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978-1-107-03173-9 - Securities Against Misrule: Juries, Assemblies, Elections

Jon Elster

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## Securities Against Misrule

*Juries, Assemblies, Elections*

This book proposes a normative theory of collective decision making, inspired by Jeremy Bentham but not including his utilitarian philosophy. The central proposal is that in designing democratic institutions one should reduce as much as possible the impact of self-interest, passion, prejudice, and bias on the decision makers, and then let the chips fall where they may. There is no independently defined good outcome that institutions can track, nor is there any way of reliably selecting good decision makers. In addition to a long initial chapter that surveys theories of collective decision making, notably social-choice theory, and a chapter expounding and discussing Bentham's views, historical chapters on the jury, constituent assemblies, and voting systems develop and illustrate the main ideas. The work draws on a welter of case studies and historical episodes, from Thucydides and Plutarch to the present. It is also grounded in psychology, behavioral economics, and law.

**Jon Elster** is the Robert K. Merton Professor of Social Science at Columbia University. He has previously held positions at the University of Paris VIII, the University of Oslo, the University of Chicago, and the Collège de France. He is a member of the American Academy of Arts and Sciences, the American Philosophical Society, Academia Europaea, and the Norwegian Academy of Science and is a corresponding Fellow of the British Academy. Elster is the author of twenty-three monographs, which have been translated into eighteen languages. Most recently, these include *L'Irrationalité*, *Alexis de Tocqueville: The First Social Scientist*, *Le Désintéressement*, *Explaining Social Behavior*, *Agir contre soi*, *Closing the Books*, and *Alchemies of the Mind*.

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*To the memory of Michael Gilbert and Lester Young*

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## Preface and Acknowledgments

This book grew out of lectures I gave at the Collège de France in 2008–09, 2009–10, and 2010–11. In the first year, I considered collective decision making quite generally, from both a normative and an explanatory point of view. In the present work, the focus is on normative analysis. The topics of the second and third sets of lectures were the Federal Convention in Philadelphia (1787) and the first French Constituent Assembly (1789–91). In this book I draw extensively on the debates in these two assemblies.

A few years earlier, I had become aware of Bentham's writings on the design of political assemblies. Although I did not immediately recognize their full significance, I have come to believe that Bentham's negative approach to institutional design – *providing securities against misrule* – is more robust and realistic than the numerous positive approaches proposed in the literature. Shorn of their eccentric and occasionally ridiculous aspects, his analyses of assemblies and legislation have provided the lodestar for my work. I thank the director of the Bentham Project at University College London, Philip Schofield, for helpful guidance and, more generally, the editors of Bentham's *Collective Works* for their superb scholarship. Although most work on Bentham has been devoted to his writings on the law, a few kindred spirits, notably Philippe Urfalino and Adrian Vermeule, have shared my enthusiasm for his work on political decision making. I suspect there is much yet to be mined in Bentham's writings.

In drawing out the implications of Bentham's ideas, I have benefited much from an encyclopedic treatise by Eugène Pierre, *Traité de droit politique électoral et parlementaire* (1893), which offers fine-grained procedural descriptions of a kind Bentham would have appreciated but that are rarely found in works of political science. The writings of, among others, James Bryce, André Castaldo, Adhémar Esmein, Roger Hoar, Paul Langford, François-Olivier Martin, Peter Novick, and J. R. Pole have also been invaluable in this respect. My hero Montaigne, and his hero Plutarch, have also provided regular inspiration. Although as lawyers and historians these writers are obviously concerned with particulars, they are also, by virtue of their ability to locate the revealing detail and the compelling counterexample, immensely helpful to the would-be

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generalist. Some readers will no doubt find that my borrowings give the book the appearance of an overloaded Christmas tree. I hope others will share my delight in discovering the “differences in similarity, similarity in difference” – in political institutions over nearly thirty centuries. Also, I believe the tree has a trunk.

The work may be read as a companion volume to *Explaining Social Behavior* (2007). In that work I argued, in a skeptical vein, against the excessive explanatory ambitions of much of recent social science. In the present volume, I argue against the excessive ambitions of normative political theory. This criticism relies in part on the earlier one, since some political theories rely on unrealistic claims about our ability to determine the optimal means to realize a given end. One could not implement utilitarianism, for instance, without causal theories telling us the costs and benefits of reform. In my earlier work, I argued that such theories are often lacking. The present criticism goes beyond this argument, however, by arguing that in many cases the end itself is ill-defined. In the case of utilitarianism, we do not know how to compare and add the welfare of different individuals.

