THE FREEMAN
IDEAS ON LIBERTY

Making the Polluter Pay

by Jonathan H. Adler

The experience of the past few decades indicates that "pollution control" is often a pretext by which the federal government regulates the minutiae of each and every industrial process and economic transaction. Much of this so-called pollution control is done in the name of the "polluter pays" principle. This principle, which is intuitively sensible, was trumpeted by early environmentalists as a means to discourage environmental harms.[1]

The "polluter pays" rhetoric is still often used, and most Americans probably think that current environmental policies make polluters pay. In truth, however, this approach is seldom embodied in American environmental laws.

Rarely are particular polluters forced to pay for actual damage caused. For example, when Congress enacted Superfund, the federal program to clean up hazardous waste, "polluter pays" was used to justify generic taxes on producers of materials (chemicals and oil) that ended up in waste dumps. Even if companies had acted responsibly—even if none of their materials or products ended up at waste sites—and they had caused no damage, they had to pay the tax if they happened to produce certain materials. Superfund is a policy under which polluters and nonpolluters alike are forced to pay exorbitant sums.

The polluter pays principle is valid, but it needs to be better understood and, ultimately, to be reinstated under institutional arrangements that make it effective and fair. To begin with, one must recognize that emissions per se are not pollution. Pollution is the imposition of a harmful waste product or emission onto the person or property of another without that person's consent; it is a "trespass" under the principles of common law. If the trespass is so minor that it creates no impact or inconvenience for the property owner, it will normally be tolerated. Otherwise, it will likely result in legal action of some kind.

The generation of a waste, in and of itself, does not necessarily harm other people or their property. Not every emission, waste, discharge, or industrial by-product is pollution. Thus there is no reason for government policy to discourage waste per se. Yet environmental regulators are eager to adopt "pollution prevention," "waste reduction," and "toxics-use reduction" schemes. Such programs completely miss the point. They tend to move away from any true concern for limiting pollution, and from holding polluters accountable for the damages that they cause.

Current environmental policy rarely focuses on harm. Indeed, sometimes it doesn't even focus on pollution at all! Much of the time the emphasis is on compliance with byzantine rules and requirements. Fines are levied not when the property of another is contaminated, but when a permit is improperly filed, or a waste-transport manifest is not completed in line with the demands of regulatory officials. The Environmental Protection Agency itself has observed that under current law "a regulated hazardous

Mr. Adler is Associate Director of Environmental Studies at the Competitive Enterprise Institute in Washington, D.C.

waste handler must do hundreds of things correctly to fully comply with the regulations, yet doing only one thing wrong makes the handler a violator."[2] Environmental rules are now so complex that only 30 percent of corporate counsels believe that full compliance with environmental laws is actually possible, according to a survey conducted by the *National Law Journal*.[3]

The Exxon *Valdez* Case

Even when harm occurs as a result of pollution, the "polluter pays" principle is routinely violated. Consider the case of the Exxon *Valdez*. In 1989, an oil tanker ran aground because its captain was drunk, and over 300,000 barrels of crude poured into the water of Prince William Sound, causing significant, though not permanent, environmental disruption. Few people are aware that the crime for which Exxon was punished was killing migratory birds without a permit. Extensive shorelines were covered in oil, and the government prosecuted Exxon for not having permission to go hunting!

Exxon was subject to civil suits from those, such as local fishermen, who claimed damage from the spill. However, much of the money that Exxon was forced to pay did not go to alleged victims of the spill. Exxon paid $125 million in fines to the federal government and the state of Alaska. In addition, Exxon was forced to pay $900 million into a fund to be doled out by government officials for environmental projects, habitat protection, and scientific research, among other things.[4] In May 1994, $38.7 million of this money was used to create a new state park.[5]

Exxon was under tremendous political pressure to restore the "public" shoreline so it engaged in a costly, and extensive, cleanup operation. Much of the cleanup was unnecessary—nature has its own methods of cleaning up spills of natural substances like oil—and in some cases the extensive beach cleaning actually caused harm. So, not only was Exxon prosecuted on generic offenses against "public" goods rather than for specific harms to specific parties, but the politicization of the spill resulted in a thoughtless policy response. Had a similar spill occurred in a more private setting—if, for example, a tanker truck had overturned, spilling onto private properties—the owners of the affected properties would have had clear, direct recourse. Additionally, they would have had a tangible incentive to ensure that any cleanup or remediation was a proper way to address the problem at hand.

