BOOK REVIEWS

The Cost of Rights: Why Liberty Depends on Taxes
Stephen Holmes and Cass R. Sunstein
New York: W. W. Norton & Co., 1999, 255 pp.

The Cost of Rights is the work of two leading left-liberal legal theorists who are determined to undermine and replace the entire structure of modern law, the very concept of individual rights, and the law-governed polity.

The Cost of Rights has a fairly clear goal, which is to eliminate even the possibility of making a conceptual distinction between "negative rights" to noninterference (e.g., the right not to be murdered or the right to free exercise of religion) and "positive rights" or "welfare rights" (e.g., the right to a subsidized education or to a house built at someone else's expense). Thus, they claim that "apparently nonwelfare rights are welfare rights too" (p. 219) and that "all legal rights are, or aspire to be, welfare rights" (p. 222). They describe their virtually complete rejection of the liberal enterprise in terms of "a kind of communitarian or collectivist theme, though with deep roots in the liberal political tradition" (p. 224). Collectivist it certainly is, but they fail to show any roots in the liberal tradition.

The first page of the book starts by identifying the traditional idea of rights with alleged libertarian "opposition to government," a sly move intended to make libertarian critics of statism seem obtuse, for, as Holmes and Sunstein note on the very next page, "individual rights and freedoms depend fundamentally on vigorous state action" (p. 14). More radically, "Statelessness spells rightslessness" (p. 19). But what Holmes and Sunstein intend by the phrase "depend fundamentally" is not that government is charged by citizens with the delegated powers necessary to defend rights and secure justice, but that government creates rights ex nihilo. The authors brush aside discussion of moral rights and consider only legal rights, i.e., those rights that a state will actually enforce, for "When they are not backed by legal force, by contrast, moral rights are toothless by definition. Unenforced moral rights are aspirations binding on conscience, not powers binding on officials" (p. 17). Having set aside moral rights, Holmes and Sunstein then borrow (without acknowledgment) the

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definition of rights associated with Joseph Raz, viz., that rights are interests of persons that are sufficiently weighty to generate duties on the part of others, to which they add a heavy dollop of legal positivism. Thus, for Holmes and Sunstein, "an interest qualifies as a right when an effective legal system treats it as such by using collective resources to defend it" (p. 17). The authors then breezily claim that "Under American law, rights are powers granted by the political community" (p. 17).

The invocation of "American law" is otiose, for the theory they advance applies to all exercises of political power; it is a conceptual claim and not one limited to any particular political history. Further, there is nothing specifically "American" about the thesis, for any identifiable "American" theory of government rests on the idea that the people, in order to secure certain ends ("these Rights," "establish Justice," "the common defence," "the general Welfare," "the Blessings of Liberty," etc.), delegate certain powers to government. The rights that are secured are not "granted" by the political community, for, as the Declaration of Independence states,

> all Men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

If Holmes and Sunstein wish to argue against that thesis and on behalf of a radically positivist theory, they are welcome to do so, but asserting *en passant* that pure positivism is somehow a matter of "American law" is shifty and devious. (It is especially bizarre when you consider that they attack a number of Supreme Court decisions that contradict their thesis; what, then, do they mean by "American law"?)

Setting aside the claim that this is a matter of "American law," let's examine the case they advance for positivism, i.e., for the thesis that law and rights are posited or laid down rather than discovered or recognized. First, they claim that focusing only on legal rights, i.e., those rights that are actually enforced by a political authority with the power to secure compliance, "can be justified by an enhanced clarity of focus" (p. 21). That is the promise, but nowhere do they fulfill it. Instead, they produce an account of rights that is both incoherent and self-contradictory.

