

Scandals

by Joseph S. Fulda

It is impossible to read a newspaper or listen to a newscast nowadays and fail to be impressed by the degree to which our society is beset by scandals, large and small. This was not always so. There was a time when scandals were infrequent, if not rare, deviations from the norm. In short, they were scandalous. Today, they *are* the norm—commonplace and expected, almost natural.

An exploration of the varied causes of this recent and unsettling phenomenon, which we shall undertake here, is necessary if one rejects the conventional wisdom that today's scandals have arisen from the character defects of our current leaders, politicians, and businessmen—who, it is believed, are morally inferior to and more venal than those of yesteryear. In studying news reports over the last few months, several sociopolitical trends largely responsible for the huge increase in indictments precipitated by scandals clearly emerge.

First, there are more requirements and prohibitions set by the law, the courts that interpret them, and the administrative agencies that apply them than ever before. And even where the requirements or prohibitions are longstanding, the focus, energy, and skill brought to their enforcement is a recent development. Naturally the more laws and regulations there are to be broken, the more violations will occur. And the more effort applied to discovering such violations, the more will be discovered.

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It is not that this generation has discovered more *mala in se*, the political theorist's term for acts wrong by their very nature and apprehensible as such to any civilized man. Rather it is the extreme proliferation of the *mala prohibita*, the designation classically given to acts simply declared crimes by the state. Into this category fall many of the ancient victimless crimes, but also, and even here in capitalist America, many economic "crimes."

For example, it is a *felony* to purchase five per cent of a company's stock without notifying the government. This not only is an abridgment of the freedoms of speech and enterprise, it is hardly apprehensible as wrong by its very nature. Even worse, it is also a felony to aid someone's nondisclosure of five per cent ownership, by holding the stock for him. What we have here, then, is a situation where a mere bailment is treated as a serious crime, its triviality masked by such terms as "parking securities" and "stock fraud," which to the general public sound so ominous.

Then there are also the numerous restrictions on mere possession, which have included illegal substances, controlled substances, contraband, fireworks, gold, firearms, burglars' tools, and whatnot. Also burdensome are the many restrictions on the peaceful exchange of goods and services between consenting adults. For example, it is felonious for a stockbroker to lend a client more than a specified percentage of the means needed for a securities purchase. What once would have been seen as an act of brotherhood or at least a common business

practice has become a “margin violation,” punishable by a prison term. Furthermore, when services are exchanged, even between friends, both parties are required to report the service received as barter income or face federal charges. One can’t even exchange small favors without the intrusion of the taxman.

Proscribed and Prescribed Actions

On and on the list goes—and we haven’t even begun to enumerate the restraints and mandates placed on business enterprises. But the idea is already clear: The index of proscribed and prescribed actions far outstrips the security needed by civilized men for social intercourse. And the longer this irrational and capricious list grows, the longer will be the list of offenders. It is well to recall Jefferson’s comment on this trend already evident in 1816. “Our legislators,” he wrote, “are not sufficiently apprised of the rightful limits of their power: that their true office is to declare and enforce only our natural rights and duties. . . . The trial of every law by one of these texts would lessen much the labors of our legislators and lighten equally our municipal codes.”¹

Second, there has been an almost unimaginable expansion of government-sponsored programs, government-funded programs (grants and subsidies), and government regulation of privately sponsored and funded activities. As I discussed in an earlier article,² such programs provide almost limitless opportunities for abuse, both for the legislators, bureaucrats, and regulators dispensing the funds, permits, or contracts and for the corporations and individuals seeking to receive them. And both sides, givers and takers, have used these opportunities.

An excellent and timely description of this process comes from William Stern, formerly CEO of New York State’s Urban Development Corporation—a huge government agency “that does everything from building convention centers to financing economically depressed mushroom farms.” Mr. Stern candidly admits that “[t]he fact that government is involved in so much in New York . . . creates the motivation to influence government. And the process of influencing government is always

sleazy. . . . It’s a side of liberalism that was not predicted, and I think not completely understood. . . . [T]he government becomes very much organized to push through the interests of whoever makes their influence felt.”³

In other words, the use of what Albert Jay Nock called “the political means” of acquiring wealth—taking it—rather than “the economic means”—earning it—is seductive. By its expansion into all areas of everyday living, government is creating temptations on a massive scale. It is easy to fault individuals who succumb to temptation, but one should do so only with the realization that government-wrought temptations are today ubiquitous and overpowering. Thus, it is not that people on both sides of the government dispensary are morally weaker than those of earlier times: The problem is the incredible size and scope of the government dispensary, and the very notion that government may take from A to give to B or regulate the peaceful activities of A to benefit B. In pursuit of privileges, favors, and contracts, people often ignore the rule of law and thereby risk ending both their own careers and the careers of those in government who assist them in return for some form of payoff. Thus, as the daily news reports show us, the existence of the government dispensary with its enormous temptations and corrupting influence is not only theoretically indefensible, it is a very real human tragedy which brings people down at the peak of their powers who otherwise would have lived decent lives and had productive careers.

