

# COMPROMISING THE UNCOMPROMISABLE : SPEED LIMITS, PARADES, CIGARETTES<sup>1</sup>

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## Introduction

The libertarian political economic philosophy (Rothbard, 1982) is based on the non-aggression axiom. In this perspective the one act that ought to be legally proscribed is the initiation of violence against non-aggressors. There are many who disagree with this view. Some maintain that far more ought to be illegal; other that not all invasions should be. While the critics may disagree amongst themselves on many issues, most have in common the belief that laissez faire capitalism is altogether too radical. This philosophy has been widely castigated as extremist, fanatical, and as occupying a position on the political spectrum at the very edge.

To some degree these criticisms are undoubtedly true in at least some sense. Libertarianism is indeed a principled philosophy, and any such view must appear to some as rigid or unyielding. However, it is the thesis of the present essay that for at least some issues, free enterprise actually constitutes a moderate or compromise viewpoint. Here, we consider three cases in point : roads, parades, and cigarette smoking.

## Roads

There is a furious albeit scholarly debate regarding optimal speed limits on the nation's highways <sup>2</sup>. It has been waxing and waning over the last several decades. On one side of this issue are those who advocate retention of the 55 miles per hour limits on freeways. Foremost among them are the Naderites, who argue, among other things, that "speed kills." Although President Clinton recently signed a bill allowing the states to post higher maxima, at their discretion, it is rumored that he did so only reluctantly. Behind these opinions is a wealth of empirical data suggesting that faster traffic flows will lead to a greater number of fatalities <sup>3</sup>.

The other side is no less intent upon upholding its view point. One argument stems from freedom, not the pragmatic issue of safety : people should have the right to do whatever they wish, unless their actions constitute an explicit "border crossing" or physical invasion of another person or his property. Even if there is a statistical correlation between deaths and higher (or no) speed

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limits, this is not equivalent to the initiation of violence. For to go fast is not, *per se*, to kill someone<sup>4</sup>

But the "speed freedom" advocates are not without a response to the claim that faster traffic is dangerous. They argue that it is not speed, but rather the variance of speed which puts motorists at risk<sup>5</sup>. For example, if all motor is to travel at between 75-80 mph, this will actually be safer than if some proceed at 40 mph (the typical minimum highway requirement) and others, cheek by jowl, at 65mph (policemen rarely ticket anyone for excessive speed of only 10 mph.)

What is the libertarian compromise between these two incompatible positions? The solution is to privatize all highways<sup>6</sup>. With all highways, byways, streets, roads, thoroughfares and other traffic arteries in the hands of private entrepreneurs, there would be no need for government to decide upon any speed regime. Just as the state now plays no role whatsoever regarding the color of cars, or cloths, or crayons, and thus there is no need for any public "decision" regarding these choices, the public sector would entirely absent itself from the decision concerning the rate of motorists. Just as there is now no U.S. government cloth or crayon "policy," so, too, would there be no speed limit "policy." Privatization is the only true compromise. Any other "solution" would be arbitrary, merely taking the limits advocated by one side, adding them to the other, and perhaps, dividing by two<sup>7</sup>.

This privatization compromise is the only one compatible with the libertarian perspective on rights<sup>8</sup>. In that view government nationalization perspective of private property is tantamount to a taking (Epstein, 1985), or, more accurately, theft (Spooner, 1966). For the only legitimate role of government<sup>9</sup> is to protect persons and their property from aggression, and while courts, armies and police are at least relevant to this task, highways are not.

## **Parades**

A Similar problem on the roads arises with regard to their use for parades. Any organized march is necessarily an infringement on the scope of vehicular and pedestrian traffic; and there is no principled, non arbitrary criterion which can unambiguously determine whether to give the nod to ordinary motorists, to a 4th of July parade, a New York City marathon, a St. Patrick's

Day parade or to one for the Nazis marching in Skokie, Illinois<sup>10</sup>

The latter two cases, of course, lead to additional challenges. Should the organizers be allowed to exclude gays? On the one hand, the parade belongs to the organizers, heterosexuals of Irish descent. If they don't want (even Irish) homosexuals to take part, that should be up to them. On the other hand, the event takes place on public property, and bisexuals and lesbians pay taxes for the creation, upkeep and maintenance of the streets just like everyone else. Should the Nazis even be allowed to carry their banners on public streets, much to the outrage of the Jewish population in Skokie, many bearing tattoos from German concentration camps, let alone have an organized march there? The American Civil Liberties Union thinks so, on the grounds of freedom of expression as the first amendment guarantees. There are those, in contrast, who think the only proper destination for such a parade would be right to jail -- or right to hell -- for holding and popularizing such evil views.

