

Against Politics, for "ordered anarchy"

Against Politics—on Government, Anarchy, and Order.

Anthony de Jasay

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1. Introductory remarks.

For the first time the political philosophy of libertarianism and of classical liberalism has gotten a solid base in logic and epistemology. For 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. Hence I will try to give the flavor of it in order to wet your appetite for reading it. The book under review is a collection of articles published between 1989 and 1996 around a common theme: the political philosophy of government and "ordered anarchy". It makes use of the rational-choice method. The essays fit together as chapters of an integrated work. "Before resorting to politics" (ch. 8) and "Conventions (ch. 9) form the center. The synoptic Introduction (pp. 4-7) concisely summarizes the contents. Part I convincingly criticizes statism, including the minimalist variety, Part II proffers Jasay's own politico-economic theories. Jasay incorporates many of the insights of Austrian Economics and its successors in the USA, while eschewing the Misesian apriorism in epistemology (which in the opinion of this reviewer is untenable [Radnitzky 1995, Reply to Hoppe]). The work has a solid basis in epistemology and semantics, and its logic is impeccable.

2. The philosophical groundplan

2.1. Jasay's image of man and society

Man's knowing capacity is seen in accord with *Critical Rationalism*: i.e., emphasis on fallibilism (while recognizing that intellectual progress is nonetheless possible), stressing that decisions have to be made under uncertainty and with a limited knowledge base, and taking into account that social actions have also 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. Like in scientific research, in social life there is no guarantee of success.

2.2. Epistemology and ethics.

In epistemology a clear distinction is made between statements (sentences with descriptive function and hence with truth value) and judgments. Consequently Jasay's *meta-ethics is non-cognitivist*: 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. Jasay adopts the *subjective value theory* of Austrian Economics: since value judgments are in principle subjective, aggregating utilities is logically impossible. Consistent with ontological individualism, He adopts methodological individualism: whenever the problem requires it, we must be able to reduce sentences using holistic parlance (talking about such entities as society, government, etc.) to statements about the actions of individuals.

In ethics Jasay voices a strong preference for the ideal of the free society, the presumption of liberty, property, and innocence (pp. 158-171). However, in contrast to libertarians like Mises, Rothbard, Hoppe, he provides a legitimating argument in favor of freedom, property, and innocence in terms of logic.

3. The concept of Politics

3.1. Politics is redistributive.

Ideally, 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 collective decision. 'Collective decision' is short for non-unanimous decision. The expression 'politics' signifies such decisions. Jasay puts forth the thesis: "All nonunanimous politics—and unanimous politics would of course be redundant—is redistributive." (3, 154). Only a minor part of redistribution is explicit transfers. Subsidies and other protective measures, such as regulations and various privileges have redistributive consequences; besides material and financial values, positions, privileges, prestige, etc. are redistributed. That politics is redistributive is particularly clear when the democratic method of decision making 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).

3.2. The moral problem of politics as such.

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 meta rules (rules for rule-making, the constitution), are decided by collective choice. That mechanism is claimed to serve some putative "Common Good", a highly problematic concept (69 f.), if only because what the "Common Good" is, is revealed by the same mechanism, it is chosen collectively. However, "No basic institution chosen collectively can be, and remain, intrinsically better than collective choice, 'the thing itself.'" (3). State coercion is used to impose the will of some on all, including on those who would reject it if they could. *This is the moral problem of politics, any politics.* Jasay's target is not the content (favoring Peter over Paul), nor the method

(democratic or otherwise); it is not that politics is dishonest, corrupt or that power is abused, lack of efficiency, or that perverse results are produced. These things avert suspicion from the "Thing itself"—witness the motto. *Politics as such is the target of the book.*

3. Part I: Criticism

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 credible (because enforceable). Jasay present a knock-down 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 (5). Contractarian arguments simply assume away the principal-agent problem (19). There is no contractual exit from the state of nature (22). "Non-rejectability" arguments involve either an infinite regress or circular reasoning. There is a striking analogy between (a) the dilemma of contractarianism in political philosophy and (b) the "justificationist" dilemma in German epistemology. In (b) either the (descriptive) statement remains without ground (*unbegründet*) or infinite regress or circle. The only way out is to abandon the quest for certainty; truth remains a guiding principle, but the methods for ascertaining the truth of a particular statement are fallible in principle (Radnitzky 1987). In (a) freedom remains the guiding principle, but there is no guarantee that a particular action be successful, help us to approximate the aim.

Likewise "minarchist" arguments and constitutionalism are destroyed. They put 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 maintained for long enough to do any good." (53). The constitution is but a chastity belt whose keys are always within reach (3). "States are an imposition, sometimes useful, sometimes a millstone, always costly, never legitimate, and never a necessity for binding agreements." (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; examine ordered anarchy, self-enforcing voluntary social orders.

