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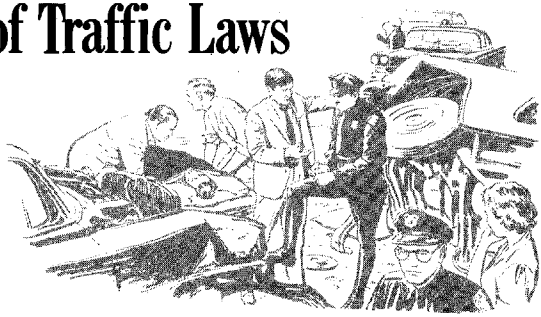
The Purpose of Traffic Laws



M .C. SHUMIATCHER

LIBERTY is the freedom of the individual — of every person — to make full use of his faculties and move where he wishes, when he wishes, how he wishes — so long as he does not harm other persons when he does so.

This principle is more clearly understandable in the case of our use of motor vehicles than almost anywhere else. On the Sahara Desert or on your own farm or on the Arctic Tundra, you may drive a vehicle as, how, and where you please without regard for anyone else. You are free to maim, wound or destroy yourself if you want to. But what of others?

Here, the law enters upon its appropriate role.

The legislator sometimes believes that he has absolute power over our persons and property. This is not so. The existence of persons and property antedated the existence of the legislator, and his function is only to concern himself with the safety of persons and property against the assaults of aggressors. The function of law is not to regulate our consciences, our work, our trade, our ideas, our wills, our education, our opinions, our talents or our pleasures. The true function of law is to protect the free exercise of my rights in each of these areas against infringement by any other person, and to prevent me from interfering with the free exercise of the same rights by others.

Since law requires the support of force to achieve this object, its lawful domain is properly confined to those areas where the use of force is necessary. Each person has the right to use force for lawful self-defense. Therefore, collective force, which is only the or-

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Dr. Shumiatcher is a prominent lawyer in Regina, Saskatchewan, well known as a lecturer, writer, defender of freedom. This article is from remarks before a recent Traffic Safety Workshop sponsored by the Saskatchewan Safety Council.

ganized combination of the individuals' force in any society, may be lawfully used for the same purpose, that is to say, for the defense of the law-abiding citizen against the attacks or depredations of the law-breakers. The question of how far the law is able to go in any particular field deserves the careful consideration of the philosophy behind the role of the law. It requires that we consider the purpose for which the mandatory injunction to perform or refrain from performing a particular act exists and the consequences which flow from that requirement.

Let us take the case for and against mandatory seat-belts. After all, a seat-belt is something which is designed principally to protect the driver of a vehicle against his own errors or faults. Assuming the purpose of the seat-belt is to protect the user alone, as I believe the case to be, then why should the law require an individual to take steps which he, in his own judgment, good or bad, decides he ought not to take. In my view, it is not for the law to compel an individual to save either his neck or his property. If individuals are left to their own devices and find that they suffer as a result of the laws of nature rather than the laws of men for acting foolishly, I believe that ultimately the message will get through to them; they will learn the error of their ways and act more providently in the future.

Has Education a Role?

Education, of course, can be a short cut to learning. It is old hat to say that the public needs more education concerning safety. Everyone seeks more money to educate persons on every conceivable subject from basket weaving to nuclear fission to safety in an automobile. The faith which so many place in the miracle of education can be compared only with medieval man's faith in the concept of salvation and a life everlasting.

That was an age in which it was believed that faith would create a better and a more moral human being. Education has usurped this role and for at least two generations, we have come to believe that if only people were better educated, if only they knew more and studied more and if only they learned more of the facts of the world about them, they would become better, more moral human beings. War and conflict would disappear from our society and we would forever live in peace and harmony with our fellow man.

Of course, we know that this is not so. Never before in the history of the Western world have so

many billions of money been spent in erecting the great temples dedicated to education in which modern man worships. The result has been not to produce graduates from our schools and universities morally superior to others, or better human beings or more peaceful citizens. Quite the contrary. There is less concern for morality today, less genuine understanding of man's nature, and less peace in our homes, our cities and our society generally, than ever before, whatever the educational attainment of the public might be. To regard education as somehow pointing the way to a new millenium – a more reasoned attitude among individuals or a better mannered performance by drivers upon the highway – is to pin one's hopes on a hollow dream.

If education will not secure better manners on the highways, then will slogans do it? It's all very well to buy and paste those bumper stickers that say, "The life you save may be your own" or "Defensive driving is the thing." But I suggest that these mean virtually nothing. What really matters is what goes on in the mind of the individual driver and what choices he makes.

We Love our Cars to Death

Perhaps the truth is that people do not really wish to avoid death on the highways at all. In the preface to his play, *Man and Superman,* George Bernard Shaw suggests that man is really in love with death. He says that man spends more thought in learning how to kill, how to destroy, how to maim and wound, how to fashion the lethal instruments of war, than he ever spent in producing or saving life.

If this be so, it is little wonder that the gruesome photographs that regularly appear in the media depicting death and destruction on the highways seem to do little more than titilate the sense of morbidity. Neither they, nor the regular statistical reports of carnage by motorcar succeed in convincing drivers to show greater consideration for other users of the highway neighborhood, or to grow more wary of the perils that haunt it.

We know, from those clever people who collect statistics and assemble them in ways that are designed to impress or shock their readers, that Canada scores high in motor car accidents. In 1969, with 8,100,000 vehicles on the road, there were 5,696 deaths, or 27.0 deaths per hundred thousand of population. The only really industrialized country that racked up a higher score were our friends and cousins to the south in the United States. They were just

half a point ahead of us at 27.5 deaths per hundred thousand of population. Australia was pretty high also, at 21 deaths per hundred thousand; but countries like the United Kingdom stood at only 13.6 deaths and France – where I was always of the opinion that the wildest drivers in the world were to be found – showed only 11.3 deaths per hundred thousand of population.

But what of the number of deaths per hundred thousand vehicles on the highway? After all, population is not the important factor here. India has a very large population but very few motor vehicles; Saudi Arabia has a large population with relatively few vehicles but a very large number of accidents – mostly with Cadillacs – so that the population and the death figures in a place like India or Saudi Arabia would not tell us very much about our own situation. In 1969, we witnessed 70.3 deaths per hundred thousand vehicles in Canada. Although the United States death rate from automobile accidents is almost identical with that of Canada upon a per capita basis, there were only 55 deaths per hundred thousand vehicles in that country, compared with our 70. The United Kingdom had 59 deaths per hundred thousand vehicles, and France produced only 6 deaths per hundred thousand vehicles as compared with Canada's 70!

In the light of these figures, and having heard all of the pleas for an active educational program and all of the appeals for safety precautions on our highways, do we think that anything will really be altered by these programs? I have the impression that the message thus far has been that if we would only have fewer accidents we would be much better off.

What of our Standards of Performance?

If we really wish to improve the dismal record of performance on the highways of this country, it seems to me that we must examine our conduct and our performance and our habits there from the same point of view that we ought to be examining our activities in other fields – in the trades and occupations in which we engage, in our business practices and in our professions, and indeed, in our sports and our recreational activities. The standards which we have set for ourselves in this country in each of these fields have fallen abysmally low. For we have abandoned our search for excellence in our trades and occupations. What has become of our fine craftsmen of yesterday? Our workers in wood and silver and precious metal; our builders, our mechanics, our

plumbers; those who produce the goods and offer their services to the public to meet human needs? What has become of their standards? How much can we rely upon their craftsmanship? How much are they concerned with quality?

Driving is an occupation like other occupations, and indeed it is the full-time job of the taxi driver, the bus driver, the long-distance trucker. What are their standards of performance? And to this question, I think our experience and observation must tell us that, as in other fields, they are declining. For we are rapidly abandoning our search for excellence in our trades and our professions, and those who once prided themselves for their capacity to produce at the highest level now have given over their efforts to other goals.

The name of the game today appears to be to do the least to get the most. To give as little and to take as much as possible, and excellence and quality be damned. You might consider applying that slogan and those words to driving on the highway. Take as much as you can and give as little as you can — and the other fellow be damned.

Compulsion Produces Mediocrity

What is most interesting to me is that, as the standards of personal excellence decline, we find that governments at every level, federal, provincial and municipal, are moving to fix the standards for the activities of men and women engaging in their businesses and professions with the naive expectation that this will improve human performance. Everything, from minimum wage laws to the manner in which doctors are required to make their reports in quintuplicate for medicare commissions, is coming to be governed by laws and regulations. The result, of course, is inevitable. Where the big stick is wielded, and government fixes minimum standards, these eventually become the maximum standards, and all who are forced to adhere to them are repelled by the concept that their performance is determined, not by the individual's capacity or motivation, but by the sanctions of force.

The burdens and responsibilities that normally rest upon the individual to perfect his techniques and to give a fair day's work for a fair day's pay, and to produce a result in which he himself takes pride because of his craftsmanship and knowledge, these are being assumed by the state which claims a peculiarly omniscient capacity in the field. Government now undertakes to fix standards, to penalize those who

do not measure up to them, and to make certain that each citizen gets "full value for his money." But I never knew a government that was able to fix a leaky faucet, or cut a head of hair, or grow a stalk of wheat, or milk a cow or repair a broken watch. And what is more, it seems to me that when the state holds the big stick over the individual and tells him what he may or may not do, the result is bound to be fear, and then hostility, and finally the kind of resignation which convinces the individual that if the only recognition he is to receive for a job well done is to avoid the penalties of the law, then whatever he will produce will be a model of mediocrity.

The state, in all its guises, is progressively removing the incentives from individuals to do difficult jobs well. Incentives to achieve are being removed by the imposition of inordinately high taxes. On the other hand, rewards are being accorded to those who do little or nothing in a productive way. Uselessness, neglect, carelessness, ineptitude, sloth – these are being rewarded by policies geared to pay money, grant concessions and distribute praise to those who claim it as their right to take whatever they want by political blackmail if possible, and by force and violence if necessary. The welfare state dictates that no longer is achievement the passkey to reward; no longer is competence, or excellence or skill of any real consequence. Is it any wonder, then, that there should be a falling away from those high standards upon which a worthwhile society must depend?

In the fields of recreation and sports, Canada is fast becoming a nation of cynical spectators, more interested in the spectacle of violence than in the skills of the game, be it played on the football field or on the ice.

You see, the characteristics that we demonstrate in our work and at our professions, in our games and sports and as spectators, are carried by us into the highways of our land and over all the byways of our lives.

Compulsory Insurance

The craftsman who isn't much interested in excellence on his bench, is likely to be equally disinterested in excellence or proficiency or care or good manners as a driver of an automobile. There are fewer craftsmen today because machines take care of the needs of most of us. The man today is rare who feels the responsibility of producing a product with which he can himself identify, because it is his own. So it is that the security that a welfare-oriented society provides its citizens by way

of protection removes the responsibility of that individual for his own care and well-being. Compulsory state automobile insurance may well be an application of this same principle, leading people to say, "What difference does it make if I crumple a fender or get into trouble on the highway? It really doesn't matter. I have a government package policy and I only pay $25, or $200 at the very most, and the rest of the damage I do will be looked after by the government. Why should *I* worry?"

Protecting citizens against their own folly and stupidity condones ignorance and encourages carelessness. I am not opposed to insurance, but I am against compulsory insurance which places no burden or onus upon the individual himself to secure it. If a man carries insurance because the state compels him to do so, he carries it because he is told to carry it. But if he carries insurance because he thinks enough about the importance of his own safety and welfare and the life and safety of others as well, then he has participated in the act of protecting both himself and others. He has taken the first step to take care. That step is capable of leading to other steps – to considering the dangers of high speed, the perils of heavy traffic, the consequences of drinking and driving. It will move him to consider others and to expect others to consider him. He will do so not because he is compelled to do so but because he wants to and knows why – because he has ceased to be an automaton and has become a thinking human being.

It has been said that the English defeated the Spanish Armada in Elizabeth's time, not on the sea, but on the playing fields of Eton. Whether this be true or false, the fact is that a sense of decency and fair play and of ordinary good manners are essential to any activity in which men and women engage in any number. It is a lack of the ordinary sense of fair play and an ignorance of good manners that, more than any other things, are responsible for catastrophe on our roads and highways. Even lack of skill can be compensated for by good manners. These are personal qualities. They cannot be legislated. On the contrary, paraphrasing Gresham's Law that bad money drives good money out of the market, so it is my firm belief that legal coercion to do good drives human desires to act fairly out of the social equation.

Those traits that are causing the loss of lives and property on the highways today are the same traits that are making of this great country of ours a place governed by the platitudinous, one

abandoned to the mediocre and geared to the performance and ability of the lowest common denominator.

Needed: "Manners in the Motor Car"

We are, most of us, bad drivers. We do not regard it as our duty to improve our skills. We do not take pride in our performance. We do not consider it necessary or even desirable to play the game on the highways. Certainly, though we know a little about table manners, we still have very little interest in road manners. It is high time, I think, that a Dorothy Dix or an Emily Post add to their books on etiquette a chapter or two on "Manners in the Motor Car" – not only when parked, but when mobile.

These are not matters for the law to deal with. So many people entertain the greatest expectations from the mere passage of a law. Laws are printed on paper and bound in books. They may even be read and sometimes studied and memorized. But they do not drive motor cars. It is people who drive. It is they and only they who are or can be responsible. Unless we are willing to withdraw the protection and the support, the direction and the compulsion to which laws are expected to give effect, we as individuals will be reluctant to assume our personal responsibilities. For what we are witnessing on our highways today is an abandonment of standards of excellence and the renunciation of personal responsibility. This, after all, is only a reflection of the human scene in almost every other place in the land today.

Ours the Responsibility

Why has Mr. Ralph Nader become so popular in these times? It is because he chooses to say that motor car accidents are happening, not because of you or of me, because of our limitations, our ignorance, our ineptitude and our lack of skill. No, it is none of these. It is General Motors and Ford Motor Company and other big corporations who are really responsible for death and carnage on the highways. So Nader likes to make us believe. It is very much like the current attack on the corporate welfare bums that we have been hearing so lugubriously launched by socialist candidates in the current Federal election. It is well to remember that the statists of whatever complexion have always sought out a plausible victim for the public to hate. It is great to reform the whole world so long as one does not have to reform himself. That's why it is always so popular to find a scapegoat, as Ralph Nader has done in the case of motor car accidents. Of course

there are automobile mechanical defects which cause accidents, but I would like to suggest to you, to paraphrase Shakespeare, that

> The Fault dear Brutus lies not in the stars (or in the Plymouths, Buicks or Fords) but in ourselves, that we are underlings.

If it is to be found anywhere, responsibility must be found precisely there – in ourselves.