Holmes and Sunstein claim to ground their claims on a common sense observation: all choices have costs. That is a conceptual or analytical claim, for to choose *X* over *Y* is to give up *Y*, which (if it is the most highly valued alternative forgone) is defined as the cost of choosing *X*. I have no objection thus far. They proceed to note that the act of choosing to enforce a right, like all choices, has a cost, viz., the most highly valued opportunity forgone. Combining that insight with the claim that the only

rights that are meaningful are those that are actually enforced, they conclude that since the enforcement of rights has costs, rights themselves have costs. Thus the subtitle to the book: "Why Liberty Depends on Taxes." All acts of enforcement have costs and require the mobilization of resources—police, judges, jailers, executioners, etc.—and are therefore positive claims on the expenditure of taxes (or other forms of compulsion; conscription would fill the bill as well as taxation) to secure those resources. The right not to be killed is thereby converted into the right to police protection, which entails the expenditure of resources and therefore choices among alternative uses of those resources. Thus, the allegedly "negative" right not to be killed is indistinguishable from the "positive" right to the expenditure of resources to hire or conscript police. Indeed, Holmes and Sunstein see no difference between expenditures on police departments and expenditures on fire departments, both of which "protect private property." The implication is that there is no difference between an arsonist and lightning, which tells us a lot about Holmes and Sunstein's theory of moral agency and their dismissal of moral rights as mere "aspirations." In an appendix toting up the "cost of rights," the complete list of items under "Protecting Property Rights" is: "Patent and trademark protection," "Disaster relief and insurance," "Federal emergency management," "Community disaster loans," "Management and protection of forests," "Real property activities," "Fund for rural America (agricultural support)," and "Records management connected with property."

According to Holmes and Sunstein, "Rights are costly because remedies are costly. Enforcement is expensive, especially uniform and fair enforcement; and legal rights are hollow to the extent that they remain unenforced. Formulated differently, almost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the public purse" (p. 43). Even "the right against being tortured by police officers and prison guards" (p. 44) is, contrary to traditional liberal thinking, not a negative right not to be harmed, but a positive right to have monitors hired by the state to supervise the police officers and prison guards: "A state that cannot arrange prompt visits to jails and prisons by taxpayer-salaried doctors, prepared to submit credible evidence at trial, cannot effectively protect the incarcerated against torture and beatings. All rights are costly because all rights presuppose taxpayer-funding of effective supervisory machinery for monitoring and enforcement" (p. 44).

This is the first striking example of the complete incoherence of their theory, for the theory of rights and obligations on which they base their theory generates an infinite regress. Holmes and Sunstein argue that I cannot have a right not to be tortured by the police unless the police have an obligation not to torture me, and the police can only have an obligation not to torture me if there are some taxpayer-funded persons (monitors) above the police who can punish them (since "duties are taken

seriously only when dereliction is punished by the public power drawing on the public purse"). But to have a right not to be tortured I would have to have a right that the monitors exercise their power to punish the police for torturing me. Do I have that right? According to Holmes and Sunstein, I would have such a right only if the monitors had a duty to punish the police, and the monitors would have a duty to punish the police only if there were some taxpayer-funded persons above the monitors who could (and would) punish the monitors for failing to punish the police, and so on, ad infinitum. For there ever to be a right of any sort, by Holmes and Sunstein's own theory, there would have to be an infinite hierarchy of people threatening to punish those lower in the hierarchy. Since there is no infinite hierarchy, we are forced to conclude that Holmes and Sunstein have actually offered an impossibility theorem of rights in the logical form of *modus tollens*: If there are rights, then there must be an infinite hierarchy of power; there is not an infinite hierarchy of power; therefore there are no rights.

The theory of liberty that Holmes and Sunstein advance also leads to strange conclusions. Throughout the book, Holmes and Sunstein use the terms "rights" and "liberty" interchangeably (e.g., pp. 39, 46, 83, 93). Taking their definition of a right as an interest that "qualifies as a right when an effective legal system treats it as such by using collective resources to defend it" (p. 17), we are justified in deducing the following:

> If I have an interest in not taking habit-forming drugs,
> *and*
> If the state uses collective resources to stop me from taking drugs,
> *then*
> I have a right that the state use collective resources to stop me from taking drugs.

