Risk:

The Rise Of the No-Lose Ethic

by Wesley J. Liebler, Timothy Muris, and Richard W. Rahn

Writing in a recent issue of* The Alternative, *E.S. Pasour, Jr., suggested that government policies of consumer protection ignored a fundamental point: "First, many, if not most regulations ignore a basic principle relating to benefits and costs. Any proposed change is beneficial to society only if the benefits exceed the costs. This principle, though elementary, is frequently ignored in public policy. An excessively high value is assigned to safety or purity, seemingly without regard to cost." If Americans want everything perfectly safe or perfectly pure, suggests Pasour, they will find that the costs are astronomical: "We as individuals, prefer different amounts of safety or purity in the kind of autos or bicycles we ride, the kind of drugs or food we use, etc. That is, since increases in safety or purity can only be achieved at an increase in cost, we should not expect everyone to desire the same amount of risk (or be willing to pay for the same amount of safety)." The authors of the following article would agree; they examine some of the questionable ways in which the government has attempted to extend citizen security. They suggest that the government ought to take into policy account the amount of individual risk a citizen might prefer. The contributors to this article were Wesley J. Liebler, currently director of the Office of Policy Planning and Evaluation of the Federal Trade Commission while on leave as a professor of law at the University of California at Los Angeles; Timothy Muris, an FTC attorney; and Richard W. Rahn, a business consultant and QUARTERLY contributing editor.

> If we can prevent the Government from wasting the labors of the people, under the pretense of taking care of them, they must become happy. — *Thomas Jefferson*

What happens to a society in which the government attempts to protect its members from most forms of financial and personal misfortune? In recent years we have seen a rapid growth of federal programs and regulatory agencies designed to protect people from financial and personal misfortune. At first glance such programs seem laudable, but the trend towards excessive legislation and regulation may well destroy not only our economic but our individual freedoms.

Excessive protectionism stifles innovation and initiative, encourages slothfulnes and waste, and results in a dull, tasteless, and mediocre society. It is becoming fashionable for both liberals and conservatives to attack the social cost of misguided regulation and protectionism of such alphabet agencies as the CAB, ICC, FDA, OSHA, FTC, SEC, CFTC, CPSC, and the Civil Service Commission. The criticism is well deserved, for the most part, but are we learning any lessons?

Unemployment insurance is considered desirable by most people (one only need look at how Congress keeps expanding and extending it), but what happens when we begin to approach the British system where many workers receive virtually no reduction in real earnings when either involuntarily unemployed or when on strike. Can a country maintain a work ethic when one is not rewarded for working nor penalized for failure to work?

Bankruptcy traditionally had been the form of protection for those who mismanaged their affairs. Under bankruptcy one pays a penalty, (loss of most assets), but is able to begin with a clean slate. Even this relatively mild penalty for complete failure is becoming unacceptable to many. Why should not Lockheed, Pan Am, and New York City, for example, be allowed to go bankrupt? If that happened, their assets would merely be shifted to different and hopefully better ownership and management. Do we really want to live in a society where our business and political leadership, no matter how important, is allowed to remain in power because neither we nor they want to admit to their failures?

The government increasingly practices "Big-Motherism." Apparently, the planners in Washington consider the average person too stupid to be trusted with caring for him/herself. Some specific examples follow.

Interlocks: Big Mother decided that having seat belts in the car wasn't enough. In making certain that our belts were fastened, the cost of cars increased $1 billion, not counting the money that millions of irate Americans spent to remove the system.

Not only do such rules require you to spend more money, they can greatly increase the average person's frustration. Witness the instructions of one major car manufacturer concerning the seat belt system:

1. Get in your car.
2. Fasten your lap/shoulder harness.
   - A. If you have a front seat passenger, his seatbelts must be fastened also, or the car will not start.
   - B. If you have a package, handbag, brief-case, etc., weighing 25 lbs. or more, and have space only in the front seat, place the object on the front seat, and then buckle the passenger-side belt.
   - C. If you have a dog weighing 25 lbs. or more occupying the passenger seat, buckle the passenger-side belt before attempting to start car.
   - D. If the passenger-side belt is already buckled when you add the package, dog, or passenger, unbuckle, then rebuckle the belt before attempting to start car.
3. Start your car.
   - A. If your car won't start, try unbuckling and rebuckling your belt (and your passenger's) to be sure the buckle was fully fastened.
   - B. If that fails, turn the ignition key to "ON," then get out of your car and raise the hood. Press the bypass switch mounted on the fire wall to "START." Close the hood, get back in your car, buckle up, and turn your ignition all the way as in normal starting.
   - C. If your car stalls, do not turn the ignition to "OFF" position. That way you can keep trying to start your car as often as necessary without leaving the car.
   - D. If you accidentally turn the ignition key to "OFF," turn it back to "ON," unbuckle, get out of the car, open the hood, press the bypass switch again for another "free" start. (Incidentally, if the bypass switch is taped down, the action will be detected by the switch and cancelled.)
4. Drive the car.
   - A. If your dog is on the floor when you begin driving the car, and then jumps on the seat and the passenger-side belt is unbuckled, a buzzer will sound. Stop the car and buckle the belt.
   - B. In a somewhat rare situation, when driving over a very rough road, you may be bounced about in your seat. Should your engine be stopped, remain buckled in your seat and restart your car. A "bounce-time" delay (designed primarily to allow you to straighten your clothing after buckling up) also allows a restart in this situation.