I have said earlier that the question of improved manners on the highway is not a question for the law. We have a plethora of laws, and a dearth of manners. The Saskatchewan Vehicles Act is two and a half times as thick today as it was twenty years ago and the number of accidents and deaths has increased at five times the rate at which the pages of highway legislation has grown. But there are some things that the law cannot do and that Parliament cannot do. It cannot create a great painter or a fine carpenter or a good tailor or a skillful gardener or a first class driver. Not by an act of Parliament nor by any number of acts of Parliament can this be done.

What laws can do, however – or perhaps I should say what the absence or the repeal of laws can do – is to revive the natural system of rewards for performing excellently, and of penalties for performing negligently or for not performing at all. Unless we are willing to withdraw the protection and the support of those who fail to learn to work or to act creditably, there will be no reason why anyone should acquire any knowledge or exert any effort to perform any act with skill or competence.

We are witnessing on our highways in Canada the abandonment of standards and the renunciation of both excellence and personal responsibility. This, unfortunately, is a reflection of the whole human scene in Canada in this day. I suggest one of the reasons for this is that we have too many laws.

Who is worried about traffic laws today? We have so many laws, that as Lord Darling said, "Men would be great criminals did they need as many laws as they make."

I am convinced that we really do not need all of those laws. Rather we need men and women who, as individuals, recognize their own personal responsibility to themselves and for themselves. When this is recognized, we shall be more concerned with our own personal conduct than with the modern fetish to do good for others, or to pretend that our real concern is with that anonymous amorphous distant undemanding body of beings we are pleased to call "humanity."

The ENERGY Crisis

ROBERT G. ANDERSON

THE DOOMSDAY CULTISTS of the mature economy seem to be at it again. These omnipresent talismen of doom, so eager to have us return to a pre-industrial society of agrarian primitivism, have found new fodder for their propaganda campaign.

The incentive for their most recent burst of gloom has been the scare value of the current "energy crisis." Responding to publicized shortages in the energy field, certain ecologists insist we are exploiting our resources so rapidly that shortly there will be nothing remaining. Future generations, we are told, will surely perish unless something is done.

Such pessimism has been fueled by the confusion surrounding the rather unorthodox behavior of firms which are admonishing customers for excessive use of their services. Instead of seeking new customers to consume more of their services, there now is a concerted effort toward encouraging nonconsumption.

This is, to say the least, a radical departure from traditional marketing practices. Yet, witness the electric utility company urging customers to "turn off the lights," and the natural gas company refusing to service new customers and reminding old ones to "turn down the thermostats." More recently the petroleum companies, acting under orders from the Federal Oil Policy Committee, have adopted "voluntary-allocation plans," resulting in limiting customer purchases of gasoline and early closings of retail gasoline stations.

Further complicating the crisis are those ecologists, who, seeing a growing problem of pollution, hamper and harass all efforts to

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expand supplies of energy, and plead for restrictions on the use of existing energy resources.

Indeed it would seem that the enemy is the consumer, whose excessive wants have finally exceeded all normal limits and have threatened to deplete a precious national inheritance. Unless these consumers are somehow convinced to temper their consumption, there is the danger that such shortages will occur as to spell final disaster for the lot of us.

Volunteer — or Else!

Numerous remedies are being advanced as popular solutions to this crisis. The efforts by utility and petroleum companies to restrict sales voluntarily is lauded as being in "the public interest," for it is placing civic duty above mere profit-making. Through "educating" the consumer to consume less, it is believed, the demand for energy resources can be lessened.

Should such efforts fail, the ultimate remedy suggested is direct government regulation of consumption by bureaucratic rationing. Such an alternative is not idle theorizing. The Federal Government has made it clear that if "voluntary" methods fail, it intends to move in. Confronted with a picture of indivduals glutting themselves on scarce economic resources and ravaging the earth of all its riches, there appears to be no alternative but to turn to collective, forceful action, complete with penalties for transgressions. The state at this point is seen as the only means available to force an adjustment to the reality of scarcity rather than endless abundance.

Once again we see the threat of government intervention in order to remedy the ill effects of an earlier government interference. The so-called "energy crisis" is a direct consequence of earlier government intrusions into the free market pricing process. To expect any good to come from further government intervention at this point is to believe that a person just run down by a truck would get relief if the truck backed over him again.

Market economics has always recognized the problem of scarcity. Indeed, it is the sole basis for the science of economics. An individual's capacity to want is insatiable, but possessing only a limited ability to fulfill his wants, the individual is never able to satisfy all of them. Clearly, choices must be made and resources allocated toward the accomplishment of those chosen ends. The process by which this is done is the concern of economics.

While a market system of economic organization cannot eliminate the problem of scarcity, it

has demonstrated its superiority over all other systems of economic organization in reducing the degree of relative scarcity. The emergence of a social division of labor and concomitant price system has resulted in attaining the highest degree of efficiency in allocating resources toward the satisfaction of human wants.

Within the framework of a market-structured society the allocation of economic goods is accomplished through prices established by the actions of buyers and sellers. This interaction between supply and demand is never static, and thus there is a continually changing price structure. As greater quantities are demanded or supplies dwindle, prices tend to rise; conversely, prices tend to fall when lesser quantities are demanded or when supplies increase. Free market prices are constantly adjusting in order to bring toward equilibrium these opposing forces of supply and demand.

It is these free market prices that direct the actions of buyers and sellers. As long as buyers and sellers are free to act, as long as the price mechanism is uninhibited, economic goods will be allocated in a fashion that will always assure their availability to anyone wishing to enter the market. Supply will always tend toward equilibrium with demand.

Serving Willing Buyers

This phenomenon of an equilibrium price, of course, has not eliminated the problem of scarcity. Instead, it can only assure that scarce goods will always be available to willing buyers. Prices serve as a means for allocating these scarce resources to those buyers who value them more highly than do others. The justice of the free market lies in the fact that the most efficient sellers will prevail in supplying scarce resources to the buyers who most urgently seek these resources over all other potential buyers. Such a system is in a continual state of flux as new buyers and new sellers supplant one another and cause prices to correspondingly rise and fall.

The present "energy crisis" stems not from a problem of economic scarcity, but instead from nonmarket forces which are interfering with free market prices, and thus causing shortages to develop. The problem of economic scarcity is present in nearly every situation of our lives. We are not in an "energy crisis" now because energy is scarce, but rather because there is a "shortage" of it. Shortages are inconceivable in a free market structure; but they do occur whenever free market methods are abandoned.

The competitive actions of buyers and sellers in a free market

system precludes any threat of shortages. The very essence of price allocation negates the development of shortages. A greater relative scarcity of a good in a free market situation will inevitably lead to higher prices as buyers bid against one another for the shrinking supply. For shortages to occur, some nonmarket force must be introduced to create the disequilibrium.

The "energy crisis" is an example of such interference. Of course energy resources are scarce; that is conceded. They always have been, and they always will be scarce. But the current shortages in the market have led many people to believe that we have encountered something worse than scarcity; all of a sudden there is a specter of a well running dry.

Misunderstanding the Causes

Popular remedies being suggested are further confused by a misunderstanding of the causes of the problem. Certain forces which have contributed to an increase in the relative scarcity of energy, and other forces which have contributed to an increased demand for energy, are now being blamed for *causing* the shortages of energy resources. Such is not the case, for under conditions of an unhampered market these forces would be reflected in a changing price structure. Only direct interference with free price movements can cause the shortages.

A leading example of a force not responsible for causing the energy shortage, but certainly a factor affecting its supply and demand, is radical ecology.[1] Ecology is frequently blamed as the primary cause of the "energy crisis." As proponents for the preservation of natural resources, the ecologists have in many instances been successful in curtailing supplies of energy resources by hampering the construction of new oil refineries, electric generating plants, drilling operations, and pipe lines. Their efforts at preserving resources in their natural state, by harassment of utilities and petroleum companies, have undoubtedly restricted present supplies. Ironically, their success in forcing automobile manufacturers to equip engines with emission-control devices has greatly increased the demand for gasoline. (Presently these devices consume an additional three million gallons of gasoline daily.)

While a paradox can readily be seen between their efforts at preservation on the one hand, and the wasteful results of their efforts regarding pollution on the other

[1] "A Conservationist Looks at Freedom," Leonard E. Read, *The Freeman*, November, 1970.

hand, the fact remains that their actions cannot be held accountable for the current energy shortage. It is certainly valid to observe that to the degree they have curtailed supplies and have increased the consumption of energy, they have been a factor in causing the prices of energy resources to rise. But ecologists can no more hamper price movements than can any other private individuals.

In the same context, forces such as import quotas, declining exploration, production controls on producing wells, tax depletion allowances, agreements between refineries and dealers, and even possible secret cartels have been advanced as the causes of our present crisis. Valid charges or not, any or all of these factors can affect only the quantities of energy resources supplied, and thus the ultimate market price. None of them, any more than the ecologist, can cause market disequilibrium in the form of shortages.

Shortages from Price-Fixing

Shortages are a result of price-fixing by government interference in the market place. Specifically, the government, through both direct and indirect methods, has been successful in preventing the prices for energy resources to rise.

The developing energy shortage has been growing for a long period of time in the utility industries. The reason is obvious when we realize that direct price regulation by government has existed far longer in this area of our energy resources than within the petroleum industry.

State public utility commissions, the Federal Power Commission, and other government regulatory commissions have direct authority over rates charged for energy by electric power and natural gas companies. Unfortunately, these commissions mistakenly assumed low rates to be in the best interests of consumers of energy resources. Under the misguided notion that low prices for energy — rather than equilibrium prices — benefited the consumer, little attention was given to the developing disequilibrium between energy supplies and energy demanded.

For many years the disequilibrium has been absorbed in the capital structures of utility companies. This consumption of accumulated capital, with its ensuing financial weakening of the utility companies, gradually affected their capacity and willingness to attract capital for expansion of their energy resources. Production of energy became marginal, if not entirely uneconomic.

At the same time, demand for energy at the low rates continued to expand until the inevitable dis-

equilibrium developed. Energy was being supplied in shorter quantities than were being demanded. Since additional quantities could not be supplied without incurring losses (at the low rates imposed on utility companies by the government commissions), these companies had no recourse but to deny service and to urge less use by their customers.

The failure of the utility industry to meet the full market demand for energy requirements had a "spill-over" effect on the petroleum industry. Customers, fearful that electrical power and natural gas supplies would be unavailable to them, sought greater quantities of fuel oil from the petroleum industry to meet their energy requirements.

Two Blows at Once

Unfortunately, this increased demand upon the petroleum industry occurred at a time when price controls on their industry had just been introduced. While the method of price regulation has been less direct than that experienced in the utility industry, the problems created are similar.

After many years of a government-imposed inflation of our money supply and resulting higher and higher prices, a government program of price controls was inevitably adopted. Abandoning all economic reasoning, the government established a "freeze" on prices of most goods and services, including petroleum products. Throughout the various "phases" of the price-control program, petroleum prices have not been able to reflect the changing forces of supply and demand affecting them.

Few industries failed to feel the pressures of the government price freeze; but the petroleum industry, along with other capital-intensive industries, felt the heaviest pressure. Inflation always inflicts the severest damage on industries with a heavy capital investment in their productive processes.

The capacity of such capital-intensive industries to calculate their economic costs is seriously hampered by inflation. Furthermore, the erosion of capital resources by inflation discourages future productive efforts by such industries. Accurate economic calculation becomes nearly impossible.

Thus, a government-imposed price freeze on the heels of a government-engineered inflation made a petroleum shortage inevitable. A combination of factors pressuring for an upward movement of prices only worsened the disequilibrium: the peculiarly sensitive financial position of the industry to inflationary pressures; ecological forces affecting their capacity to increase supplies while at the same

time increasing the consumption of the product; and heavier consumption on account of a diversion of demand from the natural gas and electric power industries.

Obviously, had petroleum prices been completely free to respond to these changing facts and conditions there would be no threat of shortages. However, the petroleum industry like the utility industry, having lost its entrepreneurial freedom to resolve the disequilibrium through the price mechanism, found itself pleading with its customers to "not buy."

The "Solution" Is the Problem

The real cause for concern at this point is not the "energy crisis" so much as it is the solution the government will undertake to "solve" the problem of the shortages. Rather than admit the failure of government price interference and allow the free market to once again achieve equilibrium between supply and demand, the government more likely will propose the adoption of rationing.

The allure of rationing seems to be based on an egalitarian ideal which rejects the price system as a discriminatory relic of economic inequality, and thus not suitable as a means for the just allocation of resources. Regrettably, this egalitarian doctrine attracts many supporters and is one of the leading threats to the survival of individual liberty.

The concept of rationing is predicated on an archaic and totally refuted objective theory of value, yet its philosophical appeal has had an overwhelming influence in our political affairs. The notion that an equal distribution of goods to individuals will provide equal utility is a complete denial of modern theory of subjective value; but government rationing still insists on the allocation of resources in this fashion.

If selective rationing of energy resources should materialize, the consequences are quite predictable. The decline of profit margins will result in a capital shift away from such industries, and this will lead to additional shrinkage of supplies. Since capital always moves away from low-profit industries and into higher-profit industries, future production of energy resources must decline. The low prices imposed by government edict will ultimately be meaningless as, finally, no supplies will be produced at all by private companies.

The historical response to this development has always been the same. Whenever governments have finally succeeded in making a productive service completely uneconomic for private enterprise, they assume the function for them-

selves and nationalize the industry. (This "final solution," it might be pointed out, not only fails to solve the problem of scarcity but tends rather to intensify it.)

Look to the Market

The appropriate alternative to our energy crisis is to return to free market principles. The consequences will not be pleasant, for the most probable result will be higher prices for energy resources than exist today.

Recent price movements in those few goods that have not been covered by the freeze give us a good contrast to the situation with respect to the controlled goods. For example, we have seen as much as a fourfold increase in the prices of some agricultural products in the past year because of inflation and other changes in the supply and demand picture. While such price rises have been a cause of much consternation to consumers, they have not resulted in shortages and subsequent rationing.

Should supplies of these agricultural products now increase (as well they might, because of their profitability), or if demand declines (because of consumer resistance to the high prices), then prices will again fall in a reflection of market actions of buyers and sellers.

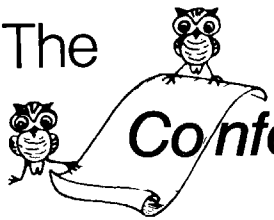
While the government planners recognized the presence of these market forces in agricultural products and exempted them from direct controls, they failed to recognize that these same forces are at play with all economic goods and services. Instead, believing that prices of manufactured goods are somehow "administered" and immune from the economic laws of supply and demand, the government imposed the price "freeze" upon them.

As must always happen with an abandonment of economic reality, the edicts of government are falling victim to inexorable economic law. The ever-changing forces of supply and demand, continuing an upward pressure on the prices of energy resources, are making the "frozen prices" a relic of economic history. The growing disequilibrium between the government-manipulated prices and the actual forces of supply and demand precipitates the inevitable shortage.

