THE FREEMAN

IDEAS ON LIBERTY

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IDEAS ON LIBERTY

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PERSPECTIVE

Advice to Youth Seeking to Go Down in History—from the Editors of *Time*

Last fall, *Time* magazine put out a special issue on "The Millennium," a survey of the history of the past one thousand years. Among the offerings is a list of the ten "Greatest People" of this entire period. The list comes as something of a surprise, when placed alongside *Time's* weekly editions. In their regular coverage, the editors dwell on political leaders, on the comings and goings of senators, presidents, and prime ministers. To the impressionable, this attention might suggest that politics is the most important thing in the world, and that rising high in government is the path to greatness.

Significantly, even *Time's* own editors don't seem to believe that. In identifying greatness, they virtually ignored politicians. Instead, they picked religious figures (St. Francis of Assisi, Martin Luther), scientists (Galileo, Albert Einstein), artists (Michelangelo, William Shakespeare, Wolfgang Amadeus Mozart), an inventor (Johannes Gutenberg), and an explorer (Christopher Columbus). Only one person on the list (Thomas Jefferson) had anything to do with politics.

While they were at it, the editors also compiled a list of the ten "Worst Villains" of the last one thousand years. All were political figures: Genghis Khan, Tamerlane, Vlad the Impaler, Cesare Borgia, Ivan the Terrible, Robespierre, Joseph Stalin, Adolf Hitler, Idi Amin, and Pol Pot.

The two listings taken together suggest a rather sobering lesson about going down in history: If you go into politics, you are more likely to wind up a villain than a hero.

—JAMES L. PAYNE

Controlling Government

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on

government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control of the government; but experience has taught mankind the necessity of auxiliary precautions.

—*The Federalist*

"One-for-All" Health Care: A Firsthand Account

I held an engineering position with an American company in Sao Paulo, Brazil, from 1957 to 1961. The Government of President Juscelino Kubitschek de Oliveira had set up a "one-for-all" health care system, supported by premiums paid into it by people with incomes above an established minimum. The Government subsidized poor and low-income people.

Several health care centers were set up, where medical needs would be determined in an interview, and doctors and hospitals would be assigned.

Every morning starting at 4 A.M., lines three blocks long would form at the centers. The first 100 patients would be admitted by 9 A.M., then wait inside till about 2 P.M. to be seen. Many in the lines had to return the next morning.

During my stay, both my children needed tonsillectomies, and my wife required a varicose vein operation. It took me a week to find out that I would have to wait 8 to 12 weeks. In addition, I would have to pay a fee commensurate with my above-average income.

I went private: all three operations were performed within three weeks for a cost of one monthly salary.

Eventually, all who would rather pay and get fast and reliable service, instead of waiting three months for the services of an unknown doctor, suspended payments for their state insurance premiums. I did too. The lines at the state health centers thinned: only low-income people and the poor lined up in the morning. In time, the Government health program collapsed for insufficient funds.

—ARTHUR S. KELLER

Property—the Secret of U.S. Economic Development

A farmer who owned the land on which Rochambeau's troops were encamped asked for his rent. The French officers paid no attention to this "absurd claim." Seeing this, the republican clodhopper cut short any further discussion and went off to fetch the Sheriff, asking him to arrest the trespasser. Your excellency should imagine the arrival of these two poor countrymen—the plaintiff and the Sheriff—unarmed but strong in support of the Law, and resolved to arrest the French General, M. de Rochambeau, in front of all his troops. The General was duly summoned by the Sheriff and required to pay all of his due. . . . How, in such a country, could desert land fail to bloom; how could the shiest and most timorous of men fail to turn honest, just, hard working, educated, and courageous?

—FRANCISCO DE MIRANDA (1750–1816)

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DENIAL OF RIGHTS THROUGH REGULATION

by Zak and Jo Anne Klemmer

When does uncompensated regulation become theft? Environmental regulations have become some of the most obtrusive laws invading private property rights today. Regulatory taking gave rise to *Lucas* v. *South Carolina Coastal Commission*, decided last year by the U.S. Supreme Court.

David Lucas paid $975,000 in 1986 for two beach-front lots on which he planned to build two houses, one for himself and one to sell. A state agency barred the construction under an environmental law that took effect two years after he purchased the lots. Lucas sued the state of South Carolina, arguing that the regulation denied him all economically viable use of his land. (It should be pointed out that similar single family houses are adjacent to both sides of Lucas' property.)

The state court agreed with Mr. Lucas' argument and awarded him $1.2 million for the regulatory taking of his property. However, the South Carolina Supreme Court reversed the lower court's decision on appeal, ruling that "a restriction 'enacted to prevent serious public harm' doesn't require a state to compensate landowners for their losses."

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This case made its way to the U.S. Supreme Court. In June 1992, Lucas received a six to two vote in his favor. In an opinion for the majority, Justice Antonin Scalia wrote, "Even if a regulation addresses a serious harm, the government must compensate a property owner denied all economically viable use of his land."

Although the decision was favorable for Lucas, it appears that the U.S. Supreme Court's decision was narrowly drawn and did not adequately protect property rights destroyed by land use restrictions. "This was a golden opportunity to 'straighten out' the law on the government taking of property. . . . The court 'blew' the opportunity . . . It's impossible to tell what it does to a whole range of cases because its effect may be extremely limited," writes Roger Pilon of the Cato Institute.

What land use restrictions achieve is a weakening of our economy by obstructing commercial development. This is a direct and intended result of environmental activism. An overly broad environmental agenda, enforced by expansive regulations with a sluggish legal system, can be as destructive to our economy as confiscatory taxation. The net effect of a regulatory taking of property, as illustrated by *Lucas*, is similar to that of a direct tax, in that it hinders (or in some cases prevents) the property owner's use of his livelihood, his rights.

Some twenty-five hundred miles away from David Lucas, Neil Simon of Tucson, Arizona, represents the Venture West Group (VWG). This is an investment group founded in Tucson in 1981. The VWG has successfully developed commercial real estate in Phoenix, Denver, and California, as well as Tucson.

Simon, like Lucas, is embroiled in a property regulatory nightmare with environmental do-goodism at its core.

The property in consideration is a 7.1 acre site at Broadway and Houghton, on Tucson's east side. This parcel has been zoned for shopping center use for the entire eleven years that VWG has owned it. Running through the middle of this parcel is a dry wash (approximately 3.2 acres), which traverses into an existing culvert under Broadway Boulevard. Many washes have been culverted along Broadway to accommodate commercial projects.

As a pretext to save the remaining "prime riparian habitat areas" within the city limits of Tucson, no-growth activists lobbied the City Council to pass the Environment Resource Zone Ordinance (ERZ) in 1990. The ERZ Ordinance was intended to prevent the development of 53 miles of designated washes. The parcel at Broadway and Houghton fell under the ERZ. Because its 600-foot-long wash bisects it into two less valuable parcels, Simon sought a variance to allow development of the shopping center. This process began in January 1991.

By December 1991 the City Board of Adjustments unanimously approved the variance. This lengthy process included, among other things, public hearings. The variance, however, was subject to design considerations intended to mitigate the impact of development on the wildlife habitat in the ERZ. These considerations attached additional costs to the project outside the control of the developers and their architects surpassing $100,000. In February 1992 the City Council of Tucson took up the issue and overturned the variance that had been granted by the City Board of Adjustments.

"We want to build the shopping center. We don't want to file a lawsuit," said Simon in reply to the Council's reversal. "The Council's action amounts to an illegal 'taking' of property," declared Sy Shorr, Simon's attorney. The VWG has filed a lawsuit of $2.5 million against the city for the refusal to allow this proposed shopping center to be built over a culverted wash.

It seems as though government agencies have an endless supply of time and money to obstruct citizens who expect these agencies to respect and honor their constitutional right to own and use private property. One may ask: When does regulation become an obstacle to productivity and progress? And, what occurs when a regulation becomes an end in itself instead of the means to an end? When regulation becomes an end in itself, it perverts the law and usurps the economic freedom it is designed to protect, resulting in poverty and decline. The endless delays and regulations which have been imposed on Simon's project have not only been financially prohibitive, but have detrimentally affected the economic health of the local community by the loss of potential employment.

More Regulation Means a Loss of Jobs

Moving westward to California we locate still more examples of undue regulations brought on by environmental activism. The Council on California Competitiveness (CCC) reported in April 1992 that the growing regulatory burden has become a major hurdle to the state's economic recovery. Since 1990, 700,000 jobs have been lost in California; yet regulatory costs to employers persist. The once proud "Golden State" no longer creates jobs and wealth. It is creating burdensome regulations, exorbitant state government employment, and deficits at record levels. According to the CCC, chaired by Peter Ueberroth, "Laws that were originally passed to protect our quality of life now are being used to thwart environmentally sound economic growth without balancing job impact with economic needs."

Ball Glass Packaging Corporation has

been producing glass jars in Santa Ana, California, for the past 60 years and has employed over 300 people. Ball Corporation is closing its doors. Why?

David Westmoreland, vice-president of Ball Corporation stated, "One of the problems we have in the South Coast Air Quality Management District (AQMD) is that we're always chasing a moving target." To be more specific, Westmoreland lamented, "[The Santa Ana plant] has a furnace which is the heart of the operation which by necessity of normal [economic] life will require major repairs next year. But, before that furnace can go through its next life cycle, new rules are passed that make it no longer in compliance. . . . You could put millions into a rebuild only to find out you've been regulated out of business."

Besides the dilemma of financial feasibility, another problem with compliance is dealing with the regulatory agencies. Meeting with enforcers who possess overlapping authority becomes time consuming and frustrating. "These agencies are really not interested in hearing about your troubles. . . . And we've had people say, 'If you can't meet the rules, shut up and get out of here.' Just like that, 'if you can't meet the damned rules, close down. We don't care!'" charged Francis Paladino, senior vice president of operations for the Ball Corporation. Consequently, Ball Corporation will do just that—close down. Those companies who looked to Ball Corporation for their jars will now have to look elsewhere.

And, again in California: At a time when South Central Los Angeles desperately needs jobs, one furniture manufacturer (who requests anonymity) said he had to move 500 jobs from Southern California to Mexico because of AQMD regulations governing wood paint. "The primary reason for the move," he said, "was that the air quality rules were neither legitimate nor reasonable. We proved that what they were asking us to do was physically impossible and we demonstrated it, so they gave us a three-month variance."

"Why they thought we could comply in three months, I cannot say," he added. The furniture is still sold in Los Angeles so the manufacturer must now ship materials to Mexico and the finished product from Mexico. This obviously adds to the traffic congestion, tailpipe emissions, and equipment costs of this manufacturer. "We have now doubled our fleet of trucks so the amount of stuff we're putting into the air with [the added] trucks is probably more than we were putting into the air as manufacturers," he said.

A 1990 Department of Commerce survey of manufacturers found that 62 percent of those surveyed cited "streamlining environmental regulations" as an imperative policy goal. In Southern California alone there are 39 agencies with water quality authority, 38 with hazardous waste authority, 17 with air quality authority, and 14 with solid waste authority. Due to this glut of regulatory agencies, Southern California is losing state revenue and employment for its residents with the exodus of businesses. States like Colorado and Nevada have recruited businesses from California by streamlining the regulatory process.

The regulatory taking of property implemented by the bureaucracy plunders the rights of property owners and produces a needless financial burden. The hidden cost of complying with these laws is measured by time lost in negotiating the nearly endless maze of local, state, and federal agencies in the permit process, through applying for variances and design changes, defending nuisance suits, and enduring delays in the legal process. All of this dramatically impedes economic growth for each of us by raising the cost of housing and manufactured products, thwarting production of new products, and eliminating employment opportunities.

All law, including environmental regulations, must be based solely on our individual rights to own and use private property. The greatest danger exists in subordinating our rights to the technocracy of the central planners. Communism may be dead or fading in Eastern Europe, but collectivism as a political philosophy is still alive and dangerous to everyone in the industrialized West. □

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A SUBTLE SEIZURE

by Daniel F. McInnis

Talk about birdbrained ideas. After Woodman, Wisconsin, resident Gene Luebker erected a birdhouse by his front window, local authorities objected. State legislators had designated Luebker's property, along with 92 miles of nearby real estate, part of the protected Lower Wisconsin Waterway. No new structures in view of the river would be tolerated, including birdhouses.

As Mr. Luebker and other property owners have discovered, state and federal zoning, historic preservation, and environmental regulations are decreasing private landholders' ability to use their land. "Private" property means less today than in any other time of our Republic.

David Lucas learned this hard lesson when the South Carolina Beach Front Managment Act barred construction of two houses on his two coastal lots.

What makes Lucas different from the millions of other property owners who have had the use of their land restricted by government is that he sued and won. His claim was based on the "taking clause" of the U.S. Constitution's Fifth Amendment.

"If we ignore the Constitution," said Mr. Lucas, "then we will become a country ruled by men, instead of by the law."

The framers of the Constitution understood well that the excesses of government had to be contained. Schooled in the English common law tradition that held that even the poorest hovel in Britain was protected from the uninvited entry of the King, they included the taking clause in the Constitution's Bill of Rights. The clause prohibits government from taking private property except for a public purpose and then only if fair compensation is paid.

