

to pay the lease and hire employees. Though Chang wanted to run a larger and fancier operation, he felt he needed more experience. Tsai writes, “I asked if by ‘experience’ he meant ‘*guanxi*,’ and he nodded with a smile.”

In the final sections of the book, Tsai compares the experiences of China’s private sector with those of informal economies in other nations. She argues persuasively that the notion of a “developmental state”—a term often used to characterize other newly industrialized countries (NICs) in East Asia whose governments actively interfere in normal market activity through targeted industrial policy and credit allocation—does not apply to China. Though some regional and local governments within the PRC have certainly been directly involved with segments of the private economy, in practice there is no coherent development policy to which “the state,” as a whole, adheres.

One conclusion, however, is surprisingly bold and misleading. Tsai asserts, “China’s economic miracle challenges new institutional economics, which emphasizes the importance of property rights in advanced industrialized countries in the West.” Though it is undeniable that the magnitude of China’s economic development is unique, that phenomenon is perfectly consistent with the idea of “adaptive efficiency” posited by Douglass North and other so-called “new institutionalists.” North and others believe that economies *can* grow without exclusive reliance on formal institutions to protect property rights and uphold contracts—but not indefinitely. Ultimately, growth in the informal economy must be constrained by high transactions costs and other inefficiencies. According to official statistics, that is already happening; private sector growth in China is slowing, as are flows of foreign direct investment (FDI). Without strong institutions and a rule of law, the private sector in China will surely remain underdeveloped.

Nevertheless, this is a remarkable book, and Tsai deserves praise for her insight and ingenuity. In the same vein as Hernando de Soto’s *The Other Path*, she has compiled rare and valuable information on an informal economy that is, by definition, elusive and unofficial. Tsai is also unusually adept at acknowledging and building upon previous research in fields other than her own—in particular, economics and sociology. In this book she combines scholarship with great storytelling. *Back-Alley Banking* is essential reading for development economists and China scholars alike.

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### **Justice and Its Surroundings**

Anthony de Jasay

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*Justice and Its Surroundings* is a brilliant work. It is also at times a difficult and a challenging work; the argument sometimes requires sub-

stantial effort to follow and it often challenges one to rethink long-settled matters. It is well worth the effort.

The book starts with a simple claim: “A thing is what it is, and not something else” (p. vii). Making distinctions is the starting point of wisdom; it helps to avoid confusion and all of the negative effects of confusion. According to Jasay, “by promoting clear thought . . . one would be doing a greater service to the good society than by promoting good principles” (p. vii). Jasay devotes his formidable intellect to achieving that goal with regard to justice and the various other topics that “surround” it, such as order, freedom, distribution, agreement, property, choice, and so forth. In his effort to clarify issues of justice rather than to propagate good principles, Jasay subjects to critical scrutiny the principles and proposals of many with whom he is otherwise in substantial agreement, including classical liberals such as F. A. Hayek and Robert Nozick. They are spared no more than are welfare-state “liberals” and socialists such as John Rawls, Brian Barry, Thomas Scanlon, and David Miller.

Part One (“The Needless State”) deals with the problem of social order generally. In those chapters Jasay reveals himself as a social choice theorist of the first order, combining remarkable clarity with insight and wit. He builds on the work in his pathbreaking book *Social Contract, Free Ride* in which he reformulated the problem of public goods and demonstrated that the state is neither necessary for the provision of public goods, nor the product of a “social contract.” Jasay continues that debunking of the myth that the state is a necessary condition of order and shows, rather, that order is a necessary condition for the state. The argument and evidence are significant for many reasons, but they are primarily relevant to the problem of justice because they undercut the claim—heard over and over from legions of political philosophers, none of whom ever adduce any evidence to sustain it, and for whom it is an unshakable article of faith—that all entitlements are creations of the state, and therefore that it is the prerogative of the state to distribute them as it sees fit. Rather than taking that claim on pure faith, Jasay considers it an empirical and contestable claim. If it is not true, then one influential set of arguments regarding justice is seriously undercut. All those who believe the extreme positivist claim that all entitlements and all order are products of the state (see, for example, Cass Sunstein and Robert Holmes, *The Cost of Rights: Why Liberty Depends on Taxes: “Rights are powers granted by the political community”* [p. 17]; and Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice: “There are no property rights antecedent to the tax structure”* [p. 74]) should read Jasay. Ignoring him is, quite frankly, an act of cowardice. Since we know, of course, how courageous academic upholders of statist orthodoxy are, there can be little doubt that Jasay’s books will be widely read.

