Mises Daily Articles

The Libertarian Manifesto on Pollution

Tags The EnvironmentFree MarketsInterventionism

04/17/2012Murray N. Rothbard

[*For a New Liberty: The Libertarian Manifesto* (1973)]

All right: Even if we concede that full private property in resources and the free market will conserve and create resources, and do it far better than government regulation, what of the problem of pollution? Wouldn't we be suffering aggravated pollution from unchecked "capitalist greed"?

There is, first of all, this stark empirical fact: Government ownership, even socialism, has proved to be no solution to the problem of pollution. Even the most starry-eyed proponents of government planning concede that the poisoning of Lake Baikal in the Soviet Union is a monument to heedless industrial pollution of a valuable natural resource. But there is far more to the problem than that. Note, for example, the two crucial areas in which pollution has become an important problem: the air and the waterways, particularly the rivers. But these are precisely two of the vital areas in society in which private property has not been permitted to function.

First, the rivers. The rivers, and the oceans too, are generally owned by the government; private property, certainly complete private property, has not been permitted in the water. In essence, then, government owns the rivers. But government ownership is not true ownership, because the government officials, while able to control the resource cannot themselves reap their capital value on the market. Government officials cannot sell the rivers or sell stock in them. Hence, they have no economic incentive to preserve the purity and value of the rivers. Rivers are, then, in the economic sense, "unowned"; therefore government officials have permitted their corruption and pollution. Anyone has been able to dump polluting garbage and wastes in the waters. But consider what would happen if private firms were able to own the rivers and the lakes. If a private firm owned Lake Erie, for example, then anyone dumping garbage in the lake would be promptly sued in the courts for their aggression against private property and would be forced by the courts to pay damages and to cease and desist from any further aggression. Thus, only private property rights will insure an end to pollution — invasion of resources. Only because the rivers are unowned is there no owner to rise up and defend his precious resource from attack. If, in contrast, anyone should dump garbage or pollutants into a lake which is privately owned (as are many smaller lakes), he would not be permitted to do so for very long — the owner would come roaring to its defense.1 Professor Dolan writes:

With a General Motors owning the Mississippi River, you can be sure that stiff effluent charges would be assessed on industries and municipalities along its banks, and that the water would be kept clean enough to maximize revenues from leases granted to firms seeking rights to drinking water, recreation, and commercial fishing.2

If government as owner has allowed the pollution of the rivers, government has also been the single major active polluter, especially in its role as municipal sewage disposer. There already exist low-cost chemical toilets which can burn off sewage without polluting air, ground, or water; but who will invest in chemical toilets when local governments will dispose of sewage free to their customers?

This example points up a problem similar to the case of the stunting of aquaculture technology by the absence of private property: if governments as owners of the rivers permit pollution of water, then industrial technology will — and has — become a water-polluting technology. If production processes are allowed to pollute the rivers unchecked by their owners, then that is the sort of production technology we will have.

If the problem of water pollution can be cured by private property rights in water, how about air pollution? How can libertarians possibly come up with a solution for this grievous problem? Surely, there can't be private property in the *air*? But the answer is: yes, there can. We have already seen how radio and TV frequencies can be privately owned. So could channels for airlines. Commercial airline routes, for example, could be privately owned; there is no need for a Civil Aeronautics Board to parcel out — and restrict — routes between various cities. But in the case of air pollution we are dealing not so much with private property *in the air* as with protecting private property in one's lungs, fields, and orchards. The vital fact about air pollution is that the polluter sends unwanted and unbidden pollutants — from smoke to nuclear radiation to sulfur oxides — *through* the air and into the lungs of innocent victims, as well as onto their material property. All such emanations which injure person or property constitute aggression against the private property of the victims. Air pollution, after all, is just as much aggression as committing arson against another's property or injuring him physically. Air pollution that injures others is aggression pure and simple. The major function of government — of courts and police — is to stop aggression; instead, the government has failed in this task and has failed grievously to exercise its defense function against air pollution.

