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STATES WITHOUT ROMANCE

I first encountered *The Calculus of Consent* in the fall of 1972, my second year at the University of Pennsylvania. Four years before, I had graduated by the skin of my teeth with a degree in humanities and engineering from MIT, at the time a kind of consolation prize for those who couldn't quite make it to the end of a more typical major in science or engineering. In the midst of my struggles, I'd thought about leaving school for a while to regain my bearings, but this meant exposing myself to the draft and a tour in Vietnam, a prospect that confused and frightened me. I considered it honorable to fight, and die if necessary, for my country – my father and millions like him had done so twenty years before, and thousands more were doing so just then. But I couldn't see just how the national interest was at stake in this particular war; indeed, I couldn't see the national interest at all. Many people were in favor of fighting the war, and it was clearly in their interest that it be fought, if not by them then by others for them. But many others were opposed to the war, and it was equally clearly not in their interest that it be fought, by themselves or anyone else. We Americans had a political process to decide whether wars were to be fought or not, but there too, decisions seemed to be made in the interests of some but not others, in a way that everyone seemed to accept, at least until that moment. But, I could see, saying that the government of the day had duly decided to fight the war was not the same as saying that the national interest required it. The national interest, whatever it was, was no-

where to be seen, until the fighting and dying began, when it was vaguely invoked to justify it all.

I decided I wouldn't fight, and would go to jail if drafted. In the fall of 1968, I found myself taking a physical exam at the Boston Navy Yard at the invitation of my draft board in Chicago. I failed the physical, and left the facility at 7 a.m., unable to decide whether I was relieved or disappointed. I'd gone to college hoping to become a professor, but that seemed pretty much ruled out by my disastrous undergraduate performance, and I turned instead to preparing for a career as a high school history teacher. Two years later, I was teaching middle-school history, English, and math to inmates at two high-security state prisons in Massachusetts. Here, I was again confronted with the enormity of the state and the consequence of its interests, and with my own naïveté in thinking I could survive confinement in a place like this on principle alone. These were huge, expensive, oppressive facilities whose only purpose seemed to be deliberately inflicting suffering on inmates in the name of the people of the Commonwealth, and presumably in their interest. Again, I wondered what the public interest in creating so much misery might be, and whose interest it was, exactly.

My young wife, listening to my impassioned nightly reports on crime and punishment, thought I should become a prison administrator, and soon thereafter that to be a good warden I ought to be an attorney too. I was admitted to Penn's law school in the spring of 1971, and within days received a letter from a professor of economics there inviting me to participate in an experiment. The idea, he said, was to produce a new kind of social actor, a lawyer with formal training in social science and a social scientist with formal training in law who would be uniquely positioned to conceive and effect useful social change from a variety of bases in local, state or national government. Or, he added

as an afterthought, to teach and do research at a university. So, with nary a course in law or social science in my thin academic portfolio, but recognizing this as my last chance to become a professor, I became a law student and a first-year Ph.D. student in public policy analysis, which in my case turned out to be almost identical to Penn's Ph.D. in economics, save that in place of macroeconomics I was to study an emerging field called positive political analysis.

I had no idea what any of this was about, and my first year's work didn't help much. I studied microeconomics, general equilibrium theory and econometrics with the economists, and to my surprise could do the math well enough to get high grades without gaining much sense of what constrained optimization and fixed-point theorems had to do with real social life. And I studied tort, crime, property and procedure with the lawyers, trying to reason like an economist on law exams and having my knuckles sharply rapped for my trouble. From the start, my wife had anticipated the unease I increasingly felt – after the luncheon welcoming us to the experiment, she remarked that the lawyers and the economists talked right past one another – and I tried, as some of my teachers encouraged me, to think about both economics and law in unconventional and innovative ways. But with few living practitioners of this new kind of scholarship in sight, and no disciplinary foundation of my own to draw on, I struggled to see what this could mean and how it might be done.

Then, in my second year, I had a seminar in the economics department on organization and another in the law school on social justice, and there were Buchanan and Tullock (1962), sharing the syllabus with Hayek (1945) and Coase (1960) in the former and Rawls (1971) and Baumol (1952) in the latter. Within the space of several days, I had a series of "Eureka!" moments: in Hayek, I saw at last what economics was about, in Coase, what it had to do with law, and in Baumol and Buchanan and Tullock, what it had to do with gov-

ernment. I was captivated, and found in each of these writers a different model of how, as Buchanan and Tullock (1962: v) put it, to effectively plow the fertile but rocky fence-rows at the artificial borders separating economics from its contiguous disciplines. I was especially taken with the protean idea of social contract that linked Buchanan and Tullock (and Coase and Rawls) to Locke and the American constitutionalists, and in seminar papers tried to apply the method of the *Calculus* to a range of jurisprudential problems, including conscription and criminal punishment. But as I sought out more by these writers on my own, I was surprised and disappointed to find that my professors had little interest in their ideas beyond these few even then canonical works. Hayek in particular, I learned, was the third rail of academic economics, but the others were also deemed unacceptably soft for the qualitative, historical nature of their arguments and evidence and their insufficient appreciation of the value of arcane equilibrium models and econometric methods to social science. I read on nonetheless, and soon found myself committed to the normatively engaged, epistemologically modest, contractarian, evolutionary, professionally dangerous way of doing economics I was trying to distill from these great surreptitious teachers and have tried to practice ever since. Not until later did I discover that Buchanan (1964) had given the name *economics of exchange* to what we were all doing, and opposed it to an already ascendant *economics of choice* that might have overwhelmed it altogether by now, were it not for the brave and fruitful plowing of Buchanan himself.