There was no means for affected citizens to hold Exxon directly responsible for much of the actual damage caused to the Alaskan shoreline. The Alaskan coast had no private owners, stewards, or protectors who could seek redress or ensure that cleanup dollars were well spent, as they could if that oil had spilled into someone's backyard. The only direct payments made by Exxon to those actually harmed were to fishermen and Alaska natives who claimed damages from a temporary decline in the salmon and seal harvest.[6]

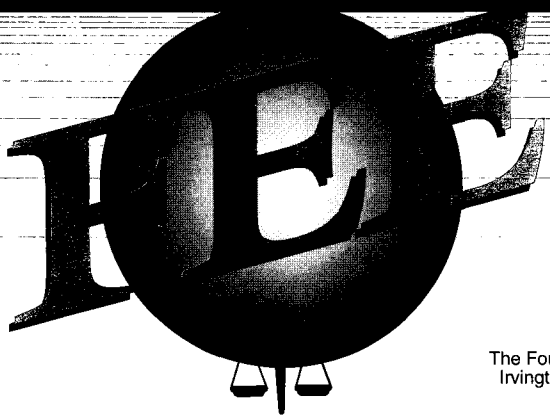
If we truly want polluters to pay, there need to be private property owners that can defend threatened or harmed resources. Ownership of ecological resources can serve as a deterrent against causing harm against others, in the same manner that private property provides such incentives in other areas. Private ownership also provides tangible incentives for better stewardship.[7]

Polluters such as Exxon should be held responsible, not for violating a bureaucratic proscription about the hunting of birds or for having harmed some "public" resource, but because they harmed someone else's person or property, and they have no right to do that. Moreover, any restitution should be paid to those harmed, not simply to a government agency that proclaims it will spend the money in the public interest.

Making Polluters Pay

A fishing club in England, the Pride of Derby Angling Club, demonstrates how property rights can prevent stream pollu-

N O T E S F R O M



The Foundation for Economic Education
Irvington-on-Hudson, New York 10533
Tel. (914) 591-7230
Fax (914) 591-8910

March 1995

MINIMUM WAGES

Few economic laws, if any, are more malicious and malignant than minimum wage laws. They prohibit workers from accepting employment unless they are paid at least the minimum. They order employers to use only workers who qualify for the minimum and reject all others. The laws erect a hurdle over which all American workers are forced to jump.

The employment hurdle actually is higher than the stated minimum, be it $4.25 or $5.15 an hour. It is higher by the costs of mandated fringe benefits which employers are forced to pay. There are Social Security contributions, unemployment and workmen's compensation, and paid holidays. The $4.25 minimum wage is at least a $6 an hour minimum cost. In some industries with high workmen's compensation levies, such as heavy industries and construction, the minimum cost may be $7 per hour or more. If local governments levy payroll taxes, they raise the hurdle by the same amount. Similarly, the costs of health insurance which many employers carry raise the height of the hurdle.

The only relevant minimum is the total minimum, that is, all the costs an employer must bear to secure the services of a worker. If the costs exceed his or her productive contribution, they inflict losses. It does not matter whether the losses result from a higher minimum mandate or a boost in Social Security taxes or workmen's compensation. A worker who inflicts losses on his employer is likely to be disemployed.

In the United States, minimum wage legislation does grievous harm to millions of unskilled laborers, especially among the racial and ethnic minorities — blacks, Puerto Ricans, Chicanos, Mexicans, and American Indians. About one–third of these workers are teenagers, almost one–half are twenty–five to sixty–five years old, and some 17 percent are seniors, sixty–five years old or older. Two–thirds of this unskilled labor are female. Although they comprise only ten percent of American labor, the harm done to them and society is greater by far than their numbers seem to indicate.

