

REVIEW OF *ORDERED ANARCHY:*
JASAY AND HIS SURROUNDINGS

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ORDERED ANARCHY: JASAY AND HIS SURROUNDINGS.
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I AM PLEASED AND A LITTLE EMBARRASSED to review the recent festschrift for Anthony de Jasay. With a few exceptions I solicited most of the contributions for it but due to other pressing obligations I was not able to prepare the book for publication and the project lingered for years. I was therefore very pleased to see that two of the original contributors, Hardy Bouillon and Hartmut Kliemt, completed the project and published it under the title “*Ordered Anarchy: Jasay and His Surroundings.*”

Ordered Anarchy is not just a well deserved tribute to the greatest social thinker of our time, but the high quality of its contributions also makes it a powerful collection of essays in the classical liberal tradition. To avoid boring the reader too much, I will not extensively review each of the contributions but briefly discuss them in light of Jasay’s own writings.

There is no doubt that Anthony de Jasay’s thinking is firmly rooted in the classical liberal tradition but, unlike most of his historical predecessors, he does not share their optimism about constitutional government. Without exception, his writings link liberalism to ordered anarchy, not democracy. Jasay is a “thoroughgoing skeptic” (as James M. Buchanan characterizes him) about the idea of minimal government, and argues that liberalism in its

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deontological incarnation is not compatible with the existence of government, even if it would just confine itself to the production of public goods. Such a conclusion is not new and goes back to libertarian economists such as Murray Rothbard and David Friedman. But what distinguishes Jasay from these libertarians is that he rejects *both* natural right theory and consequentialism.

Jasay's philosophical perspective has similarities with critical rationalism but without Karl Popper's confused application of philosophy of science to social engineering. Jasay can afford to dissect the rationale for the state because he proposes that conserved norms, common law, and markets can take the place of government. Perhaps the most recognizable feature of Jasay's oeuvre is his unique, and widely recognized, ability to combine analytical arguments with common sense. In the writings of this philosopher against politics, anarchism and realism are reconciled.

In his contribution, "Rights, Liberties, and Obligations," Hardy Bouillon identifies the view that rights (and obligations) stem from contract as one of Jasay's core ideas. Like modern Hobbesian contractarians (David Gauthier, Jan Narveson) and some individualist anarchists (Max Stirner, Benjamin Tucker), he rejects the idea that we are born into this world with certain "natural rights." His careful distinction between freedom and rights avoids puzzling concepts such as a "right to liberty." The view that rights follow from agreement leads him to reject "rights" that are "created" by the state. His objection to government created rights is not moral but epistemological in nature. In the case of private contracts, both parties confirm the existence of a prior agreement with its corresponding obligations. But in the case of rights created by law such consent is absent. In this case it might be better to talk of "orders" or "commands."

But as Jasay has recognized himself, this view on the source of obligations creates a problem for private property because we expect people to respect private property without prior agreement. There must be a place for such non-contractual obligations but can it have a similar value-free epistemological source as contractual obligations? Although I believe that Jasay makes a persuasive case for the "finders keepers" convention, I follow Bouillon in his view that the case for private property is not as strong as that for conventional contractual obligations.

Enter Jan Narveson's essay, "Anthony de Jasay on Liberties and Rights," which stresses the need for an argument, not just to respect private property, but to respect a person's liberty *in general*. Narveson believes that Jasay's arguments would be strengthened by a Hobbesian defense of a general right to liberty. I think that Narveson can safely assume that Jasay would recognize

a common interest in non-coercion, but does this mean we have to identify an agreement to abstain from coercion as a “right to liberty?” The Hobbesian argument to seek peace is a persuasive rational choice *explanation* why we generally do so. But I wonder if Jasay would follow Narveson in his contractarian case for liberty considering the role Jasay attributes to self interest in the growth of the state.