4. Part II: Emergent solutions—Towards an ordered anarchy

Promising is the repeated games approach to anarchy: institutions that support cooperation are seen as equilibria (conventions, norms, laws), second-order orders supporting a first order evolve spontaneously. People expect to have long (and prosperous) relationships with the same groups of people. There are overlapping groups. 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", off-shore banking, private arbitration courts are based on self-enforcing, relational contracts and exemplify equilibria institutions, set of rules obeyed because everyone finds it in his interest to obey. In the daily games of life, even today we live in states, but at the same time partly outside states. The libertarian model for private security production can be applied also to the production of external security (182 f.). Space limitations prevent me from elaborating the theme of chapter 9.

5. The presumption in favor of liberty

5.1. The problem situation

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; hence also in their empirical exemplification they are intertwined..

5.2. The state of the problem in the literature

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 Father, Mother Nature, or some holistic, fictitious entity like "the Society" or "the People") have lost their authority, at least for serious thinkers. ¹ Upon 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 like Mises and Rothbard adopt and adapt ideas of a modern branch of German idealism, of "justificationist philosophy" (*Begründungsphilosophie*). They legitimate the central tenets of their philosophy by "praxeology", a theory of action, which is conceived as *a priori valid*, because deducible from the "logical structure of the human mind". Mises uses 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). ² 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. In Mises' thought the result is a mix of an admirable political philosophy and a deplorable position in epistemology. ³

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, and esp. p. 85; for an overview see also Radnitzky 1999, section 3.1).

5.3. *The presumption in favor of liberty (property and innocence)*

Jasay too wishes to eschew value judgments (such as "I prefer a free society over an unfree one."), and thus he tried to base his arguments for liberty solely on descriptive sentences. The argument is adumbrated (161) and sketched in Jasay 1998, 402 ff.

¹ This happened in the same way in which the quest for "ultimate justifiers", i.e., of the truth claims with reference to a particular descriptive statement had to be abandoned, because they relentlessly lead to either a circle, or an infinite regress, or an arbitrary stopping point (see, e.g., Radnitzky 1987, on self-applicable critical rationalism).

² Popper once told me that in conversation with von Mises in Vienna both avoided the theme of "a priori valid" in order to avoid a heated quarrel.

³ For instance, if it were true, as Mises believes, that the theorems of money theory could be deduced from the concept of Money, money theory would be empty of content of empirical information, hence could not explain/predict anything (Radnitzky 1995, vol. I, p. 194).

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) it may be 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, i.e., a conjunction formulating 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, it is 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. For the conclusion of an argument to be intersubjectively binding the argument must be valid and its premises must be considered true and hence they must not contain a value judgment. Jasey's argument in favor of liberty—that feasible actions which pending a valid objection must be treated as legitimate—is novel and extremely important. Hence, I will try to reconstruct it here.

The argument. An individual has a basket 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 the law makers) 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: (i) The list of objections considered relevant in *S* is explicit, hence finite; and (ii) The list is "undenumerably" large, (denumerably infinite), open, a fuzzy set. Type (ii) cases are probably the only ones which 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, likewise 'breach of contract'. Cases have to be subsumed under specific laws, most laws turn out to be twistable to some extent, and in addition to laws the list of inadmissible actions in practice includes conventions, customs, etc., the breach of which leads to informal sanctions like, e.g., ostracism.

In cases of type (i) the problem *P* (where to place the burden of proof) is a matter of *efficiency*⁴—in practice cost-benefit assays, higher/lower transaction costs to achieve a given purpose. 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.⁵

⁴ In this context the concept of efficiency is unproblematic. In economics "efficiency" is dependent on tastes and distribution of income. Hence the concept cannot simply be imported from physical theory.

⁵ The reverse case would be a society that operates on the maxim "Everything is forbidden that is not explicitly allowed". In such a society the problem *P* does not arise, since it is simply presumed that the actor always carries the burden of proof.

In cases of type (ii) problem *P* is a matter of *logic* and 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 not *falsifiable*, i.e., 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. Moreover, placing the burden of proof on the actor has a built-in invitation to object to proposed courses of action because objections cost little. The result are that "extravagant claims of harms and rights by third parties get leverage and bargaining power" (162), the litigating society.⁶

In the type (i) case 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.⁷ With respect to type (ii) 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 are 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 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 (like falsifying the objector's claim that there is an obstacle to my doing x, when the list of obstacles is denumerably infinite or de facto inconsistent). 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 *S* (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 makes reading it a pleasurable experience.

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⁶ Product liability risk, medical malpractice risk, and frivolous litigation represent the greatest deadweight cost to the American economy.

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⁷ It would be a degenerating problem shift here to problematize the concept of "denumerably finite". Of course, in order to count a set we need a counting procedure and, hence, a unit must be defined. Since the list is not axiomatized, the question of completeness and decidability (Gödel theorem) does not arise. Hence, I regard both objections as irrelevant.