It is an unfortunate fact that many minority youths possess lower levels of education, training, and experience than white youths and, therefore, are less competitive in the labor market. Without the strictures of labor law, they would not be able to earn as high a wage as their more productive co–workers but would find ready employment at lower rates. If the minimum wage is set above their productive ability, they are likely to be dismissed or not hired at all. This explains why the unemployment rate of black youth in recent years has ranged between 40 percent and 50 percent, which is double the rate of white teenagers. If we add those individuals who in frustration and desperation have given up their search for employment, the unemployment rate

among black youth, in our estimate, exceeds 60 percent.

No matter how tragic the economic effects may be on certain groups of victims, we must not overlook the psychological harm done and the moral wrong inflicted on them. Condemned to idleness and uselessness in a highly productive society, and barred from making their own contributions, many, in desperation, turn to vice and crime. The inordinate national crime rate attests to much despair in the centers of unemployment and public assistance. Moreover, let us not forget the productive members of American society who not only must forgo the valuable services which the unemployed could render, but also are forced to support them. In return, they are compelled to live in constant fear of crimes against their persons and property.

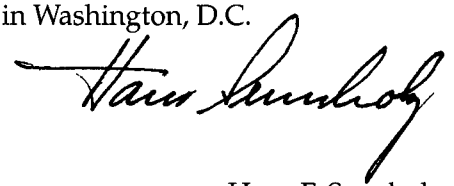
Every well–known economist has voiced his concern about minimum wage legislation, and yet, it survives sober reasoning and cogent arguments, living on in the sphere of politics. Few politicians actually believe that minimum wage legislation is truly in the workers' interest, that it increases their purchasing power and reduces poverty; and yet, many support it for political reasons. It is clever politics, yet so cruel and insincere, to promise higher wages by law, but, unable to deliver on the promise, instead raise the height of the hurdle to employment. It is politics at its worst.

The politicians are urged on by labor unions and their members who benefit significantly from legal boosts in minimum wages. Boosts obviously hurt industries using unskilled labor in competition with union labor. They may force marginal enterprises to curtail production or even shut down, which would benefit union shops. To benefit their members at the expense of nonmembers is a primary function of all unions. They call this "self–interest"; it is injury and malice to their victims.

Most of the support for minimum wage legislation comes from people who are fully aware of its unemployment effects. Many Americans in the industrial states of the North and Northeast use the law knowingly as a barrier to the industrial migration from the states to the South. Since World War II, many companies have left the North to take advantage of lower labor costs and other advantages in the South. To impede this industrial migration and to stifle Southern competition, the Northern politicians usually clamor for higher minimum wages.

Other advocates who are aware of the harm done to unskilled workers are convinced that the beneficial effects, as they see them, tend to outweigh the evil effects. Their blind faith in political action leads them to believe that evil consequences can be alleviated by new governmental efforts, such as neighborhood youth corps, job corps, public works programs, retraining programs, more aid to education, etc. To them, minimum wage legislation is a convenient path to ever bigger government and bureaucratic control.

If minimum wage legislation could actually lift wage rates and standards of living, the poverty of the world could be eradicated forthwith. The governments of Bangladesh, Sri Lanka, and Tanzania would merely have to walk in the footsteps of the U.S. government and lift wage rates by mandate. Unfortunately, what is foolish and absurd in Dhaka, Colombo, and Dar–es–Salaam is the same in Washington, D.C.



Hans F. Sennholz

You cannot correct all the evils of the world, nor relieve all the poverty in the world.

You cannot comfort all in distress, nor support all the underprivileged.

But you can stand by FEE which brings the light of freedom to the world.

New from FEE!

LEVIATHAN AT WAR

Edited by Edmund A. Opitz

"Peace on earth and good will to men" is one of humanity's older and more enduring aspirations. It accords with the sentiments of the great religious traditions, and it is in harmony with a substantial bundle of the drives which move the individual person. History, however, is not composed of aspirations alone, else it would be quite different from what it has, in fact, been. History, as it has actually been lived and recorded, provides ample justification for the pessimist who concludes that peace is only that short interval between battles when nations are recovering from the last war and preparing for the next. Things might not be this bad, in reality, but they are bad enough to draw forth our best and most earnest efforts to understand the causes of war, in the hope of finding, if not a cure, then at least an alleviation for militaristic ills.