Applying the taking clause is difficult, however, when government stops short of seizing title or possession of property and instead restricts an owner's use. The U.S. Supreme Court has been reluctant to broadly deny these "regulatory takings." It was not until 133 years after the creation of our government that the Supreme Court in *Pennsylvania Coal Co.* v. *Mahon* first held that government action could rise to the level of a taking without an actual physical occupation of the property. The Court ruled that the owner of surface property could not use a Pennsylvania law to prevent mining under the property where the mining company had previously purchased all the necessary property rights to do exactly that. Justice Holmes wrote that "[t]he general rule . . . is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."

But how far is too far? No acceptably consistent doctrine of regulatory taking has evolved. Justice Brennan, in a decision infamous to property rights advocates, admitted in *Penn Central Transportation Co.* v. *City of New York* that taking law was

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"essentially ad hoc." While noting that the "Fifth Amendment's guarantee . . . [was] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," the Court nonetheless found that New York City's historic landmark laws could prevent the owners of the Penn Central Terminal from adding multiple stories on top of the existing building. Applying an ad hoc "standard," the majority was able to decide that limiting the ability to increase the size of a building contravened no property right at all. For the good of the citizens of New York City, the owners of Penn Central had to keep the station as is without being compensated.

Personal Preference versus The Rule of Law

When courts are guided by uncertain rules, personal preference rather than the rule of law can control. In practice, overriding public interest and deference to the legislative branch and its "police power" have become broad jurisprudential exceptions to the Fifth's seemingly simple command.

Especially troublesome is the "nuisance" exception: the doctrine that the government does not have to pay compensation when it restricts land uses that harm others. Rather than locating the definition of *nuisance* in the common law or another restrictive basis, courts in the tradition of New Deal economic regulations allow legislators great deference in mandating what is and is not a nuisance. Property rights become whatever legislatures say they are.

The South Carolina Supreme Court, in reviewing Lucas' victory in trial court, relied upon the state's police power and reversed the lower court's decision. Building close to the beach was a nuisance, since the Beach Front Management Act was designed to protect dune systems that serve as a storm barrier. Development on Lucas' lot would endanger the coastline and lives and property, at least according to the South Carolina General Assembly. No compensation was owed under the "nuisance" exception.

Fortunately for Lucas, the U.S. Supreme Court disagreed. On the last day of the 1992 term, the Court ruled that the South Carolina government had indeed "gone too far." Accepting the trial court's finding that South Carolina's law confiscated Lucas' land so that there was no remaining economically viable use, the Court was willing to put the burden on the state to justify why it shouldn't pay compensation. Thus, where 100 percent of the use of property is prohibited, the state must pay compensation unless it can prove that the potential use constituted a common law nuisance to other property owners.

Activities that constitute nuisances under the common law may be legally prohibited by harmed parties. In essence, the Court recognized that the state is merely protecting those rights when it prohibits those activities: "The individual whose nuisance is enjoined gets no compensation, however large his loss, because he had no right to that activity to begin with," says Roger Pilon, the Director of the Center for Constitutional Studies at the Cato Institute. Conversely, where no common law rights exist, government cannot prohibit without compensating those who bear the burden of the regulation. Common law rights rather than legislative preference limit the power of government to regulate property.

Lucas, however, is no revolutionary breakthrough for property rights. The decision creates a rule only for those laws which are so heavy-handed that an owner is left with "worthless" property. No doubt, future legislation will be crafted with this limitation in mind. Some uses will be specifically left to land owners. As Justice Blackmun pointed out in his dissent, Lucas could still use his property to "picnic, swim, camp in a tent, or live on the property in a movable trailer." Courts still have to determine what exactly the phrase "all economically viable use" means.

Also left unresolved is the issue of how courts will view the extent of property interests. As every first-year law student

learns, a piece of property can be compared to a "bundle of sticks" that can be divided into numerous interests including the right to possess, use, and transfer. The right to each of these interests can be held by one or separate owners. Likewise, land can be divided into parcels. What would have happened if the South Carolina government had denied Lucas the ability to build on only one of his lots? *Lucas* does not answer the question of how finely government can slice property interests and avoid the issue of whether *all* economically viable use has been taken.

In light of 50 years of New Deal era precedent, the *Lucas* decision moves toward protecting individual rights and limiting the role of government in the economic sphere. Government regulations on property, rather than having the presumption of validity, are held to a judicial standard of review that puts the onus on government to justify its actions.

No doubt even this minor burden on government in an admittedly rare case will cause dire concern among those who think that government should be able to burden property at whim. Their loss in the Supreme Court presages a new battle in the court of public opinion.

Opponents of a broad-based private property protection offer two policy arguments why the Supreme Court should not protect property owners like Lucas and Luebker. First, they present apocalyptic scenarios where all zoning regulation or building codes, no matter how beneficial, would be declared unconstitutional. Second, they complain that laws, like wetlands regulations, would not exist if property owners had to be compensated for their losses.

Courts are not going to declare all zoning unconstitutional anytime soon, unfortunately. Property rights advocates have more modest goals. Government should bear the burden of justifying all property regulations in terms of the general welfare, whether the reduction in value is one or 100 percent. The *Lucas* precedent should be expanded, and the standard by which to measure regulations should be the same as the common law of trespass and nuisance, which allow property owners to use their land as long as they don't harm others. If government can't justify a regulation on health and safety grounds, they can still take private land. However, they must pay the owner for his loss.

Can Wisconsin justify banning birdhouses? Many property regulations make little sense when viewed in terms of harm to the public rather than benefit.

Rent control may benefit renters, but allowing a homeowner to charge the going rate for his property harms no one in any way our legal tradition recognizes.

Zoning likewise may not always be an innocent public good. Requiring large lots for new housing may increase the value of real estate, but it purposefully prices out teachers, policemen, and other working people.

Historic preservation laws allow preservationists to benefit from property without having to purchase it. But replacing old buildings with new often revitalizes neighborhoods. Preservationists complain not because they are harmed by improved property, but because they will no longer be able to enjoy older structures for free.

Those who argue it would be disastrous to make government pay for land taken in the name of environmental protection are admitting that their goals would not pass muster if they had to be paid for by the polity.

If environmental protection is a public good that must be provided by the government, in all fairness, the public should bear the burdens of paying for it.

After untangling himself from bureaucratic red tape, Gene Luebker got to keep his birdhouse. But not satisfied, he erected a flagpole and invited the local Veterans of Foreign Wars and the National Guard over to raise the American flag. A red-faced attorney general quickly announced that flagpoles were not banned by state law.

The lesson is clear. Private property should enjoy some protection against excesses by government. The Fifth Amendment's taking clause can justifiably provide that security for all Americans. □

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GOVERNMENT HIGHWAYS: UNSAFE AT ANY SPEED

by Richard Barbarick

The Vietnam War claimed 47,355 American lives in combat over 17 years, from 1957 to 1973. In addition, over 150,000 Americans were injured in that unpopular and unsuccessful war. Each year in the United States as many lives are lost in motor vehicle accidents as during the entire Vietnam War. For decades, 40,000 to 50,000 people have been killed each year in U.S. traffic accidents.[1] In only one year, 1968, did the complete death toll of U.S. soldiers in Vietnam exceed the death toll on roads back home in America. Where is the public uproar, the journalistic indignation, the public cry for an end to the slaughter? For years, self-styled consumer advocates have been pressuring Congress to mandate automobile safety, but the death toll remains high. No one has apparently realized that the root of the problem might be public roads, rather than private automobiles.

Since the wide acceptance of the automobile in the 1920s, over two million Americans have died in traffic accidents.[2] That is far more than the roughly 824,000 Americans who have died in U.S. wars and conflicts dating back to the American Revolution, including Civil War Confederate combat deaths.[3] Motor vehicle accidents are the leading cause of accidental death in the United States. For young people, ages 15–24, motor vehicle accidents are the leading cause of death—accidental or otherwise.[4] That statistical trend has been stable for many years.

The symptoms of roadway mismanagement are common knowledge. Mothers Against Drunk Drivers (MADD) formed in the 1980s as a grassroots effort to focus attention on drunk driving. Numerous studies have reported on the state of the aging U.S. transportation infrastructure. And there are ongoing minute-by-minute broadcasts on the roadway congestion common to metropolitan areas. Unsafe, aging, and overcrowded roadways might be expected in a Third World nation, but not in the world's largest, freest, most economically advanced country.

Americans may watch with curiosity as they see television news coverage of Eastern Europeans literally standing in line to buy staples such as bread, meat, and soap. But American commuters participate in our mixed economy's form of a waiting line by crawling through rush hour traffic. The goods may be different, but segments of our economy are equally mismanaged based on the same wrongheaded idea of "public goods."

Socialist management practices have

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been proven to be futile, yet America's roadways are largely managed on the basis of a command economy. Roadway management is government-controlled and dangerously ineffective. Decision-making is based on political expediency rather than consumer preference, economics, or engineering. This results in poor maintenance, pork barrel construction projects, growth for government's sake, and a short-term focus on managing crises. Maintenance, safety, and customer satisfaction are overlooked in exchange for political gain.

Spiro Agnew resigned as Vice President in a scandal based in part on questionable payments he received from roadway construction and engineering firms while he was governor of Maryland. As Agnew himself put it, "anyone who's been around the political scene in the United States, who would expect that campaign contributions don't come from contractors doing state and federal business, is quite naive."[5] Agnew's case is characteristic of a bad system.

Some may suggest the automobile is the source of these problems, that the so-called social costs of the automobile are simply too high. But city streets were congested before Henry Ford made the first mass-produced, affordable automobile. The ascendancy of the automobile only serves to illustrate that government management of roadways is inept. Over time, roadway managers have not responded to the challenge of the demand for motor vehicle travel through market pricing, technological innovation, and specialized roadways.

In fact, President Eisenhower's 1956 approval of the National System of Interstate and Defense Highways for connecting the country through a web of interstate freeways was motivated by Ike's interest in moving servicemen and matériel in the event of war; the civilian traveler was a secondary concern. The success of the automobile and the independence of the commuter may be unmanageable problems to government planners, but to a businessman they present a market opportunity for voluntary exchange for mutual gain. The success of airline deregulation in the late 1970s hints at the potential success of a free market in roadways.

The mismanagement of existing roadway transportation facilities has helped to create the transportation "crisis" which in turn has stimulated demand for mass transit consultants, contractors, and administrators. Of course, many such experts' proposed solutions call for an increase in taxation to support infrastructure modernization, ever more freeways, and mass transit projects on the scale of the Pharoahs' Great Pyramids.

In addition, motor vehicle transportation is subject to the burden of capricious government regulation with the subsequent limitations on consumer choices (e.g., mandatory speed limits, airbag, seat belt, and shoulder harness requirements). We have shock-absorbing bumpers that can withstand crashes at speeds of five miles per hour, yet there are no physical safeguards to prevent one from driving while legally intoxicated. One should be skeptical that this reflects the will of consumer demand.

In spite of lower speed limits, increasing the legal drinking age to 21 in all 50 states, and narrower blood-alcohol test limits, roughly half of all fatal traffic accidents are still alcohol-related.[6] America continues to suffer ongoing slaughter on its roadways. With more than two million dead, reasonable limits were exceeded decades ago. No private industry could tolerate such high rates of mortality and injury.

It is not that our government roadkeepers are unaware of these problems. The federal government has several agencies keeping score on various aspects of motor vehicle and roadway safety. The National Safety Council, the Department of Justice, the Federal Highway Administration, the National Center for Health Statistics, the Surgeon General, the Department of Transportation, and other agencies compile and analyze roadway safety statistics. Much of this statistical effort is originated or extended by various departments and agencies of the 50 states.

While the government keeps count of the victims of its own roadway mismanagement, a few others are looking to the disci-

plines of the marketplace, especially for easing congestion and raising capital to maintain and expand the transportation infrastructure. In Southern California, four sections of new highway are being built as privately funded and operated tollways with reversion to the state at the end of a 35-year management contract. Growing government budget deficits have opened the door for such semi-privatization experiments. Because of concerns about legal liability, ownership of the tollways remains with the state, so there will still be the lack of motivation to create the far safer roadways that theory suggests would exist in a free market.

In commercial aviation, airlines are low key in addressing the issue of safety in their marketing. They commonly make reference to their long experience in the sky and their use of state-of-the-art technology to be reassuring. Likewise, safety would clearly be a competitive issue in a free market for roadway transportation. High levels of safety and accident prevention are fundamental to the popularity of air travel; it is essential for the prosperity of the air transport industry, an industry with projected revenues of $48 billion in 1992.[7]

On average, a few hundred people die each year in commercial aviation accidents; air travel would slow to a trickle long before air accident rates began to approach anything close to the carnage of roadway accident rates. While it is true that many nations' airlines are state-owned, they must adhere to the strict standards of excellence set by private carriers to remain competitive. In roadways, there is no such privatized leading light to set high standards of safety and efficiency.

Organ donor cards are combined with drivers' licenses in many states. No cynic has suggested that this is an acknowledgment that roadway accidents are a leading cause of death for people who are otherwise in the prime of their lives, an ideal source of healthy human remains. Organ transplant recipients are unwitting beneficiaries of government roadway mismanagement. It is possible that motorcycles (donorcycles) would be prohibited in some privatized roadway systems, as the safety and liability issues might be too great for private enterprise to bear.

The Insurance Information Institute of New York estimated the economic loss from motor vehicle accidents and injuries at $93.9 billion in 1989.[8] For perspective, that amount equals 61 percent of the 1989 federal budget deficit.[9] But the fact that public roads have led to the deaths of millions of innocent people is overlooked. Yet the greatest cost of public roads is death and injury, not late or inconvenienced commuters. There must be a better balance among cost, safety, efficiency, and regulation. The marketplace would create a better balance than government planning provides today. The most cynical observer would suggest that poorly maintained roads are used as the basis for justifying increased construction and maintenance budgets; absent a profit motive, mismanagement is rewarded with increased funding. A well-tuned, smoothly operating system would provide less basis for ever increasing budgets.

