Natural-Law Libertarianism And The Pursuit Of Justice

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Brink Lindsey of the Cato Institute recently wrote an article arguing that libertarians should abandon any arguments regarding natural rights. As Lindsey sees it, the concept of natural rights is an "intellectual dead end" and that adherence to natural rights arguments should be abandoned. His perspective can largely be boiled down into two categories: strategic pragmatism and the inadequacy of the natural rights doctrine in constructing a libertarian legal order.

Libertarians always have and always will debate strategy. This question is not very interesting to me as it can ultimately only be answered empirically. Lindsey argues that "Instead of spinning utopias, libertarians should focus instead on the humbler but more constructive task of making the world we actually inhabit a better place." I'm very open to this argument, and as soon as the Cato Institute can demonstrate that it has actually effected change in government policy in a libertarian direction, I am willing to consider capitulating to Lindsey's arguments for a more "pragmatic" strategy. As of yet, however, his "constructive" approach to libertarianism has had no more reductive effects in government than the "purist" approach to libertarianism he loves to attack, so it is objectively impossible for him to proclaim his views to be any less "utopian" than the radicals who stubbornly cling to their principles.

More interesting to me is the claim that natural rights are insufficient in determining a "full-blown, operational legal order." This statement is interesting because I was not aware that any natural-rights libertarian scholar ever claimed that it could. Lindsey argues that "the problem lies not with the concept of natural rights, but in that concept's overextension" because these principles fail to determine the specific guidelines upon which all disputes would be precisely adjudicated.

The first correction that must be made to Lindsey's argument is that no serious libertarian thinker argues that natural rights are the beginning and end of libertarian legal theory. What these principles allow us to do is to establish, first, a property ethic and, from this, a theory of justice. Hans Hermann Hoppe offers what is arguably the most complete natural rights doctrine known as his Argumentation Ethics. Even natural rights libertarians who do not accept the ethics of argumentation generally agree on the principles it purports to prove: The Private Property Ethic (or, the Libertarian Property Ethic) and its logical derivative the Non-Aggression Principle, which we may call the "libertarian theory of justice."

This forms an ethical basis for libertarianism without which we would have no means of determining what constitutes a libertarian "position" to begin with. In fairness, Lindsey is not claiming that natural rights are necessarily wrong; he is just saying that libertarians should abandon these ideas whether they are correct or not — for pragmatic reasons, of course.

Brink Lindsey may desire a libertarian community that is held together only by a label representing a hodgepodge of contradictory political positions — after all, this is the formula that has made the Republican and Democratic parties so successful! — but we naïve "purists" often desire something more consistent and principled to associate ourselves with, and there is no means of establishing principles aside from ethical philosophy. What the ethical philosophy of natural rights allows us to do is direct our own individual behavior according to libertarian principles and to prescribe political solutions that are ethically consistent with these principles. This does not mean that there is a precisely determined, canonical position on every conceivable issue for libertarians, but these disagreements stem from the fact that ethical philosophy can (and should) be debated. But it cannot be dismissed altogether.

However, Lindsey is correct in arguing that the establishment of this theory of justice is insufficient in determining legal structure and answering certain questions regarding positive law. He does concede that "more sophisticated presentations of radical libertarianism do take note of some of these complexities" but adds the caveat that "they present these open questions as minor blank spaces in an otherwise determinate legal structure, to be filled in by custom or common-law jurisprudence." The problem with his objection is that this demands natural rights theory to be something more than it is intended to be. Thus, it isn't the natural rights libertarians who are "overextending" the theory of natural rights; it is Brink Lindsey who is doing so.

Natural rights libertarian theorists such as Murray Rothbard and Hans Hermann Hoppe also combine ethical principles with the economic methodology of Ludwig von Mises – praxeology – to determine what economic system is most compatible with the Private Property Ethic in maximizing prosperity (they determine, as anarcho-capitalists, that a purely free market is the most compatible with this end), and they derive from this economic framework the most compatible legal framework that, combined with the libertarian theory of justice, will most effectively handle disputes. The complete libertarian political framework provides both an ethical and a pragmatic answer to political questions, but Brink Lindsey appears to live in a world in which a libertarian must choose to deal exclusively with one category or the other. This one-sided approach to libertarianism is neither desirable nor possible (after all, even if one were to make an exclusively pragmatic argument, as Lindsey advises, then the assumption of any "goodness" of the results of the policies prescribed tacitly depend on some ethical value judgment to begin with).