If this "energy crisis" is to be resolved, there is only one alternative. We must return the allocation of scarce resources to the market. Freedom in the market place, so that the economic structuring of society is in the hands of individuals acting as their own free agents, is the only "final solution." Under such a system, the crisis of shortages is unknown.

LEONARD E. READ

The Confession of Error



To make no mistake is not in the power of man; but from their errors and mistakes the wise and good learn wisdom for the future.

— *Plutarch*

MANY PEOPLE, I suspect, would rather entitle this piece, "the error of confession" than "the confession of error."

My thesis is that error can and should play a profound role in man's advancement toward wisdom. There are two doors through which the fallible individual must pass before he can behold the light of truth. The first is the discernment of error; the second is the *confession of the error,* not only to self but to anyone influenced by his error, whether that influence extend to one or to a few or to millions of persons. Rarely does the individual err in solitude; most of one's mistakes have a social impact, may indeed bring harm to others as well as to himself. So, one is socially obligated to confess as well as to correct his errors.

A personal experience may help illustrate my point. In 1945 I was given the assignment of choosing two speakers to present opposing views on the U.S. foreign aid program. I chose J. Reuben Clark, Jr., President of the Church of Jesus Christ of Latter-Day Saints, whose point of view coincided with mine. The most prestigious individual I could nominate for the other side of the argument was Lord John Maynard Keynes, then on an official visit to the United States. When I called on him to invite his participation, he replied, "I shall not accept your invitation, and for two reasons. First, I shall not be in this country at the time of your meeting. And if I were here I would not accept. My mission is to obtain the British loan. Were I to stand before your audience and say what I *now* think, which is what I would do, I would disparge my mission."

Lord Keynes, it seemed, had changed his mind about government spending. He confessed this

to himself and to me but, so far as I know, not a word of his changed position reached the hundreds of millions who came within his orbit of enormous influence. Had he publicly confessed his error (he passed away nine months later) the reckless spending policies of nations all over the world might have been halted. He discerned his error which is the first step. But he never took the second step; he failed to make public his confession, and the light of truth did not shine forth. Lord Keynes opened but one of the two doors; and the rest of us are now the poorer for his failure to open and pass through that second door to truth.[1]

I would not single out the late Lord Keynes as alone in this fault. His case is simply a magnified, and thus easily observed, example of the thing I am talking about. The same inability or unwillingness to confess error plagues most of us. Keynes' leverage over events was so great for at least two reasons: (1) he was a prestigious professor of economics at Cambridge University and a titled nobleman, and (2) his error is one that all politicians, here or elsewhere, ardently want to believe: that politicians can spend the people's money on anything that suits their fancy and, by so doing, assure prosperity to the victims. Had a commoner – one without degrees and a title – made such a silly proposal he would have been "laughed out of court."

Why the reluctance to confess error openly? Doubtless, there are more reasons than we know. Take a politician – one gaining office by promising, if elected, to do this or that for his constituents, perhaps a higher minimum wage or any of thousands of "benefits" at taxpayer's expense. Later, the light dawns and he sees the error of his ways. Confess this mistake to his constituents? Not likely! He would never be returned to office, his political power at an end. More often than not such a fateful prospect destroys any desire or incentive to confess error.

But no one can confess an error until he sees it for what it is; and self-blindness is a trait as common among the electorate as among the elected. Once an error is believed and embraced as right, it is absorbed into the tissues, so to speak; it becomes a part of one's being. An immunity develops and explanations of the fallacy are warded off, not heard. Only confirmations of the error are received and they become supporting evidence. Most of us simply can-

[1] For an enlightening account of Lord Keynes' sound money theories before he went "Keynesian," see "Inflation" by John Maynard Keynes (*The Freeman*, April 1956).

not stand the thought of being wrong, at least not to the point of openly confessing an error.

Often the explanation of our error is made by a political opponent or by one having a faith or general philosophy we do not approve, that is, by our "enemies" – persons we abhor or, at least, do not like. The very source is enough to close our eyes and mind; we will have none of it! Indeed, this lack of catholicity on the part of anyone tends to confirm him in the rightness of his mistaken views. Small chance of confessing errors thus buried in rancor!

The fact that society, today, is in one of those devolutionary swings – common to history – and that countless people are proposing remedies of every variety and without success, suggests that the right answer has not yet been found.

I venture to say that the remedy is simple; indeed, if it is not simple, in all probability it is not right. The first step is to *remove all obstructions to the discernment of error; and the second is to confess the mistake openly.* How wonderfully different would be the societal situation were a considerable number of us to open these two doors. It seems obvious to me that this is the way and the only way to wisdom, truth, light!

A considerable number! Yes, but a number of individuals, one by one. After all, it is not society that acts; it is only discrete human beings.

There is no point in dwelling further on removing the obstructions to the discernment of error. Count him out who cannot rid himself of prejudice, bias, egotism, know-it-all-ness. Include only those who welcome exposure of error, regardless of source.

The door most of us have had no practice in opening is the second: open confession of discerned error, not only to self but to all who have come under the harmful influence of the mistake. By "open confession," I am not referring to any maudlin wailing. Rather, I am talking about a clear explanation of one's new insight – the truth that displaces the error he had espoused and inflicted on others as well.

There are two points to keep in mind. First, if the purpose of life is to grow in awareness, perception, consciousness, the refusal to confess error is to strangle growth; it is to nail one's self down to mediocrity, along with others under influence of one's errors. Be free!

Second, confession not only is good for the soul; it also turns out to be a joyous experience, as is any freedom from inhibitions. To prove it, try it!

How NOT to Advocate a Gold Standard

PAUL STEVENS

THERE ARE TWO POINTS on which probably all advocates of a gold standard agree. They are: (1) that the U.S. government should legalize gold, and (2) that government should not prevent its citizens from using gold as money if they voluntarily contract to do so. This means that banks desiring to store gold, print gold bonds, or print notes against gold should not be prevented from doing so. It means that buyers and sellers should not be prevented from contracting in gold for the exchange of goods.

These are certainly proper goals for advocates of a gold standard to pursue. Yet achviement of these goals is being undermined by statements containing a host of errors, inconsistencies, and contradictions about gold—statements made by those very individuals who are attempting to focus attention on gold and the virtues of a gold standard. A bad argument advocating a return to the gold standard can be more harmful to the case for gold than no argument at all.

One source of such arguments is that many gold advocates look at gold through the eyes of an investor rather than the eyes of an economist. Consequently, short-term, superficial and sometimes misleading interest in gold is being encouraged at the expense of long-term education and consistent economic theory. This approach must ultimately be counter-productive and self-defeating. The market is being saturated with literature containing misconceptions and inexact or incorrect terminology. This has led to *anti*-gold positions (i.e., positions inconsistent with capitalism and a free market), most of which can be traced to poorly defined concepts, discussions drawn out of context, and misidentified cause/effect relation-

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ships. The following arguments, terms, and positions regarding gold, its present role in international monetary matters and its proposed role in future international monetary reform, have presented a recurring yet self-defeating "defense" of gold and the gold standard.

The "Intrinsic Worth" Argument

It has been said that gold has "intrinsic worth." This argument represents a theory of economics inconsistent with the free market and consequently with the gold standard.

The intrinsic theory of value holds that worth or value is contained *within* an object. It holds that economic goods possess value inherently, innately, despite the market, despite supply and demand, i.e., in spite of men's values, choices, and actions.

Free market economists reject this argument. They hold that no man can jump outside the market and declare what a particular commodity is "worth"; that all commodities are subject to the laws of supply and demand; that in economics there is no such thing as "intrinsic worth", only *market* worth.

"Worth" means "value" and value presupposes a valu*er*. As men's values differ and change, market values change. As supply and demand conditions change, the exchange ratios of commodities relative to one another change.

Gold is not exempt from these economic laws, and yet gold is often treated *as if* it were. By using such unscientific terms as "intrinsic worth," the gold advocate can only hurt his own case – and he has. The inability of many gold advocates to objectively answer the question, "why gold?" has led to the misunderstanding of gold and to such popular terms as "gold, the *mystic* metal."

Gold would not be called "mystic" if it were understood. And understanding begins with defining one's terms. It is only through invalid concepts such as "intrinsic worth" that absurd terms such as "mystic metal" can gain popularity.

The "Store of Value" Argument

The argument that gold is a "store of value" is often used as a substitute for the "intrinsic worth" argument. Unless precisely qualified, the term can lead to the same errors, fallacies, and fallacious theories of the "intrinsic worth" argument. Thus, it may lead to a misunderstanding of the nature of money and of a proper theory of value.

"Store of value" is a term often used by those who argue that gold will always represent a *constant*

value, i.e., that gold is a "fixed yardstick" representing constant purchasing power. Implicit in this argument, once again, is the idea that gold is intrinsically valuable – immune from the laws of the market. Not so. The possibilities of gold strikes, gold shortages, fiat money inflation, depression and deflation, fluctuation of industrial demand, the relative market value of other commodities, and the differing knowledge, values, and expectations of men – all these factors have the potential of increasing or decreasing the value of gold for other men.

Does this mean that under a gold standard the "price index" and the value of money will fluctuate? It certainly does. But this is precisely the beauty of the free market and the case for freedom – that prices are allowed to fluctuate freely, thereby corresponding to the constantly changing and diverse values of free men. The advocates of a free market are not Utopians – they are realists who recognize that there are no guarantees of economic security in this world; they are willing to accept the consequences of their actions – and to accept the verdict of a free market.

The advocates of a free market are *not* willing to trade their freedom for security. The "store of value" argument offers men just such a trade. While a gold standard does offer men more *stability* of value than any other free monetary system, it does not offer men a *constant* value. There is no harm in stating that gold is a store of value so long as one knows and states exactly what is meant by the term – i.e., that gold has *stability* of value and represents perhaps the best monetary method of saving. In a free society, one is certainly free to store that which one values, so long as it is understood that the value of one's savings is not immune from the influence of the market. Thus, within the context of a free market, the only legitimate meaning of "store of value" is, "a commodity which is most marketable and therefore best facilitates the exchange of goods and services."

Gold "Price" Predictions

One way pro-gold advocates have been trying to attract attention to gold is by arousing investor interest through predictions of a higher gold "price." General estimates of prices are not by themselves harmful. For example, it was a reasonable assumption that, after having been artificially held down for forty years, the "price" of gold would increase. But specific price predictions are indirectly harmful to the case for gold.

The case for gold is subsumed

under the broader case for the free market. The advocates of free market economics and those economists concerned with economic theory take pride in the rigorous logic and objectivity of the case for the free market. But this pride is being undercut by illogical and visionary price predictions. The "price" of gold is determined by the values of those participating in the gold market. No man on earth, no group of mathematicians (no matter how many charts and graphs they employ), no *computer* on earth, is capable of knowing the values of all consumers and suppliers within the market. (Russia has been trying for years to correctly anticipate *general* consumer demands and has failed.) Therefore, to try to precisely predict something as specific as a price is impossible. The fact is, men's values are constantly changing, just as the factors of supply, demand, and cost are changing. Men cannot have *precise*, prior knowledge of prices, and by pretending to can only confuse and undercut the entire concept and basis of free market economic theory.

There is no place for crystal balls in science – and that includes the science of economics. Those attempting to attract attention to gold by making precise price predictions are contradicting and obscuring the meaning of the free market and therefore undercutting the case for a gold standard.

The "Legal Tender" Argument

Many advocates of gold argue that if gold were made legal tender, not only would individuals be allowed to own and use gold as money, but this would necessarily lead to a gold standard. What is forgotten is that this country's legal tender laws are precisely what prevent citizens from using gold as money today. Legal tender laws established the legal precedent of coercive government monopoly over the issuance and use of Federal Reserve Notes.

The free market economist does not contend that gold *must* be money. He contends only that money must be *market-originated.* The case for the gold standard is part of the broader case for *commodity* money. Consistent advocates of the gold standard hold that gold possesses those qualities and characteristics most conducive to the function of a medium of exchange, but they do not say that gold will forever be suitable as money. Neither do they hold that gold *must* be accepted as money whether men want to accept it or not. They do not ask for the police powers of state to enforce their idea of what money should be. Thus, they oppose legal tender laws.

Further, legal tender laws are not necessary. All that is necessary is that men possess the right of contract. For example, if a man contracts to pay one hundred ounces of gold to another man who agrees to accept this sum in payment, the courts need only recognize *what* has been chosen as money, and assure that the obligation be discharged.

Legal tender laws are not what is needed to return to a gold standard. On the contrary, they are one of the major factors today *preventing* the world from returning to gold.

The "Official Price of Gold" Fetish

Many advocates of gold argue that an "official price" of gold is both necessary and desirable. This position accepts the premise of opponents of the gold standard: that legal tender laws should be established allowing governments to legally fix and regulate the value of money. The free market position rejects this premise. It holds that the medium of exchange should be market-originated and market-regulated – not government-originated and government-regulated. This means that the value of money should be determined on the free market – not dictated by government decree.

At this point, the "official price" advocate usually says, "But if the price of gold isn't fixed, then no one will know what money is worth." And in the sense of having precise, prior knowledge of gold's exchange value, this is true – just as it is true for all other commodity exchange-values.

It is interesting to note that those who argue both that gold should be fixed in value and that gold is a constant store of value, hold a contradictory position in which one claim offsets the other. If gold is *already* a constant store of value, why should its "price" be fixed? And if it is necessary and desirable to fix the "price" of gold, then how can it be argued that gold has an intrinsically constant value? One need not fix that which is constant, and that which one *does* fix cannot be defined as constant. Such inconsistency pervades pro-gold literature today. In fact, what is being advocated is that gold should be a "fixed yardstick" – a *constant* "store of value" – by *government* directive, rather than a *stable* store of value by *market* "directive." Government determination to fix the purchasing power of the monetary unit ignores, contradicts and denies the law of the market.

Under a gold standard, no "official price" of gold would exist, hence no *official* store of value. But this does not mean that gold offers no *stability* of value. On the

contrary, gold has been chosen by men as a medium of exchange for over 2,500 years precisely *because* of its stability of value. But market-determined *stability* must be distinguished from government "guaranteed" *constancy*. A "guaranteed" value is neither necessary nor possible. All that is necessary is that those who print paper claims against gold specify the quantity of gold their paper claims represent and that they adhere to their promise to pay by not undermining their ability to convert their claims into gold – i.e., that they do not fraudulently increase their note issuance. The result would be a mild fluctuation of gold in relation to other commodities and monies.

