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Individualism
and
Economic
Order



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VI. "Free" Enterprise and Competitive Order*

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IF DURING the next few years, that is, during the period with which practical politicians are alone concerned, a continued movement toward more government control in the greater part of the world is almost certain, this is due, more than to anything else, to the lack of a real program, or perhaps I had better say, to a consistent philosophy of the groups which wish to oppose it. The position is even worse than mere lack of program would imply; the fact is that almost everywhere the groups which pretend to oppose socialism at the same time support policies which, if the principles on which they are based were generalized, would no less lead to socialism than the avowedly socialist policies. There is some justification at least in the taunt that many of the pretending defenders of "free enterprise" are in fact defenders of privileges and advocates of government activity in their favor rather than opponents of all privilege. In principle the industrial protectionism and government-supported cartels and the agricultural policies of the conservative groups are not different from the proposals for a more far-reaching direction of economic life sponsored by the socialists. It is an illusion when the more conservative interventionists believe that they will be able to confine these government controls to the particular kinds of which they approve. In a democratic society, at any rate, once the principle is admitted that the government undertakes responsibility for the status and position of particular groups, it is inevitable that this control will be extended to satisfy the aspirations and prejudices of the great masses. There is no hope of a return to a freer system

* The substance of a paper which served to open a discussion on the subject indicated by its title held at a conference at Mont-Pélerin, Switzerland, in April, 1947.

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until the leaders of the movement against state control are prepared first to impose upon themselves that discipline of a competitive market which they ask the masses to accept. The hopelessness of the prospect for the near future indeed is due mainly to the fact that no organized political group anywhere is in favor of a truly free system.

It is more than likely that from their point of view the practical politicians are right and that in the existing state of public opinion nothing else would be practicable. But what to the politicians are fixed limits of practicability imposed by public opinion must not be similar limits to us. Public opinion on these matters is the work of men like ourselves, the economists and political philosophers of the past few generations, who have created the political climate in which the politicians of our time must move. I do not find myself often agreeing with the late Lord Keynes, but he has never said a truer thing than when he wrote, on a subject on which his own experience has singularly qualified him to speak, that "the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good and evil."¹

It is from this long-run point of view that we must look at our task. It is the beliefs which must spread, if a free society is to be preserved, or restored, not what is practicable at the moment, which must be our concern. But, while we must emancipate ourselves from that servitude

1. J. M. Keynes, *The General Theory of Employment, Interest, and Money* (London, 1936), pp. 383-84.

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to current prejudices in which the politician is held, we must take a sane view of what persuasion and instruction are likely to achieve. While we may hope that, as regards the means to be employed and the methods to be adopted, the public may in some measure be accessible to reasonable argument, we must probably assume that many of its basic values, its ethical standards, are at least fixed for a much longer time and to some extent entirely beyond the scope of reasoning. To some extent it may be our task even here to show that the aims which our generation has set itself are incompatible or conflicting and that the pursuit of some of them will endanger even greater values. But we shall probably also find that in some respects during the last hundred years certain moral aims have firmly established themselves for the satisfaction of which in a free society suitable techniques can be found. Even if we should not altogether share the new importance attached to some of these newer values, we shall do well to assume that they will determine action for a long time to come and carefully to consider how far a place can be found for them in a free society. It is, of course, mainly the demands for greater security and greater equality I have here in mind. In both respects I believe very careful distinctions will have to be drawn between the sense in which “security” and “equality” can and cannot be provided in a free society.

Yet in another sense I think that we shall have to pay deliberate attention to the moral temper of contemporary man if we are to succeed in canalizing his energies from the harmful policies to which they are now devoted to a new effort on behalf of individual freedom. Unless we can set a definite task to the reformatory zeal of men, unless we can point out reforms which can be fought for by unselfish men, within a program for freedom, their moral fervor is certain to be used against freedom. It was probably the most fatal tactical mistake of many nineteenth-century liberals to have given the impression that the abandonment of all harmful or unnecessary state activity was the consummation of all political wisdom and that the question of *how* the state ought to use those powers which nobody denied to it offered no serious and important problems on which reasonable people could differ.

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This is, of course, not true of all nineteenth-century liberals. About a hundred years ago John Stuart Mill, then still a true liberal, stated one of our present main problems in unmistakable terms. "The principle of private property has never yet had a fair trial in any country," he wrote in the first edition of his *Political Economy*. "The laws of property have never yet conformed to the principles on which the justification of private property rests. They have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist . . . if the tendency of legislators had been to favour the diffusion, instead of the concentration of wealth, to encourage the subdivision of the large units, instead of striving to keep them together; the principle of private property would have been found to have no real connection with the physical and social evils which have made so many minds turn eagerly to any prospect of relief, however desperate."² But little was in fact done to make the rules of property conform better to its rationale, and Mill himself, like so many others, soon turned his attention to schemes involving its restriction or abolition rather than its more effective use.