Fortunately, the libertarian compromise solution is able to cut through this Gordian knot of legal and moral complexities like a hot knife through butter. Again, simply privatize the streets! In one fell swoop this intractable problem is solved. It now presents no more of a difficulty than the total non issue of whether Nazis, or Irishmen, or Martians for that matter should be allowed to rent a hotel room, or a convention center, or any other private meeting ground. Of course they should be, all of them, each and every last one. And they can exclude anyone they wish, for whatever reason, from their essentially private meeting. The foregoing was a challenging issue only because there were private people, contending for public space. There is no way to solve this under conditions of public ownership, since all private parties have equal standing under any legal system based on the rule of law (Hayek, 1973). The only solution is to reject one of the basic premises -- public ownership. Then and only then is there a reasonable resolution of the issue.

This compromise, too, saves generations of judges from twisting in the wind, trying to solve the unsolvable. Right now, happily, the U.S. has no paper clip "policy". It leaves such matters strictly to private individuals. At present, unfortunately, the state does have a highway speed limit<sup>11</sup> and a parade policy. It is time, it is past time, that we applied the principles of free enterprise which work so well for paper clips and bubble gum<sup>12</sup> to such contentious issues as speed limits and marching bands.

## Cigarettes

The same insights may also be applied to smoking regulations. Before analyzing this mare's nest of contending legal philosophies, a sharp distinction must first be drawn between primary and secondary smoke. In the former case, the (alleged) harm of cigarettes is confined to the smoker himself; in the latter, it spills over onto others and thus constitutes an invasion.

One would think that in the relatively straight forward case of primary smoking, the conclusions would be clear : the (adult) user of tobacco products bears any and all risk of his actions. Certainly, particularly in this day and age of compulsory government inspired warnings<sup>13</sup> of the dangers of smoking, no blame can be placed at their doorstep.

Another argument is that especially in an era of socialized medicine, harming one's own health is really an "attack" on others, since they will be forced to bear the costs of the smoker's subsequent ill health. In effect this is an attempt to convert primary smoking into the secondary variety. Superficially, at least, it succeeds. For under this system, if I hurt myself physically, I hurt you, financially.

But this is an entirely spurious conclusion, at least if it is interpreted as successfully converting a primary (personal) problem into secondary (social) one. For the entire transference relies on the institution of socialized medicine. Without it, if I harm myself, I m no burden to you. Under medical socialism, since I can demand payment from you for harming myself, there is at least a case for you stop me from so doing; e.g., one might argue that it is justified for you to bar me from cigarettes. That this has even a semblance of logic behind it only furnishes further reason for repealing socialistic health plans <sup>14</sup>.

What of secondary smoke, true direct secondary smoke, where the user impacts other parties not by making them pay for his future (possible) illnesses, but by blowing smoke in their faces and endangering them. Pro government economists have handled this problem of undeniable invasion under the doctrine of "market failure"<sup>15</sup>. In this view the market has failed, and so government must perforce step into the breach and right matters. The specific failure, here, is secondary smoke: others, non-smoker, will be victimized by the fumes and made to undergo risk against their will.

The statist response has been to prohibit smoking in certain areas outright (hospitals, public buildings, air flights, schools, etc.), and in other contexts insist that particular areas be cordoned off and reserved for non smokers (e.g., compelling special tobacco free areas.)

What of the other side of this debate? Opponents of this new regime argue that smoking is not at all akin to punching someone in the nose. For one thing, physical aggression has a ways been recognized as such. Assault and battery have never been legal in any country<sup>16</sup>. And yet for most of recorded history, lighting up a butt was never totally proscribed. It is only in these hypersensitive "politically correct" times that this practice has become an issue.

A second argument is that of cause and effect. The present state of scientific medical knowledge establishes no unbroken link between cigarette usage and cancer or emphysema, etc., not for the smokers themselves, still less for second parties. The one is neither a sufficient nor necessary condition for the other. There are those who indulge all their lives and never sicken while others never so much as touch the "vile weed," nor live nor work near those who do, and yet succumb. (In contrast, everyone who has his nose punched sustains physical harm.) The most that can be claimed for this etiology is statistical correlation : there is a higher incidence of lung disease amongst users. But similar merely statistical correlation : there is a higher incidence of lung disease amongst users. But similar merely statistical disparities arise in a plethora of cases.