It is important to realize that this failure has *not* been a question purely of ignorance, a simple time lag between recognizing a new technological problem and facing up to it. For if some of the modern pollutants have only recently become known, factory smoke and many of its bad effects have been known ever since the Industrial Revolution, known to the extent that the American courts, during the late — and as far back as the early 19th century made the deliberate decision to allow property rights to be violated by industrial smoke. To do so, the courts had to — and did — systematically change and weaken the defenses of property right embedded in Anglo-Saxon common law. Before the mid and late 19th century, any injurious air pollution was considered a tort, a nuisance against which the victim could sue for damages and against which he could take out an injunction to cease and desist from any further invasion of his property rights. But during the 19th century, the courts systematically altered the law of negligence and the law of nuisance

to *permit* any air pollution which was not unusually greater than any similar manufacturing firm, one that was not more extensive than the customary practice of fellow polluters.

As factories began to arise and emit smoke, blighting the orchards of neighboring farmers, the farmers would take the manufacturers to court, asking for damages and injunctions against further invasion of their property. But the judges said, in effect, "Sorry. We know that industrial smoke (i.e., air pollution) invades and interferes with your property rights. But there is something *more important* than mere property rights: and that is public policy, the 'common good.' And the common good decrees that industry is a good thing, industrial progress is a good thing, and therefore your mere private property rights must be overridden on behalf of the general welfare." And now all of us are paying the bitter price for this overriding of private property, in the form of lung disease and countless other ailments. And all for the "common good"![3]

That this principle has guided the courts during the air age as well may be seen by a decision of the Ohio courts in *Antonik v. Chamberlain* (1947). The residents of a suburban area near Akron sued to enjoin the defendants from operating a privately owned airport. The grounds were invasion of property rights through excessive noise. Refusing the injunction, the court declared:

In our business of judging in this case, while sitting as a court of equity, we must not only weigh the conflict of interests between the airport owner and the nearby landowners, but we must further recognize the public policy of the generation in which we live. We must recognize that the establishment of an airport … is of great concern to the public, and if such an airport is abated, or its establishment prevented, the consequences will be not only a serious injury to the owner of the port property but may be a serious loss of a valuable asset to the entire community.[4]

To cap the crimes of the judges, legislatures, federal and state, moved in to cement the aggression by prohibiting victims of air pollution from engaging in "class action" suits against polluters. Obviously, if a factory pollutes the atmosphere of a city where there are tens of thousands of victims, it is impractical for each victim to sue to collect his particular damages from the polluter (although an *injunction* could be used effectively by one small victim). The common law, therefore, recognizes the validity of "class action" suits, in which one or a few victims can sue the aggressor not only on their own behalf, but on behalf of the entire *class* of similar victims. But the legislatures systematically outlawed such class action suits in pollution cases. For this reason, a victim may successfully sue a polluter who injures him individually, in a one-to-one "private nuisance" suit. But he is prohibited by law from acting against a mass polluter who is injuring a large number of people in a given area! As Frank Bubb writes, "It is as if the government were to tell you that it will (attempt to) protect you from a thief who steals only from you, but it will not protect you if the thief also steals from everyone else in the neighborhood."[5]

Noise, too, is a form of air pollution. Noise is the creation of sound waves which go through the air and then bombard and invade the property and persons of others. Only recently have physicians begun to investigate the damaging effects of noise on the human physiology. Again, a libertarian legal system would permit damage and class action suits and injunctions against excessive and damaging noise: against "noise pollution."

The remedy against air pollution is therefore crystal clear, and it has nothing to do with multibillion-dollar palliative government programs at the expense of the taxpayers which do not even meet the real issue. The remedy is simply for the courts to return to their function of defending person and property rights against invasion, and therefore to enjoin anyone from injecting pollutants into the air. But what of the propollution defenders of industrial progress? And what of the increased costs that would have to be borne by the consumer? And what of our present polluting technology?

The argument that such an injunctive prohibition against pollution would add to the costs of industrial production is as reprehensible as the pre-Civil War argument that the abolition of slavery would add to the costs of growing cotton, and that therefore abolition, however morally correct, was "impractical." For this means that the polluters are able to impose all of the high costs of pollution upon those whose lungs and property rights they have been allowed to invade with impunity.

Furthermore, the cost and technology argument overlooks the vital fact that if air pollution is allowed to proceed with impunity, there continues to be no economic incentive to develop a technology that will *not* pollute. On the contrary, the incentive would continue to cut, as it has for a century, precisely the other way. Suppose, for example, that in the days when automobiles and trucks were first being used, the courts had ruled as follows:

Ordinarily, we would be opposed to trucks invading people's lawns as an invasion of private property, and we would insist that trucks confine themselves to the roads, regardless of traffic congestion. But trucks are vitally important to the public welfare, and therefore we decree that trucks should be allowed to cross any lawns they wish provided they believe that this would ease their traffic problems.