The arguments presented in Part One are of great moment. Once you have understood them, the world doesn’t look quite the same, rather like

the first time one grasped the concept of “opportunity cost” in economics. The key chapter (which can be read in isolation from the others) is “Prisoners’ Dilemma and the Theory of the State,” which appeared originally in *The New Palgrave Dictionary of Economics and the Law*. According to Jasay, “The theory of the state, with strong consent to its authority, continues to be reproduced on the basis of a prisoners’ dilemma whose social significance seems to shrink remarkably under an analytical stare” (p. 43). He argues convincingly that public goods problems are generally best understood, not as prisoners’ dilemmas, but as “hawk-and-dove” games, which have quite different payoff structures and incentives. As Jasay notes,

Unlike the prisoners’ dilemma, the payoff structure in such an interaction can have mutual non-contribution (failure to produce the public good at all) in worst place, while the “sucker” payoff (contributing and giving others a free ride) moves from worst to third-best. As a result, two pure strategies, the “hawk” and the “dove,” would both be equilibria. The hawks take the chance on a free ride, assuming enough doves will come forth to produce the good, and doves contribute unilaterally rather than take the risk of the good failing to get produced [p.49].

The outcome is that, in fact, many public goods are provided voluntarily, without coercion, precisely what more orthodox public goods theory—which models public goods production on the one-shot prisoners’ dilemma—says is impossible. Since there are countless examples of just such outcomes, we are justified in invoking the old principle that “existence is a proof of possibility” and questioning the legitimacy—or at least the range of application—of the dominant theory of public goods. (One important supplement that Jasay adds to the orthodox theory is the recognition that inputs and outputs for public goods are rarely, if ever, continuously variable, but that there are thresholds. Jasay recognizes that the world is “lumpy” and that that feature is relevant to the provision of public goods.)

Jasay’s treatment is must reading for anyone who follows modern political theory, since the prisoners’ dilemma is so frequently invoked as a kind of slam-dunk argument against the possibilities of voluntary cooperation in the production of public goods. Yet it has such a remarkably limited range of usefulness. Every time I find it being invoked, I am reminded of a conversation I had quite some years ago in Yugoslavia with a Polish sociologist. He was a Solidarity activist and he told me of his arrest, along with another activist. Both were offered the prisoner’s dilemma by the political police. Both refused to defect. The sociologist was well aware that cooperation was not the dominant strategy recommended or predicted in prisoners’ dilemmas by virtually all theorists. He continued his research in prison and was surprised to find out that, even in the most archetypical of all possible settings—an actual prison with real

prisoners—the dominant strategy for the separated prisoners who were offered the prisoners’ dilemma was to cooperate, rather than to defect.

The chapters in Part Two of the book (“Redistribution”) are not as analytically rigorous, but they do nonetheless subject to critical scrutiny a number of shibboleths of the modern redistributive state, notably that “capitalism was saved by government asserting novel powers to regulate it” (p. 108) and that the redistributive welfare state is the price paid by the productive classes (or the exploitative rich) to contain the social discontent of the unproductive classes (or the exploited poor), who would otherwise rise up to destroy them. Jasay examines and explains the effect of redistributive policies, especially in the form of mandated “social insurance,” on employment, and finds that, far from generating social harmony, such policies generate unemployment and conflict.

Part Three (“Justice”) is the heart of the book, to the explication of which the others contribute. The best essay is the one titled simply “Justice” (also originally published in *The New Palgrave Dictionary of Economics and the Law*) and it is an outstanding example of how serious philosophical inquiry can and should be informed by legal studies, epistemology, and logic. Jasay distinguishes between two conceptions of justice, both of which are necessary for a system of justice to function, but neither of which should be allowed to invade the other:

[T]he world of justice is neatly divided into two adjacent realms, with no overlap between them. The two realms are ruled by two regulating maxims, “*sum cuique*” (to each, his own) and “to each, according to . . .” (i.e., one reference variable). In the realm of “*sum cuique*,” the concept of justice leaves little space for judgments. Findings do nearly all the work. Where, on the other hand, “to each, according to . . .” is the master rule, there is an irreducible role left to judgment. This is perhaps no very bad thing as long as discretion is kept in its irreducible place.