Then there is the de minimis argument. Even if there is one day found to be a direct invasive harm from this quarter which is not merely statistical, it may well be minimal. That is, akin to the "harm" which emanates from radio waves, low level radioactivity (similar to that caused by bricks, clay, etc.), and the breathing out of carbon dioxide which each of us engages in and without which we would all die (Rothbard, 1992). The point is that even if there is a direct harm to other people, for the law to take cognizance of it, it must be "substantial".

There are some people who are seriously, even fatally harmed by carbon dioxide exhalations, over head electrical wires, radio waves, etc.; they can safely live only in an oxygen tent. If they venture out they sustain great damage. If they do, can it reasonably be said that others -- smokers, carbon dioxide exhalers (all of us), electricity users, etc., have violated their rights? Must we, in effect, halt civilization in its tracks in order to accommodate these people? Or must they bear the risk of venturing out of their oxygen tents, of "coming to the risk"

as it were? Coase (1960), Demsetz (1967, 1979) and Posner (1986) would advise the court charged with making this decision not to forestall civilization in order to enhance the mobility of these people<sup>17</sup>. Why? Because the costs would be too great. After all, there are many more of us than there are of them. True, anyone of them might gain more than any one of us might lose, but when a cost benefit analysis is conducted, wealth can be maximized by not giving these people an outdoor oxygen tent, as it were.

The libertarian would concur in this conclusion, but for very different reasons: because normal people have homesteaded (Locke, 1960; Rothbard, 1973; Hoppe, 1993) the right to engage in just these sorts of everyday, that if the invalids venture out of their safe havens, they must do so at their own peril.

So which is it? Is smoking an invasion or not?

Fortunately, it is not necessary to give an answer to this essentially empirical, scientific and medical question. Thanks to the compromising ameliorative qualities of private property rights regimes, a compromise between these two bitterly contrasting views is possible.

All that need be done is first to privatize virtually all indoor<sup>18</sup> spaces<sup>19</sup>. Given such institutional arrangements, the (principled) compromise could proceed<sup>20</sup>. Each owner would decide the smoking rules for himself, and then compete with all others on not one but two grounds. First, the old one, provision of a good or service. This would be as before. Second, the competition would take place in terms of how well the smoking rules maximize profits (e.g., satisfy customers.)

For example, health food stores would compete with one another in terms of the quality and price of their vegetables -- and their smoking rules. Presumably, they would be led by the "invisible hand"<sup>21</sup> to ban smoking outright.

Bars and grills, bowling alleys and pool halls would continue to compete with each other by providing their unique services to the public. They, also, would do so, additionally, regarding their smoking rules. In contrast, while a few might specialize in the total prohibition of tobacco, as in the health food industry, most, presumably, would not interfere with lighting up at all. Still other commercial establishments might find it most in their interests to have special smoking times (late evenings? weekends?) or areas. Many hotels feature smoking or non-

smoking rooms. Many restaurants cordon off particular areas where this habit is indulged. All of these different type of establishments have one thing in common: they would all be encouraged by the desire for profit to tailor their smoking rules<sup>22</sup> to suit the tastes of their customers. The presumption is that health food consumers would lie at the opposite end of the spectrum from the denizens of pool halls in terms of appreciation for, and tolerance of, tobacco.

There are advantages to the market in this case as there are in all others. Free enterprise is highly flexible, able to create smoking rules conforming to the desires of virtually all customers. In contrast, governmental "all-or-one" policies are likely to satisfy only the majority<sup>23</sup>.

The beauty of this market compromise plan is that people can sort themselves out according to their smoking preferences. "Tea-totalers" need not venture out into emporia where any vestige of smoking is allowed, even on a part time basis and confined to a small area. Tobacco users, too, can patronize establishments which welcome and support such choices. As long as indoor cigarette use is not defined as per se invasive<sup>24</sup>, this compromise can satisfy far more people than any other alternative.

This libertarian compromise proposal has an additional virtue : it conforms to the "politically correct" appreciation of, and support for, minority cultures<sup>25</sup>. As it happens, orientals in North America have not at all bought into the anti tobacco tirade. On the contrary<sup>26</sup> they are still very much enamored of the practice. In many cities, politically correct leftists have been willing to ban smoking in all private establishment which are "open to the public". This shows that their hatred for tobacco is stronger than their advocacy of the rights of downtrodden minorities.