The idea of roadway privatization is radical from today's perspective, but by no means is it new or even foreign. The United States has a long and rich history of private roadways, turnpikes, and bridges. The first engineered and planned toll turnpike in the United States was a 62-mile, stone and gravel road completed in 1794 between Philadelphia and Lancaster, Pennsylvania.[10] In these times of government budget crises, such privatization alternatives are more frequently discussed as a means of financing new projects. The existing roads could be sold to private businesses as well.

Innovation

Innovations in private roads might include congestion pricing, faster construction to hold down costs, limitations on vehicle size and axle weight to improve efficiency and safety, more one-way routes in congested areas, additional tunnels and bridges (right of way permitting), and more use of roadway rights of way for pipelines

and transmission lines. Other possible innovations include improved roadway surfaces and easier to understand signs and markings. Private road owners might prohibit the passage of cars with exploding gas tanks, cars in a clear state of disrepair, or vehicles that are prone to rolling over. Responsibility and liability would help enforce a new discipline on all parties. Licensing would not be done by governments, but by road owners, and police would not be used to enforce traffic regulations. They would actually be out catching criminals.

Today's "free" roads are too dangerous and too crowded. Peter Gordon, in a paper for the Reason Foundation, quotes John Kain's estimate that 95 percent of all urban roadway congestion is due to the mispricing of 5 percent of the roadways.[11] Such estimates are subject to academic and professional debate. If Kain is even close in his estimate, this suggests that America already has sufficient roadways to support today's traffic if only there were some information upon which consumers could base their trip decisions. That information would be expressed in the form of a price; a free market would be the only way to determine that price. Congestion pricing, just like long-distance telephone carriers' peak hour rates, would cause many people to choose to avoid rush hour.

But emphasis on efficiency without regard to safety improvements is short-sighted. Nobody would use efficient, privately owned and operated, congestion-priced phone lines were there a risk of electrocution each time the telephone was used. We won't wake up in a laissez faire, libertarian world any day soon, but roadway privatization is being given a trial in the name of efficiency. However, the longer term outlook must include safety.

It has long been argued that passenger vehicles subsidize roadway construction for commercial trucks and buses. In a free market, special highways might be built for some truck routes, trucks might be prohibited during parts of the day, and they would be charged fees more consistent with the cost they impose on the road owner. Government-subsidized road building puts the railroad industry at a disadvantage to the trucking industry. In this case, highway taxes and construction spending have become a political tug-of-war fought between special interest groups. This distorts the allocation of roadway resources compared to what would occur in a free market.

One can hope that the trend toward privatization will reach U.S. roadways and lead to safer and more efficient roads. Roadway slaughter can and must end. Our roadkeepers expose us to senseless risk of injury and death, and we often have to wait in line for the privilege. As America continues to enjoy the greatest freedom and prosperity known to mankind, one hopes that the world can look to America for leadership in roadway privatization and the resulting benefits of increased safety and efficiency. □

1. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1990* (110th edition) (Washington, D.C.: U.S. Government Printing Office, 1991), pp. 345, 346, 612.

2. *Statistical History of the United States from Colonial Times to the Present* (Stamford, Connecticut: Fairfield Publishers, Inc., 1965), p. 26.

3. *Statistical Abstract of the United States*, p. 346.

4. Anne Fleming, *Facts, 1991 Edition* (Arlington, Va.: Insurance Institute for Highway Safety, July 1991).

5. Spiro T. Agnew, *Go Quietly . . . or Else* (New York: William Morrow and Company, Inc., 1980), p. 114.

6. Based on 1990 data. Migdon R. Segal, *Drunk Driving* (Washington, D.C.: U.S. Library of Congress, Congressional Research Service, December 18, 1991), p. 2.

7. *Value Line Investment Survey*, Vol. XLVII, No. 41, Part 3 (New York: Value Line Investment Survey, Inc., January 26, 1992), p. 251.

8. *Statistical Abstract of the United States*, p. 612.

9. The 1989 budget deficit was $153.4 billion. *National Economic Trends* (St. Louis: Federal Reserve Bank of St. Louis, July 1992), p. 22.

10. *The New Encyclopedia Britannica*, Vol. 26, "Public Works" (Chicago: Encyclopedia Britannica, Inc., 1990), p. 363.

11. Peter Gordon, "Mythical Facts of Nation's Transit Policy," *Policy Insight*, No. 131 (Los Angeles: Reason Foundation, October 1991), p. 21.

THE FREEMAN
IDEAS ON LIBERTY

SAVING SICK CHILDREN FROM STATE SCIENCE

by A. M. Rogers

The constitutional guarantee of religious freedom has often butted heads with the state. Though religious freedom was once the cornerstone of this country, its position has been slowly eroded. And the state has justified this erosion by deference to what the law has turned into another god—science. The area of children's health and well-being has become one of the major battlegrounds of religious freedom.

Background

As early as 1880, a state removed children from a parent's care because the parent had not sought treatment from a medical doctor. In the case of *In Heinemann's Appeal*, a Pennsylvania court found the father guilty of neglect of a child under the state statute because he had himself treated his wife and three other children who were sick with diphtheria.[1] At the time, diphtheria was sweeping through parts of Europe and the United States. And interestingly, the first effective diphtheria antitoxin was not developed until 1890, by a German bacteriologist. Other Pennsylvania cases in the early 1900s held parents guilty of manslaughter for the failure to provide their children with medical treatment despite religious objections.[2]

In almost every state today, whether the parents fail to seek medical treatment for a child based on the parents' own secular perceptions of the best interest of the child or their most fervent religious beliefs, the state can intrude and the parents can be prosecuted criminally.

According to the *American Law Reports*: "It has been settled that a state, as *parens patriae*, may order medical treatment to save the life of a child notwithstanding the parents' religious objections to the treatment."[3]

In 1967 in Washington, a group of Jehovah's Witnesses brought suit in opposition to a state statute that allowed the courts to order medical treatment, including blood transfusions, for children without parental consent. Jehovah's Witnesses believe that the act of receiving blood or blood products precludes a person from resurrection and everlasting life after death. In the case of *Jehovah's Witnesses in the State of Washington* et. al. v. *Kings County Hospital Unit No. 1*, the plaintiffs argued against the statute on a variety of grounds. Among others, they argued that it denied their right to family privacy afforded them by the U.S. Constitution's Ninth and Fourteenth amendments; that it denied them equal protection under the law since the state protects the religious liberty and parental rights of all other citizens and all other religions; that since the plaintiffs have a deep sense of

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responsibility as a family, they have the right to decide what medical treatment they will accept for their children; and, that the plaintiffs have been denied life, liberty, and property without due process of the law as guaranteed them by the Constitution's Fifth Amendment and made applicable to the state by the Fourteenth Amendment.

The state's highest court did not find any of these grounds persuasive. The court concluded that religious freedom does not include the freedom to expose children to ill health or death and that the state has the right to intervene in the name of health and welfare in these circumstances.[4]

The U.S. Supreme Court typically has refused to hear similar cases. The high courts in New Jersey and Illinois also overruled parents who are Jehovah's Witnesses when they objected to their children having a court-ordered blood transfusion and both these cases were refused review by the Supreme Court.[5]

In a 1991 case in Massachusetts, a hospital sought authority to permit and administer a blood transfusion to an 8-year-old girl over her parents' religious objections.

The McCauley parents had taken their daughter Elisha to the hospital for medical tests. The tests made an initial determination of leukemia, but the doctors wanted to do a bone marrow aspiration to determine with greater certainty whether Elisha did have leukemia. However, the doctors felt this procedure could not be performed safely unless they first increased Elisha's critically low hematocrit reading by giving her a blood transfusion.

The Massachusetts State Supreme Court here found three interests at stake: the natural rights of the parents, the child's interests, and the state's interests. The court then concluded that the interests of the child and the interests of the state outweighed the parents' rights to refuse medical treatment.[6]

In these cases, the Jehovah's Witnesses were not opposed to medical treatment but only the blood transfusions. Similarly, in a 1972 Pennsylvania case, the mother, a Jehovah's Witness, agreed to the surgery but refused to consent to the blood transfusion. No doctor would perform the surgery, however, without prior consent to a blood transfusion, should it become necessary. A hospital director initiated these court proceedings under a state statute authorizing court-ordered treatment for children being deprived of the proper or necessary medical or surgical care. The child here had survived polio but was now no longer able to walk because of both obesity and curvature of the spine. The lower court authorized surgery on the spine and the concomitant blood transfusion. But the higher court reversed this order noting that the boy's condition was not life threatening.[7]

In other cases, the question of court-ordered medical treatments turns into cases of criminal prosecution.

In a 1985 Pennsylvania case, a couple was found guilty of involuntary manslaughter and endangering the welfare of a child in the death of their 2½-year-old son. The parents had not sought any medical treatment outside their own religious treatment of their son, who eventually died of a cancerous tumor.[8]

In Indiana, a jury found a mother and father guilty of reckless homicide and child neglect in the death of their 9-month-old daughter. Allyson Bergmann became ill May 28, 1984, and her parents treated her with prayers, fasting, and invocations of scripture. Allyson died eleven days later from bacterial meningitis. Indiana, like Florida, recognizes a religious-belief exception to the statute pertaining to child neglect. The Bergmanns appealed their conviction on the basis of this exception, but the appellate judge let the conviction stand, arguing that the religious-belief defense was a question of fact for the jury to decide.[9]

In contrast, in 1990 a Minnesota judge ruled that a Christian Scientist couple could not be prosecuted for manslaughter in the death of a diabetic 11-year-old boy who was the wife's natural son and the husband's stepson. The judge here cited the state law on child neglect that excepted religious treatment.[10]

In a widely publicized recent Massachusetts case, David and Ginger Twitchell were

found guilty of involuntary manslaughter in the 1990 death of their 2½-year-old son Robyn. When Robyn became ill in 1986, his parents treated him solely with prayers. Five days later, he died of a bowel obstruction. Although the Twitchells could have received up to 20 years in prison, the judge placed them on ten years' probation. They were also ordered to take their three remaining sons in for periodic medical checkups with a licensed pediatrician.[11]

In Florida, a Christian Scientist husband and wife received probation for an April 1989 conviction of third-degree murder in not providing medical treatment for their diabetic 7-year-old daughter. But recently the Florida Supreme Court reversed their conviction, stating that the religious treatment exception was too vague.[12]

This decision will likely affect the convictions of Charles and Merilee Myers, members of a religious sect that shuns doctors. They were given five years' probation in 1991 for medical neglect of their 16-year-old son who did not die from what doctors diagnosed as a near-fatal heart tumor. "Adults are free to choose martyrdom," the prosecuting attorney said. "Children cannot have it thrust upon them."[13]

In August 1989, a Santa Rosa, California, jury acquitted two Christian Scientists of involuntary manslaughter in the meningitis death of their 15-month-old daughter, but convicted them of child endangerment. However, a Los Angeles judge in February 1990 acquitted another Christian Scientist couple of involuntary manslaughter for the meningitis death of their toddler son for insufficient evidence.[14]

Several other cases indicate that the trend in some states is to order medical treatment over a parent's religious objections even where there is no life-threatening condition.

In the 1972 case of *Re Karwath*, an Iowa court held that a juvenile court acted properly when it ordered surgical removal of the tonsils and adenoids of three children in the state's care despite the father's religious objections. The father wanted the surgery to be a last resort after medication and chiropractics had been used. According to the medical testimony, the children were suffering from middle-ear infections that "could possibly lead to loss of hearing and rheumatic fever."[15] The oldest child had missed several days of school because of his ear problems and concern over this inattendance weighed heavily in the court's ruling.

In a 1972 New York case, a family court judge ordered doctors to perform what was characterized as "risky" surgery on a 15-year-old whose face and neck had been disfigured by a nonfatal, incurable disease. Here again the judge concluded that nonemergency surgery can be ordered over parental religious objections because of the state interest involved in compulsory education. The 15-year-old had not been attending school because of his disfigurement.[16]

In California, a court ordered corrective surgery for a 6-year-old boy born with clubfeet. The boy's Laotian-born parents had opposed the surgery because they believed that the boy's clubfeet was a curse inflicted on them by the spirits. The U.S. Supreme Court in 1990 refused to overturn the lower court's ruling that authorized the surgery. Nonetheless, despite the court order, no hospital has agreed to perform the operation without parental consent.[17]

In Connecticut, in 1990, a 7-year-old girl born with rheumatoid arthritis was taken from her mother because her mother, a Chinese immigrant named Juliet Cheng, had been treating her daughter Shirley with acupuncture, herbal potions, and other non-Western medical treatments. The mother had initially sought help from an American doctor who prescribed aspirin for the then 11-month-old girl, but the mother said the treatment didn't help. Doctors at Newington Children's Hospital in Poughkeepsie, New York, told Cheng that Shirley needed surgery or she would never walk again. When Cheng refused, the hospital persuaded the State Department of Children and Youth Services to take custody of the child. After five months, however, the state Department relinquished custody to the mother after two of the three doctors on the court-approved panel had examined the girl and recommended against the surgery.[18]

The State's Position

The notion *parens patriae* is the fundamental principle behind this case law. It means "father of the country" and it denotes the state's role as a sovereign guardian over "persons under disability."[19] It ultimately places the power in the state government to determine to what extent it will act to protect the interests of "its" children. Thus, the state is always the backstop and referee behind every parent. The state is the one that prescribes a legal duty to those charged with the care of a child to provide that child with medical attention. The parents are prosecuted for breaching this duty, and religious freedom is involved only parenthetically as a possible argument against state intrusion.