While it would be an exaggeration, it would not be altogether untrue to say that the interpretation of the fundamental principle of liberalism as absence of state activity rather than as a policy which deliberately adopts competition, the market, and prices as its ordering principle and uses the legal framework enforced by the state in order to make competition as effective and beneficial as possible—and to supplement it where, and only where, it cannot be made effective—is as much responsible for the decline of competition as the active support which governments have given directly and indirectly to the growth of monopoly. It is the first general thesis which we shall have to consider that competition can be made more effective and more beneficent by certain activities of government than it would be without them. With regard to some of these activities this has never been denied, although people speak sometimes as if they had forgotten about them. That a functioning market presupposes not only prevention of violence and fraud but the protection of certain rights, such as

2. *Principles of Political Economy* (1st ed.), Book II, chap. I, §5 (Vol. I, p. 253).

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property, and the enforcement of contracts, is always taken for granted. Where the traditional discussion becomes so unsatisfactory is where it is suggested that, with the recognition of the principles of private property and freedom of contract, which indeed every liberal must recognize, all the issues were settled, as if the law of property and contract were given once and for all in its final and most appropriate form, i.e., in the form which will make the market economy work at its best. It is only after we have agreed on these principles that the real problems begin.

It is this fact which I have wished to emphasize when I called the subject of this discussion “‘Free’ Enterprise and Competitive Order.” The two names do not necessarily designate the same system, and it is the system described by the second which we want. Perhaps I should at once add that what I mean by “competitive order” is almost the opposite of what is often called “ordered competition.” The purpose of a competitive order is to make competition work; that of so-called “ordered competition,” almost always to restrict the effectiveness of competition. Thus understood, this description of our subject at once distinguishes our approach as much from that of the conservative planners as from that of the socialists.

In this introductory survey I must confine myself to enumerating the main problems we shall have to discuss and must leave any detailed examination to later speakers. Perhaps I should begin by emphasizing more than I have yet done that, while our main concern must be to make the market work wherever it can work, we must, of course, not forget that there are in a modern community a considerable number of services which are needed, such as sanitary and health measures, and which could not possibly be provided by the market for the obvious reason that no price can be charged to the beneficiaries or, rather, that it is not possible to confine the benefits to those who are willing or able to pay for them. There are some obvious instances of the kind, like the one I have mentioned, but on closer examination we shall find that in some measure this kind of case shades somewhat gradually into those in which the whole of the services rendered can be sold to whoever wants to buy them. At some stage or other we shall

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certainly have to consider which services of this kind we must always expect the governments to provide *outside the market* and how far the fact that they must do so will also affect the conditions on which the market economy proceeds.

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There are two other sets of problems which concern preconditions of a competitive order rather than what one might call market policy proper and which I must mention. The first is the question of the kind of monetary and financial policy required to secure adequate economic stability. We are probably all in agreement that any mitigation of cyclical unemployment depends at least in part on monetary policy. When we turn to these problems, one of our main concerns will have to be how far it is possible to make monetary management once more automatic or at least predictable because bound by fixed rule. The second major problem on which we shall have to assume some definite answer without going into detail at this stage is that in modern society we must take it for granted that some sort of provision will be made for the unemployed and the unemployable poor. All that we can usefully consider in this connection is not whether such provision is desirable or not but merely in what form it will least interfere with the functioning of the market.

I have mentioned these points mainly in order more sharply to delimit my main subject. Before I proceed to the bare enumeration with which I must content myself, I will add only that it seems to me highly desirable that liberals shall strongly disagree on these topics, the more the better. What is needed more than anything else is that these questions of a policy for a competitive order should once again become live issues which are being discussed publicly; and we shall have made an important contribution if we succeed in directing interest to them.

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If I am not mistaken, the main headings under which the measures required to insure an effective competitive order ought to be consid-

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ered are the law of property and contract, of corporations and associations, including, in particular, trade-unions, the problems of how to deal with those monopolies or quasi-monopolistic positions which would remain in an otherwise sensibly drawn-up framework, the problems of taxation, and the problems of international trade, particularly, in our time, of the relations between free and planned economies.