Fortunately, angry consumers forced Big Mother to withdraw interlocks. The message, however, has apparently not influenced other regulations.

Consumer Product Safety Commission: The CPSC provides answers to some of the hotly-debated questions of the day. For example, one of its press releases, "CPSC Issues Safety Tips on Winter Sports," contains the following gems:

> A number of accidents happened when the skier was tired. . . . Take lessons from an expert. Studies show that beginners are hurt more frequently, so advancement is desirable. . . . Skiers should use good quality equipment that fits well. . . . Skaters should never skate close to open bodies of water.

Federal Trade Commission: The FTC also specializes in protecting consumers from themselves. The commission apparently wants to force consumers to accept what they neither want nor need. For example, the commission recently ordered an industry-wide investigation of growers, wholesalers and retailers of plants to find out if they are "failing to provide toxicity and care information concerning the plants they sell."

Information about plants and their care is readily available in the marketplace. As Commissioner Mayo J. Thompson said in dissenting to the proposed investigation, "bureaucratically ordered 'care' tags will have about as much usefulness to the American public as socks on a rooster. . . ."

The commission is also engaged in a potentially much more damaging kind of Big Motherism. That is regulating the substantive terms of contracts. Normally, one would expect the forces of the marketplace to best care for consumers. But the commission, without a showing that the marketplace has failed, has proposed rules that would prevent consumers from agreeing to contracts that consumers themselves, not some bureaucrat in Washington, decide are in their best interests. The results may be that consumers are forced to pay more for protection that, left to their own decision, they regard as not worth the cost.

This protectionist attitude not only costs consumers money, but, in some cases, it may also decrease productivity. Witness the job security given federal employees. It is all but impossible, short of the grossest crimes or incompetence, to fire a federal employee who has been on the job for a few years. Further, merit is only one of many factors — and usually not the most important — in promotion decisions. Under such a system, it is not hard to see why federal employees are not as productive as they might be. While it may be laudable to remove most government hiring and firing decisions from partisan politics, the present system certainly is not needed to accomplish that goal. Again, a protectionist attitude (this time toward employees) reduces society's welfare. A better way to protect our citizens would be to allow them to make decisions for themselves (or stand or fall on their own merits).

This is not to say that government should never intervene in the economy. Sometimes, for example, the market fails to provide consumers with information that they would pay for if given the opportunity. Cigarettes appear to be such a case. Since the link between cancer and cigarettes existed with all brands, no brand had an incentive to point out that its competitors were dangerous.

Yet, instead of banning cigarettes, government recognized that competent people should be free knowingly to take risks if they so desire. Therefore, consumers are now presented with the relevant information and left free to decide for themselves. Unfortunately, cigarette-type regulation is the exception, not the rule.

Drug Safety

One of the most important manifestations of this no-risk attitude is found in the approach to new drugs which is embodied in the legislation establishing the Food and Drug Administration. New prescription drugs cannot be sold in the United States until they have been certified as safe and effective by the FDA. This approach is usually justified on the grounds that the average consumer (or doctor) does not know (cannot learn) what the effects of new drugs might be.

There is no doubt a great deal of truth in that proposition, even though the remedies available to injured consumers under private tort law could be expected to induce a great many reputable drug companies to provide relevant information on this subject. But the cure — forbidding the sale of new drugs until certified as safe and effective by a governmental agency — may well be worse than the problem.

A better system of regulation is available. Why not let FDA rate new drugs, for both safety and effectiveness, on a scale of, say, 1-10. A drug with a high rating on both counts could be taken to be both safe and effective. On the other hand, take a drug with a safety rating of 1 and an effectiveness rating of 2. This would indicate that the drug is quite risky, producing serious adverse reactions (including death in some cases) in up to 90 percent of the patients to whom it is administered, and that it is effective in only about 20 percent of the cases.

Regulations could require that this information be forcefully brought to the attention of both the doctor and the patient before he drug could be used. If the justification for regulation is lack of knowledge, this approach would solve the problem.

But why, the proponents of the existing system might ask, take the risk that the ignorant or inattentive will not learn the facts or heed them once they have been learned. These are, of course, two quite different questions. Ignorance and inattention are with us always. We might reduce the risks that will inevitably flow from these factors by requiring both the doctor and the patient to sign a document that advises them of the risks before allowing the risky drug to be dispensed.

Even so, there is always some risk that the fools among us will sign without having read. Does it make sense to allow even this minimal risk? The solution to this question may be found when we ask why some people might not heed the warnings once they have received them. The answer is, of course, that their preference for risk may well be different than that expressed by a government bureaucracy that will no doubt be severely criticized for its "mistakes."

Take the terminal cancer case, for example, who faces certain death without the use of a particular drug, whose demise may be accelerated by its use (90 percent chance) but who has a 20 percent chance of survival if the drug is used. We suspect that even the employees of FDA would opt for the drug.

The history of the federal government as a regulator is not impressive. It is even less impressive when it comes to regulating itself. The solution may be to realize that ultimately, the people must regulate themselves. The government can and must provide some forms of basic protection. It cannot usurp basic decision-making powers because it cannot perform them effectively or efficiently. ■