Jakob Elster and Bernard Manin offered useful comments on the discussion of arguing in Chapter 1. Michael Balinski kindly and critically read the sections of Chapter 1 devoted to his work with Rida Laraki that, I believe, has the potential for revolutionizing the theory and practice of voting. Allan Gibbard commented on a very early draft of Chapter 1. In this chapter I devote some space to social-choice theory, an area where non-specialists such as myself fear to tread. Richard Posner commented usefully on Chapter 2. There is little new in what I say, but I hope there is also little that is outright wrong. In thinking about cross-voting and Numa, I was guided by Alain Boyer. I have benefited greatly from discussions of drafts of Chapters 2 and 3 at Harvard Law School and of drafts of Chapters 3 and 4 at the University of Chicago Law School. I presented an early draft of Chapter 5, which vegetated on my hard drive for a decade before it found its proper place, to seminars at Columbia Law School and Stanford Law School. In a focused workshop in Paris, Vermeule, Aanund Hylland, and John Ferejohn offered detailed comments on an early draft of the whole manuscript. Over and above Hylland's contributions on that occasion, his effort to keep me honest has been invaluable, continuing a collaboration dating back to 1973. I am also thankful for the comments of two anonymous readers for Cambridge University Press.

My research assistants at the Collège de France, Héléne Landemore, Stéphanie Novak, and Arnaud Le Pillouer, provided a constantly stimulating environment. Lectures at that institution do not allow for exchanges with the audience. My students at Columbia University have, however, offered useful comments, objections, and suggestions in the classes I have taught there in recent years on constitution-making, on the Federal Convention, and on collective decision making. Exchanges with Felix Gerlsbeck and Jeffrey Lenowitz have been especially valuable.

Unless otherwise noted, translations from French are my own. I do not signal my occasional corrections in published translations.

The dedication of the book to the memory of Michael Gilbert (1912–2006) and of Lester Young (1909–59) may require an explanation. Although I never met

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either man, I have read and reread Gilbert's novels since about 1955 and listened to Young's music on a more or less daily basis from the same time onward. They have not only provided a thread of continuity in my life but have also offered a window into worlds I have come to appreciate.

Michael Gilbert wrote crime novels. In my view, he was the best crime writer ever. Many of his novels are minor masterpieces – minor because of the genre to which they belong, masterpieces because of the skills he brought to his craft. He combined lightness of touch with deftness of plotting, together with the ability to use dialogue and indirect speech to create interesting and credible, two-and-a-half dimensional characters. His main profession as a solicitor enabled him to anchor many of his stories in the complexities of the British legal system. The observations in Chapter 4 on the 1964 Trade Union (Amalgamations) Act were taken from his novel *Flash Point*. His insight in the law also benefited him when compiling the often hilarious *Oxford Book of Legal Anecdotes*, cited several times in this book.

These facts might not be worth mentioning but for an amazing coincidence. My father, Torolf Elster (1911–2006), also wrote crime novels, among the many things he did. He was a great admirer of Gilbert and introduced me to his books at an early age. Each new novel was eagerly awaited and immediately purchased. Like Gilbert, he continued to write crime novels well into his eighties. They both escaped from the Germans during the war. Gilbert got away from a prisoner of war camp in Italy in 1943. My father jumped from the balcony at the back of his apartment when the Gestapo knocked on the front door one morning in 1942. More important, my father and Gilbert, at least as I reconstruct him from his books, had many character features in common: fundamental decency, compassion, utter lack of dogmatism and pretentiousness, as well as a puckish sense of humor.

Lester Young was a jazz musician, playing the tenor saxophone and occasionally the clarinet. On one recording, *Two to Tango*, one can even hear him sing. In my view, he was the best jazz musician ever. Artistically, his achievements tower over those of Gilbert: there is nothing minor about his masterpieces. Many critics prefer his prewar recordings, which convey utter, relaxed self-confidence and unsurpassed creativity in improvising. When we have access to alternate takes of his recordings, they are almost invariably as good as the released takes, and entirely different. Although his recordings with the Count Basie orchestra are mostly up-tempo, his duos with Billie Holiday show an exquisite romantic sensibility (miles away from sentimentalism).

By all accounts, Young had a sweet, conflict-avoiding personality. He was fully absorbed by his music. Perhaps as a result of these traits, he had a bad war. He ignored his army summons and was put in detention barracks, a traumatic experience that may have contributed to the sometimes darker and more hesitant style of his later recordings. The contrast with the prewar work can be exaggerated, however. While finishing the present book, I was constantly listening to his wonderfully light and inventive live performances in Washington, DC, from 1956. Other postwar soliloquies and meditations

express emotions rarely found in the earlier recordings. As in Billie Holiday’s parallel development over the same 25 years, the loss of technical fluency somehow seems unimportant. When I was young I preferred their exuberant early work, but with age I have become more attuned to the gains from age and experience.