The twenty-two chapters in this book examine the causes and economics of war, the conscription idea, war and individualism in American history, the importance of free trade, and the prospects for peace. Contributors include among others, Ayn Rand, Ludwig von Mises, Hans F. Sennholz, Leonard E. Read, Wesley Allen Riddle, and Edmund A. Opitz. *Leviathan At War* also includes classic essays by Daniel Webster and H. B. Liddell Hart—and Mark Twain's powerful "War Prayer."

186 pages + index **$14.95 paperback**

Spring Round Tables

Reserve these days for our spring 1995 series of Round Table events! We've set up an exciting lineup of speakers for your enlightenment that includes Joe Sobran, George Reisman and Dr. Mark Skousen. Don't miss these stimulating evenings, which begin at 5:00 with a reception and dinner, and then go on to a lively discussion session. Charge: $40 per person per event; certain discounts are available.

April 1 with Joe Sobran

May 6 with George Reisman

June 3 with Mark Skousen

Coming Seminars at FEE

Undergraduate seminar	**April 6–8**
Austrian Seminar (by invitation)	**July 9–14**
First Summer Seminar	**July 23-28**
Second Summer Seminar	**August 13-18**

Call or write: Dr. Barbara Dodsworth, 30 South Broadway, Irvington–on–Hudson, NY 10533; (914) 591–7230.

1995 Summer Seminars At FEE

For the 33rd consecutive summer, FEE will conduct its noted seminars in the freedom philosophy and the economics of a free society. Here, in the company of like-minded individuals, with experienced discussion leaders, and in a setting ideal for the calm exchange of ideas, is an opportunity for those who believe that the proper approach to economic problems is through the study of individual human action. These seminars continue to attract individuals from all walks of life who seek a better understanding of the principles of a free society and are interested in exploring ways of presenting the case more convincingly.

Each seminar will consist of 40 hours of classroom lectures and discussions in economics and government. In addition to the regular FEE staff, there will be a number of distinguished visiting lecturers.

The FEE charge for a seminar—tuition, supplies, room and board—is $400. A limited number of fellowships are available. We especially encourage the application of high school and college teachers or administrators, but all are invited.

Individuals, companies, and foundations interested in furthering this educational enterprise are invited to sponsor students and assist with the financing of the fellowship program.

The formal announcement giving details of the seminars will be sent immediately on request.

First session: July 23-28, 1995

Second session: August 13-18, 1995

Write: Seminars, The Foundation for Economic Education, 30 South Broadway, Irvington-on-Hudson, NY 10533; or Fax: (914) 591-8910.

tion. In England, clubs own the right to fish along some rivers and they protect their "beats" from pollution. In 1948, several fishing club members joined to form the Anglers' Co-operative Association (ACA). The association won a major case soon thereafter, known as the Pride of Derby case. Upstream polluters were required to stop polluting, and pay damages and legal costs, since their pollution threatened the fishery. The ACA has helped fishing clubs pursue injunctions against upstream pollution ever since. To date, the ACA has been involved in over 1,500 cases, including several against municipal water authorities.[8]

This ability of private parties to restrain upstream polluters is rarely available in the United States. Historically, some communities and individuals did obtain traditional common law remedies for water pollution. However, many such actions have since been preempted by the federal Clean Water Act.[9] Under the Clean Water Act, politically preferred polluters are treated more favorably than others. Municipal polluters face cleanup goals that are often less stringent than those of industrial polluters, and their cleanup schedules are far more lenient. Yet, to the rivers and fish, pollution is pollution.

