

1. Modern Justifications for Classical Liberalism

It was a very great honor to be invited to give the Wincott lecture for 2003, for it allowed me to renew a set of connections that I have long had with England. I started my legal education in Oxford in 1964, receiving a bachelor's degree in jurisprudence in 1966, after which I returned to the United States to complete my legal education at Yale in 1968. Immediately upon graduation from Yale, I took up the study and teaching of law, which became my life's work.

The combination of English and American education has proved a great advantage to me because it familiarized me with *three* legal systems: English and American are the obvious two; the Roman law system, which was then required study at Oxford, is the third. The English educational experience was essential to my intellectual development, but not perhaps as my instructors intended, for they nourished my affection for the laissez-faire tradition more by happenstance than by conscious design. The major questions in English law, then as now, were often resolved by administrative order within the vaunted civil service, which translated into the (then) regnant rule of English administrative law that all decisions of the minister should be final. The effect, therefore, was that in our curriculum, we concentrated on those matters that did not fall into the purview of minister's discretion in the administrative state. In effect, the legal education in England placed its emphasis on private law as it governed the unregulated

portion of the economy. That project, in turn, required us to read a large number of nineteenth-century and earlier decisions written by judges who were congenial to voluntary contract and private property. At the same time, my study of Roman law persuaded me that the basic principles of English common law could also take hold in political settings widely different from those in modern times.

Unlike political theorists who work at an abstract level, these judges had the huge advantage of testing their basic theories against the concrete cases that cried out for decision. By the same token, these same judges often suffered from a professional disadvantage because, with a few notable exceptions, they did not ground their views in general political theory. Indeed, it is on that score that the English legal education has lagged somewhat, both then and now, for it does not place enough emphasis on the importance of interdisciplinary studies, which have been the centerpiece of American legal education for several decades at least. But an English and American legal education proved, in my case, to be happily complementary.

Having learned from two cultures, I regard my comparative advantage in this intellectual debate over the uses and limits of state power to be my ability to work as an arbitrageur between the two worlds—for, in time, I came to believe that the rules of decision in these private disputes had real relevance to the larger questions that had, in practice, been taken over by the modern administrative state. The conclusions, moreover, seemed to hold with equal force in the United States, notwithstanding the two very great differences between our legal systems: the U.S. written constitution and federalism are linked features that are, as yet, nowhere found in England. I hope that, armed with the tools of economics and political theory, I can produce theoretical arguments that explain the

Modern Justifications for Classical Liberalism

3

social desirability of certain institutions better than the ancient appeal to “natural reason.” That term, which has its origin in the Roman texts, worked well enough in ages past when intuition was the dominant guide to the formation of legal policy. It counted as the leading intellectual motif for such great political and legal writers as Grotius, Locke, Pufendorf, and Blackstone, who have exerted such an enormous positive influence in modern times. But now that we have developed a stronger apparatus of economic and political theory, that form of theoretical quiescence can no longer carry the day. There is so much to say about social institutions and laws that it becomes foolhardy to regard self-evidence as the ultimate criterion of a sound legal rule, political institution, or social practice. We have to use the most modern logic and theory available—whether we want to or not—for our adversaries, whoever they may be, will rightly do the same on the other side. Fortunately, the use of the new techniques usually proves benevolent in that it helps us justify, in a modern idiom, the results of these earlier writers in terms more robust than they could supply for their own deeply held intuitions. Our job, therefore, is neither to junk their conclusions nor to belittle their efforts. It is to engage in an intelligent reconstruction of great ideas that have withstood the test of time.

My more immediate connection to England relates directly to Harold Wincott and the *Financial Times*. It leads to one of the central themes of this lecture. The *Financial Times* was kind enough to publish an article of mine in its October 13, 2003, edition. It began with a picture (reproduced as the frontispiece to this chapter) that relates to the topic of this talk—first gather the low-hanging fruit—but that, I fear, not even the most astute reader could decipher. The picture shows a tree with a lot of apples. On one side, there are people standing on the ground, reaching out and grabbing the

apples; on the other side stand people with ladders and hoists trying to figure out how they can climb up to gather the apples at the top of the tree. The obvious query is: what on earth does a picture of a tree with a collection of apples have to do with the question of how to organize different markets? As I looked at the illustration, I would have said that the picture contained an oblique reference to the temptation and fall of Adam and Eve as evidence that the private appropriation of natural resources is the source of all evil in the world. But my column had no such devious intention. To clarify matters, therefore, I will take a moment to explain what the picture is about because, in fact, it highlights the central theme of this lecture: first and foremost, get the easy cases right, and then worry about the hard cases later.