If the thesis presently to be unfolded is anywhere near right, the concept of justice requires that where findings furnish complete answers, they should be left to do so. The persistent invasion of one realm of justice by the regulating maxim of the other brings incoherence, confusion, and discredit to justice [p. 143].

Generally, it is the latter principle (“to each, according to . . .”) that invades the former, on the basis of the claim (demolished in Part One of *Justice and Its Surroundings*) that all wealth is the product of the state (or of “society” as a choosing entity) and therefore that wealth may be distributed in whatever way is “best.” Since all goods are inextricably jointly produced by society, or are made possible only by the existence and operations of the state, they can or should be distributed to the most deserving, on the basis of need, effort, or some other variable.

Jasay argues that, whereas *sum cuique* can be realized through findings, that is, intersubjectively verifiable claims about acts or states of the

world, “to each, according to . . .” requires judgments that are contingent on stipulations of what the appropriate reference variable is to be, and that such stipulations cannot have the intersubjective verifiability that findings (“the contract was properly executed,” “consideration was given,” etc.) can have. “To each, according to . . .” has its role, but it must not be allowed to invade, transform, and ultimately eliminate the realm of liberties that constitutes the *sum cuique*. In the course of his exposition, Jasay argues that the latter is divided between admissible and inadmissible acts, and therefore that it is fundamentally a realm of liberties. On a foundation of liberties Jasay constructs an edifice of property:

If finding and appropriating what is unowned is a liberty, abstaining from consumption is a liberty, and voluntary exchange is a liberty, then property is a liberty. Under “*sum cuique*” a person’s property is *his* if and because the acts that led to his possessing it were *his* liberties [p. 162].

The arguments are subtle and should be considered carefully by anyone concerned with “social justice,” as it has been expounded in recent decades.

Part Four (“Socialism”) is primarily concerned with driving the oaken stake yet again through the heart of socialism, not in its classical formulation, but in the “market socialist” formulation that represents its dying gasp. Having a few oaken stakes on hand may not be such a bad thing, and Jasay provides us with a sufficient stockpile. In the final chapter of the book, Jasay shares a story in a footnote: “In a large flock of geese, the most precious ones started to languish and die one by one. The wise rabbi was asked to find a remedy. As each of his suggestions was put into practice, more geese died. When the wretched gooseherd finally reported the demise of his last bird, the rabbi, much annoyed, exclaimed: ‘What a shame, I had so many good ideas left’ ” (p. 302). He reminds us that the socialists are, indeed, still full of so many good ideas.

The final section, Part Five (“Freedom”), was less focused than the others, but contains a remarkable chapter coauthored with the German philosopher and social choice theorist Hartmut Kliemt, “The Paretian Liberal, His Liberties and His Contracts,” which responds to a well-known essay, “The Impossibility of a Paretian Liberal,” by Amartya Sen (1970). Sen had argued that liberalism, or the idea of individual rights, is incompatible with the principle according to which trading what one values less for what one values more makes both parties to the trade better off. The response by Jasay and Kliemt is fairly complex and invokes the distinction between liberties and rights that Jasay sets out in the earlier essay on “Justice.” As Jasay and Kliemt note, “The adherent of liberal individualism is primarily interested in what we in this paper call liberties. Rights, or what we choose to call such in this paper, are in his view a contingent consequence of liberties: a person *A* creates a right for

person *B* by assuming an obligation to perform a particular act if *B* requires him to do so. *B* cannot have the right to this performance if *A* preserves his liberty to perform or not to perform the act. The free choice between *preserving* and *surrendering* liberties is a defining feature of the liberal creed, and of a liberal theory of rights” (p. 265). Liberties are primary to rights, understood as entailing obligations on others. Jasay sums it up in the introduction to the book: “A freedom is the relation of one person and one act. A right/obligation is the relation of two (or more) persons and one act. The transformation of a freedom into an obligation for oneself and a right for another is itself a freedom. In plain English, it is called the freedom of contract” (p. xxix). (I should point out that Sen responds to Jasay and Kliemt in [Sen 2002: 449–52].)