Let us stipulate that the state places me in prison in order to keep me from taking drugs (and let's set aside the fact that real states have failed to keep drugs out of prison). Since, according to Holmes and Sunstein, to have my rights enforced is to enjoy the protection of my liberty, by putting me into prison the state is making me free. Indeed, if the state were somehow to fail to imprison me, they would be violating my rights and making me unfree. (But then, if the right were not actually enforced by the state, it would be no right. Trying to follow the implications of Holmes and Sunstein's theory is like thinking out the implications of the elevation of evil to good by the members of "The Addams Family." Ultimately, the attempt collapses into incoherence.) Holmes and Sunstein have advanced a profoundly collectivist theory of liberty, without any identifiable connection to the liberal political tradition.

Finally, the theory Holmes and Sunstein advance collapses into contradiction by page 203 of the book, which contains the first consideration of "moral ideas" since the introduction, where moral rights were dismissed in order to achieve "an enhanced clarity of focus." After maintaining for 200 pages that rights are dependent upon power, which they defined as

the power to impose punishment ("duties are taken seriously only when dereliction is punished by the public power drawing on the public purse"), they make the following startling admission: "The dependency of rights on power does not spell cynicism because power itself has various sources. It arises not from money or office or social status alone. It also comes from moral ideas capable of rallying organized social support" (p. 203). The example they give is the civil rights movement, which dragged the state into protecting the civil rights of African Americans. But if moral ideas count as a form of "power," then what is the justification for the dismissal of moral rights at the outset? Could we not say that a police officer should abstain from torturing me firstly because it is a wicked and immoral thing to do—because it is a violation of my right not to be tortured—and not *merely* because the officer fears being punished by his superiors, who, in turn, must fear being punished by their superiors? The theory of Holmes and Sunstein collapses into incoherence when they incorporate "moral ideas" into their definition of power, which was offered as an alternative to moral ideas in the first place. (This shiftiness also shows up when they shift from terms such as "creation" and "grant" to describe the origins of rights to "recognition" when discussing the rather more touchy subject of "religious liberty" [p. 182].)

Their theory not only implodes as a moral theory, but it is incoherent as a political theory as well. Holmes and Sunstein cannot decide whether government is a power separate from the people that bargains with them or is the representative of the people:

> For its part, the government is willing to refrain from imposing confiscatory tax rates, not only because of political incentives, but also because public officials understand that reliable long-term revenues will be augmented if citizens are encouraged to accumulate private wealth, keep honest books, and bank and invest their earnings inside the country, or at least within the purview and reach of the IRS [p. 195].

Here, government is a party separate from the citizenry that *bargains with* them. But:

> If supposedly impartial rights accrued solely to the advantage of the rich, the American government's vital claim to represent society as a whole, rather than being a tool of special interests, would not only be tarnished. It would crumble [p. 207].

Here, government *represents* society.

One should expect of theorists who trumpet their attachment to democracy some coherent statement of the relationship between government and society. Their theory is not only incoherent and contradictory on the level of rights theory, but it fails as a political theory, as well.

This work is the logical combination of the views of two intelligent men who are profoundly hostile to individual liberty and limited government. Sunstein has gained some notoriety for advancing a novel "expressive"

theory of law, according to which law is not about the securing of justice or the conditions of social cooperation, but about "norm management." That is the theory that conservatives have advanced against eliminating sodomy laws; it is not necessarily that they want sodomy laws to be uniformly enforced, you see, but repealing them would send the "wrong message" about "society's" estimation of homosexuality. The theory is profoundly anti-liberal. Holmes, in an earlier book, *Passions and Constraint: On the Theory of Liberal Democracy* (1995), had advanced the historically implausible thesis that the American founding was purely an act of "positive constitutionalism," with the emphasis on enabling the state to provide collective goods for the people and little or no concern with limiting the power of the state to do evil (which Holmes terms "negative constitutionalism"). That runs into some difficulty when we consider the language of the founding documents, not to mention the Kentucky Resolutions, in which Jefferson wrote that "confidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go." (Holmes even misstates Locke's theory of property as "a monopoly granted and guaranteed by government for the sake of the public interest" [p. 254]; compare Locke's Second Treatise, §27, along with many other passages.)

