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THE FUTILITY OF THE LIBERTARIAN FETISH FOR FREEDOM: MILTON FRIEDMAN'S *CAPITALISM AND FREEDOM* REVISITED

F.E. Guerra-Pujol

Whenever I think of markets in general or the "Chicago school" in particular, the late great Milton Friedman (1912-2006) invariably comes to mind. Of course, there have been many other eloquent defenders of markets ever since Adam Smith penned his tome on *The Wealth of Nations*, just as there have been many other renowned economists at the University of Chicago, such as George Stigler (1911-1991), Ronald Coase (1910-___), and Gary Becker (1930-___), but it is Professor Friedman who stands out in my mind, and he stands out in large part for his passionate defense of economic and political freedom in his classic book *Capitalism and Freedom*. At the time of its original publication in 1962 – fifty years ago! – , the idea of free markets was under siege and in many places soundly defeated. The world was divided into two great ideological camps – the free world and socialist bloc – and both sides were

engaged in a fierce and worldwide struggle of heroic proportions. Yet, like an Old Testament prophet, Friedman himself lived to see the fall of the Berlin Wall, the birth of the World Trade Organization, and the creation of a single pan-European currency – all these remarkable events occurring within 50 years of his book's publication. Even Communist China has become a capitalist country.

With the spread of democracy and the triumph of capitalism the world over, it seems that history has vindicated Milton Friedman, the Chicago school, and the libertarian conception of freedom. Nevertheless, I see three major problems with Friedman's defense of markets and freedom generally. One problem is definitional. Friedman's definition of freedom is fuzzy and rife with ambiguities. Another problem is factual. It is not at all clear whether democracy (however defined) leads to economic freedom, or vice-versa. In fact, if the many case studies that Friedman discusses in his own book are any example, then it appears that democracy generally leads to paternalism and ill-conceived government interventions of all sorts. But the basic problem with Friedman's approach towards markets and freedom – and the main theme of this paper – is simply that Friedman is dogmatic. Professor Friedman is dogmatic not in a metaphorical

sense but rather in a literal sense because Friedman – like Hayek, Nozick, and Rothbard, just to name a few of the usual libertarian suspects – treats freedom as an end in itself, the most important moral value of all. His classic book about capitalism, like the works of Hayek, et al., is thus no different in spirit and form than a religious tract or a catechism.

In this paper, I shall analyze Friedman's dogmatic approach towards freedom (part 2), his misuse of historical examples (part 3), and his tautological definition of freedom (part 4). In fairness to Friedman, however, I shall conclude by explaining why any attempt to define freedom is bound to fail, and I shall also explain why freedom, however defined, must necessarily and paradoxically entail some form of coercion.

A NEW WEAPON IN THE OBESITY BATTLE: COORDINATED STATE ATTORNEYS GENERAL *PARENS PATRIAE* CONSUMER PROTECTION LAWSUITS

Divya Srinath

Food marketing to children has received increasing attention as a significant contributor to obesity. Studies show that nearly thirty-four percent of children and teens in America are either overweight or at risk of becoming overweight, and slightly more than twenty percent of children in America between the ages of two and five are already overweight or obese. Since the 1970s, the number of advertisements per year that children see on television has doubled from 20,000 to 40,000, and the majority of advertisements targeted to children are for candy, cereal, and fast food. Children spend more of their own money at younger ages, and they influence a substantial portion of the total sales of certain foods, including salty snacks, soft drinks, frozen pizza, and cold cereals. In 2005, the Institute of Medicine (IOM) Committee on Food Marketing and the Diets of

Children and Youth wrote that "before a certain age, children lack the defenses, or skills, to discriminate commercial from noncommercial content, or to attribute persuasive intent to advertising…[Young children have] limited ability to comprehend the nature and purpose of advertising."

