

# The Roundtable

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who engage in it have been persuaded that it has power, and that it gives them, however indirectly, some degree of influence over the future course of events ("God willing," as they say). But the power of actually changing the course of events with your own hands has always been much

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more compelling, even among the religiously inclined.

What you need here is some human and humane, non-magical alternative to the *action* of prayer. I think that one of the things that atheists often overlook about prayer is that it actually does make a difference to the people who practice it, though not for the reasons that the religious assume. The reason, I think, is that it gives you something to *do* in times of crisis. It's a first step out of paralysis. The downside is that it places most or all of the responsibility for what happens next in the hands of another (nonexistent) party, but all of the literature I know suggests that taking some action is the best antidote to feelings of fear and depression.

Here is an opportunity to promote the virtue of benevolence at the same time that you're teaching a lesson about the value of human life and reason. There are lots of ways to do this. For example, there are many disaster relief organizations that are collecting money, food, clothing, and other things to help the families devastated by the bombing. Some of those are secular, and one thing to do is to get your daughter involved in one of these efforts.

Here is an action one can take that alleviates wrongfully inflicted pain and suffering. It feels good to do that—it feels

right. It is a way of denying the validity of the injustice done by acting in ways that are diametrically opposed to it. It is a way of counterbalancing the evil the bombing represents, and by getting involved in it as a project in which others are involved, it gives tangible evidence that there are lots of people out there who are not seeking to achieve their ends by violence. And you could emphasize the difference between acting in this way and simply praying for someone else to take care of things (where was He when the bomb was being built in the first place?), even pointing out that the way that the truly religious in the community actually make a real, tangible difference is by helping in the same ways that you are helping. Their prayers are just a kind of incantation or ritual that serves as prelude to the really important action.

I think this kind of activity will help, but sooner or later it will occur to your daughter that this is *reactive* and after the fact. It doesn't address the problem of why I shouldn't be afraid that this will happen to me next week. That's a good question, and it has no easy answers, but if you can restore that sense of being in control, the answers that you do give will be much easier to listen to. Those answers have to do with the value and importance of building a society that is based on principles of reason rather than blind faith. Promoting a world in which those kinds of beliefs and values are fully shared is another kind of action that one can take to reduce the possibility of future actions like the bombing. But that's pretty abstract, and there are many, many ways to do that. So that's a much longer discussion that will continue, I suspect, over many years to come.

Finally, let me say that I think that it's highly likely that this is all going to turn out well in the end. The reason I feel so confident about that is that you are clearly thinking well and deeply about this yourself. It sounds as if you already have good communication with your daughter, and you are therefore providing a fine model of how reasonable, sane people deal with the

unreasonable and insane. That's a fine recipe for eventual success.

—Kenneth Livingston, Ph.D.

## Intellectual Property Rights

As an intellectual property law attorney with a great appreciation of Ayn Rand's philosophy and an interest in property rights theory, I was quite interested to read Murray I. Franck's article in the April 1995 *IOS Journal*, "Intellectual Property Rights: Are Intangibles True Property?"

Mr. Franck argues that "intangible" property such as "personality property" and patents, copyrights, and trademarks, is actually property deserving the protection of law. However, there seem to me to be several insurmountable problems in treating intangible entities such as reputations and inventions as "property."

First, the very reason we need property rights is that we do not live in the Garden of Eden, where everything is in infinite abundance. Rather, some things are by their nature *scarce*, which means that there can be conflicts between individuals over who gets to consume and control various scarce goods. Because of the possibility of such conflicts and the necessity of humans being able to use physical goods to survive in the world, we must have a system of property rights that solve such conflicts by allocating specific scarce goods to specific individuals. Thus I can own and farm Blackacre, and you can build a house on Greenacre, rather than us eternally warring over these tracts.

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However, intangibles such as *ideas* (e.g., a particular invention which may be patented under today's laws) are the exact opposite of a scarce good: person B may learn of and use A's idea without

diminishing A's possession and use of the idea. As Thomas Jefferson wrote, "He who receives an idea from me, receives instruction himself without lessening mine: as he who lights his taper at mine, receives light without darkening me." (It is true that the economic value of A's idea may diminish if B is able to learn and use it without paying A for this, but property rights protect the integrity of one's property, not its value, since value is dependent on what others are willing to pay for it. For example, your house may be more valuable on the market if your neighbor has a nice rose garden, but you do not have a right to this value at all, and your neighbor has every right to tear down his rose garden even if it reduces the value of your property.) Thus, ideas do not deserve property protection because they are not scarce goods and are thus simply not property.