It should not go unremarked that *The Cost of Rights* is extraordinarily polemical, unscholarly, and nasty in its criticisms of those with differing views. For example, immediately after gallantly conceding that "Many critics of the regulatory-welfare state are in perfectly good faith" (p. 216) they turn around to tar all critics of the welfare state with the charge of racism: "But their claim that 'positive rights' are somehow un-American and should be replaced by a policy of nonintervention is so implausible on its face that we may well wonder why it persists. What explains the survival of such a grievously inadequate way of thinking? There are many possible answers, but inherited biases—including racial prejudice, conscious and unconscious—probably play a role. Indeed, the claim that the only real liberties are the rights of property and contract can sometimes verge on a form of white separatism: prison-building should supplant Head Start. Withdrawal into gated communities should replace a politics of inclusion" (p. 216). The charge is not only unsubstantiated, it is beneath contempt. Still, despite their slithery style of argument, Holmes and Sunstein have advanced a thesis deserving of a rebuttal that does not sink to the level of its advocates. I hope that I have succeeded.

Holmes and Sunstein have produced a statement of collectivism clothed largely in liberal language. But a sheep's coat does not a sheep make.

Tom G. Palmer
Cato Institute

Post-Socialist Political Economy: Selected Essays
James M. Buchanan
Northhampton, Mass.: Edward Elgar, 1997, 285 pp.

The art of political economy has been a dying art for most of the 20th century. Since mid-century, political economy has made a comeback and that comeback was largely due to James Buchanan. Buchanan's work has made scholars pay attention to the rules of the game within which markets are embedded. He has also constantly pointed out that political economy reform must always begin in the "here and now" and not in whatever arbitrary start-state we imagine. Real world reform is constrained, to this extent, by where we start from. It is that point of departure which defines the problem that must be addressed by the political economist.

Post-Socialist Political Economy collects a variety of papers Buchanan wrote in response to the events of 1989–91, or influenced by those events. The essays emphasize the themes of how rules of the game within which we play structure the incentives that guide our actions and the flow of information that we must process in making our choices. In essence, this reiterates Buchanan's work on the "constitution of economic life" that sets the rules within which economic outcomes continually emerge. Deliberate choice can only be made at the level of rules, not among these outcomes. Thus, Buchanan's work bounds the pattern of outcomes, but cannot provide detailed predictions of outcomes.

The new wrinkle to these essays is Buchanan's consideration of the issue of legitimacy of the rules as conveyed in the asymmetric lived experience among people of the West and the East. The work of public choice and market process scholars has highlighted the incentive and informational difficulties associated with alternative institutional environments, but Buchanan peers beneath given institutions and explores the legitimacy accorded to those institutions by different people. The basic institutions of a Western market society, for example, do not accord well with the lived experience of the Soviet peoples with markets. The institutions of pricing and bargaining existed in both Soviet and post-Soviet periods. But under the Soviet period, the experience was one within the following situation: a black market without well-defined or enforced property rights, and a shortage of goods and lack of alternative supply networks.

Those who could exploit the shortage situation could capture "rents" in the form of monetary "bribes," "black-market profits," and nonmonetary "privileges." Markets were necessary for daily survival, but black (and other colored) markets are not the same as aboveground and legitimated markets backed by the rule of law despite the formal similarity of prices and bargaining. The asymmetry between "markets" has to be the starting point of thinking about transition.