"Acting to guard the general interest in the youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."[20]

But the million-dollar question is what course of treatment will guarantee a child's well-being?

Medical testimony is crucial in these cases. The child's death has to be seen as the result of the parents' failure to get medical attention. Doctors cite statistics on the child's chances of survival based on the stage the disease is in when treatment is begun. For example, in the Pennsylvania *Barnhart* case, a doctor testified that the child's chance of surviving the cancerous tumor was 95 percent if the cancer was discovered at an early stage, 85 percent if the tumor had spread locally, and so forth.

Yet, even if true, what do these statistics mean? The 5 percent who don't survive even when the cancer is discovered at an early stage die for a variety of reasons. The treatment may fail to cure the cancer or the treatment itself may kill them. Who can tell whether the Barnhart child falls in the 95 percent or the 5 percent? The state certainly can't know.

The scientifically naive believe that there is truth in science. They see medicine as equivalent to mathematics where 2 plus 2 always equals 4 and, therefore, when a doctor diagnoses a heart tumor as "fatal," it will cause death 100 percent of the time. But medicine is not a logical system; it exists in the empirical world of complex human organisms. When the court officials order that the child be treated and the child dies, hasn't the child in this situation also had "martyrdom" thrust upon him?

Science, particularly medicine, is experimental, which means no particular result is predictable with 100 percent accuracy. The U.S. Government Office of Technology Assessment reports that 80 to 90 percent of doctors' treatment methods are not based on scientifically proven principles and, consequently, the results are not guaranteed reproducible.[21] Childhood vaccinations that were supposed to wipe out illnesses are themselves responsible for causing severe health problems and even death in a small minority of children. According to the California Department of Health Services, the risk of dying or developing brain damage from the pertussis vaccine is estimated to be one in 100,000, and the chance of developing paralysis from the polio vaccine is one in 500,000.[22]

There are also other complicating factors. Studies show the high risk involved in medical treatment, for example, of misdiagnosis, and that one out of five people entering a hospital leaves with a condition he didn't have when he entered.[23]

David and Ginger Twitchell, the Massachusetts Christian Scientists convicted of involuntary manslaughter, had thought their son was sick with the flu. He had felt well enough to go outside and play the day before he died. After the trial was over, David Twitchell told reporters that he and his wife "will try to obey the judge's instructions," but he added that he was "having trouble figuring out whose judgment is going to decide exactly when a problem is serious and not just a cold." He also stated that he

didn't believe a regular checkup would have saved his son's life.[24]

In every one of these cases, the state acts under the mistaken notion that it can accomplish what it sets out to accomplish: the child's well-being. Further, if parents are to be criminally liable, then the government, as *parens patriae*, when it fails to cure the child, should also be liable to criminal prosecution. But the truth is that in every case the parents are being held liable because their chosen course of treatment failed to cure their children. It was the illness itself—whether bowel obstruction, meningitis, cancer, diabetes, or whatever—that killed the child. Under the government's own logic, state officials who mandate that modern medicine be used should also be held guilty when modern medicine fails.

A different standard is being applied to the parents than to the state in these cases that involve a failure to cure. These are not cases of medical malpractice or parental abuse where the doctors or parents contribute to causing the child's death by an act of poisoning, starvation, administration of the wrong medication, or some other kind of physical abuse. When the parents do their very best for their children and the children die, the parents are held responsible for their failure to cure the child. But when the doctors do their very best for a child and the child dies, the doctors are not held responsible for their failure to cure the child. This results in an unfair, inequitable treatment of the parents.

A Fair and Equitable Standard

To apply the state laws to everyone equally and to eliminate this unfair double standard, the legal system has two choices. The system can prosecute parents, government officials, and doctors alike when their mandated course of treatment fails to cure the child. The doctor who follows the medically accepted treatment of chemotherapy for cancer and cures his patient won't be prosecuted. The doctor who follows the same course of treatment but fails to cure his patient will be prosecuted as well as the government official who authorized the treatment. Of course, if officials and doctors are more successful at curing cancer, meningitis, and other diseases than parents are, the percentage of doctors and officials being prosecuted would be less than the percentage of parents being prosecuted.

The other option, which is supported by the Constitution's First Amendment, is for the members of the legal community to realize that even though science has become enormously successful, disease and other maladies can never be perfectly controlled by any judge, doctor, parent, or legislature. Parents should be accorded the same immunity from prosecution when their cures fail as doctors are in the same circumstances. And, then, parents will be free to pursue the course of treatment they choose without state intrusion.

The attitude of state judicial and legislative systems is threatening the preservation of freedom. State officials attempt to ascribe a certainty to science and medicine that simply is impossible to achieve. By science's nature, there can be no certainty for treating a particular sick child. It is time to eliminate the double standard for parents and doctors. □

1. *In Heinemann's Appeal*, 96 Pa. 112 (1880).
2. 52 *A.L.R.* 3rd 1118.
3. *Ibid.*, p. 1119.
4. *Jehovah's Witnesses in the State of Washington* et al. v. *Kings County Hospital Unit No. 1*, 278 F.Supp. 488 (W.D. Washington, 1967).
5. *State* v. *Perricone*, 37 N.J. 463, cert. denied 371 U.S. 890 (1961); *People ex. rel. Wallace* v. *Labranz*, 411 Ill. 618, cert. denied 344 U.S. 824 (1952).
6. *Matter of McCauley*, 565 N.E. 2d 411 (1991).
7. *Re Green*, 448 Pa. 338 (1972).
8. *Com.* v. *Barnhart*, 497 A.2d 616 (1985).
9. *Bergmann* v. *State* 486 N.E. 2d 652 (1985).
10. *The Orlando Sentinel*, February 17, 1990, A-20.
11. *The Orlando Sentinel*, July 7, 1990, A-14.
12. *The Orlando Sentinel*, September 6, 1992, B-6.
13. *The Daytona Beach News Journal*, July 22, 1991, B-3.
14. *The Daytona Beach News Journal*, April 18, 1990, A-2.
15. *In Re Karwath*, 199 N.W.2d 147 (1972, Iowa).
16. *Re Sampson*, 29 N.Y.2d 900 (1972).
17. *The Orlando Sentinel*, December 16, 1990, A-19.
18. *Ibid.*
19. *Black's Law Dictionary*, revised 4th Ed. (West Publishing, 1968), p. 1269.
20. *Com.* v. *Barnhart*, 497 A.2d 616, 622 (1985).
21. Charles B. Inlander, *Take This Book to the Hospital With You* (New York: Pantheon Books, 1991), p. 111.
22. *The Orlando Sentinel*, March 5, 1991, G-4.
23. Inlander, p. iv.
24. *The Orlando Sentinel*, July 7, 1990, A-14.

THE FREEMAN
IDEAS ON LIBERTY

IN DEFENSE OF PROPERTY RIGHTS AND CAPITALISM

by Tibor R. Machan

The concept of freedom, in its socially relevant sense, means the condition of individuals free from aggression by others.[1] This is the political freedom of the unique American political tradition. It rests on the recognition of every individual's equal moral nature as a self-determined and self-responsible agent, regardless of admittedly enormous circumstantial differences.

By political freedom I mean that no one is an involuntary master or servant of anyone, including the government. In short, when the consent of the governed is the reigning principle, political freedom exists; when it is compromised, political freedom is in peril. Economic freedom implies freedom of trade, in the classical liberal tradition of political economy.

To understand the nature of free trade, one must note first of all that it is logically dependent on the principle of the right to private property. One cannot trade if one does not own anything. Oddly, Karl Marx clearly identified the function of property rights: "the right of man to property is the right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independently from society, the right of selfishness."[2]

Marx focused on the worst-case scenario, but one should not do that when considering the characteristics of a system of principles. Of course, the right to private property makes free trade possible and thus leaves one free to dispose of one's possessions irrationally. But it also leaves one free to act and trade in accordance with the best judgments one can form—something Marx did not mention. Marx gave us just a fraction of the story. Private property enables one to dispose of one's belongings either responsibly or irresponsibly, so that trade can yield both worthy and unworthy results. Yet, precisely because it is private property, acting in a fashion that brings unworthy results will be less likely, since the harm will first of all befall the owner, not others. Property discourages irrationality and encourages rationality.

It bears noting that most prominent and articulate contemporary defenders of capitalism are economists. This creates a misimpression. Economists study the way the free market satisfies human desires, but they ignore the nature of those desires. They do not concern themselves with whether the

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market may be morally justified, whether it is an institution basically in line with human moral values. Economists focus on explaining, describing, and predicting the ways of a free market. They insist that economics is value free.

When the most prominent advocates of the free market are economists, it appears that nothing other than efficiency matters about the marketplace. But, in fact, there are certain normative or ethical features of the free society that an economic analysis of free markets leaves unmentioned. This would not be a problem if economists were not the virtually exclusive defenders of the free market.[3] But the market rests on institutions and ideas that are ethical in nature.

Freedom of trade presupposes property rights. If no such rights exist, then there is no need for or opportunity to trade. People could just take from others what they want and would not need to wait for agreement on terms. Or, alternatively, if everyone owned everything, no one could ever trade. Everyone's permission would be required for every transaction.

For individuals and voluntary associations, such as corporations and partnerships, to set terms of trade presupposes the authority to make decisions about property. That is indeed a moral precondition of a free market, not a purely "descriptive" one.[4]

The moral nature of property rights should be clear enough: If I own something, that means that others *ought to* refrain from thwarting my choice of what to do with it. I am the one who is authorized to set terms, not others. (This is why theft is a vice!) This is a moral issue because it involves considerations of what persons ought to do.

And, not surprisingly, critics of a free society seem to know all this. They capitalize on the fact that economists are reluctant to discuss ethical issues by suggesting that something is amiss in their theory. What critics don't realize is that precisely because of this value component at the base of market economic theory, the system is demonstrably sound and much of what economists say about it is right.

If economists who defend the marketplace admitted that at its base we find certain assumptions as to how individuals ought to act and what governments should uphold, they could still proceed to carry on with their analysis of how such a system works and why it produces more efficiently than all others. This would leave open the question as to whether those basic assumptions are sound. Even if they turned out not to be, the economist could insist that the business of economics is to study market processes and others should take on the task of figuring out whether alternatives to a market economy might be preferable for other than economic reasons.[5]

I have noted that the principle of property rights underlies the market. What are property rights? They are necessary preconditions of genuine free trade and thus of a free market.

Certainly there are numerous societies in which conditions resembling a structure of property rights are evident—we might call them a structure of property *privileges*. In these societies persons are *permitted*, within certain limits, to hold and trade goods and services, although the government—the local Coastal Commission, the Federal Communications Commission, the king, or some other powerful group or person—can legally revoke the privilege. In such societies there is no genuine free market. They have what resembles free markets in the same way a sophisticated zoo can resemble the actual wilds, or some parents give children limited personal responsibility. And, of course, the more such privileges become entrenched and depended upon, the more the market will exhibit the tendencies we expect in a free market place. In any case, the right to private property needs now to be considered in some detail, since it is the bedrock of economic freedom. We are interested here in the way human freedom relates to economic freedom.

The Right to Private Property

Human freedom, as understood within the American libertarian political tradition, is inseparable from economic freedom and

the principle of the right to private property. Why is this so?

Political freedom, as we have seen, means not aggressively intruding upon one another. We have also noted that this is a crucial requirement of human dignity, the opportunity to aspire to moral excellence. What has not been brought out in this discussion is that any opportunity must have a sphere or realm. Making moral choices requires that one have room for making them—to use Robert Nozick's phrase, it requires "moral space."[6]

Very plainly put, the principle of the right to private property serves the purpose of always translating the freedom of self-responsibility into realistic, concrete policies. To the extent that a human polity must be focused on securing the opportunity for individuals to pursue "the general welfare"—and insofar as the human good must be achieved by all individuals on their own within a concrete realm of jurisdiction or "moral space"—a good human community must secure for all persons such realms of private jurisdiction. The law of property would be that branch of legal theory which would develop the method for securing for all their proper domain of authority within a highly complex society, one in which what belongs to someone can range from a horse to a sophisticated chemical formula to a musical arrangement.

To the extent that the law of property is not guided by the principle of the right to private property, it departs from this objective. But, of course, the main question that faces us in this connection is how to determine the parameters of the domain of personal authority and thus assign protection to just that set of items or property?

This is a very complex issue indeed. Locke's labor theory of property is not adequate as an answer because it is not clear what can count as "mixing one's labor" with nature. Ideally, if we were to start from scratch, the entrepreneurial theory of property would be best. Described by James Sadowsky, this line of analysis supports the conclusion that "The owner of property performs an entrepreneurial function. He must predict the future valuation that he and others will make and act or not act accordingly. He is 'rewarded' not primarily for his work, but for his good judgment."[7]

This is consistent with an earlier point we raised, namely, the basis of personal moral responsibility. That basis is in one's fundamental choice to think or not to think, to exercise one's rational capacity, one's faculty of reason. Since morality presupposes choice, and since all persons are free primarily in their use of their minds, the source of moral merit is, as Sadowsky put it, good judgment. A rational creature would be expected to excel precisely in proportion to his willingness to live by good judgment, and when this good judgment is made with reference to matters of prosperity, it is no less meritorious than when it is made with reference to hygiene, truth-seeking, family matters, career, or politics.