This problem of unequal treatment is compounded by the prevalence of citizen suit provisions in the Clean Water Act and other environmental laws. Although it may sound good to allow any citizen or citizen group to force the government to enforce pollution laws (and to allow the citizen or group to recoup legal costs), what it means is that special interest groups can effectively determine the enforcement priorities of government agencies. Many of the environmental organizations that engage in citizen suits have an anti-business bias. As a result, private industry is subject to more legal actions than either agricultural activities or governmental facilities, even though both of the latter are greater sources of water pollution. Indeed, between 1984 and 1988, environmentalist citizen suits against private industry were more than six times as common than suits against governmental facilities.[10] "There are no *environmental* reasons why environmental groups would display such a pronounced preference for proceeding against corporate polluters," notes Michael Greve of the Center for Individual Rights.[11]

Many environmental groups have found that citizen suits can be a lucrative source of revenue.[12] There is something profoundly unjust about limiting the legal recourse of persons harmed by polluting activities, as the politicization of pollution control has done, while at the same time encouraging the use of citizen suits by organizations with no stake in the resources they claim to be protecting.

Another example of failure to make polluters pay is the case of air pollution. It is well established that a small fraction of automobiles are responsible for the vast preponderance of auto-related emissions. Indeed, over half of all auto emissions are generated by only ten percent of the cars on the road.[13] This means that for every ten cars, the dirtiest one pollutes as much as the other nine. But federal officials insist upon imposing significant costs on the owners of all cars through "clean fuel" requirements, periodic emissions inspections, and the like, in order to meet federal air quality standards. If emission reductions are necessary in some regions to protect human health (an arguable proposition), targeting the dirtiest portion of the automobile fleet would reduce pollution more efficiently and more equitably. Indeed, if airsheds were managed privately, one would expect this sort of approach to emissions reductions.

The broad approaches (which I call "driftnet" approaches) achieve pollution reductions more through their scope than their efficiency and tend to produce environmental improvements at the expense of innocent individuals who have not contributed to environmental harm. Environmental protection and simple justice are better served when pollution reduction efforts focus on the true sources of pollution, and ensure that it is the polluters that pay for the damages caused.

Do Pollution Taxes Work?

There is one other approach that appears to embody the "polluter pays" principle: the imposition of emission taxes. This idea is generally associated with the economist A.C. Pigou, who argued that pollution taxes would force offending industries to "internalize" the costs they were imposing on others.

But there are several problems with this approach. First, such taxes would be used to enrich government coffers, not to compensate those who were harmed by the pollution. It is one thing for the state to decide disputes and ensure that polluters make restitution to those whom they have harmed. It is another thing for the state to identify polluting activities and use pollution taxes as a source of general revenue. The former is in accord with common law principles of justice; the latter encourages the continued growth of the regulatory state.

The second problem is that the state is in no position to assess the actual costs imposed by pollution. Pollution taxes enacted through the political process are likely to reflect political priorities rather than environmental ones. The federal gasoline tax, for example, is often defended as a "polluter pays" approach because oil exploration, refining, and use all have environmental impacts. However, a tax on gasoline is a poor proxy for taxing environmental impacts—the same gallon of gasoline will produce different levels of emissions in different vehicles. And special-interest pleading ensures that certain types of fuels and fuel additives receive special exemptions from the tax.

In fact, pollution tax schemes almost inevitably rely upon some proxy for pollution that can be taxed. It is far easier to levy a tax on an easily measurable factor, such as use of a resource or aggregate emissions, than it is to try and measure the impact on people—yet it is the impact on people and the environments that they are concerned about that should matter. Using tax mechanisms in place of common law principles, no matter how well intentioned the policy, is a "polluter pays" approach that is destined to fail.

In sum, making the polluter pay should not entail trying to eliminate the generation of wastes and other by-products of a modern industrial society. Nor does it mean regulating every emission, every industrial process, indeed every aspect of economic life. It means focusing environmental protection efforts on the greatest sources of harm and ensuring that polluters pay for the costs of the harms they inflict upon others. This goal can be best accomplished through a decentralization of environmental policy and a greater reliance upon common law remedies. Central government dictates are not up to the task. □

