

fee awards “to the prevailing party.” In *Flannery*, a jury awarded the plaintiff \$250,000 in damages, and the trial court awarded an additional \$1 million in attorneys’ fees. The plaintiff and her lawyers fought over who would keep the latter award. (You may wonder how the attorneys’ fees awarded could possibly be four times the amount of damages, or why courts award attorneys’ fees other than the standard 40 percent contingency fee arrangement, but such reasonable inquiries go beyond the scope this column. Your correspondent will explain this in a later column.)

The Court concluded by a 5-1 vote (with only Justice Kennard dissenting) that despite the clear language of the statute and (non-binding) federal cases to the contrary, attorneys’ fees awarded to the “prevailing party” belong to the lawyers, not the client. The basis for this conclusion is that giving the fees to the client might discourage lawyers from bringing lawsuits. To most people, lawsuits are a curse, a bane, the equivalent of a debilitating disease. To judges (whose power, remember, depends on a steady volume of litigation), however, lawsuits are good. Litigation should be rewarded to encourage more of it! (I’m not making this up.) As the Court explained in *Flannery*:

[P]rivately initiated lawsuits are often essential to the

effectuation of the fundamental public policies embodied in constitutional or statutory provisions .... [W]ere we to interpret [the FEHA] as plaintiff urges, vesting ownership of fees awarded thereunder and not disposed of by contract to the litigant, rather than in counsel, we would diminish the certainty that attorneys who undertake FEHA cases will be fully compensated, and to that extent we would dilute [FEHA’s] effectiveness at encouraging counsel to undertake FEHA litigation.

This is close to a bald judicial admission that litigation exists for the benefit of the lawyers rather than the parties.

The dirty little secret of Legal Realism is that liberating judges from the Rule of Law has subjected the rest of us to the Rule of Lawyers. At the end of the day, Stephen Reinhardt and his activist brethren have limited influence — their decisions can be appealed, reversed, and sometimes overridden by legislation or referenda. Different presidents and governors can make incremental changes through appointments. In some states, voters can reject particular judges. But the work of lawyers goes on, day in and day out, largely unnoticed. Until the legal establishment is disempowered through comprehensive legal reform, we will all remain pawns of this mandarin class. CPF

## THE MIDNIGHT ECONOMIST

# How do we ration a pie too small?

*Inflicting shortages through price controls will not magically return us to Eden.*

W I L L I A M   R .   A L L E N

**Y**OU PEOPLE out there are acquisitive and self-centered. No matter how much you have, you are not fully satisfied. So we have a rationing, as well as a production, problem. We have had production and rationing problems ever

*William R. Allen, readily visible in the UCLA Department of Economics, chooses to rely on Adam Smith’s invisible hand of the market.*

since a bungling Eve blew it in the Garden. All of the pie of aggregate output is divided among the members of the community, but everyone would like a bigger slice.

If the markets for the many goods are cleared, everyone can buy as much as he is willing to buy at going prices. But we all still want more. So how about forcing down prices? However, if we decree lower prices, we induce greater quantities demanded of the various

goods and smaller quantities supplied of most of them. Inflicting shortages through price controls will not magically return us to Eden.

Under the best of circumstances, we are confronted with scarcity. We must — somehow, through some procedures, by some criteria — ration most of what we consume. Since we do not have enough of most things to make everyone fully content, inevitably we compete. In an open market, we compete through offering money, bidding up prices to levels where those still in the bidding will wish to buy no more than is available.

**I**N A purported spirit of “fairness” and a striving for “equity,” we sometimes stipulate maximum prices, making it illegal to buy or sell an item above the ceiling price. Such stipulation does not eliminate scarcity, and thus it does not eliminate competition. Rather, it simply curtails one form of competition, so alternative and less efficient forms must then be used. If people cannot buy as much as they want at pegged prices, how else can they compete? In what other ways can the necessary and inevitable rationing be done?

One perfectly splendid way is to wait in line: first-come-first-served — with those at the end of the line not served at all. So the relatively small money expenditure must be supplemented with time and aggravation. Happy were the gasoline lines of the 1970s.

Or the artificially suppressed price may be adminis-

tered with ration coupons, as with meat and gasoline during World War II. The essence of that scheme is that everyone gets to buy the same amount of the good despite the different demands. It is right and proper that everyone get his per capita allotment of rutabagas.

Or there can be tie-in deals. You get the apartment in competition with a dozen others because you are willing to pay heavily for the pile of sticks which the landlord calls a Steinway piano. A variant tactic is for the landlord to charge a massive “key fee.”

Or you may pay under-the-table, with no pretense of buying a piano. Irrational, inefficient laws tempt us to compete with scarcity through cheating and lying and special privilege.

Or a government bureaucracy may allocate the good on various inspired grounds and criteria: age, occupation, geographical location, health, income, political loyalty, old-boy connections.

Perhaps the most pernicious basis of rationing is personality and appearance. If not everyone can get the apartment or the loan or the meat, those left out will be those with the wrong skin color, the wrong sex, the wrong age, the wrong religion, the wrong nationality, or who talk funny or are not pretty.

There is much to be said for the impersonality and dispassion of the open market. Money is simply money, and mine is no better than yours. If distributive competition is to be conducted in terms of social stature, beauty, grace, and charm, a few of us will do all right. But most of you will be in big trouble. CFF.

## THE WORKING PRESS

# Suddenly 1992

*Few papers report how rising costs are making California again a bad bet for business.*

T I M W . F E R G U S O N

**T**HE *LOS ANGELES TIMES* and other major media concluded in the wake of September 11 that the bloom was off the California economy. Indeed, the severity of the state budget crunch (and its political impact on Gray Davis, as we discussed last time) was drawing attention in vari-

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ous quarters, including the bond markets. But while briefly mentioning the energy blackouts, the *Times's* front-page story focused most attention on external factors such as the dropoff in travel and tourism. What few papers — with the notable exception of the *Los Angeles Business Journal* — have done is drill into the microeconomy of small and mid-sized enterprises to see how cost factors are making California again an inhospitable place to set up or maintain shop.