The IOM concluded that the current pattern of marketing "represents, at best, a missed opportunity, and, at worst, a direct threat to the health of the next generation." Further, the IOM recommends restrictions on television advertising if the food and beverage industries do not voluntarily shift their advertising emphasis away from non-nutritious products. In addition, many advocacy groups, such as the Campaign for a Commercial-Free Childhood and Commercial Alert, have demanded congressional action along with prominent health organizations such as the American Academy of Pediatrics, the American Public Health Association, and the American Psychological Association (APA).

The most common proposals seek to restrict the quantity and content of advertisements during children's television programs and require that broadcasters provide equal time for messages that promote good nutrition and physical activity. Regulation also targets print media, the Internet, in-

store promotional campaigns, and product tie-ins to children's television programs. However, as described in Section (II)(A) of this article, federal regulation is impeded by various factors including a history of vigorous political opposition, judicial interpretations disallowing restrictions of advertising under the First Amendment, and federal agency preference against permitting broad restrictions on advertising. While more promising, state regulation also faces political and industry opposition, and may be more limited in its influence over corporate behavior. Litigation, including either tort litigation against food producers and suppliers or personal injury claims, discussed in Section (II)(B), may provide impetus for industry modification of marketing practices. However, state legislation restricting tort litigation and the etiological causation requirement threaten the success of individual plaintiff litigation against food marketers.

In contrast, as described in Section (III)(A), state Attorneys Generals may act on behalf of vulnerable child consumers, under the authority granted to these officials to protect the state's health and welfare against unfair, unconscionable, and deceptive marketing practices. Acting as plaintiffs, states can provoke industry change, and obtain

damages and potential injunctive relief by adopting successful strategies from the landmark litigation against the tobacco industry, such as the coordinated state investigatory approach, as explained in Section III(B). By using their *parens patrie* authority, as elaborated in Section III(C), state Attorneys Generals can circumvent the court-created pressures placed on consumer class actions in recent years and thereby provide an important state function to protect well-deserving child consumers.

AN EXPLORATORY ANALYSIS OF THE PREVALENCE OF TEEN SEXTING

Carly M. Hilinski-Rosick
Tina L. Freiburger

The problem of "sexting," a word derived from the words "text" and "sex," has recently been brought to the public's attention through a number of nationally-publicized cases where teens have been charged with the production and possession of child pornography as a result of sexting. Although there is no universal definition for sexting, it commonly means to send a nude, or semi-nude, or suggestive picture or message to another person via cell phone. As the proliferation of cell phones has grown, the problem of sexting seems to have grown as well. Recent studies have found that 75% of 12 to 17 year olds own cell phones, and nearly 90% of them regularly send text messages. Further, more than two-thirds of teens say that they are more likely to send text messages to their friends to communicate than speaking with them on the phone.

At the same time that cell phone use is increasing, to the point where nearly all teens have

and use a cell phone, teens also are being exposed to sexually suggestive messages more and more, through the media, print ads, and online activity. The Centers for Disease Control (CDC) reports that nearly 50% of teens have had sexual intercourse and about 14% of sexually active girls and 10% of sexually active boys report that they do not use any type of birth control. Research also has indicated that teens who are sexually active are also more likely to engage in sexting, as nearly half of teens who reported having sexual intercourse within the past week also reported that they engaged in at least one instance of sexting in the past week as well.

Sexting can have social consequences for teens, as illustrated by stories of teens who were socially ostracized after explicit pictures, which were meant to be private between a boyfriend and girlfriend, were shared with much larger audiences. In addition to these social and personal negative consequences, sexting has recently led to legal consequences as well. One of the first states to receive media attention after threatening to bring charges against teens who had engaged in sexting was Pennsylvania. In 2009, a local district attorney in northeast threatened to charge 17 students who were either pictured in images or were found in possession

of images on their cell phones that prosecutors labeled as "provocative." They were able to escape charges if they participated in an after-school program and probation. In Florida, an 18-year old was convicted of sending nude images of his 16-year old girlfriend to family and friends after they had an argument. He is now required to register as a sex offender for the next 25 years. Additionally, in states across the U.S., teens have been charged with a range of crimes, including disorderly conduct, illegal use of a minor in nudity-oriented material, and felony sexual abuse of children.