1. See, for example, Sydney Howe, "Making the Polluters Pay," *The Washington Post*, January 30, 1977, C8.
2. U.S. Environmental Protection Agency, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study* (Washington, D.C.: U.S. EPA, July 1990), p. 36.
3. Figure cited in Marianne Lavelle, "Environmental Vise: Law, Compliance," *National Law Journal*, August 30, 1993, p. S1.
4. Jeff Berliner, "Exxon Pleads Guilty, Judge Accepts $1 Billion Settlement," United Press International, October 8, 1991.
5. "Oil Spill Money Creates New Alaska Park," Associated Press, May 27, 1994.
6. However, it should be noted that the jury awards to the fisherman were more likely the product of outrage over the spill than actual demonstrated damage (see Jeff Wheelwright, "Exxon Was Right, Alas," *The New York Times*, July 31, 1994, p. 15). This is another product of focusing on "public" harms rather than harms inflicted on particular parties.
7. This point is elaborated upon in Robert J. Smith, "Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife," *Cato Journal*, Fall 1981, pp. 439–468.
8. This history is recounted in Kent Jeffreys, *Who Should Own the Ocean?* (Washington, D.C.: Competitive Enterprise Institute, Fall 1991), pp. 17–18.
9. See Roger E. Meiners and Bruce Yandle, "Clean Water Legislation: Reauthorize or Repeal?" in *Taking the Environment Seriously*, Meiners and Yandle, eds. (Lanham, Md.: Rowman and Littlefield, 1993), pp. 88–94.
10. Michael Greve, "Private Enforcement, Private Rewards," in *Environmental Politics: Public Costs, Private Rewards*, M. Greve and F. Smith, eds. (New York: Praeger, 1992), p. 111.
11. *Ibid.*
12. *Ibid.*, pp. 109–110.
13. J.G. Calvert, et al., "Achieving Acceptable Air Quality: Some Reflections on Controlling Vehicle Emissions," *Science*, July 2, 1993, p. 40; and, Donald Stedman, et al., *On-Road Remote Sensing of CO and HC Emissions in California*, Final Report Contract No. A032-093 (Sacramento: California Air Resources Board, February 1994), p. 13.

THE FREEMAN
IDEAS ON LIBERTY

Why Governments Can't Handle Risk

by Randy T. Simmons

Public opinion surveys indicate that mainstream America is worried about environmental risks.[1] In 1990, for the first time since pollsters began asking the questions, a plurality (46 percent) of American voters believed that the quality of life where they live was worse than it was five years previous, and the number who were pessimistic about the future of the environment (46 percent) exceeded the number who were optimistic (32 percent).

These surveys, reported in *The Polling Report,* also indicate that Americans expect government to resolve these anxieties. In 1982, one-third of Americans wanted more government regulation of the environment. By 1990, two-thirds wanted more. In 1982, 45 percent agreed with the statement that the environment was so important that requirements and standards could not be too high. In 1990, 80 percent agreed. People apparently remain confident of government's ability to protect them against risk.

But the truth is that the government is spectacularly ill-suited to anticipate future harms. There are a number of reasons.

First, most of the potential harms we face are low-probability future events about which no one can know very much. By putting protection against these events into the hands of a central authority, almost inevitably a single approach to the harm will be taken. Given such uncertainty, any policy of anticipation is likely to be the wrong one.

The problem with leaving prediction in the hands of a central authority is illustrated by the government's mineral assessment process (even though geology is a more certain science than assessing risks in an uncertain future). For each proposed wilderness area, the Bureau of Land Management, the Bureau of Mines, and the Geological Survey conduct mineral assessments to determine the potential for finding mineral deposits, based on existing geological theory. The agencies produce probabilistic estimates of mineral potential.

But scientists do not regard these estimates as specific, quantitative data. Even for the areas that appear to offer little mineral promise, a negative assessment report is not absolute. The vast oil and gas deposits in the Overthrust Belt were unknown only a few decades ago; several exploration companies had failed to find anything. But someone with a new geological theory applied a slightly different technology in a previously dry hole and discovered the reserves.

If we didn't have a variety of people making different assessments—if, instead, everyone relied on the government's assessments—the oil might never have been found. Such uncertainties prompted Wil-

Professor Simmons is the Head of the Political Science Department of Utah State University.