Economic freedom is a necessary but not sufficient condition of human excellence. It is a prerequisite of human dignity. It is indispensable for moral agents who must make their way in life in the context of a world the various parts of which may be controlled by different individuals. So as to make certain that each individual has a reasonably clear idea of what parts of reality are within his or her jurisdiction—so that he has, as it were, his moral props in clear focus—a system of private property rights is necessary. Such a system preserves the moral independence—though not, as caricatured by Marx and many others, the social autonomy—of everyone.

Capitalism and Morality

Statists of all stripes have been very eager to undermine the moral legitimacy of capitalism. Economic defenders of the system have tended to avoid the argument, maintaining that on the whole the capitalist system produces greater wealth than do others, a result which everyone seems clearly to prefer.

But this defense is inadequate. We can easily think of circumstances when considerations of prosperity must be traded off so

as to achieve other values. We know that no expense must be spared when aiming for some goals. Some economists duck this fact by engaging in economic imperialism, holding that since all values are reducible to wealth, all trade-offs are economic. But this is not so. Friendship is not mainly an economic value—if one were to trade it for, say, a raise in pay, one would be acting unethically, not simply losing some valued items. A betrayal will not qualify for an exchange of economic values.[8]

Because the economists have tied their hands about morality, capitalism has been under fire from all sides. It is really something of a tragedy that the most humane, most productive, and most benign system of human economic arrangements would be the target of some of the most morally reprehensible critics—terrorists, Marxist-Leninists, fascists, *et al.* But, to quote Shakespeare, "Wisdom and goodness to the vile seem vile: Filths savour but themselves."[9]

Consider some typical and oft repeated charges against capitalism:

1. Capitalism is anarchic.
2. Capitalism produces waste and trivia.
3. Capitalism caters to the base within us.
4. Capitalism neglects the poor.
5. The workers under capitalism are exploited.
6. The wealthy under capitalism gain special protection against adversity.
7. Capitalism destroys the fine arts.
8. Capitalism threatens the environment.

One could go on, especially if one included charges which are leveled with a particular axe to grind, e.g., about inequality of wealth, the disparity of wages paid to different segments of society, and so forth. But these charges presuppose the normativity of human economic equality, something that rests on intuition rather than argument.[10]

Let us take some time here to respond to some of the moral criticisms of the free market capitalist system. We will see, I think, that in preserving human freedom, especially in the context of commerce, capitalism not only escapes being responsible for moral shortcomings but actually facilitates moral excellence throughout a culture.

Capitalism and Human Excellence

The alleged anarchism of capitalism rests on the view that when free trade or exchange reigns—i.e., producers can freely attempt to interest consumers in their wares, while consumers can freely choose to spend their earnings on items they wish to have—this must result in reckless disregard for what is of real importance in human life.

The charge is plausible, because in a free market place there is ample opportunity for producing and consuming trivial and even morally odious goods—e.g., pet rocks and pornography—as well as plenty of evil production and consumption. The charge, made by Marxists and conservatives alike, is strengthened by the fact that the alternative offered is always some *vision* of perfect order—e.g., humanity fully matured in some distant future (Marx) and society well governed by wise leadership (Plato and George Will).

But the reality is that markets are not anarchic but merely reflect the human situation. We are not guaranteed the company of wise and virtuous fellows. We can only choose what we will do about their presence in the neighborhood. We can trust in the illusion of some future paradise on earth or in the guaranteed, long range superiority of certain persons, both of which are fantastic. Or we can try to make sure that the effects of other people's foolishness and vice will be limited to their own domain. A system of private property rights can do this better than anything else.[11]

As for the second objection, capitalism does at times produce waste and trivia. But it produces immensely useful items as well, more so than any other system. From the mass production of stereo equipment and prints of the best of mankind's artistic achievements, to hospital instruments and special nutrition for those with health problems, capitalism especially serves the unique, because its method of production

guided by the price system informs producers of needs better than any other method.

Moreover, what may seem trivial to some people can be of immense value to others. The reason this is overlooked is that even today many people fail to accord proper standing to individual differences. Thus while most of us may find the various items in tourist traps useless, there can be individuals to whom these can be of value.

As to the pornography or prostitution which could exist in a pure capitalist system, it is not something that need be rationalized away as wonderful (since there is a demand for these, and the consumer is king).[12] It is possible to combat them on the personal, social, and cultural levels (through the comic arts, editorials, pulpit, and so forth). Capitalism does not just protect the freedom of the base but also that of the noble. It is a prejudice to hold that the market caters to our baser self. Capitalism, by encouraging the rational and responsible use of property, actually meliorates vices like greed, envy, and dishonesty. It is planned economies in which those vices are rife.

As for the poor and the workers, the treatment of workers under early industrial capitalism was not as harsh as the Marxists have alleged. It is true that England at the end of the eighteenth and the beginning of the nineteenth century was rather different from the ideal situation. But the extent of the misery after the introduction of more or less free economies has been grossly exaggerated.

There would have been even greater misery had this system *not* been introduced. This leads us to believe that there was something radically wrong before the change that has never been given the proper attention. While most of the frightful restrictions on economic action were removed, many of the enormous feudal land-holdings were left untouched in the name of respect for private property.

As we know, these holdings were mostly the result either of conquest or state land-grants. It is highly dubious that these holdings could ever have attained their size on the free market. Justice would have dictated the division of these lands among the agricultural workers. Unfortunately this was not done. The result was that a few individuals had votes in the market far beyond their due and were thereby enabled to determine the course of events.[13]

With this power at their disposal, it is not surprising that "capitalists" enjoyed special advantages. But to mistake this for a typically capitalist situation is a serious confusion.

There is another error underlying the charge that capitalism leads to worker exploitation. This is that workers are helpless creatures. The market, however, makes it possible for workers to improve their lot.

Marx was influenced by Thomas Malthus' view that the working class will multiply far more rapidly than the income it can generate will support, thus workers will be more and more exploitable, given how plentiful they are. Malthus has been refuted both in theory and by history—the enormous number of working people in the world have frequently enough found themselves very productively employed, usually when markets were more than less free, when governments did not distort the principles of free trade by domestic and international violation of individual rights. In addition, Marx had little confidence in human creativity and entrepreneurship. Thus he did not make sufficient room for a sustained rise in the demand for goods and services, based on what human beings could both invent and learn to enjoy or use. The work force in a capitalist society is, therefore, far from easily exploited. Indeed, it is insulting to workers to think otherwise, and Marx (and later Lenin) had a low opinion of ordinary human beings.

Finally—and this is most difficult for some to fathom—many who are allegedly exploited among the workers have placed themselves in a position of weakness. They failed to develop their skills and talents, so they must take what they can get of limited jobs for the unskilled. They should in fact be grateful that someone will provide them with opportunity, not protest that they are being mistreated. To proclaim that workers

are always exploited, as a class, is to show that one is wearing ideological blinders and is really not very familiar with actual persons in the labor force.

The next charge against capitalism is that it favors the wealthy. In a free society where no special legal privileges are permitted for anyone and where government is restricted by constitutions from regulating economic affairs, the wealthy have only those advantages which come from wealth. These involve the greater ability to purchase various goods and services offered on the free market, an advantage that in a constitutionally limited government does not include political power. Furthermore, wealth gives some only one type of advantage. Personality, character, talent, good will, perseverance, and hard work can often result in far greater success than wealth.

Marx has tried to discredit the claim that it was governments in the past—feudalist, mercantilist—which gave lopsided advantages to some select people. When the large joint stock companies had been established, governments clearly favored them, so that nations might gain wealth, although this proved to be a rather frail strategy. In any case, without going into the historical record of why some firms managed to exercise undue power in the market place—namely, because of their special legal privileges—we can point to some matters everyone can testify to. Mostly we can note that in the United States, which has had the greatest degree of capitalism in human history, the positions of the wealthy and the poor are not held by one single class or select few. Rather these positions are in constant flux—or at least this has been so in the past, prior to the onset of the massive welfare state—far more than under any other system. This seems to suggest that the wealthy under capitalism have less political or legal power than in other systems.

The charge that capitalism destroys the fine arts because it makes mass culture dominant is also unfounded. Because of the "noise" of popular culture, the fine arts may not be so visible as are rock and roll, television, and popular literature. But in total quantity, never have so many listened to, viewed, and otherwise experienced so much of great artistic achievements as in capitalist or near-capitalist societies. The mass production of the arts, indeed the finest of them, proves this beyond any reasonable doubt.

As to capitalism's impact on the environment, there is no other system that makes a better effort to avoid the tragedy of the commons, the source of all environmental problems. This is because under capitalism property is privately owned. Any use of property to the detriment of neighbors would be legally actionable as a form of dumping, trespass, assault, invasion, and so forth. When privatization is impossible or technically infeasible, there would be personal injury provisions against pollution. Any activity that isn't peaceful in this sense would have to be prohibited, no less than rape or assault is now. Indeed, the most effective environmentalist public policy flows from a system of private property rights in which both persons and property are supposed to be protected from invasion.[14]

Final Reflections on the Value of Free Markets

It is true that human beings are not perfect. To try to force them to be perfect is futile. Herbert Spencer was dead right when he observed that "The ultimate result of shielding men from the effects of folly is to fill the world with fools."[15] A sign of our imperfection is that we keep returning to the failed effort to perfect one another.

To ask that government, for example, attempt to cure us of our imperfection is to show that one isn't willing to live by one's own evaluations: If the world needs improving, the proper approach is to use whatever skill one has to remedy matters. Censors should try their hands at writing better literature. Critics of waste should produce things of value. Those who fear the base within us should turn to moral education as a way to help out. Those who sympathize

with the "exploited" workers might help by becoming one and seeking remedies.

Capitalism is the political manifestation of the human condition: We are free to do good or evil, and in society we need to keep this in mind. The free market, through the principle of the right to private property, helps us keep this in mind—indeed, institutionalizes it through the law of property.

Democracy itself, which is so much prized even by outspoken critics of the free market, would be impossible without meeting the preconditions of the marketplace. This is because democracy requires some secure realm of personal jurisdiction or authority for those who are asked to make their views evident by way of the vote. They need to know that if they are a minority, they will not be at the mercy of vengeful victors who deprive them of their lives, liberty, and property. In short, a democratic polity cannot function without capitalism, the system in which private property rights are protected. □

1. I discuss the different kinds of freedom that are of concern to us in my paper, "Two Senses of Human Freedom," *The Freeman*, Vol. 39, January 1989, pp. 33–37.

2. Karl Marx, *Selected Writings* (Oxford University Press, 1977), p. 53.

3. I have in mind such eminent economists as Milton Friedman, James Buchanan, Gary Becker, and the late George Stigler, F. A. Hayek, and Ludwig von Mises, all of whom stress those aspects of the free market that pertain to its efficiency and eschew concern with whether the system is indeed in accord with, for example, prudence and justice.

4. Some argue that rights should be thought of as metanormative principles in that they do not directly bear on how one ought to conduct oneself but on the conditions required by everyone in a community for making the choice about how to live. See, for more on this, Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature, An Aristotelian Defense of Liberal Order* (La Salle, Ill.: Open Court Publishing Co., Inc., 1991).

5. Something along these lines applies to any applied science; e.g., engineering or building construction. They assume that what is to be done is morally justifiable, though it isn't their province to dwell on that issue.

6. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 57.

7. James Sadowsky, "Private Property and Collective Ownership," T. Machan, ed., *The Libertarian Alternative* (Chicago: Nelson-Hall, 1974), p. 123.

8. Democritus of Abdera wrote: "The same thing is good and true for all men, but the pleasant differs from one and another." Quoted in Barry Gordon, *Economic Analysis before Adam Smith* (New York: Barnes and Noble, 1976), p. 15.

9. *King Lear*, Act IV, Sc. II.

10. This doctrine has gained considerable support at the hands of John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), in which the role of moral intuitions as the central feature of the foundation of political justice is vigorously endorsed.

11. Some of this is implicit in the Austrian economists' famous discovery of the calculation problem under socialism. See Trygve J. B. Hoff, *Economic Calculation in the Socialist Society* (Indianapolis, Ind.: Liberty Press, 1981).

The discovery of serious difficulties with a common ownership policy should be credited to Aristotle (*Politics*, Book II, Ch. 3, 1261b34–1261b38). Another version of the point is made in Garrett Hardin, "The Tragedy of the Commons," *Science*, vol. 162 (1968), pp. 1243–48.

Perhaps there is yet another expression of this same difficulty, in connection with the various impossibility theorems showing that rational public choice is not possible in a fully democratic society, one in which citizens may demand the satisfaction of their desires from the government. See Kenneth J. Arrow, *Social Choice and Individual Values*, 2nd edition (New York: Wiley, 1963). See my "Rational Choice and Public Affairs," *Theory and Decision*, vol. 12 (September 1980), pp. 229–258, as an attempt to spell out the criteria by which we should determine whether something falls within the public domain and is, thus, subject to public policy decision making. I develop this line of thinking further in Tibor R. Machan, *Private Rights, Public Illusions* (New York: Transaction Books, forthcoming).