As far as the great field of the law of property and contract are concerned, we must, as I have already emphasized, above all beware of the error that the formulas “private property” and “freedom of contract” solve our problems. They are not adequate answers because their meaning is ambiguous. Our problems begin when we ask what ought to be the contents of property rights, what contracts should be enforceable, and how contracts should be interpreted or, rather, what standard forms of contract should be read into the informal agreements of everyday transactions.

Where the law of property is concerned, it is not difficult to see that the simple rules which are adequate to ordinary mobile “things” or “chattel” are not suitable for indefinite extension. We need only turn to the problems which arise in connection with land, particularly with regard to urban land in modern large towns, in order to realize that a conception of property which is based on the assumption that the use of a particular item of property affects only the interests of its owner breaks down. There can be no doubt that a good many, at least, of the problems with which the modern town planner is concerned are genuine problems with which governments or local authorities are bound to concern themselves. Unless we can provide some guidance in fields like this about what are legitimate or necessary government activities and what are its limits, we must not complain if our views are not taken seriously when we oppose other kinds of less justified “planning.”

The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. I am thinking here of the extension of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks,

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and the like. It seems to me beyond doubt that in these fields a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work. In the field of industrial patents in particular we shall have seriously to examine whether the award of a monopoly privilege is really the most appropriate and effective form of reward for the kind of risk-bearing which investment in scientific research involves.

Patents, in particular, are specially interesting from our point of view because they provide so clear an illustration of how it is necessary in all such instances not to apply a ready-made formula but to go back to the rationale of the market system and to decide for each class what the precise rights are to be which the government ought to protect. This is a task at least as much for economists as for lawyers. Perhaps it is not a waste of your time if I illustrate what I have in mind by quoting a rather well-known decision in which an American judge argued that "as to the suggestion that competitors were excluded from the use of the patent we answer that such exclusion may be said to have been the very essence of the right conferred by the patent" and adds "as it is the privilege of any owner of property to use it or not to use it without any question of motive."³ It is this last statement which seems to me to be significant for the way in which a mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege.

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Another field in which a mechanical extension of the simplified conception of private property has produced undesirable results is in the field of trade-marks and proprietary names. I myself have no doubt that legislation has important tasks to perform in this field and that securing adequate and truthful information concerning the origin of any product is one, but only one, aspect of this. But the exclusive stress on the description of the producer and the neglect of similar provisions concerning the character and quality of the commodity has to some

3. *Continental Bag Co. v. Eastern Bag Co.*, 210 U.S. 405 (1909).

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extent helped to create monopolistic conditions because trade-marks have come to be used as a description of the kind of commodity, which then of course only the owner of the trade-mark could produce ("Kodak," "Coca-Cola"). This difficulty might be solved, for example, if the use of trade-marks were protected only in connection with descriptive names which would be free for all to use.

The situation is rather similar in the field of contract. We cannot regard "freedom of contract" as a real answer to our problems if we know that not all contracts ought to be made enforceable and in fact are bound to argue that contracts "in restraint of trade" ought not to be enforced. Once we extend the power to make contracts from natural persons to corporations and the like, it no longer can be the contract but it must be the law which decides who is liable and how the property is to be determined and safeguarded which limits the liability of the corporation.

"Freedom of contract" is in fact no solution because in a complex society like ours no contract can explicitly provide against all contingencies and because jurisdiction and legislation evolve standard types of contracts for many purposes which not only tend to become exclusively practicable and intelligible but which determine the interpretation of, and are used to fill the lacunae in, all contracts which can actually be made. A legal system which leaves the kind of contractual obligations on which the order of society rests entirely to the ever new decision of the contracting parties has never existed and probably cannot exist. Here, as much as in the realm of property, the precise content of the permanent legal framework, the rules of civil law, are of the greatest importance for the way in which a competitive market will operate. The extent to which the development of civil law, as much where it is judge-made law as where it is amended by legislation, can determine the developments away from or toward a competitive system, and how much this change in civil law is determined by the dominant ideas of what would be a desirable social order is well illustrated by the development, during the last fifty years, of legislation and jurisdiction on cartels, monopoly, and the restraint of trade generally. It seems to me that no doubt is possible that this development, even

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where it fully maintained the principle of "freedom of contract," and partly because it did so, has greatly contributed to the decline of competition. But little intellectual effort has been directed to the question in what way this legal framework should be modified to make competition more effective.