Fixing this situation is not just a matter of freeing prices so they can adjust to the market-clearing level. Of course, freeing prices is a necessary

move, but it is not sufficient. "Getting prices right" is not enough. What is required is an intricate mix of institutions that enable individuals to realize the gains from exchange, but the intricate mix of institutions must be legitimated in the belief structures of the people—we cannot just impose whatever institutional structure we want wherever we want to, it has to be "grounded."

Buchanan's book is an optimistic book about man's ability to design rules of the game to improve the everyday life of people tempered by a realist's appreciation of the difficulty of designing rules that can "stick." The future is ours to make, Buchanan insists, but with that call comes a huge moral responsibility that we must take seriously. In the end, *Post-Socialist Political Economy* is not a call for action as much as an invitation to study and think about profound issues. As such Buchanan provides the reader with an anti-utopian, and nonhubris, track for the political economy of transition. He lays out the unique role of economics as a public science—with special emphasis on the spontaneous ordering of market activities within a system of property, contract, and consent, and how deviations from that system are counterproductive. Economics as a public science, Buchanan reminds us, provides citizens with knowledge that empowers them to become informed participants within the democratic process.

The book ends with three chapters dealing with the idea of federalism and its relevance for the modern world. In so doing, Buchanan underscores his basic thesis—the need to establish constraints on the natural proclivities of men for shortsightedness and free-riding so that citizens can realize the generalized benefits of a market economy.

Buchanan's book contains much wisdom that is lacking from most (if not all) the emerging literature on the problems of post-socialist political economy in East and Central Europe and the former Soviet Union. Many of those books have a lot of details on the situation, or clever technical arguments, but little in terms of a moral narrative on political economy.

A few years ago I reviewed Joseph Stiglitz's book *Whither Socialism?* and started the review by pointing out that when you take a premier economic theorist and combine that with a premier economic problem you have very high expectations indeed. Buchanan's book raises our expectations in a similar way, but whereas Stiglitz fails to meet the challenge, in my assessment, Buchanan succeeds in putting questions in front of us that we must answer if we hope to move forward and address the difficulties associated with post-socialist political economy. Those questions deal with

(1) the *de facto* property rights arrangement that existed under the old system,
(2) the *institutional arrangements* within which markets are to be embedded after the reforms, and
(3) the *historical experience* and *cultural legacy* of the country under examination, and specifically the question of the lived experience with market institutions as a carrier of legitimacy.

If we do not pay attention to those issues, we risk continual frustration due to misspecification of the problems and poor design of transition policies.

Peter J. Boettke
George Mason University

Against Politics: On Government, Anarchy, and Order
Anthony de Jasay
London: Routledge, 1997, 245 pp.

For the first time the political philosophy of libertarianism and classical liberalism has gotten a solid base in logic and epistemology. To many Jasay's book will be a revelation (as James Buchanan remarked about Jasay's first book, *The State*). It would be impudent to attempt to give an exposition of the contents of this rich and tightly argued book. Thus I will try to give the flavor of it in order to whet your appetite for reading it.

Against Politics is a collection of articles published between 1989 and 1996 around a common theme: the political philosophy of government and "ordered anarchy." The essays fit together as chapters of an integrated work. The synoptic Introduction (pp. 1–7) concisely summarizes the contents. Part I convincingly criticizes statism, including the minimalist variety, while Part II proffers Jasay's own politico-economic theories. "Before Resorting to Politics" (Chapter 8) and "Conventions: Some Thoughts on the Economics of Ordered Anarchy" (Chapter 9) form the center of the book. Jasay incorporates many of the insights of Austrian economics and its successors in the United States, while eschewing the Misesian apriorism in epistemology (which in the opinion of this reviewer is untenable [Radnitzky 1995]). The work has a solid basis in epistemology and semantics, and its logic is impeccable.