If the courts had ruled in this way, then we would now have a transportation system in which lawns would be systematically desecrated by trucks. And any attempt to stop this would be decried in the name of modern transportation needs! The point is that this is precisely the way that the courts ruled on air pollution — pollution which is far more damaging to all of us than trampling on lawns. In this way, the government gave the green light, from the very start, to a polluting technology. It is no wonder then that this is precisely the kind of technology we have. The only remedy is to force the polluting invaders to stop their invasion, and thereby to redirect technology into nonpolluting or even antipolluting channels.

Already, even at our necessarily primitive stage in antipollution technology, techniques have been developed to combat air and noise pollution. Mufflers can be installed on noisy machines that emit sound waves precisely contra-cyclical to the waves of the machines, and thereby can cancel out these racking sounds. Air wastes can even now be recaptured as they leave the chimney and be recycled to yield products useful to industry. Thus, sulfur dioxide, a major noxious air pollutant, can be captured and recycled to produce economically valuable sulfuric acid.6 The highly polluting spark ignition engine will either have to be "cured" by new devices or replaced altogether by such nonpolluting engines as diesel, gas turbine, or steam, or by an electric car. And, as libertarian systems engineer Robert Poole, Jr., points out, the costs of installing the non- or antipolluting technology would then "ultimately be borne by the consumers

of the firms' products, i.e., by those who *choose* to associate with the firm, rather than being passed on to innocent third parties in the form of pollution (or as taxes)."[7]

Robert Poole cogently defines pollution "as the transfer of harmful matter or energy to the person or property of another, without the latter's consent."[8] The libertarian — and the only complete — solution to the problem of air pollution is to use the courts and the legal structure to combat and prevent such invasion. There are recent signs that the legal system is beginning to change in this direction: new judicial decisions and repeal of laws disallowing class action suits. But this is only a beginning.[9]

Among conservatives — in contrast to libertarians — there are two ultimately similar responses to the problem of air pollution. One response, by Ayn Rand and Robert Moses among others, is to deny that the problem exists, and to attribute the entire agitation to leftists who want to destroy capitalism and technology on behalf of a tribal form of socialism. While part of this charge may be correct, denial of the very existence of the problem is to deny science itself and to give a vital hostage to the leftist charge that defenders of capitalism "place property rights above human rights." Moreover, a defense of air pollution does not even defend property rights; on the contrary, it puts these conservatives' stamp of approval on those industrialists who are trampling upon the property rights of the mass of the citizenry.

A second, and more sophisticated, conservative response is by such free-market economists as Milton Friedman. The Friedmanites concede the existence of air pollution but propose to meet it, *not* by a defense of property rights, but rather by a supposedly utilitarian "cost-benefit" calculation by government, which will then make and enforce a "social decision" on *how much* pollution to allow. This decision would then be enforced either by licensing a given amount of pollution (the granting of "pollution rights"), by a graded scale of taxes against it, or by the taxpayers paying firms *not* to pollute. Not only would these proposals grant an enormous amount of bureaucratic power to government in the name of safeguarding the "free market"; they would continue to override property rights in the name of a collective decision enforced by the State. This is far from any genuine "free market," and reveals that, as in many other economic areas, it is impossible to *really* defend freedom and the free market without insisting on defending the rights of private property. Friedman's grotesque dictum that those urban inhabitants who don't wish to contract emphysema should move to the country is starkly reminiscent of Marie Antoinette's famous "Let them eat cake" — and reveals a lack of sensitivity to human or property rights. Friedman's statement, in fact, is of a piece with the typically conservative, "If you don't like it here, leave," a statement that implies that the government rightly owns the entire land area of "here," and that anyone who objects to its rule must therefore leave the area. Robert Poole's libertarian critique of the Friedmanite proposals offers a refreshing contrast:

Unfortunately, it is an example of the most serious failing of the conservative economists: nowhere in the proposal is there any mention of *rights*. This is the same failing that has undercut advocates of capitalism for 200 years. Even today, the term "laissez-faire" is apt to bring forth images of eighteenth century English factory towns engulfed in smoke and grimy with soot. The early capitalists agreed with the courts that smoke and soot were the "price" that must be paid for the benefits of industry.… Yet laissez-faire without rights is a contradiction in terms; the laissez-faire position is based on and derived from man's rights, and can endure only when rights are

held inviolable. Now, in an age of increasing awareness of the environment, this old contradiction is coming back to haunt capitalism.