Do we need an argument in favor of liberty at all? Or should we just confine ourselves to clarifying our philosophical language and falsifying prevailing theories about the state (as Jasay has so skillfully done)? Jasay often seems to fall back on “conventions,” and perhaps for good reason. Respect for person and property is an important component of conventions in many civilizations, which in turn can be explained by evolutionary and rational choice theory. The *real* challenge is to understand why most people exempt government officials from such conventions. One may even wonder if libertarians are doing themselves a favor to search for a “justification” for libertarian rights. Perhaps one of the mistakes in the history of classical liberal thought is to assume such a burden of proof. It is at this juncture where the critical rationalist perspective of authors like Jasay and Radnitzky may offer a better alternative.

Hypothetical contracts are not worth the paper they are not written on. Nevertheless, John Rawls’s hypothetical social contract has produced a sizable literature in the form of critiques, restatements, and refinements. To a cynical reader, the Rawlsian enterprise is the ultimate example of why intellectuals should refrain from offering opinions on society. In Rawls’s perspective, the challenge of reconciling self interest and the common good is simply swept under the carpet by not allowing the very differences among individuals that traditionally produce moral, social, and political disagreement to enter the social contract. But even in the absence of such differences, interpreters of Rawls’s work have not been able to agree on the substance of this social contract, let alone the consequences for public policy.

In his contribution on Rawls, Tom Palmer focuses on the question of whether Rawls’s social contract leaves room for exit. Are we allowed to escape from the burdens and benefits of the social contract? The highly illiberal answer that Palmer finds in Rawls’s work is “NO.” But perhaps even the “state of nature” is to be preferred. As Jasay writes in his book *The State*:

People who live in states have as a rule never experienced the state of nature and vice versa, and have no practical possibility of moving from the one to the other. It is often a historical anachronism and an anthropological absurdity to suppose such movement. On what

grounds, then, do people form hypotheses about the relative merits of state and state of nature?¹

Jasay has offered a number of technical criticisms of the Rawlsian enterprise but his most fundamental objection is that this tradition treats justice as a matter of social choice instead of a quality of individual acts (see Jasay's *Justice as Something Else* on this distinction). Palmer's detailed analysis of Rawls's "hypothetical contract with people you cannot escape" is a good example of where the social choice approach can lead us.

Unabashedly theoretic, Anthony de Jasay's analysis of human interaction does not seek to create a technocratic framework within which rulers-managers (or their academic surrogates) can find handles for steering and manipulating the actions of other people towards some preferred optimal state of society. There is no trace in his work of the presumption that rulers and managers are, or can be, related to society in the same way that an engineer is related to a piece of machinery or an experimental biologist to the animals in his laboratory. [59]

This spot-on characterization of Jasay's oeuvre is the starting point of Frank van Dun's essay, "Concepts of Order," on the difference between the classical liberal concept of order and socialist concepts of order. Of particular interest is van Dun's historical philosophical analysis of solutions to conflicts that arise from scarcity. Of the four different solutions he discusses (Abundance, Unity, Consensus, and Property) he identifies property as the only one that is immune to "charges of utopianism." This classical liberal concept of order, the "convivial order" is contrasted with social orders that require social organization with a command and obedience structure.

Gerard Radnitzky's contribution "Against Politics, for 'Ordered Anarchy'" has seen publication before through the Cato Institute but remains the best short introduction to Anthony de Jasay's work. As a philosopher of science, Radnitzky emphasizes the logical and epistemological merits of Jasay's writings, which clearly impressed the author greatly. Radnitzky devotes a substantial portion of his text to Jasay's argument in favor of the presumption of liberty, an argument that "consists solely of descriptive sentences." Although de Jasay's work would not lose much of its persuasion without this argument, it will be interesting to follow the fate of this part of Jasay's contributions.