Further, to advocate "pegging" gold to a given number of dollars would only amount to a fiction in today's inflationary climate, just as it would be a fiction to fix the price of any commodity. The free market must be allowed to determine the value of gold and all money substitutes, just as it determines the value of any and all commodities – by supply, consumer demand, and the cost of production. Just as there is no validity to the case for price controls, there is no validity to the case for exchange controls.

If men want security of purchasing power, they need not and should not look for government-guaranteed "security"; they can easily obtain security through the free market by including in all contracts that purchases, repayments, and the like be made in money adjusted to compensate for any changes in the value of money. Futures markets can be, and have been, established in any commodity, money, or money substitute that men show a desire to participate in. Yet rarely have men sought a guaranteed protection against loss.

Those who argue for an "official price" of gold can only hurt the case for a *free market* and therefore a gold standard. Price controls contradict a free market and therefore should be avoided. This includes control of all prices, including the "price" of money. Price controls have always been counter-productive and self-defeating. Worse, they establish the principle of government-provided "security" at the expense of individual freedom. To argue that an "official price" of gold is necessary and desirable is to argue that the free market is not.

The Devaluation Syndrome

The argument that there must be and/or should be a major devaluation of the dollar is an offshoot of the "official price" argument. It accepts all the premises of that

argument and therefore makes the same mistakes. But there are further implications of this argument that must be examined.

First, devaluation means a return to a monetary system of fixed exchange rates at a time when inflation makes it impossible to fix the value of anything, let alone the value of money. Bretton Woods is an eloquent example of what happens, given fixed exchange rates together with inflationary policies. It is not good enough to say, "Well, we shouldn't have inflation. Fixed exchange rates would work if government stopped printing money and adhered to the value of the monetary unit." The fact is that we *do* have inflation and may continue to have inflation for many years to come. The devaluation argument drops the matter out of context and reverses cause and effect by demanding a system of stable money and prices at a time when there is no reason to assume that this kind of stability is possible to the world.

Second, the devaluation argument delegates to the International Monetary Fund (IMF) the power to establish an international monetary system by *law*. Implicit in the devaluation argument is acceptance of the unfounded assumption offered by the IMF, that *this time* the devaluation and exchange rate realignment will be final. Many advocates of a gold standard unwittingly accept this assumption and thus believe that the way to achieve a gold standard is through a major devaluation which would re-establish a convertible gold dollar. This, they believe, is the way to eliminate inflation.

But in fact just the opposite is true. It is not a gold standard that will lead to the elimination of inflation; it is the elimination of inflation that will lead to a gold standard. To attempt to maintain an international gold standard through the IMF is impossible, given today's political context – we would only end up "going off gold" again with gold getting the blame for the resulting crisis. Allow individual gold ownership and allow the use of gold and an international gold standard will naturally evolve – when and *only* when government monetary policy becomes non-inflationary. Until then, gold and exchange rates of national monies should be left free to seek their own levels.

Fixed exchange rates will never (and should never) result from a formal international organization such as the IMF. The stability of exchange rates will be the result, not of government price-fixing, but of noninflationary adherence to the value of money – i.e., the elimination of legal sanctions that

permit any government agency or bank to fraudulently increase the money supply.

Under a gold standard in which all nations deal in weights of gold, exchange rates would necessarily be fixed by relative weight – not by law. No formal international monetary system would be necessary and no nation would be forced into, or prevented from, using other monies such as silver, paper, and so forth. A gold standard does not require exchange rates fixed by law. It assumes only that exchange rates will be fixed as a *result* of adherence to the definition of money. This means that if a monetary unit is defined as one ounce of gold, it will necessarily exchange for other monetary units at a precise ratio – *unless* the monetary unit is debased and misrepresented.

Thus there is no need for a formal, i.e., legal, international monetary system. All that is needed is the free market. The way back to a gold standard is not backward toward the Bretton Woods system, but forward toward a noninflationary system of freely self-adjusting exchange rates in terms of currencies and gold.

Third, the argument for devaluation is inconsistent with and contradicts another main argument propagated today by gold advocates: that the world is headed for runaway inflation and/or depression and deflation. If it can be reasonably assumed that prices may skyrocket or plunge, as most gold advocates contend, what sense does it make to advocate raising the "price" of gold and fixing exchange rates? If it is anticipated that prices will fluctuate dramatically, exchange rates need to be as flexible as possible to adjust quickly to men's changing economic evaluations, to price-cost factors, and to supply and demand conditions. It makes no sense at all to advocate fixing the "price" of gold, exchange rates (or anything else) when expectations are that prices will rise or fall dramatically. Such price controls are doomed to failure and can only result in dangerous economic and monetary distortions that will ultimately lead to the restriction of trade and to a lower standard of living for individuals.

The "Stop Printing Money" Argument

Inflation is the fraudulent increase in the supply of money and credit. It is both immoral and impractical to inflate. Eventually inflation might be outlawed, but not today – and not overnight. Both rational economic analysis and history verify the disastrous consequences possible given a dramatic increase or decrease in the nation's money stock.

In today's context, when the

whole of the American banking system and economy is geared toward inflationary finance, it is to no one's short-term or long-term interest to advocate that government should immediately stop printing money or that the inflationary arm of government – the Federal Reserve Board – should be abolished. For, taken literally, these well-meaning intentions could result in a nightmare of economic turmoil.

Rather, it should be stressed that the supply of fiat money should be slowly *reduced* and stabilized to correspond to increases in the gold supply, and that structural changes within the banking system should take place to facilitate elimination of the artificial and arbitrary nature of note issuance. This would reduce inflation and go a long way toward establishing the proper direction necessary for a return to gold.

The case against inflation can never be stated too often and its importance to a sound monetary system can never be overemphasized. Clearly the battle against inflation must be won before the return to a gold standard can be secure. But neither can the importance and necessity of a *gradual* return to gold be overemphasized.

Inflation certainly is immoral and economically impractical – but so is any proposal that aims to unleash unnecessary hardship on citizens in the name of "morality" and "practicality." The road back to a gold standard will be long and hard, but the road should be made as smooth as possible by intelligent guidance. Thus, advocates of a return to the gold standard should make clear their intentions: they advocate a reduction in the fraudulent increase of the money supply – which means a reduction to the point at which this increase is based on the production of a particular commodity – which means gradual departure from a government-regulated money supply and gradual return to a market-regulated money supply.

The "Demonetization" Threat

To demonetize usually means to remove a particular form of money from circulation. In this sense, gold has been demonetized in the U.S. for forty years. But this is not what many opponents of gold mean when they say gold should be "demonetized." They believe that, internationally, the *official* role of gold should be reduced and finally eliminated among governments; and that, nationally, gold should circulate like any other commodity. Gold advocates usually denounce this "intent to demonetize" as an attempt to undermine

the principle of the gold standard in order to more effectively pursue inflationary policies. This certainly may be the intention, but in today's context "demonetization" could be a very good thing for gold advocates and a very bad thing for the opponents of gold. Consider the following facts:

(1) Gold cannot by itself prevent inflation. If policy makers are determined to inflate, they will do so with or without gold. For the most part, the degree of inflation will depend on the lack of knowledge or irrationality of policy makers and can only be combated by the knowledge and rationality of a nation's citizens.

(2) Gold has been used by governments primarily to give an unwarranted status and credibility to their fiat money – a status and credibility that could not be maintained if gold were "demonetized" and allowed to circulate alongside the depreciating money of government.

(3) If it is true that today's governments are notoriously poor money managers, why entrust them with the majority of the world's gold? Would it not be put to better use managed by individuals?

Today we are farther from a gold standard than at any other time in our history. Policy makers have had decades to propagate their anti-gold theories. Most Americans have never owned gold. Thus, most Americans do not know why it should be money. It should be clear that men who do not know *why* gold should be money, will not demand it as such. Just as no government can prevent private ownership of gold if a majority of its citizens demand it, no minority group (such as the present advocates of gold) can force government or citizens to return to gold if they do not desire to.

The road back to a gold standard is an educational one; and it may take us as many decades to return to gold as it took to abandon it. With governments as the major holders of gold in the world today, citizens derive little or none of the benefits of gold. This prevents the kind of self-education that might occur given popular exposure to gold. Rather than campaigning against "demonetization" of gold, or for legal tender gold legislation, gold advocates should seek repeal of legal tender restrictions on the use of gold in payment of *private* debts.

In today's context, "demonetization" means to return gold to individuals. At a time when all the evidence points to the mismanagement of gold by governments, when it is plain that governments are using gold to their citizens' disadvantage, when there is no

reason to assume that policy makers desire or know how to return to a gold standard, why advocate a *government* program to return to gold? Government will be the *last* to realize the virtue and importance of gold as money.

Gold has no business being in the possession of such so-called money managers. Let governments have their fiat money and receive the full responsibility and blame for their note depreciation; let individuals regain governments' gold and rediscover the benefits of gold; make the policy makers' phrase, "gold is a barbarous relic," a *government* position; let both gold and fiat money circulate among men and we'll then see who possesses, determines, and controls money – individuals or governments.

"Demonetization" is no threat to Americans. Gold advocates should not *fear* it – they should *demand* it. The quickest and surest way back to a gold standard is not through the wasteland of *government* channels, but through *private* channels. A gold standard will evolve naturally when men are allowed to freely own and use gold, and when men desire to own and use gold as money.

On Context, Cause and Effect

It is important that one recognize just how far the educational process of this country must go before a return to the gold standard is possible. The gold standard requires monetary stability which means that all those government domestic programs now popularly advocated, and financed through inflation, must be opposed by the majority of U.S. citizens. Further, a gold standard requires *economic* stability, which means all of the malinvestments, overconsumption and misallocation of resources that have resulted from years of artificial, government-made "booms" and led to a multitude of economic distortions, must take their toll. This means that the anticipation of recessions, depressions, inflation or deflation must be behind Americans and reasonable expectations of economic stability and real growth clearly in sight. This kind of stability is a long way off – yet this is the kind of stability necessary before a gold standard can be established as a lasting monetary system. The gold standard could never last long without confidence in future monetary and economic stability. If those presently advocating gold ownership and the ownership of other investment hedges are doing so because they are convinced that the world is headed for great monetary and economic *in*stability, they should be equally convinced that it still is far too soon to be advocating a

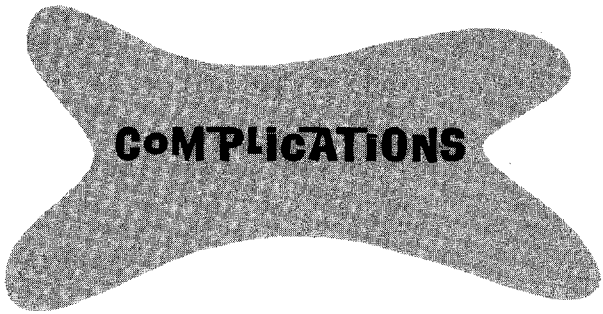
full return to the gold standard.

Even more premature is the attempt to submit *specific* proposals of exactly *how* to return to the gold standard. This problem must be seen in *context*. Even assuming that men desire to return to gold, any *specific* plans for implementing a return to gold will depend greatly on such factors as international monetary arrangements and conditions, domestic monetary and economic conditions, and the legal, financial and structural conditions of the banking system. These conditions change. Thus, a good proposal today may be sadly lacking a year from now. Until fundamental political changes occur in this country, it is unreasonable for anyone to assume he must address himself to the question of specifically how to return to a gold standard.

Rather, one should concern himself with eliminating those laws which are preventing men from using gold as money and attacking those policies which encourage government inflation. The legalization of gold and its use as money, an end to legal tender laws, the freedom of individuals to mint coins, and the elimination of laws that prevent banks from existing independently of the Federal Reserve System – all these are valid interim measures one can advocate. But the problem of how to return to a gold standard will be solved, for the most part, through solving more fundamental problems.

A full gold standard cannot return until economic stability returns; we cannot return to economic stability until we return to monetary stability. Monetary stability cannot be secured until the source, nature and immorality of inflation is exposed to and understood by Americans. But the evils of inflation cannot be understood until individuals grasp the meaning of money and the nature of property rights. And property rights will not be secured without a full understanding and defense of individual rights. Thus, nothing less than a return to laissez-faire capitalism and a free market will insure a return to and defense of the gold standard. Therefore, a massive and extensive educational task on the virtues of capitalism confronts all those who desire to effectively fight for a gold standard.

Men will want to return to gold only when they rediscover what money is, and men will not rediscover what money *is* until they understand *why* what they have is *not* money.



BRIAN SUMMERS

ONE of the notions commonly held by critics of the free enterprise system is that the more complex an economy becomes, the more government intervention is needed. If this assertion, which sounds perfectly natural to many people, is in fact true, then economic freedom in America is a relic of a simpler past. Let us examine this notion by considering what it means for an economy to be "complicated."

Let us begin by considering a free enterprise system. In such an economy capital is privately owned and the government restricts itself to protecting people from humanly initiated force and fraud. In this atmosphere of *laissez faire,* capitalists compete with one another for the consumer's dollar. A businessman cannot stand still for long in such a situation because the competition is always innovating. *Innovation!* This is the key to success in a free enterprise economy. The men who come up with and implement better ideas are the men who will show profits on their capital investments. Thus, every day entrepreneurs complicate things by marketing new products and modifications of old products. Who decides which entrepreneurs will succeed and which will fail? Who decrees that capital will constantly flow toward the men with better ideas? The consumers! They are the ones who, acting in their own interests, determine the capitalist's fate by purchasing his products or passing them by.

Thus do competing businessmen

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complicate the consumer's life by marketing an ever-increasing variety of products. It may take a little longer to walk through a modern shopping center than an old-time general store, but the consumer definitely benefits from the increased assortment of goods from which to freely choose. In fact, the free market is, if anything, more valuable to today's consumer than to his forebears. After all, the greater the selection from which to choose, the more valuable does freedom of choice become.

Progress and Change

In their eagerness to market new products, capitalists have not only complicated consumers' lives, but they have also complicated their own. They have increasingly turned to technology, specialization, division of labor, and trade to produce their goods. The complex economic relationships that arise are naturally best worked out by the people directly involved. They have the best understanding of their own problems, and they have the greatest incentive for efficiency. It is, after all, *their* capital that is at stake.

The complications that arise in a free enterprise system result from entrepreneurs' desire to better serve consumers and thereby earn a return on their time, effort, and capital investment. These complications are thus, directly or indirectly, beneficial to the buying public.

There are, however, politico-economic complications that prove detrimental to the consuming public. They appear when an economy moves away from *laissez faire,* as the American economy has done. These complications are, in fact, the very same government interventions that are supposed to "cure" an economy of its complexity!