But for me, the most influential and lasting message of the *Calculus* appeared right at the start, where foundational assumptions were aired and the ground laid for complex arguments to follow. It was about the very questions that had perplexed me since college, and it seemed to have been written just so that I would someday read it and learn how to ask them. "What is the State?" Buchanan and Tullock (1962: 11) asked. How should it be

conceived? Not, they said, as an organic, supraindividual being, as some German philosophers thought, despite the attractive notion that if the State *were* such a social organism, it clearly could have interests and purposes. But if the State was not a collective being, they went on, *it could not have interests of its own*: "Only some organic conception of society can postulate the emergence of a mystical general will that is derived independently of the decision-making process in which the political choices made by the separate individuals are controlling." In rejecting such collective interests and purposes and recognizing instead only individual interests and a decision-making process to mediate among them,

we are left with a purely individualist conception of the collectivity. Collective action is viewed as the action of individuals when they choose to accomplish purposes collectively rather than individually, and the government is seen as nothing more than the set of processes, the machine, which allows such collective action to take place. This approach makes the State into something that is constructed by men (*ibid.*: 12-13).

These were liberating, intoxicating words. As I had dimly perceived years before, there *was* no national interest. There were only individuals, their complex, contradictory interests, and a constitutionally governed political process that transformed these interests into decisions and policies that might well lack any apparent purpose or logic beyond their ability to command a legislative majority or the enthusiasm of a powerful executive, and thus the mantle of legitimacy, at the moment they were made. To oppose a war made legitimate by such a process was not to betray the interests of the nation, but simply to conclude that the fallible human legislators and officials whose interactions comprise the ma-

chine of government had used it to produce a bad set of decisions. But this just led to more questions. If the State had no interests, was there a State at all? How *should* we conceive it? In the end, Buchanan and Tullock never really say. In the tradition of Locke, they show how rational individuals could agree to empower certain of their fellow citizens, the government, to act coercively against them in the future, with no appeal to interests beyond their own. There is, as they say, nothing mystical about this. But then where, and what, is the State, and how is it different from the government?

Conflating the two, the passage above intimates that they are one and the same. But what Buchanan and Tullock (and Locke) actually describe as "constructed by men" is not the State but the institutions of government that empower fallible individuals to exercise coercive power in the name of the State (or "the people"), leaving the State itself in limbo, or defined away. Yet for many people, even social contractarians like me, states are not fictions or shadows but real social objects, and the institutions of government, the complex of legislatures, executives, courts and the procedures that govern their operation, do not fill the entire space mapped out by the idea of a State. The residual is whatever lends legitimacy and moral authority to the decisions and acts of the fallible governors if they are taken according to the procedures set out in the constitution to which all have consented, and about this there is indeed something that, if not mystical, still has the power to inspire loyalty and sacrifice in free men and women. Buchanan, in a separate appendix (*ibid.*: 308), comes close to saying what it is. "The State ... may be conceived as a set of rules or institutions through which individual human beings act collectively.... A given set of rules describes a social organization, a political order." But even this is not quite right, for while a given set of rules may constitute and regulate the operation of any kind of organization, governments included, what makes an organization constituted by a contract a

political order is not the rules but the element of consent, explicit or implied, that makes the contract binding on the contractors and legitimates the actions of the individuals empowered to act under its rules. In a contractarian world, the State as such lies precisely in the agreement of the contractors to the terms of the constitutional contract, and its majesty, even to those who mistrust it, is measured by the extent and consequence of the coercive powers the contract grants the government and the circumstances in which they are deployed.

The State, that is, is not a material or corporeal thing but an *idea*, a specific instance of a broadly shared state of mind or intentionality about what is or is not a social reality that Searle (1995) calls *collective intentionality* and that turns the objects of that intentionality into *social facts*. Real states, what we mean when we talk about the United States prosecuting a war or the Commonwealth of Massachusetts punishing its prisoners, may not have interests or purposes distinguishable from those of their human constituents, but as Searle rigorously argues, they are no less real for that or for being "merely" ideas and not corporeal objects or organisms. At the end of World War I, the American essayist Randolph Bourne (1919: 67-73) noted the contempt with which free men treat the government of the day and their reverence for the State that lingers behind it, and argued that the liberating achievement of industrial society had been to suppress the State in the consciousness of men and replace it with the government, allowing them to break free of "the herd" and live the lives they choose. But the moment war is declared, he lamented, these same people

allow themselves to be regimented, coerced, deranged ... and turned into a solid manufactory of destruction.... The citizen throws off his contempt and indifference

to Government, identifies himself with its purposes, revives all his military memories and symbols, and the State once more walks, an august presence, through the imaginations of men.

Buchanan and Tullock's greatest legacy has been their indispensable part in keeping the State at bay in the consciousness of free men and women, an achievement made all the more impressive by the moment at which it was begun in the *Calculus*, at the apogee of the Cold War and its widely shared ethos of clear national purpose, sacrifice in its name ("Ask not ...") and projection of military power. I have applauded this general endeavor my entire adult life, and its impact is all around us, though not entirely as I, and possibly Buchanan and Tullock, might have hoped. Government is indeed treated with contempt in most quarters, and apart from the endless wars against seemingly inexhaustible enemies of the nation, the State has largely been demystified. But with this has come a diminution of government's legitimacy, a loosening of the people's sense of consent to the contract, that has corroded American politics and led increasing numbers to look with hostile distrust at anything government attempts to do. If we are to have free government at all, something must fill the gap left by the retreat of the State.

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