12. Walter Block's book *Defending the Undefendable* (New York: Fleet Press Co., 1976), which is argued from a free market perspective, makes it appear, quite mistakenly, that nothing else but coercion constitutes evil conduct. Clearly, however, one can betray friends, debase an ideal, lack courage, act imprudently, and do all kinds of moral wrongs without coercing anyone. Even some of the practices that may appear to be justified rebellion, such as littering, could turn out to be mere slothfulness or at least lack of civility in others. The defense of human liberty does not require abandoning moral standards—quite the contrary: It is in part so as to enable us to invoke moral standards freely, without regimentation from others, that freedom is vital to everyone.

13. Sadowsky, p. 124.

14. For a more detailed treatment of this issue, see Tibor R. Machan, *Private Rights, Public Illusions*, Chapter 8.

15. Herbert Spencer, "State Tampering with Money Banks," *Essays* (1891).

Three Blessings in One

■ The superior freedom of the capitalist system, its superior justice, and its superior productivity are not three superiorities, but one. The justice follows from the freedom, and the productivity follows from the freedom and the justice.

—HENRY HAZLITT

THE FREEMAN
IDEAS ON LIBERTY

RE-REGULATING AIRLINES

by Paul A. Cleveland

In 1978, Congress passed legislation which phased out the Civil Aeronautics Board and thus deregulated the airline industry. The bill was passed amid industry speculation that deregulation would endure for only a brief period of time. Trade publications prophesied re-regulation would follow the demise of a number of the large trunk carriers. They predicted that only four or five large carriers would survive in the competitive environment and when this occurred a movement to re-regulate the industry would result.

Fourteen years after deregulation we have seen the financial collapse of several of the large trunk carriers and the merger of others. As a result, just as industry insiders forecasted, the number of large airlines in the nation has shrunk substantially. Additionally, the media are running numerous stories about fluctuations in the airline industry and the loss of stability. Amid these stories there are calls for re-regulation just as industry officials had prognosticated; but no one seems interested in the facts about deregulation.

In the midst of all the clamor about the instability of the industry and the demise of once profitable carriers, no one seems to be asking whether or not deregulation has resulted in anything positive for the consumer. Given the media attention to gloom and doom, the reality might surprise many people. In fact, in the years since deregulation, air travel has increased dramatically and the real price of air travel has fallen. In 1977 domestic air travel accounted for 147.078 billion revenue passenger miles of air transportation service. By 1986 this level increased to 252.724 billion revenue passenger miles. This is an increase of 71.8 percent or an average annualized growth rate of over 6 percent. To put this growth rate in perspective, we can note that real GNP for the economy grew at an average annualized rate of less than 3 percent for the same period.

In addition, airlines are increasing the percentage of seats actually filled on their flights, thus making more efficient use of their resources. The average load factor during the ten-year period leading up to deregulation was 52.4 percent. This percentage increased to 59.8 percent for the following ten-year period. This increase has been accomplished through the development of hub-and-spoke networks which allow the airlines to clear passengers through central terminals and thus offer much wider varieties of service than could have been offered before. It is granted that network expansion typically requires passengers to make one stop en route to their final destinations, but it is this approach which has made air travel accessible to many more consumers. Furthermore, it is a technique that allows the

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airlines to control costs and operate their equipment efficiently. This is borne out by the data which indicate that the number of available aircraft for service has risen by 52.2 percent from 1977 to 1986. Given that air passenger service has increased by more than 70 percent for this same period we can see the increased efficiency of the equipment used. That the airlines were forced to control their costs of providing the service is just one more positive result of deregulation. This process weeded out those firms which could not provide service at the competitive rate.

As a final consequence of deregulation, some might be surprised to find out that the number of fatalities per passenger mile of service has actually fallen during deregulation. Air travel is safer today than ever before. During the ten-year period prior to deregulation the industry averaged 253.5 fatalities per year. During the ten-year period following deregulation average yearly fatalities in the industry dropped to 153.8. This reduction even includes those airline deaths that occurred as a result of some type of terrorist activity. Why has this happened? I think it is the result of competition which has streamlined the industry and resulted in the continued operation of only those airlines most qualified to offer a quality service at an attractive price.

Given all these positive results, why then would anyone propose re-regulating the airline industry? We can identify three reasons for those proposals. First, some individuals have a vested interest in a regulated airline industry. Second, many people continue to hold the misconceived notion that industrial competition depends solely on the number of market participants. Finally, there seems to be a rising concern that major airlines are developing monopoly control at their primary hub airports. Let's examine each of these areas of concern.

Vested Interests

If deregulation taught us anything, it is that industry insiders have a vested interest in being regulated. In the years since deregulation took effect we have seen numerous airlines unable to manage the resources at their disposal well enough to continue in business. As a result, a competitive environment has forced them from the industry. Managers in this industry must have had a much easier life when they were not allowed to compete against one another. Even now, those who have competed successfully must long for the days when life was easier. No doubt they would welcome the re-regulation of the industry.

This is true not only for the managers, but for the other employees as well. When competition is thwarted it is easy to request and obtain pay increases that would never be warranted in a competitive environment. Therefore, it shouldn't be surprising to see union officials discuss the "disaster" of deregulation. Indeed, competition has been a disaster for the unions because it has undermined their privileged position.

Finally, there are governmental officials. They also have a vested interest in re-regulating the industry. Bureaucrats must have bureaus. Without them they have no position from which to meddle in the affairs of others. Busybodies are generally uninterested in producing something valuable for someone else. Rather, they prefer to intrude upon other people's businesses.

Understanding the Nature of Competition

Next consider the prominent view of competition. People today have developed a distorted understanding of the meaning of competition. As Israel Kirzner points out in his book *Competition and Entrepreneurship*, the reason for this confusion rests with economists and their focus on long-run, perfectly competitive equilibrium as a definition of competition. But as Kirzner quite rightly points out, this is not competition at all. Rather, it is the absence of it.

In the context of the airline industry, the current concern with the number of remaining large carriers is unimportant. The process of competition is working. We see the process working as we watch those airlines

which are unable to keep up fall by the wayside. Their assets are then reallocated to the remaining firms that have proven their ability to provide a relatively more desirable service to the traveling public. In light of this process, is it any wonder that air travel has expanded so rapidly since deregulation?

Even if it were true that numbers were important, the re-regulationists would still be no better off in their argument for re-regulating the industry. This follows from the fact that it is not the number of airlines that exist which is important in their argument, but rather the number of airlines that provide service for a particular city-pair market. During the regulatory years it was not surprising to be limited to only one carrier which served a specific city-pair market. For more heavily traveled routes, we sometimes found two firms; but it was unusual for more than two air carriers to serve the same route. Therefore, if the result of airline deregulation is the elimination of all but four airlines, and the remaining carriers serve roughly the same markets, on the basis of numbers alone we must conclude that there is more competition.

The "Monopoly Control" Hubbub

This brings us to the final concern. In recent years there has been a great deal of interest about the level of competition at hub airports. In particular, some writers have suggested that airlines are engaged in developing monopoly control over air transportation into and out of their primary hubs. These writers have focused on the percentage of service dominated by one carrier at some airports. For example, Delta accounts for a significant proportion of the traffic through Atlanta, and Northwest accounts for a sizable portion of traffic through Minneapolis. The critics argued that since these airlines control such large portions of the traffic through these hubs, they can therefore charge higher prices for nonstop service originating or ending at these hubs.

In response to this criticism one is left to wonder why this state of affairs is so bad. After all, if price is the primary factor for the customer there are probably numerous one-stop options to and from these airports. Alternatively, if time is of the essence, then the extra price would certainly not be problematic from the consumer's point of view. Either way, one would be hard pressed to argue that the airlines were not providing a valued service for the price. We have already seen that one result of deregulation has been the development of hub-and-spoke networking which typically requires that passengers be funneled through a central clearinghouse en route to their final destinations. We also saw that this approach makes the most efficient use of resources. Therefore, it is not surprising to find that passengers pay a premium for nonstop service.

There remains, however, one more feature of the airline industry that we should consider with respect to the issue of fortress hubs. Specifically we need to consider the way in which airports are constructed and operated in the United States. Airports have typically been constructed and operated as public enterprises. That is, they are government owned and operated. The funding to construct airports has come from local bond issues and from federal funds. To obtain gates and landing slots the airlines sign use agreements with the public authorities assigned the task of overseeing airport operations.

There are two types of use agreements commonly employed. They are the compensatory agreement and the residual cost agreement. A compensatory agreement is a standard type of contract. The airline agrees to compensate the airport authority for its use of the facilities according to the terms of the agreement. The rates for leasing gates and for landing and take-off slots are spelled out in the agreement. Under this type of contract the financial risk of the airport remains with the airport authority.

A residual cost agreement is somewhat different. Under the terms of this contract the airlines agree to pick up any additional costs of the airport not covered by previous payments for gates, landing and take-off slots, concessions and other ground-related

revenues. This contract shifts the financial liability from the airport authority to the airlines. In particular, the airline most at risk is the one with the dominant presence at the airport using such a contract.

Dominant airlines have been unwilling to sign these agreements without the inclusion of a "majority-in-interest clause." A majority-in-interest clause allows the airline underwriting the burden of the financial risk the power to control future capital decisions. Thus a dominant airline could prevent the expansion of the airport if the proposed construction did not meet its own time frame for expansion. In a very real sense, the airline would be in a position to thwart entry because of the nature of the use agreement.

The problem in this case is not a competitive airline industry. Rather the problem is a socialized system of airports. If the airports were privatized this problem would vanish, for an entrepreneurial airport would seek profitable airport expansions. Someone might try to argue that airlines which currently have the majority positions at airports would end up purchasing the airports so as to continue to limit entry and competition; but this argument is weak. In this case the airline would be pitted against itself. Should it operate its airport at a less than optimal level and take a loss on the airport for the sake of its air passenger service? I think the answer is no. Through the fortress hub situation the competitive airline industry has revealed to us another industry which needs to be competitive.

What will happen to the airline industry in the future? Will it be re-regulated as the industry prognosticators have forecast or will it remain competitive? Will we ever seriously consider privatizing the airports or will we continue to operate them as relics from the past? For now we don't know the answers to these questions. Let us hope that we will have the common sense to maintain and enjoy not only a competitive airline industry, but a competitive airport industry to match. □

THE FREEMAN
IDEAS ON LIBERTY

RENT CONTROL AND THE PENULTIMATE SOLUTION

by Scott Gardner

In January 1988 President Reagan indicated that he would ask Congress to end federal aid to cities that had enacted rent control laws. This request was motivated by newly completed studies showing that the destructiveness of rent regulation effectively nullified any benefits that might be bestowed on municipal economies by federal funds. Predictably, his proposal aroused such a storm of protest and recrimination that the President backed down, and since then no national politician has dared to challenge rent controls in any public forum.

I can readily understand why. For the past fifty years, rent control has been a sacred cow of statism. In fact, this law is considered by many to be among the crowning achievements of enlightened social legislation.

As a former owner of a small Manhattan townhouse with just six residential tenants, I had occasion to experience this "crowning achievement" first hand. During the ten years I owned this property, I was involved in thirty or forty administrative actions, which included assorted rent rollback hearings, illegal occupancy determinations, nonpayment proceedings, violation summonses, unauthorized subleases, and rent overcharge rulings, all precipitated by my tenants' unlawful conduct.

Mr. Gardner, a former landlord and proponent of free-market housing, is a newspaper columnist and author of Live Rent-Free for Life, *a satirical exposé of the New York City rent-control system.*

In every case I found myself at the "enlightened" mercy of a group of judges, politicians, and bureaucrats who exhibited such biased and vindictive attitudes toward landlords that I began to feel as though I were a Jew in Nazi Germany.

At first I dismissed this feeling as an outrageous over-reaction to the difficulties I was going through. Having had relatives who perished in the Holocaust, I tried to convince myself that this inappropriate comparison was the product of my own imagination. After doing some additional research, I came to the conclusion that this apparently innocuous law called rent control is not so benign as its proponents would like us to believe it is.

While there are obviously many differences between rent control and Naziism, both systems display similarities too numerous to ignore. The sad truth is that when rent control's rhetoric of humanitarianism is peeled away, underneath is a political philosophy ominously similar to fascism.

I am aware that in today's entitlement-oriented society, there is a great resistance on the part of the social liberal community to see rent control in any but the most humanitarian light, claiming it provides a measure of protection for the poor and the downtrodden. Naziism initially was also seen as a great benefactor of the poor by many observers both inside and outside Germany.

Long before Hitler embarked on his program of mass extermination, Nazi discrimination and restrictions against the Jews were primarily economic in nature: expulsion from the professions, confiscation and destruction of commercial property, extortion of money for ransom and exit permits. To avoid trivializing the Holocaust and invoking visions of Auschwitz, I therefore limit my comparison of rent control with the *early* treatment of the Jews at the very beginning of the Nazi regime.

The analogy between rent control and Naziism starts with the disturbing fact that while it is unfortunate for people to be antagonistic toward landlords (or Jews as the case may be), it is extremely dangerous to have these prejudices mandated by government, codified by law, and politically enforced.

Rent control laws that have been entrenched in communities like New York City, Berkeley, and Cambridge implicitly assume all landlords are greedy scoundrels and need to be disciplined and punished for exploitation of their tenants (who are all paragons of virtue in desperate need of protection against such monsters). By singling out landlords for such "special" treatment—*and making it the law*—rent control's similarity to the Nazi policy of discrimination against Jews becomes readily apparent.