Economic theory does not empower us to determine the specific manner in which a legal system will manifest in a given society. It simply tells us that — on the assumption that human beings value peace above conflict — institutions will emerge that will best facilitate the administration of justice according to the preferences of consumers. This is the economic basis for private courts.

Concomitant to private courts is the establishment of private law, which legal theorists will refer to as "common law." As previously quoted, Lindsey assumes that no libertarian has ever offered any answer as to how common law will fill in the "blank spaces" of the "otherwise determinate legal structure." This may be the case if one confines himself to the world of the Cato Institute, as

Brink Lindsey appears to do in citing only "Cato Institute adjunct scholars" in reference to his arguments. But if he were to venture out into the wider libertarian world, Lindsey would find a plethora of scholarship on the issue of common law jurisprudence. Edward Stringham edited an entire collection of scholarly articles regarding anarchic legal theory. Bruce Benson has been conducting scholarship in this field since the 1980s, and his work The Enterprise of Law details the centuries-long Anglo-Saxon history of private dispute adjudication (this work is nearly three decades old, so it may be fair that Lindsey has not yet had time to read it). Even one of the Cato Institute's own senior fellows, John Hasnas, has written a great deal on the establishment of common law through the tort system!

Common law systems throughout history do not address rights violations in a uniform way, and it would be absurd to suggest that any theoretical system of private courts would do so either. However, what can be said is that in the absence of a coercive government, courts will manifest, there will exist an avenue for bringing perceived rights violations in front of an arbiter, and there will be a mechanism through which restitution can be enforced. Lindsey is perplexed by the fact that natural rights doctrines fail to determine the nuances of questions such as the specific boundaries of property rights (in a previous article attacking the Non-Aggression Principle, he asks "How far below the surface should property rights in land extend? How high into the sky?"), the extent to which a person may lawfully go in defending his or her property, or the precise magnitude of restitution paid to a victim in specific circumstances. These questions, of course, cannot be answered through natural rights theory (except for maybe the property rights one), but it is not a failure of the concept of natural rights that it cannot answer questions that lie beyond its scope! Such questions can only be answered by the individual arbiters in a given system (anarchic or not), and in the case of private law, a natural rights libertarian is in the position to contract with arbitration firms that best conform to libertarian ethics.

This last point was addressed in a simple but profound article by Ben Powell. In "You Are an Anarchist. The Question Is How Often?" Dr. Powell points out that, even for people who are classically liberal for natural rights reasons, "No system will perfect human morality. And, because it is costly to monitor and prevent deviant behavior, some such behavior will exist under any governance system. So even a well-functioning anarchy would still have rights violations. The question remains one of comparative institutions." It would be naïve to assume that even the purist libertarian political system (say, anarchy) would usher in a state of perfect and universal adherence to the Non-Aggression Principle; nirvana is not for this world. Muggers will still mug, and killers will still kill. The question is not "how do we avoid these rights violations completely?" The question is merely "what society would best deal with them? What society would minimize rights violations?" The natural rights philosophy does not give us the answers to how all the precise nuances of a legal structure will manifest, but it does give us a means of judging whatever legal systems emerge in the absence of government.

But to even ask these questions, one must first establish and defend the concept of rights at all. The libertarians who adhere to natural rights doctrines are simply arguing that in order to make "the world we inhabit a better place," we have to have some means of establishing what that actually is, and that necessitates an ethical philosophy. These libertarians are not arguing for natural rights because they are libertarian; rather, they are libertarian because they recognize natural rights. Ignoring these ethics does not make libertarianism more "practical," it just eliminates libertarianism altogether. All that is left in Brink Lindsey's pragmatic world is the

arbitrary political position that government should be smaller to some vague extent, and this would be “good” for reasons we have no means of offering.

Only in the world of Brink Lindsey is this approach to libertarianism more “determinate” than the philosophy of natural rights.