As an example of how government interventions complicate rather than simplify economic affairs, let us consider a man in the construction business. In addition to all his other concerns, he must contend with such interventions as building codes, zoning ordinances, eminent domain, inflation (due to legal tender laws and Federal deficits), wage and price controls, rent controls, credit regulations, investment regulations, hiring "guidelines," laws that prohibit the hiring of nonunion workers (and the resulting strikes, slowdowns, featherbedding, increased labor costs, and sudden shortages of materials), minimum wage laws, overtime laws, licensing laws, blue laws, numerous taxes and quasi-taxes (income taxes, profits taxes, property taxes, sales taxes, social security

taxes, unemployment compensation taxes, workmen's compensation insurance premiums, disability insurance premiums, etc.), the mountain of paper work that the government requires of all businessmen and so on and on. All these complications hinder the businessman and thus create costs that must eventually be borne by the buying public.

Not only do government interventions create obstacles that the businessman must try to overcome, but they further complicate his plans by being in a constant state of flux. In making his calculations, the businessman must try to predict which way the laws will turn. Unfortunately, this is often very difficult, if not impossible, for not only must the entrepreneur deal with legislatively enacted (amended, repealed) laws, but he must also contend with arbitrary *ad hoc* administrative edicts. He never knows when the President (governor, mayor) will complicate his plans with a surprise executive order such as a sudden imposition (modification, removal) of wage and price controls.

Economic complications do not call for more government intervention. Rather, they call for increased freedom in which to work out the complex relationships that naturally arise in an advanced economy.

IDEAS ON LIBERTY

The Freedom To Fail

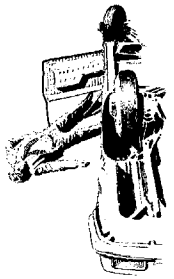
BECAUSE FAILURE is repugnant to a welfare-oriented society, we see continued efforts made to put a floor under everything.

This includes a spreading attempt to bolster up faltering business firms or even whole areas or industries by government grants, loans, subsidies, defense contracts, and the like.

Ironically, the greatest danger to our economic system today lies not in a direct attack on profits, but in a well-meaning effort to insure everyone against failure. To put it bluntly, this means subsidizing inefficiency; it is the antithesis of the effective operation of the profit motive.

We are in danger of losing one of our greatest freedoms: the freedom to fail. Profit and loss are two sides of the same coin; take away one side and you take away the whole coin. Our greatest economic asset is the right to invest private capital in the hope of making a profit, but at the risk of losing our shirt.

GEORGE CLINE SMITH



No-Fault Insurance Means No Moral Responsibility

RIDGWAY K. FOLEY, JR.

LEGAL SYSTEMS derived from the Anglo-American tradition historically impose liability upon a civil wrongdoer in a manner consistent with the premise that each man, being a morally responsible agent, carries with him the obligation to endure the consequences of his own choices and conduct. In legal parlance, a "tort" consists of a civil wrong done by one man (or association of men) to another, either intentionally or negligently. Thus, if I strike you with my fist (battery) or run over your foot unintentionally with my automobile (negligence), the law decrees that I should reimburse you, to the extent of your injury, in money damages because I was determined, by judge or jury,[1] to be *at fault* and responsible for my acts. This system, which has worked well historically, becomes senseless if men are viewed as creatures not exhibiting the ability to choose, if man is not a purposive, acting being. In invidious ways, the civil law reflects the statist tendency generally permeating society. This essay proposes to expose one aspect of this illiberal trend.

Introduction: Voluntary Means of Risk Distribution

Considering man's almost infinite capacity to inflict devastating civil injury upon his fellows, with catastrophic results to the victims and to the tortfeasor's (negligent actor's) pocketbook, it should come as no surprise that civilization has witnessed a profusion of risk distribution plans and techniques. Private insurance forms the most common and acceptable plan, from the point of view of a voluntarist society. For a stated premium, XYZ Insurance Company contracts with actor A

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that if A carelessly injures another individual while operating A's automobile, or any other motor vehicle, within a given period of time, XYZ will not only defend any lawsuits commenced by the injured party against A but also will pay any money judgment the victim might recover from A up to a stated limit. The type and terms of these contracts in a free society find limits only in the imagination of mankind. The XYZ Insurance Company stays in business and makes a profit by choosing its risks carefully, by prompt and fair administration of claims, and by institution of safe driver campaigns and periodic vehicle inspections. A gives up part of his stored-up value (capital) to XYZ in exchange for the promise of the latter to distribute the risk of A's momentary inadvertence among others in society. The victim appreciates the scheme for he is much less likely to come up with an uncollectible judgment against an insurance carrier compared to an individual actor whose assets may be limited.

1. *Incipient Revolution in Automobile Insurance and Tort Law*

These myriad private insurance plans serve a free society well. As in other enterprises, state intervention disrupts the logic and symmetry of liberty and causes dislocation of resources. In the negligence tort insurance field, state dislocation appears most often in the form of state-mandated insurance plans where (1) every actor is required to carry liability insurance and (2) every policy is required to contain certain governmentally imposed provisions. Such policies are often termed "no-fault" insurance or "basic protection" plans.

Society cannot rationally demand that every citizen carry insurance. The typical rationale asserts protection of potential victims as a reason. Yet destruction of freedom represents too high a price to pay for potentialities which may never come to pass. If an actor wishes to self-insure his own conduct, he ought not be denied this choice.

Likewise, the state should not fit each insurance policy issued onto a Procrustean bed. The beauty of private risk distribution, from its onset at Lloyds Coffee House in London, rests in its infinite variety and man's ability to tailor coverage to the needs of the day. Policies impelled by the state must be geared necessarily to the lowest common denominator, disparaging insured and victim alike. The actor loses because his freedom flies away and he holds a mandated policy not necessarily representative of his

needs and wants, for which he pays a premium beyond that required by the free market. The victim loses because he often finds tortfeasors covered only to the statutory minimum limits, limits which may not fully recompense him for his injuries.

The last decade bears witness to increased attempts to initiate compulsory automobile liability insurance on either state or federal governmental levels under the euphemism of "no-fault" insurance. The term misleads. These plans – none of the proponents seem able to agree with one another as to names, nature, or content – represent an immoral and coercive inroad into one of the few remaining citadels of free choice. The plans, by whatever label, are *no responsibility* insurance plans and should not be dignified by any more prestigious label.

Because of the hodge-podge of proffered plans, "no-fault" offers a difficult test of definitional and analytical ability. Simplified, the system would require each individual to carry liability insurance which would reimburse the insured in the event of injury by another up to a specified amount for out-of-pocket expenses (e.g., medical bills, drugs, lost wages) and (under some plans) a limited specified amount for "pain and suffering" and future loss. No recovery could be effected from the negligent actor, no matter how heinous or careless his conduct, no matter how much harm he inflicted; tort actions against a wrongdoer would be abolished. Under the present system, the tort victim may recover both his out-of-pocket losses and his general damages (pain and suffering, future loss) without limit from one who causes him harm.

2. *Inappropriate Reasons Advanced for "No-Fault"*

This essay focuses upon the myriad "no-fault" plans offered but the focus rests upon one aspect most often ignored – the philosophical or moral reason disparaging this intrusion into personal freedom. Nevertheless, at the genesis it seems appropriate to devote cursory attention to some of the reasons most commonly advanced in support of "no-fault" insurance plans.[2]

(A) *Unclog the Court:* Proponents of no-fault argue that automobile injury litigation clogs the courts, resulting in unconscionable delays, and that a new and speedy system is required. This claim lacks veracity. Overcrowding generally results from inefficient administration of justice, lazy judges, delaying counsel, and the great volume of nonautomobile

claims including Workmen's Compensation appeals, criminal cases and the like. About 90 per cent of all automobile claims are settled without suit and less than 2 per cent proceed to verdict; approximately 15 per cent of the court's time is concerned with vehicle litigation.[3] Antitrust cases and protracted criminal proceedings eat up much greater amounts of juridical time. Moreover, substitution of no-fault does not guarantee the end of controversy – victims will still contest about existence and extent of coverage, much as has occurred in Workmen's Compensation litigation[4] in the past half century. Compensation proceedings are normally contested outside the regular court system (with only appeals to the courts remaining) but the iceberg below the waterline manifests a plethora of hearing officers, evaluators, and investigative personnel, quite as tedious, slow, and cumbersome a system as the worst courts of general jurisdiction. One need only look to Multnomah County, Oregon, serving a metropolitan area of approximately one million persons, to put the lie to this argument: the average length of time between filing a case and time of trial rarely exceeds 4 or 5 months. Speedy justice can be done without jarring the system or denigrating individual liberty.

(B) *Insurance Rates Must Be Reduced:* Proponents claim that rising insurance premiums can be lowered by no-fault plans. Since cost increases largely reflect a governmental increase in the money supply and increased jury awards which reflect, in turn, the inflationary trend, this reason lacks merit.

Furthermore, states with modified no-fault plans experience no dramatic cost reduction. Massachusetts, the first state to adopt such a scheme, "has suffered a severe economic recession as a result of this socialization of automobile liability insurance" according to Kathleen Ryan Dacey, Assistant District Attorney for Suffolk County.[5] Moreover, the Massachusetts experience demonstrates once again that "there ain't no such thing as a free lunch": the burden has been shifted and costs continue to skyrocket concomitant with increased losses and governmentally sponsored inflation. Losses may be shifted between *kinds* of insurance carriers (e.g., from auto liability insurers to health and accident insurers) but *someone* pays the piper under no-fault.[6]

(C) *Fault System Discriminates Between Victims:* Proponents contend that in roughly equivalent cases, some claimants recover substantial payments, while others re-

ceive little or nothing. Yet this fact, if true, does not justify trash-canning a system which respects moral choice and has worked well for decades. The entire premise of this argument fails for, properly viewed, the cases cannot be roughly equivalent or they would have been treated as such. The parties, or the judge, or the jury, decided that case A deserved one treatment and case B deserved another. The charm of a flexible system lies in its adaptability and the fact that it works well in a majority of situations.

(D) *The Lawyers Get Rich in the Fault System:* Proponents claim that most claimants' cases in the fault milieu proceed under a contingent fee arrangement where the lawyer takes a percentage of the award if successful and nothing if the case is lost. Actually, the plaintiff's lawyer may suffer an out-of-pocket loss when he advances costs for deposition reporters and expert witnesses for an impecunious client.[7]

More saliently, the contingent-fee system effectively opens the door for claimants to participate in the system even if they lack funds. Absent such a plan, some injured persons would be forced to deal with their adversaries *sans* lawyers. Here, they diffuse the risk of loss by employing a professional who takes part of the risk. And, almost every lawyer around (and there are a great many around these days) would be more than happy to accept employment in bodily injury cases on a straight-time basis where the client pays the lawyer, win or lose, on an hourly basis for the time actually expended on his behalf.

(E) *Is the Fault System Inefficient?* Proponents argue that the inefficiency and high overhead of the fault sytem costs too much, and too little of the claim dollar filters down for the victim.

In the first place, the same can be said for much more complex kinds of legal claims: security law violations, professional malpractice, products liability claims. Why single out automobile bodily injury claims for different treatment?

In the second place, recorded history does not provide a single example of a governmental institution which operated a more efficient and less costly operation than a private concern; there is no need to expect lightning to strike the automobile insurance field. Recur to Workmen's Compensation claims: any fair analysis over the years will reveal that the overhead has not decreased with the imposition of the government system.

3. *Advantage of the Present System.*[8]

An individual may seek insurance or not as he sees fit. No-fault would negate this freedom of choice.

An injured party may recover for his or her total loss – for all expenses, for permanent injuries, for disfigurement, for grief. No-fault would impose a rigid and limited recovery.

Fault concepts recompense all persons whether employed or not. One who is not working may recover little or nothing under many no-fault plans; the retiree, the housewife, the college student, all are penalized.

The current system tends to charge premiums and distribute risk based on likelihood of harm. No-fault not only encourages bad driving and negligent conduct but also shifts the bad driver's cost to the good driver. It discriminates against commercial vehicle owners, against the lower salaried persons who cannot afford maximum insurance coverage, and against those producers who earn more than the maximum. In short, it discriminates against all who fail to fit Procrustes' bed.

Today, one can present his claim in court, favored with a constitutional right to trial by jury. No-fault would take away the right to have one's peers decide blameworthiness.

4. *Retention of the Fault Concept — A Moral Reason*

The reasons advanced for no-fault will not withstand rigorous scrutiny. A system which has withstood the test of time, one which serves a civilization well in most cases, should not be summarily discarded. Yet beyond these reasons exists a much more compelling rationale impelling retention of the present system of personal responsibility – a moral reason which supplies the justification for placing the burden upon the actor. The remainder of this article considers various aspects of this rationale.

As discussed at the outset, a plethora of currently emerging plans seek to revolutionize the settlement of automobile accident claims and, incidentally, to ravage traditional tort concepts. These suggestions vary in detail but are linked by two common denominators: a drastic alteration of tort law by substitution of liability without fault (enterprise liability), and imposition of new, involuntary methods of doing business upon the insurance industry.

While the panoply proffered by the theorists of change contain many proposals which are beyond the scope of this paper (alteration of the doctrine of contributory negligence, change of the collateral source rule, compulsory "ba-

sic protection" insurance with optional overlays for additional protection are common incidents) literature in the field abounds for the interested reader.[9]

5. *Check Your Premises: Beware of Professors Bearing Plans*

The concept of fault must be retained; it would be folly to alter the foundations of our tort system. The attack levied is nothing less than an assault upon the fundamental axioms of individual liberty.

The fault system ultimately rests upon the tenet of individual responsibility for personal action. If an individual is capable of self-determination, and is limited only by his finiteness and the consequences of his own volition, then it follows that the results of human conduct must be visited upon the actor. If one fails to conduct his activities carefully, and as a result injures another, the negligent actor should reimburse the victim for his loss.

These, then are the premises of the fault system of *ex delicto* jurisprudence: man is a thinking, acting, creative being.[10] Since no sound basis exists to exalt one man's judgment over that of another where the choice pertains to the affairs of the latter, fairness and common sense demand that, as far as possible, each person be allowed to determine his own destiny. To this end, man reaches his highest level of creativity and productivity when his creative processes are unhampered by external restraints imposed by other men, acting singly or cooperatively. The free man, however, must bear the burden of his liberty, by accepting the legal, as well as the axiological, burden for his conduct. Self-determination requires self-restraint and personal responsibility.[11]

Oddly, the casualty insurance industry itself is rent asunder by countervailing tenets and inharmonious plans for change, specifically in the field of automobile liability insurance protection.[12] Elimination of the fault concept and substitution of compulsory state-sanctioned insurance will destroy an industry which must ultimately thrive or wither upon the basic precepts of private property, limited government, free enterprise and individual responsibility. A voluntarist system permits the insurer to utilize its ingenuity in private risk diffusion by encouraging tailored coverage to fit specific individual needs.