Rent control is based on a denial of the notion of equality before the law. For example, in New York City, any and all statements by tenants are automatically accepted at face value as true, while every allegation by a landlord must be accompanied by documented proof. While there are dozens of official complaint forms, telephone hotlines, and agencies dedicated to protect tenants against their landlords, nothing similar is available for landlords' protection against their tenants. While tenants are given free legal counsel by the city, landlords must assume these costs privately. And finally, the law specifically forbids tenants from entering into separate rental agreements with their landlords, thus abrogating property owners' rights of voluntary contract. But this double standard before the law is just the tip of the iceberg.

While rent control stops short of confiscating a landlord's property outright like the Nazis did to the Jews, this law does force landlords to subsidize their tenants regardless of whether the tenants need such support or whether the landlords can afford to give it.

The large numbers of wealthy tenants enjoying the benefits of rent control—including such luminaries as a former mayor of New York City, a city housing judge, a state assemblyman, the U.S. Ambassador to the United Nations, and an heiress to the MCA fortune—have been well documented in the press.

This irrational system lacks even the appearance of logic, which underlies welfare-state redistributionism that requires the rich to subsidize the poor. Yet despite its irrationality, rent control has remained in force so many years for three primary reasons:

- Landlords are a small minority of the voting population.
- Landlords cannot pick up their properties and move them across state lines to escape such restrictions.
- A combination of envy and animosity toward landlords as a group has created a climate of public indifference to their plight.

One of the hallmarks of totalitarianism is the use of group stereotypes as a way of achieving certain ends. When Hitler said that "Jews are parasites sucking the lifeblood of their hosts," he wasn't talking about one or two individual Jews; he was talking about *all* Jews. The deliberate vilification of a whole class of people fosters the hatred that is the first step in a campaign whose ultimate goal is the destruction of that group, as the world to its horror eventually discovered.

When I hear local politicians calling landlords, "greedy speculators gouging their tenants with unconscionable rents," they are not talking about one or two individual landlords; they are talking about *all* landlords. (By an interesting coincidence, in the Nazi party newspaper, *Völkischer Beobachter*, Jews were condemned as " . . . foreign

landlords who pocketed the money of German tenants.") Landlords are capitalists, and the anti-capitalistic mentality prevalent in Hitler's Germany may be found in America as well.

Propaganda has a powerful impact on public opinion. If you repeat something loud enough and long enough, a lot of people will believe it, no matter how preposterous the statement may be. When the Nazi press attacked the German Jews as vicious, unscrupulous, money-grubbing scoundrels—the same terms in which capitalists have been denounced for more than a century—even the Jews began to have doubts. Coincidentally, those are the very same adjectives used today by American politicians and journalists to describe American landlords.

When the *Village Voice* headlines the "Ten Worst Landlords of the Year," or former New York City Council President Andrew J. Stein's lists of "The Dirtiest Dozen Landlords," it seems to me that Herr Goebbels himself could not have planned a more effective propaganda campaign to discredit all landlords for the faults of a few.

Once the smear campaign has been effective, it is relatively simple to deprive the victims of their fundamental rights, and to do it in a tone of moral righteousness. After all, if New York landlords, or German Jews, are that despicable, they deserve to be treated as criminals.

In Germany, punishment for Jews arrived in the form of Adolf Hitler's Nuremberg Laws of 1935, a set of statutes designed to "protect" the German *Volk*. The government deprived Jews of their rights of citizenship as well the right to own any business or property.

As a result of those laws and the tacit permission they granted, the legal restraints and civil niceties normally observed between fellow citizens broke down and the floodgates of prejudice were opened wide. It became a profitable game for anyone to cheat, denounce, discriminate against, or confiscate the property of Jews without having the slightest pangs of conscience or suffering any legal consequences.

In New York, punishment for landlords came about as a result of the Rent Control Law of 1943, a set of statutes designed to protect the city's tenants from "rent gougers." The government officially deprived landlords of the most fundamental tenet of property ownership: the right to charge free market rents. Imposed during the War, the law was justified as a temporary wartime necessity.

After the war, however, when the vast majority of such emergency statutes were repealed across the nation, New York's rent control law, for various political reasons, was kept on the books. As a result of rent control and the tacit permission it grants, in New York City it is considered socially acceptable, if not morally praiseworthy, for tenants to cheat, denounce, discriminate against, or confiscate the property of their landlords without having the slightest pangs of conscience or suffering any legal consequences.

Most law-abiding New Yorkers would rather die than swipe a loaf of bread from their grocer; most would never dream of stealing a coat from their tailor. Yet these same people haven't the slightest qualms about violating their contracts and illegally subletting their apartments, falsifying their true primary residences, withholding rent for years by means of convoluted legal tactics, demanding enormous sums of money from landlords to move, or complaining to any one of a dozen government agencies about trivial or non-existent violations in order to thwart and delay legitimate rent increases.

A similar thing happened in Nazi Germany. There was a segment of the populace who did not necessarily approve of Hitler's treatment of the Jews, but who were all too ready to cash in on the results. They took advantage of the situation to enrich themselves at the expense of their Jewish neighbors.

I suppose it is an unfortunate failing of human nature, but when government gives people a license to steal, it takes a very highly principled person to resist the temptation. Our entire structure of political redistribution of wealth is based on an implicit

recognition of that fact. In New York City, for example, there is no penalty for defrauding your landlord or for committing any of the actions listed above. There is only reward for the unscrupulous tenant. Yet landlords are routinely given stiff penalties including fines, treble damages, and jail sentences for relatively minor infractions of the law.

The Jew in Germany had no remedy in law; the courts were in Hitler's pocket. Instructions to the police and Gestapo were well defined: The National Socialist state did not want the Jews, but it did want their property. The Jews had no choice but to abandon their property and flee—if they could.

The landlord in New York also has no remedy in law; the courts have upheld the city's right to control rents even though it violates the property rights guarantee of the Fifth and Fourteenth Amendments. With government policy dedicated to making rental property ownership a losing proposition, many landlords had no choice but to abandon their buildings and lose their life savings.

Since the imposition of rent control, the city has confiscated *in rem* 20,000 such abandoned structures containing over 100,000 apartments; at the time perfectly usable apartments that could have eased the city's chronic housing shortage and relieved the plight of the homeless. Instead, most of these buildings have turned into vacant wrecks giving refuge only to drug pushers, addicts, and prostitutes; mute testimony to the social cost of rent control.

Every election brings out an assortment of social-liberal candidates who try to outdo each other in currying the tenant vote by squeezing the landlord even harder. The imposition of commercial rent control as well as various proposals for permanent rent freezes and anti-warehousing legislation are typical examples of such "enlightened" civic thinking.

Set against a background of landlord bashing, political pandering, and tenant avarice, it is no wonder that every time the city holds its Rent Guideline hearings, the meetings are dominated by rowdy, mob-frenzied, Brownshirt-like demonstrations by highly organized tenant activists who shout down opposition speakers and attempt to disrupt the proceedings.

In a lawsuit filed by five major real estate firms against the Rent Guidelines Board, affidavits by two members of the RGB claimed that they were unable to perform their duties, because "throughout the meeting there were threats, intimidation, and harassment. This was accompanied by incessant and deafening noise, demonstrators, whistling, chanting and banging of chairs."

I'm sure that none of the foregoing disgraceful situations was foreseen by those who originally drafted the rent control statutes. But illegal tenant activity, biased judges, hostile administrators, political opportunism, negative public opinion, and mob action against landlords are just as much in effect in New York as they were in Nazi Germany against the Jews—and they have turned rent control into a national travesty.

Despite the overwhelming evidence of the financial and social damage of rent control laws, politicians in New York, Berkeley, and Cambridge, among many others, have succeeded in keeping alive this iniquitous system that most Americans repudiated years ago.

It is time we Americans were jolted out of our complacency and made to see rent control for the evil it really is: bigotry pretending to be benevolence, anti-capitalism pretending to be humanitarianism, and demagoguery disguised as democracy. □

THE FREEMAN
IDEAS ON LIBERTY

SEXUAL HARASSMENT: WHAT IS IT?

by Wendy McElroy

The issue of sexual harassment is shredding the fabric of the relations between men and women. Conservatives see laws against sexual harassment as further attacks on men and the free market. Feminists see sexual harassment as yet another outrage against women committed by men and the free market. Men fear to pay women compliments; some women feel harassed by every Southerner who calls them "honey." It is difficult to remember a time when there was less good will or humor between the sexes.

Meanwhile, employers rush to formulate policies they hope will insulate them from charges of sexual harassment, which the Equal Employment Opportunity Commission (EEOC) has ruled is a violation of Section 703 of Title VII of the 1964 Civil Rights Act. Because sexual harassment falls under Title VII (which defines the responsibilities of *employers*), it is employers who have become the targets of legal action. According to the EEOC guideline, employers are responsible for any sexual harassment within their businesses if they knew or should have known about the situation and if they took no immediate action to remedy the problem.

With all the controversy and liability that adheres to the issue of sexual harassment, one question becomes crucial: What is it?

Most feminists answer this question quickly. The National Organization for Women has offered this definition: "any repeated or unwarranted verbal or physical sexual advance, sexually explicit derogatory statement, or sexually discriminatory remark made by someone in the workplace, which is offensive or objectionable to the recipient, or which causes the recipient discomfort or humiliation, or which interferes with the recipient's job performance."

The legal system has evolved its own standards. In general, the judiciary has divided sexual harassment into two categories: (1) a *quid pro quo*, by which sexual favors are directly traded for professional gain; and (2) a hostile working environment, in which women are threatened. In 1980, the EEOC concurred with this guideline by finding that sexual harassment includes physical, verbal, and environmental abuse. This guideline was affirmed unanimously by the U.S. Supreme Court in 1986.

It is the more subtle form of sexual harassment—"a hostile working environment"—that has caused most of the controversy and confusion. Companies and institutions across the continent scramble to clarify the specifics of this litigious issue. The policy advanced by the Presidential Advisory Committee on Sexual Harassment at York University in Toronto is fairly typical. York defined sexual harassment as: "unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted; or, implied or expressed promise of reward for complying

Ms. McElroy is the editor of Freedom, Feminism, and the State *(Cato Institute, 1982), which has been republished as a university text by Holmes and Meier.*

with a sexually oriented request; or, implied or expressed threat of reprisal, in the form of either actual reprisal or the denial of opportunity, for refusal to comply with a sexually oriented request; or, sexually oriented remarks and behavior which may reasonably be perceived to create a negative psychological and emotional environment for work and study."

Such policies clarify nothing. Words like "unwanted," "abusive," and "perceived" are too subjective to allow a real sense of what behavior constitutes sexual harassment. Further attempts to reach a definition seem only to muddy the issue. For example, in September 1989, Harvard University issued a guideline that removed any connection between behavior and intent. In other words, sexual harassment can occur even though the transgressor was a man of goodwill, with absolutely no intention of harm. In the section "Sexism in the Classroom," the Harvard guideline cautioned: "Alienating messages may be subtle and even unintentional, but they nevertheless tend to compromise the learning experience of both sexes. . . . For example, it is condescending to make a point of calling only upon women in a class on topics such as marriage and the family, imposing the assumption that only women have a natural interest in this area."

The 9th U.S. Circuit Court complicated the definition even more in a landmark decision. Judge Robert Beezer ruled that women are protected from any remark or behavior that a "reasonable woman" would have problems with. The court also embedded a double standard into the law by declaring that some behavior acceptable to men may be legally actionable by women.

No wonder men are resentful. They are being backed into a corner by accusations that seem to have no rules of evidence and little burden of proof.

Government Is Not Part of The Solution

I stumble into this quagmire with a unique perspective. As an individualist feminist, I believe not only in the rights of women, but also in their dignity. I also believe that the free market is the best way for women to protect both. In short, although I think sexual harassment is a real problem, I don't want government involved in the solution.

I do not include assault or threat of assault in this discussion of sexual harassment. Such behavior is clearly a legal matter. By "sexual harassment" I refer only to behavior that is non-violent, however offensive it may be. In this, the law should have no part.

Yet—because women resort to lawsuits—sexual harassment is almost always discussed in legal terms. What is the exact definition of the offense? What constitutes evidence?

I want to ask more fundamental questions: (1) Can the law effectively address this area? Is it even possible for the courts to adjudicate and punish attitudes toward women? (2) Should the law address this area? What is the cost and danger of doing so?

To answer the first question it is important to appreciate that sexual harassment is an expression of some men's attitudes toward women. Since I don't believe government can successfully mandate attitudes, I think legal remedies are doomed to failure—or worse. A change in attitude can come only from a change in the hearts and minds of people. This cannot be legislated.

To address the second question: Should government control the bad attitudes of its people? The very prospect of this is horrifying. The worst oppressor in the history of women has been the state. When the state claims to be "protecting" me through paternalistic policies, I tend to reach for my dignity, if not for my wallet.

But the main reason to avoid the legal system is not historical. It is simply that sexual harassment doesn't violate anyone's rights.

What is the purpose of law in society? I believe the purpose of law is to protect individual rights, to protect self-ownership. Self-ownership means that every human being, simply by being human, has a moral and legal claim to his or her own body. Law comes into play only when a woman is a victim or initiator of force.

Contrast this with the view of law implicit in legislative attempts to prohibit or punish sexual harassment. Most feminists are trying to use the law to enforce a proper standard of morality or behavior, such as non-discrimination or respect for women. The law has become a means of enforcing "virtue." From this perspective, certain "bad" acts ought to be prohibited whether or not they are peaceful. In the case of sexual harassment, because men should not hold degrading opinions of women, the law punishes men whenever their unacceptable opinions are expressed in a public manner. The correct moral position becomes law.