Although stories of sexting have dominated the media in recent years, we still do not know much about what drives teens to send these messages or what a typical "sexter" looks like. Thus far, little empirical research has been conducted to examine the nature and prevalence of sexting. Gleaning more information about sexting is important, given the sheer number of text messages that are sent and received every day. The current study hopes to fill this gap by examining the nature and prevalence of sexting using a sample of young college students. Through in-class surveys, this research examined the prevalence of sexting, as well as the reasons for sexting, and the characteristics of those who engaged

in this behavior.

MORE THAN ETHICAL QUANDARIES AND WORLDWIDE CONSPIRACIES: USING POPULAR NON-LEGAL CULTURE TO UNDERSTAND LEGAL CULTURE

Brett Harrison Davinger

Law and Popular Culture focuses on popular legal culture: courtroom dramas or movies about lawyer/lawyer proxies. These "legal" films almost exclusively concentrate on the attorney, and, consequently, its area of study is limited to areas such as the attorney/client relationship, legal ethics, the life of a lawyer, and the stresses of being involved in a global conspiracy that implicates everyone from paralegals to the President. From the earliest films in the genre (such as *Counsellor at Law*) to more recent ones (such as *The Lincoln Lawyer*), the attorney usually retains central importance.

However, the law is more than the lawyer. The law is more than even the judges, the plaintiffs, the defendants, the juries, the courtroom, the statutes, and the trials. Law is law itself, an abstract concept with real significance in the way that it affects the

actions of people, corporations, and governments. Unfortunately, popular legal culture rarely looks into broader and more philosophical jurisprudential concepts. However, movies that do not involve litigation or even feature an attorney may offer something deeper to the individuals studying law (or Law and Popular Culture) than the confines of an appellate decision or the tried-and-true formula of the job-hating attorney in the midst of an existential crisis.

This paper shows how viewing and examining a "legal" film can be enriched by pairing it with a "non-legal" film. Legal films broach some subjects, but "non-legal" films lead to a deeper understanding of certain issues because these movies are not constrained by "legal" film conventions. When chosen and used properly, "non-legal" films complement the "legal" films by taking the viewer into the weightier realms that underlie the basis behind our entire justice system and, thus, serve to enhance our cultural understanding of the law.

This article focuses on four different law-related topics and compares a "legal" film with a "non-legal" film to show how the "non-legal" film enriches the understanding of the "legal" film's legal and jurisprudential concepts. Hopefully, this

device expands Law and Popular Culture's reach by encouraging scholars, teachers, and students to find different and more substantial ways to deepen their appreciation and, therefore, enhance the value of the Law and Popular Culture field.

Section II, titled Legal Philosophy, provides a basic introduction to some abstract legal ideas and gives basic examples of how "legal" and "non-legal" films show complementary facets of the same concepts. Then, this section takes one specific theory, namely natural law, and examines how it exists under a "God" theory by applying it to the "legal" film *A Man for All Seasons* and the "non-legal" film *A Serious Man*. Subsequently, the article uses the "legal" film *Judgment at Nuremberg* and the "non-legal" film *Nixon* to examine natural law without considering God's presence. Section III focuses on Criminal Law with the more practical and relatable concepts of punishment and guilt. This article considers punishment by comparing the "legal" film *M.* and the "non-legal" film *A Clockwork Orange*. Further, this article reaches a better understanding of both emotional and legal guilt by combining the "legal" film *Reversal of Fortune* with the "non-legal" film *Crimes and Misdemeanors.* Finally, Section IV offers a Conclusion that briefly discusses the

importance of film on the cultural landscape and how it can be better used in Law and Popular Culture.