Man's knowing capacity is seen in accord with Critical Rationalism. While recognizing that intellectual progress is nonetheless possible, the emphasis is on fallibilism, stressing that decisions have to be made under uncertainty and with a limited knowledge base, and taking into account that social actions also have unintended consequences. Only individuals can act (ontological individualism). Man strives to better his lot and makes at least implicitly cost-benefit assays whenever he deliberates; he reacts to a changing physical and social environment and a changing knowledge base.

In epistemology a clear distinction is made between statements (sentences with a descriptive function and, hence, with truth value) and judgments. Consequently Jasay's metaethics is noncognitivist: a sentence formulating a genuine value judgment ("value judgment," for short) has no truth value, since it has no empirical content of information. ("Truth" is defined in terms of the correspondence between the content of information of a descriptive sentence to facts.) A genuine value judgment can only have "validity" relative to a particular value system or system of

norms. It is logically impossible to deduce a value judgment or norm from a set of descriptive sentences.

In ethics, Jasay voices a strong preference for the ideal of the free society, the presumption of liberty, property, and innocence (pp. 158–71). However, in contrast to libertarians such as Ludwig von Mises, Murray Rothbard, and Hans Hoppe, he provides a legitimating argument in favor of freedom, property, and innocence in terms of logic.

Typically, social action occurs either in the context of a voluntary social order or in a coercive order. The prototype of a voluntary order is exchange, the market; the choice example of a coercive order is the state. The state is the last (highest) instance of power, against which there is no appeal to another instance. It is a territorial monopolist in violence, and it declares its violence to be "legitimate." The absence of voluntariness is not a defining characteristic. The state would be the state even if the social contract were a tenable theory. (In Chapter 1 Jasay shows that this is not the case.) The market is based on individual choice, whereas politics by definition is based on collective decisionmaking. "Collective decision" is short for nonunanimous decision. The expression "politics" signifies such decisions. Jasay puts forth the thesis: "All nonunanimous politics—and unanimous politics would of course be redundant, and an oxymoron—is redistributive" (p. 3). Only a minor part of redistribution is explicit transfers. Subsidies and other protective measures such as regulations and various privileges have redistributive consequences. Material and financial values, positions, privileges, and prestige are also redistributed. That politics is redistributive is particularly clear when the democratic method of decisionmaking is being used. "If much of this [contractarian] reasoning is baseless, and the state is simply an enforcing mechanism to enable a winning coalition to exploit the residual losing coalition without recourse to violence, the delusions of necessity and convenience are of course an aid to the efficiency of the process" (p. 2).

In politics some decide for all, i.e., some override the preferences of others and dispose of the resources of others. Even the domain (what kind of alternatives there are), the borders between the realm of the collective versus the private, and by what metarules (rules for rulemaking, the constitution) are decided by collective choice. That mechanism is claimed to serve some putative "Common Good," a highly problematic concept (p. 69 f.), if only because what the "Common Good" is is also chosen collectively. However, "No basic institution chosen collectively can be, and remain, intrinsically better than collective choice, 'the Thing itself'" (p. 3). State coercion is used to impose the will of some on all, including on those who would reject it if they could. That is the moral problem of politics, any politics.

Jasay's target is not the content of politics (favoring Peter over Paul), nor its method (democratic or otherwise); it is not that politics is dishonest or corrupt, or that power is abused, or that perverse results are produced. Those things divert suspicion from the "Thing itself." Politics as such is the target of the book.

The customary "liberal" arguments for the state are decisively debunked. The Hobbesian "Prisoners' Dilemma" expresses the problem of private contractors in the "state of nature": how to make contracts enforceable and thus credible. Jasay presents a knockdown argument against contractarianism: If contracts would require an enforcer—and according to contractarian theory a "last" enforcer can be created only by a social contract—then that contract too would need an enforcer, and so ad infinitum (p. 5). Contractarian arguments simply assume away the principal-agent problem (p. 19). There is no contractual exit from the state of nature (p. 22). "Non-rejectability" arguments involve either an infinite regress or circular reasoning.