Another problem with intellectual property rights is that at least some of them seem to be inherently arbitrary and vague. This is in contrast to normal property rights to tangible or corporeal objects like land and furniture, which have objective, intersubjectively ascertainable boundaries that can be determined and respected by everybody. A patent protects an invention which is defined in the patent's "claims," but these claims are much more vague than are the boundaries of normal property.

There is often no objective answer as to whether an allegedly infringing invention is the "same" as that claimed in the patent.

Further, the scope of things that patent

rights apply to seems both arbitrary and inherently vague and subjective. Patents, for example, protect "inventions" but not "abstract ideas." Thus I can get a patent on a new mousetrap, while, in a recent case (*In re Trovato*, 1994) the inventor of a new way to calculate a number representing the shortest path between two points, an extremely useful technique, was denied patent protection because this was "merely" a math-

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ematical algorithm. Why the distinction? Are not both equally beneficial to mankind? Do not both "discoveries" require creative intellect? Patent law seems to arbitrarily protect some intellectual creations, but not others.

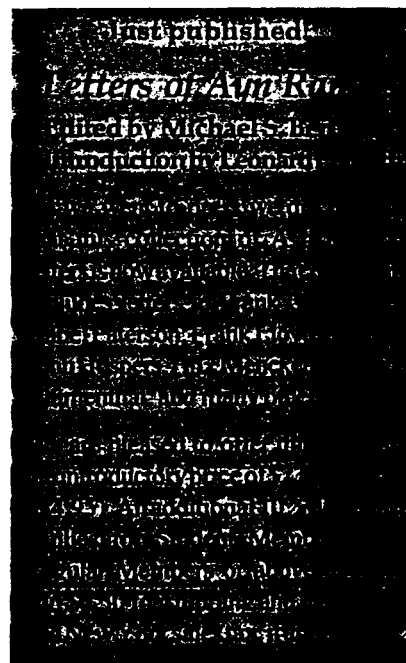
—N. Stephan Kinsella, West Chester, PA

As a general thesis about property rights, I think Mr. Kinsella's point about scarcity misses the essence of the issue. Property rights are required because man needs to support his life by the use of his reason. The primary task in this regard is to create values that satisfy human needs, rather than relying on what we find in nature, as animals do. I therefore agree with Murray Franck's premise that the essential basis of property rights lies in the phenomenon of creating value.

Scarcity becomes a relevant issue when we consider the use of things in nature, such as land, as inputs to the process of creating value. As a general rule, I would say that two conditions are required in order to appropriate things in nature and make them one's property: 1) one must put them to some productive use, and 2) that productive use must require exclusive control over them, i.e., the right to exclude others.

Condition (2) holds only when the resource is scarce. But for things that one has created, such as a new product, one's act of creation is the source of the right, regardless of scarcity.

—David Kelley □



### IOS Journal Submissions

The *IOS Journal* welcomes proposals from writers for essays, reviews (books, movies, training programs, CD-ROMs), and shorter comments (along the lines of Op-Ed pieces). The *Journal* especially encourages submissions to The Roundtable.

Those who are interested in writing for the *Journal* should compose a one-page letter stating the proposed topic, the essential argument or point of view, and the writer's qualifications (not necessarily formal) to address the topic. Samples of your writing also would be helpful. Letters can be sent to IOS (addressed to the editor); faxed to the editor (1-718-965-2708 or 1-516-324-1775); or e-mailed to the production editor (dcermele@delphi.com). The editors will reply to all queries.

{This final part of my letter-to-the-editor was cut from the published letter. — SK}

One final problem with intellectual property rights is that at least some of them require legislation to be created — i.e., they would never form in a common-law system. A patent, for example, is a monopolistic grant by government to exclude others from using or selling one's patented invention. It is doubtful that a rights-respecting court-based system would create or recognize such privileges. Bruno Leoni explained in *Freedom and the Law* why legislation should not be considered the primary way of making law. Legislators are incapable of escaping special-interest influence, and are also hopelessly ignorant of the complex patterns that naturally evolve in society, much as central economic planners cannot efficiently plan socialist societies, as Ludwig von Mises demonstrated in the 1920s.

Thus legislators' centrally-issued commands are usually inept and have unintended consequences. It is very unlikely that edicts issued by government employees will have anything to do with individual rights or with what property law ought to be. For this reason common-law type systems should be relied upon as the primary way of discovering legal principles, and legislation should be distrusted and relegated to a strictly secondary status. Intellectual property rights that depend on legislation for their existence are suspect on this ground alone.