NONCONSENSUAL INSEMINATION: INTIMATE PARTNER VIOLENCE, PATRIARCHY, POLICE EDUCATION AND POLICY

Carmen M. Cusack
Grace Telesco

Nonconsensual insemination is an act of Intimate Partner Violence (IPV). Almost anyone can be a victim of nonconsensual insemination, and offenders can belong to any age group, class, ethnicity, race, gender, sex, or sexuality. Nonconsensual insemination is a pervasive problem that occurs when men are forced to inseminate against their wills, or men inseminate their intimate partners without the partner's express consent. Many people may be victims of nonconsensual insemination over their lifetimes either through coercion, or following consensual unprotected sex that ends unexpectedly or against a partner's wishes. The criminal justice system needs to prosecute offenders under existing domestic violence and battery laws, and also craft specific laws to prohibit all contexts of nonconsensual insemination. Advocates and policymakers should craft these new laws to reduce the problems caused

by nonconsensual insemination, e.g. sexually transmitted infection (STI) and unintended pregnancy, and to increase victims' rights and sexual agency. These specific laws should mirror HIV- and STI-state laws requiring informed consent prior to ejaculation.

Nonconsensual insemination may correlate with patriarchal beliefs and attitudes like other acts of IPV or criminal sexual deviance. Society must approach this problem as a crime, and end victim blaming, increase reporting and police response to nonconsensual insemination, and increase prosecution. Since states have not yet written specific statutes barring all contexts of nonconsensual insemination, existing IPV laws may suffice. More victims are likely to come forward and report the crime as more awareness about this form of IPV develops in society. However, if the police receive a call about nonconsensual insemination, how should they respond?

Society often improperly blames victims for sexual misconduct that occurs in conjunction with unprotected sex. People who have unprotected sex might be wrongly blamed for failing to protect themselves from a sex partner, even though the concept of "unprotected" sex solely ought to refer

to protection from unintended pregnancy and disease transmissions, not protection from unwanted sex acts. If two people never agreed to a specific sex act and the act is performed in contravention of a partner's wishes, then the sex act is illegal. Police who receive a call about nonconsensual insemination may not know how to respond without proper training. Policing is reported to be a patriarchal institution. Society consistently associates victim blaming and gender role assignment with patriarchal values. For nonconsensual insemination, gender role assignment may manifest with expectations that a man may rightfully inseminate a partner who permits unprotected sex, or gender role assignment may suggest that real men should take responsibility for their actions and "man up" even though the child is the product of a sexual assault committed by the woman. Police, who are mostly male, are humans just as susceptible to patriarchal influence as the rest of society. In addition to social influences, however, the police profession calls for brotherhood, aggression, dominance, and other forms of masculinizing behaviors and attitudes that could increase their idealization of patriarchal responses to sex-related and gender-related crime.

These ideas are not new, but these issues'

application to nonconsensual insemination is relatively new. In this article, I present a two-part interview with Dr. Grace Telesco. Dr. Telesco is a retired Lieutenant in the New York Police Department (NYPD). She served for twenty years with the NYPD. She was one of the first proponents of domestic violence education for officers, and she served as the Chairperson of the Behavioral Science Department at the New York City Police Academy. She pioneered domestic violence training in the NYPD and educated officers for many years. I interviewed her about the relationship between policing, patriarchy, and IPV. She provides fascinating insight about the importance of police education on IPV, mandatory arrests, police policy, and patriarchy in policing and society.

In Section II, I review the relationship between patriarchy, IPV, and policing. In Section III, I question Dr. Telesco, report her answers, and analyze her answers within the context of nonconsensual insemination. In Section IV, I present ten brief, hypothetical situations where nonconsensual insemination could occur. Each situation offers distinct evidence that police should consider when determining whether, and how, to charge suspects, e.g. with battery, domestic violence, sexual assault,

etc. In Section V, I conclude by emphasizing the need for police education on nonconsensual insemination.