Likewise "minarchist" arguments and constitutionalism are destroyed. They put forth a false problem: to find rules such that they create incentives for politicians to stick to the mandate of the "social contract." They falsely assume that constitutional politics differs radically from ordinary politics. The real problem is not to design a constitution of liberty, but "to find the conditions . . . under which [a constitution of liberty] would be likely to be adopted, respected, and left intact for long enough to do any good" (p. 53). The constitution is but a chastity belt whose keys are always within reach (p. 3). "States are an imposition, sometimes useful, sometimes a millstone, always costly, never legitimate, and never a necessity for binding agreements" (p. 36). The problem of collective action has not been solved. Hence, we should examine alternatives. The guiding maxim is that, if politics at all, then make the domain of politics as small as possible. Let us examine ordered anarchy and self-enforcing voluntary social orders.

The repeated games approach to anarchy is promising: institutions that support cooperation are seen as equilibria (conventions, norms, laws), and second-order orders supporting a first order evolve spontaneously. People expect to have long (and prosperous) relationships with the same groups of people. Reputation is offered to guarantee future behavior. Organized methods to economize the costs of gathering information and voluntary social orders arise. Medieval Europe's "Law Merchant," offshore banking, and private arbitration courts are based on self-enforcing, relational contracts and exemplify equilibria institutions. In other words, a set of rules is obeyed because everyone finds it in his interest to obey it.

The key ideas of "strict" (Jasay 1991) liberalism, freedom, and property are conceptually inseparable, because freedom, property, and individuality cannot be conceived as unrelated entities. Thus they are intertwined in their empirical exemplification.

In the literature, legitimizing arguments for positions in political philosophy usually make recourse to some natural-law doctrine. To John Locke the theistic version of the doctrine was available. Today "ultimate legitimizers" (God, Mother Nature, or some holistic, fictitious entity like "Society" or "the People") have lost their authority, at least for serious thinkers.

Upon a closer look, Rothbard's ostensibly natural-law arguments for the central tenets of libertarianism turn out to be pragmatic: the right to self-ownership helps man to realize his vital interests.

Within the wing of property-right anarchists, prominent thinkers such as Mises and Rothbard adopt and adapt ideas of a modern branch of German idealism, of "justificationist philosophy" (*Begründungsphilosophie*). They legitimize the central tenets of their philosophy by "praxeology," a theory of action, which is conceived as *a priori valid*, because it is deducible from the "logical structure of the human mind." Mises uses Immanuel Kant's doctrine of the Synthetic Apriori, of propositions which assert something about reality, and the truth of which is known a priori, i.e., independent of experience (e.g., Mises 1978 [1962]: 42). Critical rationalists emphasize that man possesses many genetic aprioris, but rightly reject the idea of a descriptive sentence with respect to which truth claims are independent of empirical testing, independent of the test of experience.

Hayek, as a typical classical liberal, was ambivalent: he wanted to accord to freedom and property final value (he called them "taboos"), but he thought that it was not possible to entertain that position without losing one's intellectual integrity. Thus, *à contre cœur,* he took a consequential position with respect to freedom, assigning instrumental value to it (e.g., Hayek 1960: 50, 85).

Jasay (p. 161) too wishes to eschew value judgments (such as "I prefer a free society over an unfree one"), and thus he tries to base his arguments for liberty solely on descriptive sentences.