The main field in which these problems arise and the one from which I can best illustrate my point it, of course, the law of corporations and particularly that concerning limited liability. I do not think that there can be much doubt that the particular form legislation has taken in this field has greatly assisted the growth of monopoly or that it was only because of special legislation conferring special rights—not so much to the corporations themselves as to those dealing with corporations—that size of enterprise has become an advantage beyond the point where it is justified by technological facts. It seems to me that, in general, the freedom of the individual by no means need be extended to give all these freedoms to organized groups of individuals, and even that it may on occasion be the duty of government to protect the individual against organized groups. It appears to me also as if historically in the field of the law of corporations we had a situation rather analogous to that in the field of the law of property to which I have already referred. As in the law of property the rules developed for ordinary mobile property were extended uncritically and without appropriate modifications to all sorts of new rights; thus the recognition of corporations as fictitious or legal persons has had the effect that all the rights of a natural person were automatically extended to corporations. There may be valid arguments for so designing corporation law as to impede the indefinite growth of individual corporations; and the ways in which this could be done without setting up any rigid limits or giving the government undesirable powers of direct interference is one of the more interesting problems which we might discuss.

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I have so far deliberately spoken only of what is required to make competition effective on the side of employers, not because I regard

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this as of such exclusive importance, but because I am convinced that there is politically no chance to do anything about the other side of the problem—the labor side—until the employers have themselves shown their belief in competition and demonstrated that they are willing to put their own house in order. But we must not delude ourselves that in many ways the most crucial, the most difficult, and the most delicate part of our task consists in formulating an appropriate program of labor or trade-union policy. In no other respect, I believe, was the development of liberal opinion more inconsistent or more unfortunate or is there more uncertainty and vagueness even among the true liberals of today. Historically liberalism, first, far too long maintained an unjustified opposition against trade-unions as such, only to collapse completely at the beginning of this century and to grant to trade-unions in many respects exemption from the ordinary law and even, to all intents and purposes, to legalize violence, coercion, and intimidation. That, if there is to be any hope of a return to a free economy, the question of how the powers of trade-unions can be appropriately delimited in law as well as in fact is one of the most important of all the questions to which we must give our attention. I have many times already in the course of this outline felt tempted to refer you to the writings of the late Henry Simons, but I want now especially to draw your attention to his “Reflections on Syndicalism,” which states this problem with rare courage and lucidity.⁴

The problem has recently, of course, become even bigger by the assumption on the part of most governments of the responsibility for what is called “full employment” and by all its implications, and I do not see how we can, when we reach these problems, any longer separate them from the more general problems of monetary policy which I have suggested we should, as far as possible, keep separate. The same is true of the next set of major problems, which I can now only briefly mention—those of international trade, tariffs and foreign exchange control, etc. While on all these our long-run point of view ought not

4. Henry C. Simons, “Some Reflections on Syndicalism,” *Journal of Political Economy*, LII (March, 1944), 1-25; reprinted in his *Economic Policy for a Free Society* (Chicago: University of Chicago Press, 1948), pp. 121-58.

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to be in doubt, they do, of course, raise real problems for the immediate future, which, however, we had probably better leave on one side as belonging to the questions of immediate policy rather than long-run principles. The same, I am afraid, we should probably not be entitled to do with regard to that other problem I have already mentioned—the problem of the relation between free and planned economies.

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If I am to confine myself to the enunciation of the main problems, I must now hurry to a conclusion and just touch on one more major field—that of taxation. It is, of course, by itself very large. I want to pick out only two aspects of it. The one is the effect of progressive income taxation at the rate which has now been reached and used for extreme egalitarian ends. The two consequences of this which seem to me the most serious are, on the one hand, that it makes for social immobility by making it practically impossible for the successful man to rise by accumulating a fortune and that, on the other, it has come near eliminating that most important element in any free society—the man of independent means, a figure whose essential role in maintaining a free opinion and generally the atmosphere of independence from government control we only begin to realize as he is disappearing from the stage. Similar comments apply to modern inheritance taxation and particularly to estate duties as they exist in Great Britain. But, in mentioning this, I ought at once to add that inheritance taxes could, of course, be made an instrument toward greater social mobility and greater dispersion of property and, consequently, may have to be regarded as important tools of a truly liberal policy which ought not to stand condemned by the abuse which has been made of it.

There are many other important problems which I have not even mentioned. But I hope that what I have said will be sufficient to indicate the field which I had in mind when I suggested our present topic for discussion. It is too wide a field to treat the whole of it adequately even if we had much more time at our disposal. But, as I have said before, I hope that these discussions will be only a beginning and that it does not matter a great deal exactly where we start.