Here is how I reached this conclusion. The study of any complex social system leads, on reflection, to the comforting observation that the world contains easy and hard cases. The following characteristics are true of hard cases: they require a huge expenditure of intellectual energy in order to figure out their solution, and yet, measured against some social ideal, our best choices invariably suffer from a very high rate of error, even when we do our level best. The happy side of this process is that we are likely to be damned no matter which alternative we embrace. So, if the law seeks to determine a very complicated issue, such as the optimum duration of a patent, it is easy to identify an infinite set of permutations, because the question of patent duration cannot be effectively decided in isolation without reference to patent scope, itself a highly technical area. To make matters worse, the field of patentable inventions might be too broad for a general solution to the problem. For example, the answer that seems to work well for pharmaceutical patents may not be as sensible for software patents. But the moment we decide that different

patent classes should have different durations, then someone will be faced with the unhappy task of classifying a new generation of inventions that regrettably straddles a preexisting set of categories established in ignorance of the future path of technical development. Such is the case with computer software, for example. Given this shifting background, it is very difficult to conclude authoritatively that one patent duration rather than another is the best. Of course, we can make credible arguments that patent duration should be far shorter than copyright duration, but that does not fix an appropriate length of time for either form of intellectual property. In the end, the best answers rely on educated hunches by persons who work within the field, who may differ substantially in their conclusions.

In some cases, the problems get even more difficult than patent duration because of the discontinuous nature of the basic choice. All too often, the world does not allow us the luxury of continually fine-tuning responses until we approach some social ideal. The question of whether to build a new airport or highway or rail system gives rise to an initial “yes or no” choice. Once that basic commitment is made, it will, of course, be followed by a host of smaller decisions, some of which can be fine-tuned, but others, not. The advantages and disadvantages of the basic choice are hard to foresee and are equally hard to evaluate quantitatively even when foreseen. Just think of how hard it is to estimate the impact of a new airport on noise, pollution, traffic, land values, business growth, and the like. The only thing we can say with certainty is that some affected persons will win and others will lose. Yet it is no mean feat to examine which persons fall into which class or to determine how much compensation, if any, is owing to those persons who are inconvenienced by the process. The difficulty of the subject matter and the nature of

the political process restrict us to sharply discontinuous solutions, all of which could be far removed from the social ideal. Any choice is likely to contain large errors; but the same is not necessarily true of the *difference* in errors between two solutions. That figure could be small. Thus, if one error goes high by 1000, and the other, low by 1000, then the error levels could be enormous, but equally balanced. In this midst of our travail, we ought to take comfort in the thought that so long as people do their level best to get the hard cases right, then we should not protest too loudly if they get them wrong. The chances are that other people would have made similar mistakes, and we will never get able people to work on difficult social projects as long as we insist on judging their handiwork harshly with the benefit of hindsight. Our standard of criticism has to respect the decisions made in good faith by persons in positions of responsibility, so that they are not hauled into the dock when it appears they made the wrong decision. This principle lies at the core of the doctrine of official immunity. We have to learn to both live and prosper in a second-best world.

The appropriate response to hard cases, then, is an uneasy mix between patience and deference. The easy cases, in contrast, turn out to be miraculously important for the day-to-day operations of any system precisely because we can be confident that the wrong decision will lead to serious social dislocations with few offsetting benefits. This proposition holds for how a society draws the interface between market choice and government behavior, which is my main theme. But once again, we have to keep the basic point about economic organization in perspective. The truly great social catastrophes do not come from a misapplication of the basic principles of a market economy. They arise from a wholesale disrespect for individual liberty, which is manifested in tol-

Modern Justifications for Classical Liberalism

7

erated lynchings and arbitrary arrests, and from a total contempt for private property, through its outright seizure by government forces intent on stifling opposition or lining their own pockets. The reason Great Britain and the United States did not go the way of Germany and the Soviet Union in the turmoil of the 1930s was that the political institutions in both countries were able to hold firm against these palpable excesses, even as they went astray on a host of smaller economic issues.

It was the failure to grasp this point clearly that led Friedrich Hayek, in *The Road to Serfdom* (1944), to be too gloomy about the fate of democratic institutions in western Europe and the United States. Socialism does not always lead to national socialism, so long as these critical minimum conditions for political freedom are respected across the political spectrum. Once this distinction is kept in mind, it becomes clear why we can properly count Franklin D. Roosevelt as a great American president on the political frontier even while taking strong exception, as I shall do, to the misguided economic policies that permeated his New Deal. Roosevelt's contemporary competition in the category of world historical figures was Adolf Hitler, Joseph Stalin, Mao Tse-tung, and Chiang Kai-shek. In that group, Roosevelt, along with Winston Churchill, stood tall as a beacon of liberty in a world that had plunged into disaster. Conrad Black (2003) may well be right to hail Roosevelt as a great figure, and even as the saviour of capitalism, but Roosevelt's success on the political level should not blind us to his shortfalls on the matters of economic and legal policy, especially on the matters of agriculture and labor, which are the central theme of this lecture.