An argument in favor of something that is recommended because it is judged to be valuable may be either (a) an argument whose premises have recourse to a final value, an intrinsic value, or (b) an argument based on an instrumental value—consequentialist, arguing that something is valuable because it is instrumental in bringing about consequences which are evaluated as valuable per se. A sentence that formulates a consequentialist argument is a descriptive sentence, i.e., a sentence the truth value of which is subject to empirical testing. It has only the form of a value judgment. Such an argument (type b) is provisional or, more accurately, incomplete. It presupposes a final value, because unless it does so, it can only lead to an infinite regress or a circle. To make it complete, to get a proper argument (a), the value judgment expressing the final value has to be made explicit. A final value by definition need not and cannot be justified. It is an arbitrary stopping point. Given subjective value theory, such a stopping point would be just that: arbitrary. Hence Jasay must require that his argument be valid in force of logic, "valid" in the sense of being logically sound, and hence he must require that it does not have recourse to a (genuine) value judgment. His attempt to produce an argument in favor of liberty is novel and extremely important. It rests on the assumption that feasible actions without a pending valid objection are admissible for logical reasons and thus must be treated as legitimate.

In a nutshell, this is the argument. An individual x has a set of feasible acts, his option space. This set can be divided into two subsets: the set of acts *admissible* in society S (at time t) and the set of acts inadmissible in S. Let us assume that x claims that act A is admissible, i.e., that there are *no objections* to his performing A, and that x's claim is opposed by an individual y. Where is it rational (for lawmakers) to place the burden of proof—on the potential actor or on the objector (problem P)? The possible objections consist of laws and conventions in good working order. (Concrete cases have of course to be subsumed under the *type* cases described in the laws or implied in the conventions.) There are two clear-cut cases: (1) the list of objections considered relevant in S is explicit and thus finite; and (2) the list is "undenumerably" large (denumerably infinite), open, a fuzzy set. Type 2 cases are probably the only ones that matter in real-life situations. With respect to the list of objections (e.g., harming others), even in the context of law the expression "harm" allows interpretation, as does "breach of contract." Cases have to be subsumed under specific laws, and most laws turn out to be twistable to some extent. In addition to laws the list of inadmissible actions in practice includes conventions and customs, the breach of which leads to informal sanctions such as, for instance, ostracism.

In type 1 cases the problem P (where to place the burden of proof) is a matter of efficiency. The longer the list, the more costly it is for the actor to prove his case, i.e., to falsify the objector's claim. By contrast, unless he is acting frivolously, the potential objector has in mind a particular item on the list of objections. Hence for him the costs of verifying his claim are negligible.

In type 2 cases the problem P is a matter of logic and epistemology; the asymmetry between verifiability and falsifiability is decisive. (Verifiability and falsifiability are logical relations between sets of sentences.) The objector's claim is verifiable, whereas it is logically impossible to falsify the objector's claim. Hence it would be unreasonable (to say the least) to place the burden of proof on the actor.

In type 1 cases we assume that the denumerably finite list is consistent. Unless an inconsistency has been deduced we are entitled to do so—this is good enough for mundane purposes. With respect to type 2 cases it should be remembered that laws are twistable. Hence the consistency of the system may be doubted. When a glaring inconsistency has been shown, attempts should be made to improve the system.

In summary, Jasay's argument in favor of liberty (property and innocence) is incontrovertible. It does not have recourse to any (genuine) value judgment, i.e., to a sentence that is subjective and hence cannot have a truth value. It is *a matter of logic.* Does an argument in favor of liberty presuppose a preference for liberty? No. Constructing an argument is an exercise in logic. That it comments on and recommends liberty is merely its illocutionary force.

Jasay's argument entails the request to any rational being, in particular to legislators, not to request (in sincerity) what is logically impossible.

This has nothing to do with value judgments: the logically impossible is literally "unthinkable," since thinking and logic are two sides of the same coin. "Ought implies can" is a descriptive statement.

The set of actions admissible in society (legal positivism) has an interesting subset: the set of objections valid in a Free Society, i.e., the list of actions inadmissible in a Free Society. Hence, for the friend of freedom, the theoretical test would be to match the objection at hand on the list of valid objections.

Everybody, even a seasoned political philosopher, can learn from Jasay's book, and the clarity and conciseness of his style make reading it a pleasurable experience.

Gerard Radnitzky
University of Trier

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