I have great problems with imposing my moral views—however correct I believe them to be—on other people. I have trouble understanding how someone's bad attitude violates my rights. It seems to me that the most fundamental human freedom is the right to weigh evidence and reach a conclusion. People have a right to reach conclusions that I find wrong and offensive: They have a right to consider me inferior because of my sex. If I can take someone to court over his or her attitude toward me, this says that I have a right to tell them what opinions they are legally allowed to hold. More than this—it says that the government has a right to regulate opinions.

In *Time* magazine, Ellen Frankel Paul of Bowling Green State University commented on this grim prospect: "Do we really want legislators and judges delving into our most intimate private lives? Deciding when a look is a leer and when a leer is a civil rights offense? Should people have a legally enforceable right not to be offended by others? At some point, the price for such protection is the loss of both liberty and privacy rights."

Which Standard?

Any attempt to impose "thought control" would be the death of individual freedom. And this is a freedom to which the weakest members of society (such as women) should cling. If moral and cultural standards can be imposed by law, ultimately it will not be the weak who decide "which standard."

Moreover, if government has the right to control and punish cultural attitudes, where will the cut-off point be? If it is proper to punish bad sexual attitudes, why not bad religious ones? Yet the political control of bad attitudes is precisely what sexual harassment laws are about.

A driving force behind these laws is socialist or radical feminism. In turn, this form of feminism is a building block of political correctness—the movement that considers virtually all of Western culture to be racist and sexist. Those who are politically correct seek to correct this injustice by championing the victims of Western civilization.

Dinesh D'Souza, in his controversial book *Illiberal Education*, defined these "victims": "Those who suffer from the effects of Western colonialism in the third world, as well as race and gender discrimination in America." In other words, women and minorities.

For the good of society, a persecution of "wrong" attitudes toward women has begun. I believe that a new inquisition is underway, one that is being driven by the political correctness movement. It is—in large part—an economic inquisition. One of the main battlefields has become the workplace. The heretics to be punished are those businessmen who do not express the politically correct attitude toward women.

And yet in condemning the political exploitation of abused women, I do not want to deny the importance of sexual harassment as a problem. Sexual harassment is an offense to the dignity and decency of human beings. To forswear the legal system is not to abandon the right of protest.

Many well intentioned men are like those who have never suffered from racism; they have a natural tendency to dismiss the suffering as not real. Many women share this reaction. Even the insightful commentator Jane S. Shaw declared:

"I'm skeptical about sexual harassment simply because during more than twenty years in the workforce, I never experienced anything that I would call sexual harassment. I have, however, experienced some awkward on-the-job situations that were

related to sex . . . . They undoubtedly reflected uncertainty about appropriate behavior, especially as mores changed over the past couple of decades."

I cannot comment on Ms. Shaw's personal perceptions or her experiences. But I can add my own. For the last few years, I have achieved a modest status as a writer of documentaries. During this period, I have experienced no sexual harassment whatsoever.

Before this, I worked at whatever job I could in order to pursue writing at night. I entered the workforce at the lowest rung. In other words, I was an interchangeable unit. When I was a secretary, thousands of other women could have performed my job as well as I did. When I was an interchangeable unit, I relied heavily upon the common decency of my employers, who were men. Most were benevolent; a few lived up to the worst stereotypes of predatory men; one crossed the line into assault. Although I do not forgive any of the humiliations, only the assault was a matter for the law.

Most men are decent people who are busy living their lives. When the shrill and accusing cry of aggrieved women reaches their ears, they have the natural impulse to turn away. Because they see nothing of themselves in the male caricatures being presented, they dismiss the women as hysterical or man-hating. On at least one level, I can't blame them. Much of men's reactions come from the fact that women are using force, in the form of law, to impose standards of behavior upon them. And force is the death of discussion or sympathy.

Men are becoming so angry about sexual harassment that they are losing their sense of compassion for abused women. Every word in the workplace might become evidence in a legal proceeding. To them, women's cry for decent treatment resembles a witch hunt. Men's compassion has been replaced by exasperated demands for a list of things they are no longer allowed to say or do, for a clear definition of what constitutes sexual harassment. This is a fair question.

I freely admit that I cannot clearly define sexual harassment any more than I can clearly define what is offensive. Sexual harassment is a subjective term that depends on the personalities and cultural backgrounds of the people involved.

But to say that the edges of a problem are gray, rather than hard and clean, is not to say that it does not exist. Racism is difficult to define, yet few people would deny its existence. Subjectivity is a good reason for keeping both sexual harassment and racism out of the court system, where the law requires a clear point of enforcement. But it is not a reason to ignore the pain of abused women.

The free market is not an arena of justice: It was never meant to be. It is simply a coordinating mechanism, by which supply and demand are balanced. Equally, the court system does not protect my dignity: That is not its proper purpose. It exists to protect my rights. It is up to me to stand up and protest any assault on dignity. Those who tell me to be silent or walk away are denying that I have this right of protest. No wonder so many women are turning to the law.

I would like to believe that my commitment to individual rights and to women's dignity are not in conflict. I do believe that an attack on sexism is not an attack on the free market: It does not deny the right of businessmen to hire and fire according to their own personal judgment. It does say: If an employer has the legal right to fire me, I have the legal right to protest, publicly and loudly, not from the witness stand of a courtroom, but from whatever platforms a free society allows.

Those who are hostile to the free market are using the issue of sexual harassment to gain political control of the workplace. They are having an easy time of it, because they seem to be the only ones addressing a genuine problem. The very intensity of women's indignation over sexual harassment should have alerted people to the need for a solution. But by blaming women, businesses have dismissed the problem. They have left it to others to voice the growing wellspring of anger. □

THE FREEMAN
IDEAS ON LIBERTY

Do No Harm

by Jane M. Orient, M.D.

I am Jane Orient, Executive Director of the Association of American Physicians and Surgeons. I am in the solo practice of private medicine in Tucson, Arizona. I speak as a physician who is bound by the Oath of Hippocrates.

By my Oath, I must refrain from doing harm to my patients, and I must abstain from mischief and corruption. I may not promise my patient a three-minute remedy and then give her a deadly potion.

Furthermore, I must "follow that method of treatment which according to my ability and judgment I consider for the benefit of my *patients*." I may not subordinate my judgment to that of a secret council. I may not sacrifice my patient's welfare to a social agenda. I may not deny my patient a cancer treatment or heart surgery so that his resources can be used to benefit someone with a higher social priority, such as a person who is entitled to a free checkup.

I want the best medical care for my patients and for all Americans. We cannot provide the best until we get the cost down.

We will not lower costs by abolishing the Oath of Hippocrates and destroying the patient-physician relationship. The Oath of Hippocrates dates to the fifth century B.C.; the acceleration of American medical costs dates to 1965.

Costs skyrocketed because the government got *into* medicine. Costs will not decrease until we get the government *out* of medicine:

out of private physicians' offices, where regulations are driving physicians out of business, especially in rural areas and inner cities;

out of hospitals, where compliance costs add a huge administrative overhead;

out of the pharmaceutical industry, where government adds $250 million to the cost of marketing a single new drug;

out of the medical marketplace, where government intervention has destroyed the normal economic mechanisms that keep costs reasonable in a free market.

We need to bring *patients* back *into* the financial equation. We must allow *patients* to benefit from their prudent spending and saving decisions. All Americans should be permitted to use pre-tax dollars to establish their own medical savings accounts.

To preserve excellence in American medicine, we must preserve patients' freedom of choice—not turn it into the sham of picking Monolith A or Monolith B, both offering the same government-dictated benefits package.

If government forces us all into a bureaucratically managed system, we will still have something called "health care," delivered by persons called "health care providers." But such a system will have no place for ethical physicians, whose Oath forbids them to accept a situation of conflict of interest with their patients.

Government bureaucracy has never controlled costs. The promise of universal access to comprehensive service under a global budget and government rules is, in a word, bankrupt.

Government officials do not take an oath to do no harm. What a government system *can* accomplish is to destroy the art and science of medicine in these United States of America.

This article is adapted from a statement by Dr. Orient on behalf of the Association of American Physicians and Surgeons before the White House task force on health care reform, George Washington University, Washington, D.C., March 29, 1993.

BOOKS

Drug Policy and the Decline of American Cities

by Sam Staley

Transaction, 1992 • 257 pages • $29.95

Reviewed by Doug Bandow

The drug war is raging on the streets of cities across America, but off the front pages. While Uncle Sam's expansive and expensive efforts to staunch the nation's taste for drugs have failed to end substance abuse, they have turned scores of urban areas into combat zones. Indeed, the war on drugs has become a war on cities. Observes Sam Staley, president of the Urban Policy Research Institute: "the policies that form the core of the Drug War strategy are hastening the destruction of central city economies by abrogating the institutions that are most likely to lead to economic rejuvenation: private property, respect for civil liberties, and smoothly operating markets."

Staley's book is important because he approaches his subject as a scholar rather than an ideologue. Although drug use and sales affect the entire nation, the consequences, particularly the pervasive violence, have fallen most heavily on urban America. Staley's thesis that the drug war is unwinnable is not unusual; what is unique is his conclusion that the drug war is inextricably linked to the catastrophic deterioration of the cities. But the relationship is a complicated one. Staley writes: "The ways in which public policy undermines the processes necessary for encouraging productive economic and social development requires an understanding of the changing economic environment of central cities."

He begins by reviewing the dynamics of urban growth and the illicit trade that has enveloped many cities. As last summer's riots in Los Angeles obviously demonstrate, the state of many urban areas is not good. Particularly significant are the declines in population and employment. Moreover, the composition of city jobs has shifted from manufacturing to service. This has tended to encourage suburbanization and the creation of "ring cities" around shrinking centers.

Many factors have been working together to hinder urban economic growth. Staley focuses on the role of institutions—"the established customs, laws, and traditions that provide the underpinnings of any society." Unfortunately, government has long been less than friendly to these sorts of institutions. Virtually unbounded use of the so-called "police power" and eminent domain, for instance, has sharply restricted the value of private property rights. The ever more draconian drug war has damaged civil liberties and shredded the social fabric of many cities. Such political intervention, Staley argues, "undermines the very institutions that facilitate social progress," necessarily encumbering cities' economies.

Moreover, given the relative dearth of legitimate employment, drug trafficking has proved increasingly attractive for young black males. Indeed, the drug trade has helped fill the cities' economic gap, expanding as legal businesses shrank. Observes Staley, "some inner-city neighborhoods are now fueled principally by the drug economy."

Urban centers remained the locus of drug trafficking even as the suburbs expanded in part because of the large pool of unemployed labor available for the drug trade in cities. Moreover, urban neighborhoods offer significant advantages for both customers and dealers, including relative anonymity for participants, simple access to the market, numerous escape routes from police, and myriad hiding places for inventory.

The drug laws do not just skew individual behavior. They also warp the institutions discussed by Staley that arise naturally through the community's business and social interaction. In the case of the inner city, drug prohibition has unintentionally funneled billions of dollars to other criminal

enterprises, simultaneously encouraging entrepreneurial youth to enter the drug trade and rewarding the most violent criminals who do join. Moreover, the rules by which criminal drug gangs, which exist only because of drug prohibition, operate are not conducive to sustained urban economic development.

Thus, the drug war has not only denied legitimate firms the service of many of the brightest inner-city youth, but also undermined the rule of law and protection of property rights in the larger community and turned neighborhoods into deadly battlegrounds. Indeed, Staley emphasizes—and backs with evidence—the fact that drug-related crime is largely the result of the illegal nature of the business and not drug use. First, writes Staley, "the root of the criminal activity stemming from drug use flows from users' inability to afford their habit" because enforcement increases drug prices. Second, dealers and users are able to settle disputes only through violence.

The direct consequences of pervasive lawlessness are hideous enough for people living in the inner city. But the indirect impact may be equally harmful in the long run. By sabotaging the very institutions necessary for community stability and economic growth, drug policy is impoverishing increasingly large sections of urban areas across the country. Sadly, writes Staley, "the negative attributes of the underworld now pervade the economic and social systems of American cities."

Were the benefits of the drug war great enough, perhaps one could still try to justify current policy. However, the results of tens of billions of dollars worth of spending by all levels of government has been, in Staley's words, "far from satisfactory." Arrests, prosecutions, and imprisonments all skyrocketed during the 1980s, along with expenditures, interdictions, and violations of civil liberties. Nevertheless, tens of millions of Americans still use illicit substances every year and even high school students say that drugs remain easily obtainable.

The only realistic alternative to the drug war, Staley argues, is decriminalization. He is realistic in assessing the impact of ending legal strictures against drug use. Serious social problems would remain, but they would, in his view, be more manageable, with drug use treated as a health rather than a legal and criminal issue. Decriminalization, then, he writes, "is offered as a first step toward refocusing drug policy on the human dimension," a means of allowing "policymakers and policy analysts to focus on the consequences of drug use."

Urban America is faltering for many reasons: welfare programs that destroy families and communities, schools that don't teach, regulations that abrogate private property rights, laws that limit economic opportunity, the widespread use of drugs, and the lack of Christian ethics. But, as Staley demonstrates in his thoughtful, well-researched book, a serious problem is the drug war. Though undertaken with the best of intentions, the government's crusade against drug use is undermining the institutions necessary for economic and social progress in the inner city. Unless we are willing to rethink this failed strategy, the nation's large urban areas will continue to decline. □

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