6. *Limitations Inherent and Apparent*

Two inquiries stand forth: (1) Does any justification exist for treating automobile accident claims differently from other civil

injury claims? (2) Would removal of the fault doctrine also obviate deterrence to irresponsible conduct?

Empirical justification was sought for support or assault on these propositions. The undertaking proved fruitless, although there is general evidence available that legal sanctions *do* affect human behavior in the "desired" (coerced) direction.[13] One searches in vain for reports, studies, charts, graphs, statistics or analyses which "prove" that sanctions under the fault system deter misconduct or that automobile accident cases merit disparate treatment from other accidents.

Moreover, a review of the leading proponents of enterprise liability and "basic insurance protection" reveals a similar lack of usable empirical data; the advocates of change are no better prepared to support their contentions than are defenders of the faith.

As a result, each advocate must assert his proposition and curry support by arguments. Included in the rationale are deductions emanating from *assumed* empirical proof of the underlying pillars of both doctrine and anti-doctrine.

For example, Flemming James, Jr., denigrates personal blameworthiness in the field of accidents.[14] However, the psychological studies cited in support of his grandiose comments are limited in value, diluted by age, and subject to criticism as to their underlying premises.[15]

In final analysis, the issues presented may not lend themselves to "proof" under our present state of knowledge. But that does not inhibit a choice, for the opposing arguments can be analyzed with a view to determine which empirical *assumptions* most nearly accord with reality.[16]

7. Differential Treatment Justified?

No sound reason exists for fragmenting tort law into accident categories.

If negligence "torts" are posited as conduct of the same generic type, then no logical reason appears for segregation and discrimination between the negligent automobile operator and the negligent homeowner who fails to maintain his back steps.

Certainly, as Prosser has indicated, definition and classification of "torts" is not so simple; indeed, it might be less complicated to compartmentalize the various torts as fields of law instead of parts of the same field.[17] Notwithstanding this insight, there is no substantial difference between *negligence* torts; there is no valid reason to distinguish between negligent operation of an automobile, negligent omission to repair the

back steps, and negligent ignition of a neighbor's hay field.

If there is no substantial distinction between various kinds of negligent conduct, then each tortfeasor should be treated identically, and not favored or disfavored merely because he happens to drive an automobile. Equal treatment of tortfeasors and victims in negligence cases is demanded if the statement "we are a government of laws, not of men" is more than a mere shibboleth, and if "equal protection of the laws" possesses any substantive meaning.

From the victim's perspective, there is nothing inherently different whether he is injured by auto, by tripping down some stairs, or by a negligently caused conflagration. If a tortfeasor's conduct is no more nor less reprehensible and the opportunity for harm to the victim is substantially identical, no logical reason appears for discriminatory treatment.

No reason exists supporting differentiation between automobile accidents and other claims. There is no difference meriting diverse treatment from the perspective of victim or tortfeasor. Indeed, it seems unjust and nonegalitarian to accord different sanctions under different rules based only on the instrumentality of the accident.

Nonetheless, there have been proponents of separatism. The advocates of the Keeton-O'Connell-type plans, in various guises, fit this mold. One of the more candid writers is Professor Flemming, who advocates retention of the present system for the "residuary area of injury incidental to ordinary, commonplace activities."[18] In this posture he aligns himself with Professor Ehrenzweig, who favors continued conventional negligence rules for "backyard cases" involving little people.[19]

No attempt will be made at this juncture to delineate the various social insurance plans, since each varies with the program of the author. Generally, the *avant-garde* tendency is to carve out particular areas for specific rules, and to leave a residual area for the "little people" to be governed by "conventional" (semantically unclear) negligence concepts. Among the areas most commonly segregated for special attention are automobile accident claims and product liability actions.

What basis exists for specifying that products liability or automobile accident claims shall constitute the areas for blanket "compensation without fault" treatment? In all substantial premises, the justification is identical to the rationale of "enterprise liability." The arguments advanced (includ-

ing appropriate variations) are nothing less than the juridical equivalent of the fuzzy political thinking which dominates statist political philosophies.

In brief, the enterprise liability proponents suggest that in specified categories (e.g., auto accident and products liability) the victim is unable to protect himself (a questionable premise considering the availability of individual insurance plans[20] and the ability of the individual to avoid dangerous situations), and the enterprise inevitably takes its toll of human sacrifices; therefore, having made the determination that it is a socially utilitarian enterprise with benefits accruing to the enterprise and "society," the enterprise or society (i.e., "the not-at-fault portions of society who pay taxes") should foot the bill for the unfortunate victim. Large enterprises are able to diffuse losses into relatively palatable chunks, through liability insurance or because of mere size. The cost is allocated to the overhead of the business (but the advocates forget conveniently that the ultimate payment is made by the consumer). The innocent victim [21] may have to seek welfare or leave his family destitute through no fault of his own unless the enterprise or society pays him. Isn't it better that someone else (or many someone elses) pick up $5 (or $50, or $5,000) to ameliorate his loss? Let's all distribute the risk (let's all soak the rich).

The mind boggles at the fallacies of enterprise liability. A complete dissection of the deception requires effort beyond the temporal and spatial limitations of the treatise.[22] Some of the more flagrant trickeries in "enterprise liability" are obvious:

(1) Is the victim "innocent"? Is it not just as likely that in a given number of cases the injured party is at least partially at fault? Perhaps he was participating in a dangerous but socially useful activity too; shouldn't he pay for his loss because it is part of his "overhead" and should be economically allocated? In only a few cases are we able to make the assumption that the claimant is truly innocent; only in these cases is the term "victim" semantically valid. In the disputed case, this very value judgment may only occur after the fact of trial.

(2) If the loss is to be diffused, who decides the mode of diffusion? The Court? The legislature? The payor or the recipient? Who has the moral right to decide that C should pay A's loss: A, B, or C? or ABC? (Notice that ABC can outvote C.)

(3) Is it true that those who benefit from an industry would bear the loss under any or all of

the plans suggested for risk diffusion? It is much more likely, given the current scheme of things, that the individuals who bear the loss will be people who have little or no contact with the particular industry, who are faultless in their own conduct, who merely wish to be left alone, and who happen to possess the resources to pay the tab (and lack effective elective voice to prevent plunder of their property). The looter philosophy fails to discern this particular evil which is apparent and inherent in any kind of risk adjusting or social engineering.

Underlying all statist postulates and proposals is the arrogant assumption that A can better live B's life for B than B can, and the concomitant disregard for the fact that the user benefits most from increased productivity and efficient use of natural resources.

(4) Is it not more consonant with freedom, with the maximization of individual choice and individual responsibility, to permit variation according to individual tastes? There are available or possible, in infinite variety, private insurance plans for personal private protection of the "victim."[23] He can bond with others and seek protection from a group insurer (e.g., major medical coverage, accident and health insurance, disability coverage, income replacement insurance); he can secure private individual health, accident, disability, life and other types of coverage in infinite combinations and kinds. If insurance is not presently available in the desired form, it can be created in a free society. If protection of the individual and his family are important, shouldn't the individual protect his own instead of seeking state-imposed protection? The sole reason for exhorting state activity in *any* case is simply monetary (cost shifting): A wants the state to act so that A (or B for whom A is concerned) need not pay the cost; instead C will pay most of the cost. It is unjust to penalize the provident; a free system allows free choice to insure or not to insure. Under a compulsory system, payment by the provident tends to benefit the improvident, or those persons who choose not to commit part of their assets to protective devices.

(5) Enterprise liability conveniently overlooks economic reality. As a major premise, the advocates assert that the entrepreneur gains a profit from his enterprise and must pay for the human loss factor involved. A profit motive *per se* is not evil. The individual engaged in the industry and the consuming public also gain from the enterprise, often more than

the entrepreneur. Any other conclusion is either intellectually dishonest or dismally stupid. There is a certain risk in just living and there is no reason to diffuse *that* risk. The end result of a nationalization scheme would be a distinctly lowered standard of living which would adversely affect the "innocent victims" in their roles as consumer, employee, and inhabitant of the country.[24].

The fault system does not guarantee compensation to all accident victims; it was never intended to effect that result. Each citizen must bear the risk of some loss, without shifting it to third parties. Man can properly diffuse losses by contract or voluntary engagement; he ought not be able to mulct his blameless neighbor unless that neighbor specifically caused the consequences by socially undesirable actions.

The success of the segregation attempt in singling out automobile accident claims for basic ("socialistic" or "nationally imposed") protection, must rise or fall upon the enterprise liability concept in one of its guises. Enterprise liability does not accord with good morals, and fails to consider relevant empirical assumptions which can be perceived by any observant individual possessing a modicum of common sense. Hence, the doctrine is empty.

The retention of a traditional negligence system of identical substance for all types of claims is recommended primarily by the egalitarian concept that each person engaging in substantially similar conduct should, for reasons of justice, be treated similarly. No sound reason exists to deviate from this norm.

8. *The Deterrent Factor*

Fault-based tort liability deters dangerous, irresponsible and socially undesirable conduct. Adoption of a basic protection plan for automobile claims will delete the fault factor from this segment of tort law. Obviation of the fault concept will thereby attenuate or wholly destroy the deterrent factor. Deterrence is an admirable and valid goal of civil jurisprudence and should not be destroyed.

These assertions, in simple terms, state the fundamental premises of the traditional tort doctrine. If each statement is true, then it follows that the basic-protection automobile insurance plans should be dismissed out of hand.

Each premise has been challenged by articulate purveyors of the liability-without-fault doctrine. Deterrence has been downgraded or ignored as a reason for imposing responsibility upon an individual for his conduct.

First, what is the position of the advocate of the fault system, stated in simple terms? It is truly no more than an *a priori* tenet that reward and punishment meted out by a system of liability based upon fault serve (1) to deter the careless actor from acting carelessly again, and (2) to exemplify the pain attendant to carelessness so as to deter others within the ambit of knowledge from doing the same or similar act.[25]

If I know that it is foolhardy to drive an automobile through the streets of a metropolitan area during business hours at 80 miles an hour, and if I further know that in so conducting myself I hold in my hands the lives and properties of others, as a moral man I may channel my conduct, thwart my own desires and slow my speed to a reasonable pace. But moral suasion may not be enough. If I further know that I am responsible to other parties whose lives, liberties and properties are damaged or destroyed by my unreasonable conduct, and that the law will sanction their claims against me, hopefully I will be persuaded to act more prudently. Moreover, my neighbor, who might like to join in a race through the center of town, will also be dissuaded of the wisdom of such an endeavor if he sees that I am forced to pay a strict penalty to a person who is injured by my misbehavior.

In order for deterrence to work satisfactorily, it is necessary (1) that the standard be clearly specified, if not at the penumbra then at least at the core, and (2) that the penalty be sufficiently severe in contradistinction to the pleasure thwarted so that the ordinary human actor be disimbued with socially irresponsible action. Two further implicit criteria exist, fundamental to all legal order: (3) the conduct deterred must be truly socially irresponsible and dangerous to the activities and lives of other persons—whimsical and useless laws are rarely obeyed, and disregard for law flows naturally from an overabundance of regulations; a few laws, reasonably based and strictly enforced, are generally sufficient for the ordering of society; (4) the standard to be obeyed must be known.[26]

At present, no studies have been uncovered which factually prove or disprove the primary premise approving the value of deterrence. Little empirical data exists supporting abstract propositions. Moreover, any test, survey, or statistic would be subject to criticism as to, *inter alia*, sampling technique and coverage.

The second premise appears satisfied. Admittedly, the third premise (a proliferation of laws) has

been savaged. Sufficient knowledge of the standard exists to satisfy the fourth premise.

As to the first premise, it may be posited generally that it is just that the penalty extracted from the tortfeasor equal the amount of money necessary to compensate the injured party for his damages. The penalty in this respect does not appear untoward and should be sufficient in the ordinary instance to deter. In criminal law, deterrence is not achieved by $50 fines.[27] But in civil law, where the actor knows that if his fault causes harm he is liable to the extent of the loss (a sliding scale based upon the foreseeable consequences of his conduct) he is more likely to take adequate precautions. The standard of conduct to which the actor is held may be subject to some salutary challenge, but it encompasses the only workable and just criterion available, given the existent state of man's knowledge.

Previous allusion has been made to the difficulty of marshalling scientific support for a moral concept.[28] Whether or not the fault doctrine provides a direct deterrent effect is a matter of much speculation but little proof.[29]

While an individual may not necessarily become a more prudent driver solely because he fears the consequences of his negligence, he often purchases insurance to protect himself against the contingency of a loss or lawsuit. By this type of purchase, drivers voluntarily provide a pool out of which an injured party can recover. This type of compensation fund, more consonant with the scheme of freedom, exists without the coercive force of the state's further meddling in man's affairs (as would neecssarily occur in the basic protection cabal).

Initially, the proponents of the doctrine of basic protection or liability without fault ignore the fact that their type of insurance protection could be purchased by any ready buyer in an open market without state compulsion. Coverage could be tailored to individual needs.[30]

Harper and James devote considerable time to the problem; in fact, their eleventh chapter is entitled "The Accident Problem and Its Solution."[31] Without benefit of citation or proof, they charge that the traditional fault system causes court congestion.[32] It is unfair and invalid to assign the fault concept in automobile claims as the *cause* of court congestion.[33]

Accident proneness also has been proved to the satisfaction of Harper and James.[34] In other words, a few individuals tend to have a higher percentage of acci-

dents than random sampling would demand. In brief, the authors conclude that there are many individual causes of accidents, e.g., stress, fatigue, mental or physical inability to reach a careful standard, which are not subject to the deterrent effect of juridical penalties. Once again this contention lacks proof and validity. Reason suggests contrary assumptions and arguments, and empirical proof is nonexistent.[35]

Further, the proponents of liability without fault are fond of asserting that the fault doctrine worked well in the early nineteenth century and fit the concept of individualistic morality, as if this concept were unfitted for 1973, and as if the two centuries differed so greatly in this regard.[36]

Advocates of liability without fault assault deterrence on several counts.

First, it is urged that the objective standard of the reasonably prudent individual has attenuated the deterrent factor.[37] Many people are assertedly incapable of achieving the status of the "reasonable man"; yet the law calls upon them to act in a manner foreign to their physical, physiological and mental abilities. Application of a subjective standard might deter, but one is undeterred if he is held to a standard with which he cannot comply.

The appropriate rebuttal to this argument is to examine the validity of its premises. Accuracy may exist in a small number of cases. But no one can prove or disprove the ability or inability of the vast majority of the American population to achieve an objective standard of care. The standard is a fluid and shifting one. And does not Professor James miss the point, that the ameliorative effects of the fact finder upon one who "cannot" reach the standard effectively obviate this argument?