“The Paretian Liberal, His Liberties, and His Contracts” would have been improved by some explication of certain terms, as well as of the logical notation used in it. I had to dust off my very old college textbooks in formal and symbolic logic to understand some of the passages. That could have been avoided by a bit of editorial work on the part of the publisher and would have made the important insights of the essay more accessible to a wider audience.

The concluding chapter neatly shows how security in one’s rights has costs. For every right there is an obligation, and obligations are onerous, especially when they can be enforced by violence. That is why Randy Barnett has argued in *The Structure of Liberty: Justice and the Rule of Law* that “rights are a necessary evil” (p. 200). What is remarkable is that, despite the onerousness of freedom (it imposes obligations on us to respect the rights of others, and therefore restraints on our behavior, as much as it enables us to do what we want), freedom has managed to hold its own, and even to expand in places where it was effectively unknown. *Justice and Its Surroundings* ends on a remarkably upbeat note, considering the tone of much of the book.

Naturally, even a positive review must include some quibble, some criticism, some picking of nits. Otherwise it would be hard to distinguish from the jacket copy that publishers use to entice potential buyers to become actual buyers of the book. So here is my quibble: I fear that, in the sustained effort to be precise, Jasay may have missed a relationship between rights and liberties that is recognized, however imprecisely, in ordinary language. In particular, as part of Jasay’s insistence on the distinction between liberties and rights, he denies that there is a right to freedom, a relationship between right and freedom that many would affirm. Jasay starts with a presumption of liberty: “Every feasible act is deemed to be free unless a sufficient reason speaks against it. Justice has the main, if not the sole, say in deciding what are sufficient reasons” (p. xxvi). (He adduces an epistemological argument in favor of that presumption.) On the basis of Jasay’s quite reasonable view that it is unfreedoms that must be specified, rather than freedoms, he concludes, “It is not that we have a ‘right’ to freedom; it is that they (and we) have no ‘right’ to

commit wrong acts” (p. xxvi). But if others have no right to infringe on one of my liberties, then it is because they do not have that liberty, and if they have no liberty to infringe on one of my liberties, then they have an obligation toward me not to infringe on that freedom, and if so, then I have an enforceable right to my freedom’s noninfringement, and the correlative liberty to enforce that right.

Hillel Steiner, in his admirable exercise in precise and careful thinking, *An Essay on Rights*, argues that to generate a harmonious system of “compossible” rights, those liberties whose exercise is necessary for the fulfillment of the obligations correlative to rights held by others must be vested, protected by a perimeter of rights or “clothed” in the form of property. Otherwise, at least some obligatory acts would not be permissible, generating deontic contradictions and corresponding legal, political, and social conflicts. Furthermore, “Other persons have no specific duty to forbear from interfering with my playing patience [the British name for the card game “Solitaire”] and I therefore have no strict right (claim) to that forbearance. But the many specific forbearance duties which they do have (and my correlative rights) with respect to my physical person, my house and my cards would normally suffice to imply the impermissibility of their interference with my playing patience at home and, hence, would assign me the freedom to do so” (p. 75). A set of liberties that is protected by rights is a set of liberties to which I have a right: I have the liberty to play cards in my house because I have a property in my house, but I do not have a liberty to play cards in yours, at least not without your permission, because you are the one with the property in that house.

It seems to me that the phrase, “Every person has a right to be free,” is a reasonable attempt to express the relationship between liberty and rights. Or, as James Madison put it of “a man” in his essay on “Property”: “He has a property very dear to him in the safety and liberty of his person” (p. 515). John Locke had earlier summed up the function of civil society as “the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property” (II, §123, p. 350). Describing relationships among rights and liberties with precision is not an easy task, and we are (or, at any rate, I am) indebted to Anthony de Jasay for his achievements in that regard. But, with all the trepidation of offering a criticism of such a precision maven, I fear that Jasay’s work did not adequately express the relationship between rights and liberties.

One of the numerous impressive features about Anthony de Jasay is that he is, as the book jacket to *Justice and Its Surroundings* puts it, “an independent theorist.” He is not a professor, sits on no tenure committees, and has neither a retinue of graduate students nor courses in which he can testdrive ideas that will later become articles or books. And yet—mirabile dictu!—he manages to write articles and books of remarkable wisdom and acuity. Maybe state-funded universities aren’t necessary for the production of wisdom and insight, after all. But wait. That couldn’t be

true. After all, who would write books if they didn't have state-funded sinecures and tenure?

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