Is the state a necessary institution for the production of public goods *or* a vehicle for the exercise of power and extortion? In his contribution, "Beliefs as Institution-specific Rationalized Self Interest," Bruce Benson

¹Anthony de Jasay, *The State* (Indianapolis, IN: Liberty Fund, Inc., 1985), para. 1.1.6.

delves into the literature on the origins and evolution of norms, private property, and government and suggests that one “legitimizing tactic for rulers is to create the belief that only he can provide, vital ‘services’ to everyone in the jurisdiction.” Although Benson’s analysis covers a lot more than the rationale for government, his perspective to study government (non-unanimous collective decision making) as an instrument to distribute wealth complements the perspective of Jasay’s book *The State*. As such, his contribution is a fine example of one of the shapes a Jasayan research program could take. An interesting aspect of Benson’s analysis is that he offers an explanation why conventions to respect contract and private property can co-exist with conventions to accept the authority of the state to tax its citizens. Even a single individual can hold such contradictory beliefs “due to simultaneous involvement in numerous institutionalized groups, some of which encourage voluntary interaction (within the group), some of which facilitate involuntary transfers (generally from outside the group), and some of which do both.” Benson’s contribution is a reminder how libertarian scholarship could look like if there would be less emphasis on public policy recommendations and more emphasis on economic and evolutionary studies of the interaction between the individual, groups, society and the state.

In his contribution “Why Government?” Randall G. Holcombe argues that government is not necessary but inevitable. Holcombe follows Jasay in rejecting the social contract argument for the state and contrasts the public goods argument for government with the growing literature on the private provision of public goods. To Holcombe, “governments are imposed on people by force, and maintain their power over people by force.” So why does Holcombe believe government is inevitable? Because stateless societies invite their own destruction by predatory groups. Such predatory groups can be dominant protection agencies that cross the line from protection to exploitation, or groups that impose domination through military conquest. This concern is shared by Jasay himself when he writes that “an anarchistic society may not be well equipped to resist military conquest by a command-directed one.” Where the two authors seem to diverge, however, is on the issue of actually *advocating* government. Whereas Jasay restricts himself to analyzing claims about the necessity of government, Holcombe argues that citizens can avoid “excessive predation” in the future by establishing their own (minimal) government.

It seems to me that there are at least two problems with this argument. If government is inevitable because ordered anarchy is incompatible with the predatory nature of some people, it is easy to imagine how these people will transform any limited government into a big government as well. Another puzzle is how Holcombe expects a government that is created for such

cynical reasons to maintain its legitimacy. Although all governments have been established by force, many people *also* consider them as legitimate. Can a government that is not perceived as necessary, nor economically efficient, be stable? It may very well be that increased acceptance of the arguments of Jasay and Holcombe will produce an increased movement towards the creation of mechanisms to defend a stateless society from predators. Throughout history most people have accepted government as necessary. We do not know how society will change as these views erode.

Both Anthony de Jasay and James M. Buchanan embrace the rational choice framework but they part ways in their views of constitutional government. Despite Buchanan's characterization of public choice as "politics without romance," Jasay stands bemused at the view that constitutional politics can be different from normal politics. In his essay, Hartmut Kliemt contrasts the constitutional optimism of Buchanan with the constitutional pessimism of Jasay. Reading these different perspectives, it is hard not to root for Jasay, the *realist*. But as Kliemt notes, even Jasay acknowledges that the actual substance of a constitution does matter. It would be unreasonable to deny that all constitutions are *equally* futile. Granted that in the long run all constitutions will not be able to contain government power and prevent massive redistribution of wealth, we can at least ensure that we adopt a constitution that prevents such excesses for the longest period.

It is in this kind of pragmatic thinking *for* the state where Jasay's perspective really shines. Unlike Buchanan, Jasay does not treat constitutional democratic government as "us" but as "them." According to Kliemt:

For him the tendency of modern democratic political thought to conceptualize the state as "our" rather than "their" instrument is at the root of the most threatening developments in western legal orders. Any effort that might let the state appear less dangerous is itself dangerous in Jasay's eyes. [167]

Another argument that can be made in favor of Jasay's position is that even if we could constrain government, economic common sense dictates that we should not expect government to do a particularly good job as a monopolist in protection. Why settle for coercive and wasteful provision of public goods?

Anthony de Jasay has never settled for this; his writings are among the most intelligent critiques of government in the history of social thought. As I.M.D. Little concludes the book in his informative and insightful salute to the man, "long it may continue."