# Responsibility and Happiness

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seem arbitrary, irrational, even oppressive. After all, much of culture consists of rules, conventions, habits, and practices that are taken for granted; they are, quite literally, the common sense of the community, and people would be understandably baffled if they were asked to justify them rationally from first principles. When immigrants arrive in large numbers from cultures that stress different rules and even disregard those embodied in American culture, this reduces the status of American culture....”

But even if we had no further immigration, we are already a multicultural soci-

ety. Consensus about values and beliefs cannot be willed into existence, certainly not in a society as diverse as that of the United States. If we want to counter the subjectivism that lies behind the flight from responsibility, it is no longer an option to teach conformity. Our only option, culturally speaking, is to teach genuine cognitive responsibility.

## The Difference It Makes

Here, then, is my answer to the question I posed at the outset, the question of what difference it makes in practice whether one adopts the conventional view of responsibility or the Objectivist view. The conventional view breeds a managerial outlook on life. People with this outlook expect someone else to set the rules and to reward them for following the

rules. Such people do not regard themselves as full owners of their own lives and persons; they do not regard their own happiness as an end in itself; and they do not take cognitive responsibility for choosing their values and convictions.

The Objectivist view of responsibility, by contrast, says we should be entrepreneurs of our own lives, with a sense of self-ownership and commitment to happiness, exercising reason on our own initiative and dealing with others on the basis of trade, not status, tradition, or obedience.

I believe in the Objectivist conception of responsibility for philosophical reasons. I think it is the one that agrees with the facts about human nature and values. But I also think our society desperately needs this conception as a way to counter the flight from responsibility. ■

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porary. Naturally, if the symptoms do not abate, and they begin to interfere with daily functioning, professional assistance should be sought.

—Richard A. Warshak, Ph.D., Dallas, TX

## Intellectual and Personality Property

I wish to thank Stephen Kinsella for his letter [*IOS Journal*, June 1995] highlighting several insightful challenges to the proposition that, although they are intangibles, intellectual and personality property are true property, entitled to legal recognition and protection. While my original lecture incorporated full answers to the issues Mr. Kinsella raises, space limitations permit only a summary response here.

1. Intellectual and personality property meet the criteria of all property, namely “creation and earning.” Intellectual and personality property are not *government granted* monopolies any more than is government protection of one’s movie theater against nonpaying trespassers. And, as is the case with all property, trespassers and

infringers diminish the value of intellectual and personality property, a value placed upon it by consumers.

2. Mr. Kinsella is correct, of course, that no one can legitimately demand that the market deem his property to be of value or, if the market does so deem it, that conditions remain static in order to maintain that value. Intellectual property law is consistent with this position: it protects inventions that leapfrog existing patents, often rendering them worthless in the eyes of consumers.

3. The level of creativity required for intellectual property protection is quite high, so that not everything new or beneficial rises to the dignity of property. For example, the idea of the modern supermarket is not protected.

4. That there are problems in specifying exactly what qualifies as intellectual property protection does not mean that intellectual property is not property. Such problems are not more difficult than those involved in defining rights in the airwaves once seemed—or in defining what quantity of smoke from a neighbor’s barbecue constitutes trespass or infringement of one’s right to the quiet enjoyment of his own backyard. If any of these laws is discovered to reflect a technical error, the error can be corrected.

5. Just as the common law evolved to recognize “trespass by barbecue smoke,” it would have evolved to recognize property in the airwaves and in intellectual creations. But even if it could be established somehow that the common law would *never* have recognized intellectual property rights, this would not be an argument against such rights. The common law often requires legislation to correct it (for example, in recognizing the rights of women). Indeed it is a myth that the common law evolves to reflect, and that legislation always is in conflict with, the requirements of human nature. The same minds that employ induction and deduction to decide a particular case, making common law, can employ those methods to legislate universal laws. (See Carl Menger’s *Investigations into the Methods of the Social Sciences*, 1883, pp. 223–224.)

6. Finally, although property rights help to “ration” scarcity, scarcity is not the basis of property rights. The view that it is, expressed in the third paragraph of Mr. Kinsella’s letter, appears to reverse cause and effect in that it sees rights as a function of society’s needs rather than as inherent in the individual who in turn must live in society.

—Murray I. Franck, New York, NY ■