Second, Professor James contends that legal fault has already been diluted, and the deterrent factor lessened by the very nature of the jury system.[38] This, too, is an unprovable proposition. It presupposes that juries always assume that defendants in automobile liability cases are insured, that the insurance exists for the purpose of compensating the victim, and therefore the standard of fault is meaningless.[39] The assumption lacks both support and validity. Acceptance of the proposition requires a determination that jurors willfully violate their oath; no practicing lawyer believes that this occurs often.

Third, it is claimed that the deterrent effect of fault has been severely diluted by the advent of the vicarious liability.[40] Those who

pay are not the tortfeasors; instead they are the owner of the business, the employer of the negligent servant, or the insurance company which bargains to protect the harm-causing driver. To deter A, A must be punished if he does not act in accord with the standards, and A is hardly punished if B pays for A's conduct.

The argument appeals superficially.[41] However, the assertion oversimplifies the fact. The realities of excess insurance problems which face the practicing attorney belie the validity of the contention. For example, in Oregon, minimum insurance limits have long been $5,000 each person, $10,000 each accident; in 1968 they were raised to $10,000 each person, $20,000 each accident. Yet many serious accident cases are filed each year where the prayer far exceeds minimum limits although many drivers purchase only that required coverage. Certainly there is an exposure to harm and a penalty to the "true tortfeasor" where the prayer or the recovery, or both, exceed available insurance protection. If nothing more, there are additional costs and fees incurred by the driver who secures independent legal counsel to protect his uninsured interest.

Moreover, automobile insurance rates are partially based upon driving records and prior adherence to standards of care. The careless driver will pay a premium proportionately higher than the careful driver in most cases under the fault system. Merit driving rating plans applied by many industries deter, as does the specter of the assigned-risk pool. Even so strong an advocate of enterprise liability as John G. Flemming recognizes the existence of this type of deterrent.[42] He admits that premiums based upon accident rates may well deter, the same as potential loss of assets, loss of driving or automobile privileges, and the suggestions of the accident-prevention teams sent forth by insurance companies.

Moreover, *inconvenience* deters. The allegedly negligent driver is greatly inconvenienced when he is sued, even if the prayer is less than his policy limits, because the tortfeasor must be a named party to the action, he may be deposed, and he may spend days in court in the uncomfortable position of party and witness. As a consequence, he will lose free time or wages, and all in all will find his daily routine disrupted.

Allied with this last argument is the contention that, like vicarious liability, the advent of widespread liability insurance has weakened the deterrent factor because the true tortfeasor does not bear the risk of loss. The forego-

ing rebuttal applies with equal fervor here. Furthermore, it is unacceptable to assume that normal individuals alter driving patterns from good to wicked because they contract with a third party to pass on the financial burden.

Fourth, proponents of the "nondeterrence" position assert "enterprise liability" arguments to advance their position.[43] For example, both James and Calabresi contend that appropriate economic resource allocation demands that the industry bear the cost of harm as a portion of overhead. This sophist argument fails upon analysis of the major premises: the enterprise does not cause the harm – human actors cause the harm because of their conduct, their failure to act reasonably. The resource allocation assertion begs the question and assumes validity of social engineering. Moreover, it is unmeritorious to say that victims of strict liability are "ill-equipped" to protect themselves.[44] Who can better determine the desirability of a specific course of conduct than the actor?

Fifth, the liability-without-fault claque claims, curiously, that the fault system is ineffectual because there is no *necessary* relation between the extent of fault and the extent of loss.[45] This contention really is not a nondeterrent argument (unless it is intended to mean that one will think the law unjust and therefore not be deterred if he is forced to pay a large amount for a small fault); actually it is an axiological argument, and a faulty one at that. The fault doctrine can be defended on the basic tenet that it is just that a person bear the consequences of his own acts; no more, no less.

Oddly enough, the authors of the Keeton-O'Connell plan are not so likely to dismiss deterrence with a mere passing glance. Instead they tend to follow Professor Calabresi's distinction between general and specific deterrence.[46] Keeton, however, feels that deterrence is diluted because most people will not admit fault, even to themselves.[47] The practicing lawyer perceives a contrary tendency; many people, because of the sympathetic nature of human character, admit fault where none really exists.

The theoretical bases of the entire subject of deterrence are analyzed by Glanville Williams.[48] Although he contends that the deterrent theory does not provide a perfect rationale for a fault-based tort concept,[49] Williams recognizes the existence of deterrence as at least a partial premise. For example, he contends that employers

now take numerous precautions for employee safety unknown prior to the Factory Acts.[50] Is this not a type of deterrence?

9. *Liability Without Fault Means Liability Without Responsibility*

Fault is fundamental to freedom. Retention of traditional jurisprudential concepts exhorts man to be more ordered, more careful of his voluntary actions, and to regard his neighbor when planning conduct. Imposition of individual responsibility upon the actor to pay the price of careless conduct tends to demand compliance with reasonable rules of care and thus promote harmony in a crowded world. No reason exists to fragment tort law and discriminate against the automobile accident case. Acceptance of liability without fault in the arena of automobile accident litigation can cure no evil – only produce more ills.

• FOOTNOTES •

1 The administration of common justice – the settlement of civil disputes between members of society – forms one of the restricted areas where the state may act justly, where governmental coercive force may be properly applied. For a discussion of the appropriate forms and uses of law consonant with a libertarian society see, Foley, Ridgway K., Jr., "Individual Liberty and the Rule of Law" 21 *Freeman* No. 6, 357-378 (June 1971), and 7 *Will. L. J.* 396-418 (Dec. 1971).

2 Several of these reasons appear in different guises and, where appropriate, comment will be directed to them again later in this article.

3 Obviously, these figures will vary from county to county.

See, Hodash, Frederic, "Auto Compensation Plans and the Claims Man," 549 *Insurance L. J.* 816 (1968) Experience with maritime and employment compensation schemes reveals no real benefit to the victim nor corresponding reduction in overhead and none is to be anticipated in the automobile accident arena.

A general critique of specific basic protection shortcomings may be found in Knepper, William E., "Alimony for Accident Victims?" 15 *Def. L. J.* 513 (1966). See also DRI News Release January 9, 1969: "DRI urges investigation of lost savings claims by no-fault proponents."

4 Workmen's Compensation Law offers a statist species of liability without fault. A workman injured on the job must be paid a limited amount for lost wages, medical expenses, and any permanent or temporary disability by his employer (or the employer's insurer) without regard to fault causing the accident. Even if the employee foolishly causes his own injury, his employer suffers the ultimate loss.

5 See 18 *American Bar News* No. 3, p. 7 (March 1973). See also *Trial Magazine* (April 1972).

6 No comprehensive treatment of the Massachusetts rule is intended; that state is selected merely because it provided the harbinger of no-fault plans.

7 For a critique of no-fault from the plaintiffs' bar, see "No-Fault Insurance – A Primer," American Trial Lawyers Association, Cambridge, Massachusetts; this brochure answers the several arguments advanced in favor of no-fault in summary fashion.

The defense bar has also published a monograph which considers several of the problems in modern tort law and recommends reforms. See, "Responsible

Reform — An Update" (The Defense Research Institute, Inc., Milwaukee, Wisconsin) Vol. 1972 (No. 3). While not directly concerned with no-fault insurance, this treatise offers some interesting comments relating to the questions posed here.

8 Reasons for the retention of fault in our juridical system are touched upon only cursorily in the text. They may be classified as axiological, praxeological, economic, political, pragmatic, and historical. Perhaps the most cogent rationale is essentially philosophic or moral. See, e.g., Williams, Glanville, "The Aims of the Law of Tort," 4 *Current Leg. Prob.* 137 (1951) *passim.* It is noteworthy that one of the severest critics of the traditional system admits that the concept worked well in the nineteenth century, but is somehow inexplicably unsuited for today. See, James, Flemming, Jr., "An Evaluation of the Fault Concept," 32 *Tenn. L. Rev.*, 394 *et seq.* (1965). Perhaps Professor James is a victim of the "golden century syndrome" which erroneously presupposes a perfect condition of liberty existent in the Jacksonian United States. See Note 1, *op. cit.*

9 Few controversies have provided such a fertile field, attracting all manner of commentators. A mere bibliography would overextend this treatise. The efficient force, if not the harbinger of basic protectionism, is the work of Professors Keeton and O'Connell, which reached its apex in Keeton, Robert E. & O'Connell, Jeffrey, *Basic Protection for the Traffic Victim,* (Little, Brown & Company, 1965). No enduring critique is intended of the Keeton-O'Connell plan or, indeed, of any of the several other harangues which alternately mock or plagiarize "basic protection." Different positions are displayed in such articles as: Knepper, William E., "Alimony for Accident Victims?" 15 *Def. L. J.* 513 (1966); Hold, William E., "Critique of Basic Protection for the Traffic Victim — The Keeton-O'Connell Proposal," 541 *Insurance Law Journal* 73 (Feb. 1968); Kluwin, John A., "Analysis of Criticisms of the Fault System" 534 *Insurance Law Journal* 389 (July 1967); and Vondra, M. Lyn, "A Revised Plan for Protective Automobile Insurance," 553 *Insurance Law Journal* 7 (Jan. 1969). Numerous articles have appeared in the *American Bar Association Journal,* e.g., "New Hope for Concensus in the Automobile Injury Impasse," 52 *A.B.A.J.* 533 (1966); "Control of the Drinking Driver: Science Challenges Legal Creativity," 54 *A.B.A.J.* 555 (1968); "Basic Protection: A Rebuttal to Its Critics," 53 *A.B.A.J.* 633 (1967); "Basic Protection and Court Congestion," 53 *A.B.A.J.* 926 (1966).

See also, Keeton, Robert E. & O'Connell, Jeffrey, "Alternative Paths Toward Nonfault Automobile Insurance," 585 *Insurance Law Journal* 517 (Oct. 1971), Quinn, Neil K. & Allen, Fredrick W., "Analysis of the Illinois Plan: Provision, Practice and Problem," 588 *Insurance Law Journal* (Jan. 1972); Kornblum, Guy O., "No-Fault Automobile Insurance — Comparison of the State Plans and the Uniform Act," 8 *The Forum* 175 (No. 2, Winter 1972); Rokes, Willis Park, *No-Fault Insurance* (Insurance Press, Inc., Santa Monica, California 1971).

An interesting series of articles appears in the August 1968 issue of the *Insurance Law Journal*: Blum, Walter T. & Kalven, Harry, Jr., "A Stopgap Plan for Compensating Auto Accident Victims," 547 *Insurance L. J.* 661 (August 1968); Pretze, Paul W., "The Adversary System is Challenged," 547 *Insurance L. J.* 671 (Aug. 1968); and Logan, Ben H., "Insure the Driver," 547 *Insurance L. J.* 682 (Aug. 1968). This list is neither comprehensive nor exhaustive; it is intended to display several points of departure which, together with the specific citations herein, will provide an overview of the issues raised and answers offered.

10 See, e.g., von Mises, Ludwig, *Human Action* (3d rev. ed., Henry Regnery Company, 1966) *passim.*

11 See my article, Note 1, *op. cit.*; see also Foley, Ridgway K., Jr., "The Rationale for Liberty" 23 *Freeman* No. 4,

222-229 (April 1973), wherein these premises are discussed and amplified.

12 See, e.g., "American Insurance Association Proposes No-Fault Auto Coverages," 69 *Best's Insurance News* (Property-Liability Edition No. 8) 10 *et. seq.* (December 1968). Compare, Kemper, James S., Jr., "Automobile Insurance: The Politics of Surrender" (Kemper Institute Reports 1968) and Wise, Paul S., "Automobile Insurance: Which Road Toward Reform?" (American Mutual Insurance Alliance 1968).

13 See particularly, Barmach and Payne, "The Lackland Accident Countermeasures Experiment," *Accident Research* 665 (1964, Haddon, *et al*), and the California Department of Motor Vehicles 1965 "Report on the Relationship between Concurrent Accidents and Citations." Compare Brainard, "The Psychological Aspects of Highway Safety," *Trial* 55 (Aug./September 1968).

14 See, 2 Harper & James, *The Law of Torts*, 752, *et seq.*, § 12.4; see also, James, *op. cit.*, Note 8 at p. 397.

15 These reveries might be challenged as to breadth of study, form of inquiry, and mode of analysis. The potential of statistical error and the chance of misinterpretation of empirical data always besets this character of undertaking. The problem of the inherent research bias is considered in Hold, William T., "Critique of Basic Protection for the Traffic Victim — The Keeton-O'Connell Proposal," 541 *Insurance Law Journal* 73, 80 (Feb. 1968).

16 This admission is far removed from a capitulation on the fundamental issue of fault versus liability without fault, since the limitations inhere primarily in the "deterrence" aspect of the problem. Even absent a deterrent effect, the fault doctrine is justified on other bases not subject to these shortcomings. See Section 3 and Note 8, *supra.*

17 See, e.g., Prosser, *Torts* (3d ed 1964) p. 1, *et seq.*, § 1.

18 See Flemming, John G., "The Role of Negligence in Modern Tort Law," 53 *Va. L. Rev.* 815, 849 (1967).

19 Comment, "Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case," 8 *U. Chi. L. Rev.* 729 (1941).

20 Brainard, Calvin H., "A No-Fault Catechism: Ten Basic Questions Raised and Answered," 583 *Insurance Law Journal* 317, 318 (June 1972), points out that no-fault really is first-party coverage, an ancient concept. Of course, it loses much flavor when the state mandates the particular insurance plan.

21 Note the assumptions and the calculated use of the emotive term.

22 A cursory attempt (in slightly different context) to expose the specious thinking underlying this concept appears in Foley, Ridgway K., Jr., "A Survey of the Maritime Doctrine of Seaworthiness," 46 *Or. L. Rev.* 369, particularly 397-399, 419-420 (1967).

23 See Note 20, *op. cit.*

24 Perhaps the pertinent question is, what will the looters do when there is no one left to loot?

25 See general studies in Note 13, supra. Part of the underlying attack levied against the existent system is a tacit or explicit belief that "fault" is an "impossible" concept. If the critics are correct, then the precept should be discarded but if it is merely difficult of application, then by all means let us retain fault and labor to improve our system.

Fault *is* alive and well. As found by arbitrators (judges or juries acting as fact-finders), fault is a community value-judgment as to the propriety or impropriety of conduct and evaluation of the loss caused A by B for which B should recompense A.

26 See Williams, Glanville, "The Aims of the Law of Tort," 4 *Current Leg. Prob.* 137, 150 (1951).

27 Witness the proliferation of prostitution and gambling.

28 Blum, Walter T. and Kalven, Harry, Jr., "Public Law Perspectives on a Private Law Problem." 31 *U. Chi. L. Rev.* 641, 646 (1964); Blum, Walter T. and

Kalven, Harry, Jr., "The Empty Cabinet of Dr. Calabresi," 34 *U. Chi. L. Rev.* 239, 270 (1967).