It is *true* that air is a scarce resource [as the Friedmanites say], but one must then ask *why* it is scarce. If it is scarce because of a systematic violation of rights, then the solution is not to raise the price of the status quo, thereby sanctioning the rights-violations, but to assert the rights and demand that they be protected.… When a factory discharges a great quantity of sulfur dioxide molecules that enter someone's lungs and cause pulmonary edema, the factory owners have aggressed against him as much as if they had broken his leg. The point must be emphasized because it is vital to the libertarian laissez-faire position. A laissez-faire polluter is a contradiction in terms and must be identified as such. A libertarian society would be a *full-liability* society, where everyone is fully responsible for his actions and any harmful consequences they might cause.10

In addition to betraying its presumed function of defending private property, government has contributed to air pollution in a more positive sense. It was not so long ago that the Department of Agriculture conducted mass sprayings of DDT by helicopter over large areas, overriding the wishes of individual objecting farmers. It *still* continues to pour tons of poisonous and carcinogenic insecticides all over the South in an expensive and vain attempt to eradicate the fire ant.11 And the Atomic Energy Commission has poured radioactive wastes into the air and into the ground by means of its nuclear power plants, and through atomic testing. Municipal power and water plants, and the plants of licensed monopoly utility companies, mightily pollute the atmosphere. One of the major tasks of the State in this area is therefore to stop its *own* poisoning of the atmosphere.

Thus, when we peel away the confusions and the unsound philosophy of the modern ecologists, we find an important bedrock case against the existing system; but the case turns out to be not against capitalism, private property, growth, or technology per se. It is a case against the failure of government to allow and to defend the rights of private property against invasion. If property rights were to be defended fully, against private and governmental invasion alike, we would find here, as in other areas of our economy and society, that private enterprise and modern technology would come to mankind not as a curse but as its salvation.

- 1. "Existing "appropriation" law in the Western states already provides the basis for full "homesteading" private property rights in the rivers. For a full discussion, see Jack Hirshleifer, James C. DeHaven, and Jerome W. Milliman, *Water Supply; Economics, Technology, and Policy* (Chicago: University of Chicago Press, 1960), chapter IX.
- 2. Edwin G. Dolan, "Capitalism and the Environment," *Individualist* (March 1971): 3.
- 3. See E.F. Roberts, "Plead the Ninth Amendment!" *Natural History* (August–September 1970): 18ff. For a definitive history and analysis of the change in the legal system toward growth and property rights in the first half of the 19th century, see Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977).
- 4. Quoted in Milton Katz, *The Function of Tort Liability in Technology Assessment* (Cambridge, Mass.: Harvard University Program on Technology and Society, 1969), p. 610.

- 5. Frank Bubb, "The Cure for Air Pollution," *The Libertarian Forum* (April 15, 1970): 1. Also see Dolan, *TANSTAAFL*, pp. 37–39.
- 6. See Jane Jacobs, *The Economy of Cities* (New York: Random House, 1969), pp. 109ff.
- 7. Poole, "Reason and Ecology," pp. 251–52.
- 8. Ibid., p. 245.
- 9. Thus, see Dolan, *TANSTAAFL*, p. 39, and Katz, *The Function of Tort Liability in Technology Assessment*, passim.
- 10. Poole, "Reason and Ecology," pp. 252–53. Friedman's dictum can be found in Peter Maiken, "Hysterics Won't Clean Up Pollution," *Human Events* (April 25, 1970): 13, 21–23. A fuller presentation of the Friedmanite position may be found in Thomas D. Crocker and A.J. Rogers III, *Environmental Economics* (Hinsdale, Ill.: Dryden Press, 1971); and similar views may be found in J.H. Dales, iPollution, Property, and Prices (Toronto: University of Toronto Press, 1968), and Larry E. Ruff, "The Economic Common Sense of Pollution," *Public Interest* (Spring, 1970): 69–85.
- 11. Glenn Garvin, "Killing Fire Ants With Carcinogens," *Inquiry* (February 6, 1978): 7–8.

Author:

Murray N. Rothbard

Murray N. Rothbard made major contributions to economics, history, political philosophy, and legal theory. He combined Austrian economics with a fervent commitment to individual liberty.