Third, with the advent of special prosecutors, full-disclosure requirements, and many other similar developments, the intense scrutiny placed on public officials and public figures is greater than that of any previous age. Facilitated by modern transportation, communication, and information processing systems, such scrutiny is urged on us by its advocates because of the pervasive corruption discovered in and following the Watergate era. And the more corruption discovered, the more intense is the push for yet more scrutiny.

On the surface, it appears that this trend is not directly caused by the growth of government. After all, scrutiny from the press, encouraged by the very weakened state in which

the courts have left libel law in the United States, can be as unrelenting as that of a U.S. Attorney, a state prosecutor, or a legislative panel.

However, closer examination reveals that what really has occurred is the blurring of the all-important distinction between private and public. With almost everything heretofore considered private now considered public, such scrutiny is to be expected. And the continuing attenuation of the distinction between the public and the private is a direct consequence of the growth of government.

Nor is scrutiny itself goal-free. Most of it is directed to discovering whether the person has violated some insignificant *malum prohibitum* or whether he has been involved in the abuse of the government dispensary. Only rarely does the scrutiny placed on persons in public life result from suspicion that a *malum in se*, unre-

lated to the government dispensary, has been committed.

In sum, were government's powers to grant subsidies, privileges, contracts, tax exceptions, licenses, and permits sharply curtailed and were government to refrain from declaring peaceful acts illegal, even today's heightened scrutiny would yield little of substance. The public would soon lose interest in reading about probes, inquiries, hearings, and investigations—and scandals once again would be scandalous. □

1. E. Dumbauld, ed., *The Political Writings of Thomas Jefferson*, p. 55.

2. J. Fulda, "The New Bondage," *The Freeman*, April 1982, pp. 243-248.

3. P. Weber, "City of Scams: The Streets Were Paved with Gold Diggers," *National Review*, June 5, 1987, p. 27. The article discusses the corruption scandals in both New York State and New York City, which magnify yet still typify the situation with government in general.

IDEAS
ON
LIBERTY



Culture vs. Barbarism

Culture strives to establish a boundary between itself and barbarism. The manifestations of barbarism are called "crimes." But existing criminology is insufficient to isolate barbarism. It is insufficient because the idea of "crime" in existing criminology is artificial, for what is called crime is really an infringement of "existing laws," whereas "laws" are very often a manifestation of barbarism and violence. Such are the prohibiting laws of different kinds which abound in modern life.

The number of these laws is constantly growing in all countries and, owing to this, what is called crime is very often not a crime at all, for it contains no element of violence or harm. On the other hand, unquestionable crimes escape the field of vision of criminology, either because they have not the recognized form of crime or because they surpass a certain scale. In existing criminology there are concepts: a criminal man, a criminal profession, a criminal society, a criminal sect, a criminal caste and a criminal tribe, but there is no concept of a criminal state, or a criminal government, or criminal legislation. Consequently the biggest crimes actually escape being called crimes.

—P. D. OUSPENSKY

A New Model of the Universe

Should Cigarette Advertising Be Banned?

by Douglas J. Den Uyl and Tibor R. Machan

The American Medical Association has recently called for a ban on the advertising and promotion of all tobacco products. A new wave of debate on Constitutional questions and on the nature of advertising is sure to follow and, indeed, has already begun. We intend to sidestep the “public policy” approach and focus instead on what is less discussed: basic moral and political values.

We consider the main values embodied by our Constitution to be basic moral values as well. Central among these values are liberty, limited government, and natural or human rights. We also take it that these values are not subject to majority rule. This point was clearly expressed by the U.S. Supreme Court when it stated in *West Virginia State Board of Education v. Barnette* (1943) that

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts. One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Our particular issue is commercial speech

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and its deserved protection under the First Amendment. Tobacco advertising is a clear though controversial example of the principles we wish to address.

Virtually all attacks on liberty, including the liberty to express various viewpoints, ideas, theories, beliefs, appeals, requests, and so forth rest upon a basic moral error. This is the error of confusing basic rights with what is morally or ethically right.

The recent attempt to ban commercial speech about tobacco products is one of the purer examples of this error. If we assume, for the sake of argument only, that it would be right for people to stop smoking, we have, as yet, said absolutely nothing about the rights of the case. It may turn out that forcing people to quit smoking, restricting their access to tobacco products or information about such products, violates their rights. The paradox here is that in the pursuit of what is right, one may do what is morally wrong!

The reason for the paradox is that the particular way in which the “good” (or right thing) in question is pursued may conflict with another good that takes priority. All social moral principles are not created equal. Some are more fundamental than others. What is characteristic of rights is that, almost by definition, they are foundational or basic. Other social values must give way to them in cases of conflict. We can see this in everyday speech. It makes perfect sense to say, “It may not be right for someone to do (or believe) this, but he or she has every right to do so.”