29 See Notes 14 and 15, *supra*, and accompanying text.

30 Some of the fuzzy thinking penetrating this position and obscuring realty is discussed, *supra*, Section 7. See Also Note 20, *op. cit.*

31 See 2 Harper & James, *The Law of Torts*, 729 *et seq.*, § 11, *et seq.*

32 *Ibid.*, at page 734.

33 An excellent example of an uncongested court in a metropolitan area is Multnomah County, Oregon, serving a metropolitan population approximating 1 million persons. The average lapse between filing of the complaint and trial date approximates 4 to 5 months in the court of general jurisdiction; the federal district court in this district is likewise current. In fact, our federal judges are frequently called to other parts of the country to bring their dockets current. Perhaps there would be less court congestion if bench and bar worked together to alleviate the true causes thereof.

The "court congestion" assertion has been overstated; automobile accident litigation has not increased apace with the urbanization of society. Defense counsel have gathered statistics derogating the argument to its rightful place in the juridical ash heap. See, e.g., statistics collected by the Oregon Association of Defense Counsel.

34 *Ibid.*, § 11.4.

35 *Ibid.*, Footnote 35 (pp. 741-742) summarizes an interesting exchange between Professor Jaffe and Professor James on the *moral* aspect of James' position. Prosser does not go into the detail found in Harper & James; he baldly asserts:

"The idea of punishment, or of discouraging other offenses, usually does not enter into tort law, except insofar as it may lead the courts to weight the scales somewhat in favor of the plaintiff's interest in determining that a tort has been committed in the first place. * * *." Prosser, Torts (3d ed) 9 § 2.

In discussing the factors which affect tort liability, *ibid.* 16, *et seq.*, § 4, Prosser does examine the moral aspect of the defendant's conduct and speaks in terms of prevention and punishment. He defers to Glanville Williams on the subject of deterrence. *Ibid.* p. 23, n. 73 (see, *infra*).

36 See, e.g., Flemming James, Jr., "An Evaluation of the Fault Concept" 32 *Tenn. L. Rev.* at 394 (1965). See note 4, *supra*.

37 *Ibid.*, 32 *Tenn. L. Rev.* at 395-396.

38 *Ibid.*, at 397.

39 *Ibid.*, at 396.

40 *Ibid.*, at 395-396.

41 The writer believes the untoward extension of vicarious liability (liability of A for consequences of B's acts) is poorly conceived, but defense or attack on that system exceeds the scope of this article.

42 John G. Flemming, "The Role of Negligence in Modern Tort Law," 53 *Va. L. Rev.* 815, 825 *et seq.* (1967) Professor Robert C. Cranston (University of Michigan Law School) suggests that the strongest deterrent effects of civil liability are discernible in the operation of the automobile insurance system.

43 *Op. cit.*, Note 35, *supra*, at 400; see also Calabresi, *op. cit.*, *passim;* see Section 7, *supra*.

44 See Flemming, *op. cit.*, Note 42 at 822.

45 See, e.g., Flemming, *op. cit.* Note 42 at 832.

46 Calabresi, 78 *Harv. L. Rev.* 713 *et seq.* See Robert E. Keeton "Is There a Place for Negligence in Modern Tort Law?" 53 *V. L. Rev.* 886, 888 *et seq.* (1967).

47 See, e.g., Keeton, *ibid.*, 890 *et seq.*

48 Williams, Glanville "The Aims of the Law of Tort," *supra, 4 Current Leg. Prob.* 137 (1951).

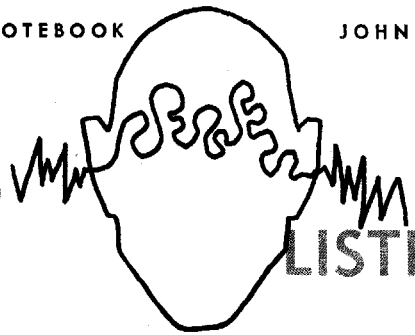
49 *Ibid.*, at 146.

50 *Ibid.*, at 149. The assertion is accepted as valid, *arguendo*. The causal relationship between Factory Acts and improved safety practices may not be accurate.

A REVIEWER'S NOTEBOOK

JOHN CHAMBERLAIN

WHO'S LISTENING?



I STARTED reading Leonard Read's *Who's Listening?* (Foundation for Economic Education, $4.00 cloth, $2.50 paper) in the middle of the Watergate uproar, when any mention of listening suggested telephones, not face-to-face conversation. Watergate was, of course, a seeming irrelevance, but could I help it that Mr. Read got me to thinking about it in the light of what he calls the "freedom philosophy"? Suddenly, while meditating on Mr. Read's formulation of a Law of Readiness, it popped into my quite ready mind that a tapped telephone is an adulterated good, an interference with free market choice that is all the worse when government, whose agents should be busy protecting the consumers of telephone service against crooks who would invade their privacy, is the prime culprit in the tapping.

It is this sort of illumination that Mr. Read provokes. He would be the first to admit that he stands on the shoulders of Adam Smith, Frederic Bastiat, Carl Menger and other great economic thinkers of the past, but he performs his own unique role in moving the thinking of his intellectual heroes beyond economics into general philosophy.

Take the Read Law of Readiness, for example. He disclaims that the discovery of the Law is original with him. And, indeed, the Law is implicit in Bastiat's famous passage about the ability of the principle of free exchange to supply a million people in Paris with the necessities and amenities of life without anybody planning and directing everything from a central conning tower. Bastiat talks about "this secret power" that brings supply and demand into a relationship without arbitrary decision by bureaucrats or elected officials. He marvels that the light of self-interest, when left free of

hindrance, could bring what is necessary each day to a gigantic market without either choking it or leaving it undersupplied. A mysterious Law of Readiness seemed to be at work, although Bastiat didn't frame it quite that way. It is Leonard Read who has given the law its proper name. Like the Law of Gravity, it can be worked with without being quite understood. Readiness comes from a condition of inner and outer freedom. It might be phrased as the Law of Openness. If nobody stands in the way, someone, somewhere, will spring into action to satisfy a want. This is fundamental to understanding economic action. But, as Read defines his Law of Readiness, it is also fundamental to the flow of ideas from mind to mind.

Persons Not Vilified

It is precisely because he is so certain that his ideas will reach others who are ready for them that Mr. Read preserves his almost preternatural calm. Read will attack the generality of men who want to lord it over others, but he doesn't single out any particular individual as a rascal. He attacks "flight plans" that depend on coercion somewhere down the line, such as taxing our grandchildren to pay for our own contemporary frivolities, but he doesn't name the coercers. He doesn't deride or vilify. Partly his method derives from his habit of humility, but there is more to it than that. He finds that anger or belittling gets people's backs up. They flare out in self-defense – and in doing that they cease to listen. The Law of Readiness does not work for a man who has been hurt or embittered by a jibe or a nasty epithet.

Since he believes that Society is comprised of "I's" and You's," Mr. Read doesn't believe there is such a thing as "social" justice. Justice can't be rendered to classes or groups in general, but only to each person in particular. "To each his own." It cannot be called justice to the individual if a man's substance is to be seized to pass on to other individuals who demand rights as a "class." "Social justice" involves depriving others to gain one's own ends. It depends on legalized plunder.

Organized Thievery

So Mr. Read, without ever attacking the Department of Health, Education and Welfare, gets his point across that welfare is organized thievery. In 1971 the Federal government spent $92 billion on "social welfare." This had nothing to do with private or voluntary charity; it was $92 billion taken out of the hides of people by the compulsion of taxation or the

cheating involved in inflation. The believers in social welfare and social justice would argue that modern complexities require coercive redistribution of wealth, but the world was just about as "modern" in 1960 as it is now. How does one explain, then, our population could get along on $24 billion in "social welfare" in 1960 as compared to $92 billion in 1971? Social welfare expenditures are actually twenty-nine times as high in dollar figures today as thirty-six years ago. Adjusted for the decline in the dollar's purchasing power, the figure would show only a six-fold increase. The need to make such an adjustment is in itself a criticism of our policies. Mr. Read does not make a direct correlation between the rise in welfare expenditures and the debasement of the currency, but he hints at the connection when he says that if the trend in expenditures continues the dollar, sooner or later, will become worthless. And then what will HEW be able to use for money?

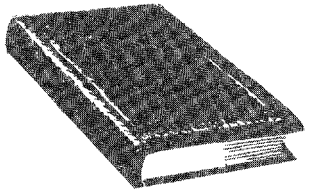
One wishes, somewhat forlornly, that our politicians would ponder the Read Law of Readiness. Here we are on the brink of an energy shortage that has everybody yelling for the government to do something! The trouble is that government has already done too much. It has controlled the price of natural gas, thus discouraging investment that might have gone into discovery and exploitation of new sources. It has frowned on oil imports, with the result that we have no deep-water unloading arrangements for the big new tankers. It has permitted a stupid law to keep oil companies from building a trans-Alaska pipeline that would cut our dependence on Arab oil in half. It has not permitted the construction of atomic energy plants. It has let the ecologists run rampant, forcing environmental protection laws that have doubled the consumption of gas in the newest cars without really helping the atmosphere. (If you burn more gas, you automatically get more pollution.)

What Might Have Been

If the Law of Readiness had been allowed to operate, plants and pipelines would have been built, spigots for deep-water tankers would have been placed twenty miles offshore with connecting pipes running to new refineries on the mainland, and the Alaskan pipeline would have been in operation a couple of years ago. Meanwhile, if the environment had suffered, we would have learned something about cleaning it up. The entrepreneurs were ready to dig up the necessary capital for new ventures, and the customers were waiting for cheaper prices.

But, alas, our negative attitude brought the crisis upon ourselves. We can blame the politicians, and they should be blamed for not having any sense of statesmanship. But we should also blame ourselves for electing them to office in the first place, and for not solving our problems without running to government.

Leonard Read's book invites hundreds of applications of its basic thinking to contemporary problems. Mr. Read does not believe in singling out and scolding people who may be presumed responsible for creating the problems, but he surely can't object to analysis that might cause an occasional villain to identify himself as such. When he likens the "promoters" of such public works as The Gateway Arch, Urban Renewal, or moonshots" to the "monarchs of ancient Egypt," who used "slave labor" to build the pyramids, he may not be naming names. But some people are sure to recognize themselves as the indicated Pharoahs, which could be the beginning of wisdom for them.



▶ THE RISE OF RADICALISM by Eugene Methvin (New Rochelle, New York: Arlington House, 1973) 584 pp., $11.95

Reviewed by: Allan C. Brownfeld

FOR TOO LONG we have tended to group political philosophies and movements on a scale running from right to left; Communism on the outer fringe of the left with Nazism and Fascism at the extreme right.

The fact is that these movements have far more in common than they do in disagreement. All three – Communism, Nazism, and Fascism – believe that it is possible for man, whom they hold to be perfectible, to create a perfect world. All three oppose the concept of God, or a force beyond man, and place man in the ultimate position of Creator. Since man is perfectible and man is also a God, there is no reason why a heaven on earth cannot be created.

In what can only be described as an encyclopedic review of radical movements from the inception of the progenitor of them all, the French Revolution, until today, Eugene Methvin, a member of the editorial staff of *The Reader's Digest* and a close observer of the subject about which he has written, places these movements in the perspective of history and traces them to their philosophical root.

Discussing the utopian fallacy which underlies modern radicalism, Methvin points out that, "Man has created centaurs, unicorns, satyrs, and mermaids – but he has never seen one. And he has created the post-revolutionary utopia. But he has never seen one of those either. Yet in its name he has committed horrendous crimes."

The radical – from Robespierre, to Lenin, to Hitler, to the variety at work today – sets out to destroy the existing world order and remake it to his own plan. "If humanity does not conform," the author points out, "then so much the worse for humanity – he will crush it . . . This breed of radical turns all men into puppets for his own pleasure and gratification. And like all burners of heretics, he will destroy any sovereign soul who dares breathe free."

Compulsive utopians, when they get serious about politics, inevitably deal with reality the way Procrustes, the legendary cruel robber-giant of Attica dealt with his victims. Procrustes would lure travelers to his home and when they would lie down on his bed, he lopped off as much of their limbs as was required to make their length equal that of his bed; or if they were too short, he stretched them. Hence, the word "procrustean" has come to stand for the trait of reducing events of reality to fit preconceived forms of force or mutilation.

The Fascist and Nazi movements which came to power in Italy and Germany came from percisely the same radical root as did the Communist movement which gained power in the Soviet Union – and shared the same hostility to capitalism and to the concept of private property. Methvin notes that Mussolini, at the time of his switch from the Italian Socialist Party in 1914, ". . . was backing up to the point from which Karl Marx departed in the fall of 1843 when, as a young messianic philosopher . . . he decided 'the proletariat' would be the horse the intellectual could ride to glory. Mussolini, from the same point, decided that the 20th century required a revaluation and new conclusion: the revolutionary radical must ride the nationalist masses – and build nationalist 'consciousness' – instead. Again, no change in objectives, merely in propaganda, myths and slogans. He simply substituted the myth of national solidarity for the myth of proletarian solidarity."

Mussolini made a virtue of having no program. Throughout his ascent to power, he experimented with slogans, always seeking the combination that would work. According to the author, "He foreshadowed the American SDS radi-

cal Mark Rudd's famous 1968 answer: 'First we will make a revolution; then we will find out what for'." Mussolini in 1922 answered "Our program is simple: we wish to govern Italy. They ask us for programs, but there are already too many. It is not programs that are wanting for the salvation of Italy, but men and will power."

The appeal used by Hitler in Germany was similar. "Hitler," notes Methvin, "used the slogan 'the broad masses' as frequently as orthodox Marxists referred to 'the working class.' This was his target audience – the same as Lenin defined in his basic works on propaganda and organization: 'All classes, every droplet of discontent.' "

Hitler and the Communists felt an affinity because, like them, he was a revolutionary. Methvin notes that, "No self-styled 'leftist' would have trouble accepting his views of revolution." The two revolutionary movements – Communism and Nazism – drew on the same reservoirs of recruits. Reminiscing in 1941, Hitler recalled the famed Coburg street fight of October, 1922 in which he and 800 storm troopers routed the Communists: "Later on the Reds we had beaten up became our best supporters. When the Falange imprisons its opponents, it's committing the gravest of faults. Wasn't my party at the time of which I'm speaking composed of 90 per cent left-wing elements?"

"There is more that binds us to Bolshevism," Hitler declared, "than separates us from it. There is, above all, revolutionary feeling . . . The petit bourgeois Social Democrat and the trade-union boss will never be a National Socialist, but the Communist always will."

For both Nazism and Communism, it was the "bourgeoisie" which constituted the enemy. Those who believe the roots of so-called "left" and "right" wing revolutionary movements are antithetical would do well to read Eugene Methvin's book. They would learn a far different story.