon a certain ordering of preferences, a certain value structure, which many of us may share, but which many legislators may not. Accordingly, his arguments need to be buttressed by further arguments, taken not from the theory of value, whether economic or moral, but from the classical theory of rights. And those arguments need to be directed not to the legislature but to the courts.

<sup>8</sup>See Franklin Delano Roosevelt’s message to Congress, January 11, 1944, and his Chicago speech, October 28, 1944, cited by Edward S. Corwin, *Liberty Against Government* (Baton Rouge, La.: Louisiana State University Press, 1948), pp. 4–5.

<sup>9</sup>For a fuller discussion of this theory, see my articles mentioned above as well as the following: “Ordering Rights Consistently: Or What We Do and Do Not Have Rights To,” *Georgia Law Review* 13 (Summer 1979): 1171–96; “Corporations and Rights: On Treating Corporate People Justly,” *Georgia Law Review* 13 (Summer 1979): 1245–1370; “On the Foundations of Justice,” *Intercollegiate Review* 17 (Fall/Winter 1981): 3–14; “Capitalism and Rights: An Essay Toward Fine Tuning the Moral Foundations of the Free Society,” *Journal of Business Ethics* 1 (February 1982): 29–42; “Property Rights, Takings, and a Free Society,” *Harvard Journal of Law and Public Policy* 6 (Summer 1983): 165–95.