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### Endnotes

1. The author wishes to thank David Kennedy, Anthony Sullivan, and the Trustees of the Earhart Foundation for the financial support necessary to write this article. The opinions expressed herein, of course, reflect the thinking of the author alone.
2. In 1995 the federal government delegated speed regulations to the states.
3. See Castle (1976), Egmore and Egmore (1986), Forester, et. al. (1984), Fowles and Loeb (1989), Graves, et. al. (1989), Hauer (1971), Hoskin (1986), Jondrow, et. al. (1983), Kamerud (1983), Lave (1985), Peltzman (1975), Sommers (1985). For a critique, See Block (1997, 1983).
4. Similarly, ownership of a gun is not the same thing as murder, even if there is a positive correlation between them.
5. For more on this hypothesis, see Lave (1985). For a reply, see Levy and Asch (1989), Fowles and Loeb (1989), Snyder (1989). For a rejoinder to his critics, See Lave (1989). Also see Garber and Gadirau (1988).
6. For answers to objections that this is impossible, would create chaos, would not work, would be an abomination, or would be akin to Solomon's decision to cut the baby in half and give each part to two contending mothers, see Block (1979), Klein (1990), Klein et. al (1993a, 1993b), Klein and Fielding (1992, 1993a, 1993b), Roth (1987), Rothbard (1973), Woolridge (1970).
7. Any such procedure, moreover, would encourage "Strategic" behavior : each side would have an incentive to exaggerate its real goal, so as to bring the judgement closer in conformity to its own wishes.
8. See on this Benson (1981), Flew (1982), Machan (1978), Rasmussen (1980).
9. If indeed it has one. For support of this contention, see Nozick (1974). Epstein (1985); for a critique see Rothbard (1973), Hoppe (1989, 1993), D. Friedman (1989), Benson (1989).

10. Sometime issues of this sort can be matter of life or death. Much of the fighting in Belfast, for example, can be traced to the organization of rival parades on the part of the Catholic and Protestants in that city. As a matter of fact, Northern Ireland' "annual marching season" is the occasion for bitterness between the two rival factions.

11. Even when the federales give over these decisions to the 50 states, the latter are still part of government.

12. When is the last time either of these products were in the news as a problem?

13. For the libertarian, this is a clear and present violation of free speech rights. For the right to speak freely also implies the right to maintain silence. As to charges of fraud against tobacco companies, as long as they do not claim that cigarettes and cigars are "safe," they should not be made to bear any of the attendant risks. And this applies even in the absence of such warning, during the time when they were not compulsory. On this see Block, 1977b.

14. This "Logic" also applies to eating fatty foods, failing to brush one's teeth, not getting enough exercise, etc. Taken to its logical conclusion, socialized medicine thus implies a world of Big Brother controlling you for your own good.

15. For critics of this view, see Cowen (1988), Hummel (1990), Mises (1966), Rothbard (1962).

16. De jure, that is. De facto, unfortunately, is entirely a different matter. But de jure is itself important. At least it shows an ideal direction for the law, even if it is not always upheld in actual police work or court decisions.

17. For a critique of these three economists in particular, and of their "Law and Economic Philosophy" in general, see Block (1977, 1995), Cordato (1992), Krecke (1992), North (1990, 1992).

18. No one, even anti tobacco extremists, allege that smoking is rights violative outdoors. That is why we commonly see corporal's guards of tobacco adherents engaging in these practises just outside the doors of hospitals, universities office buildings, etc., even in the dead of winter.

19. Under libertarian anarchism, the problem is totally solved; there are no public spaces at all, indoor or outdoor; under limited government libertarianism, the problem is not entirely solved, since there would, presumably, be some indoor public space (e.g., devoted to courts, armies and police) but at least the problem would be strictly confined to these few areas.

20. In contrast, the "unprincipled" compromise would be to allow all or most or much public property to remain under government control -- either outright ownership or regulation -- and then, say, take half of it and allow smoking and on the other half not. Or to allow "democracy" to decide where smoking may occur and where-not.

21. Usually associated with Adam Smith (1776). However, Rothbard (1995) calls into question this linkage.

22. A they do everything else.

23. If that. When was the last time an election was decided upon this one issue alone?

24. Even actual explicit violence cannot be defined a per se invasive. This would allow no scope for adult consensual sado-masochism, nor for boxing, wrestling, judo, kerate tournaments, which each participant agree to enter the ring, knowing that the mutual goal in the infliction of (limited) violence. This applies, as well, to the present case. No one could venture into a privately owned establishment which clearly indicates that smoking is into a privately owned establishment which clearly indicates that smoking is allowed, and then logically object to the practice. No more than could a boxer legally complain about being punched in the ring. For an alternative and in my opinion incorrect view on the "manly sport," see North (1990, p. 344)

25. Obviously, this holds true only for those who value political correctness.

26. See for example *British Columbia Report*, 21 August 1996, p. 16).