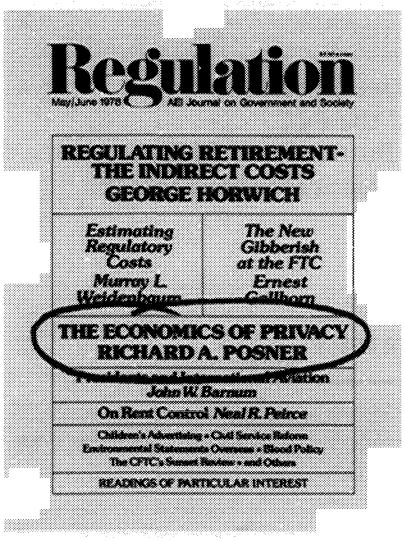
Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.



The Humanism of Privacy

TO THE EDITOR:

I read Professor Richard A. Posner's "An Economic Theory of Privacy" (*Regulation*, May/June 1978) with considerable interest, and some disappointment.

By applying economic criteria, the article concludes that organizational privacy should be given more attention and personal privacy less. By making organizational needs the central focus, it appears to unfairly play down human needs. The protection of personal privacy is a critical individual right, no less than other basic noneconomic rights provided for in the Constitution (such as protections against self-incrimination, unreasonable searches and seizures, and restrictions on freedom of assembly).

The article also sidesteps the obvious fact that organizations are collections of humans, with psychological needs to be let alone, to think, to ponder, to relax, to be judged on what they are and not on how an impersonal data bank might incorrectly profile them. This is **not** to denigrate the need for organizations to be protected from onerous regulation. But when personal privacy is being eroded at an increasingly disturbing pace, let us not rush in to hinder what few thrusts are being made to reestablish the rights of the individual.

Personal privacy is what American democratic free enterprise is all about: the right of the individual—be he business executive, corner grocer, or man-in-the-street—to move about physically and mentally without interference in his business dealings and job selections as well as in his personal and family relationships. Obviously, privacy is much more than a kind of property right. It is a basic psychological and citizen right in a democratic society.

As former chairman of the Privacy Protection Study Commission of the United States, I had the opportunity over a two-year period to examine in depth what has been happening to the right of personal privacy in our nation.

Unlimited amounts of personal data are being accumulated by scores of organizations and fed into data banks. Much of it is being shared with others, often without the knowledge of the individual concerned. With split-second retrieval, anything that is ever recorded about a person becomes immediately available; and with computer-to-computer linkage anything put into the data bank of one organization can be tied together with another organization's data bank. This linkage may create a major threat to our way of life. . . .

Information about people has become a valuable commodity in today's society. Facts about people are not only an important tool for the conduct of business and government, but also an item to be exchanged and marketed for a variety of purposes. Chronic problems of previously minor dimension have become major social policy questions as the efficiencies of modern recordkeeping technology have eased the task of compiling, comparing, and retrieving information for use in administrative decision making, and as an instrument of surveillance. . . . In both government and business, records are kept about individuals without their ever knowing the records exist, let alone how they are used.

Last summer, we presented to President Carter and the Congress our report, *Personal Privacy in an Information Society*, containing 162 recommendations for positive action to help deal with the disturbing personal privacy problems that have been surfacing in recent years. I believe these recommendations place in proper perspective the economic needs of organizations and the personal needs of individuals which make up those same organizations.

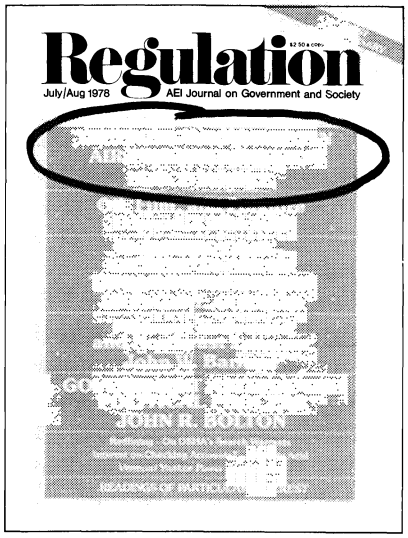
David F. Linowes,
University of Illinois

TO THE EDITOR:

Where Professor Posner sees economic rationality, I see the recognition of the right to individual autonomy, but it often turns out we are looking at the same thing. At first, Professor Posner's argument for more protection of business privacy and less of personal privacy *looks* hard to square with a concern for individual rights. Yet, on reflection, I must agree with him about recent highly moralistic trends in legislation in the opposite direction. The point is, of course, that to grant the individual a legal right to control "private" information about himself entails a corresponding restriction in the liberty of other individuals who may have come upon that information not by eavesdropping, breaking and entering, or surreptitiously opening mail, but by open inquiry (perhaps of the subject himself) and diligent observation. I take it Posner condemns the first kind of invasion (eavesdropping, burglary, and so on) as surely as the most fervent exponent of the right to privacy. In protecting privacy that far, we do no more than recognize the individual's right to his person and property and we restrict the liberty of others no more than do laws against burglary or theft. When we go further and give an individual control of information that another

has obtained without any independent violation of right, we intrude the state's control deep into that other person's discretion to make the best of what he learned legitimately as he kept his wits about him, his eyes open, and his ears cocked. In spite of appearances, this does tend to be an instance of state interference with liberty rather than just an instance of the state's furthering and arbitrating the equal liberties of citizens. For this new right of privacy —on whose economic rationality Posner throws such doubts—is so vague that it is easily open to manipulation by organized litigants, pressure groups, and activist political judges with axes to grind and scores to settle.

Charles Fried,
Harvard University



Air Emission Rights

TO THE EDITOR:

Bruce Yandle's "Emerging Market in Air Pollution Rights" (*Regulation*, July/August 1978) discusses a new concept that started down its winding path to potential reality when the U.S. Environmental Protection Agency addressed a problem confronting our largest metropolitan areas. To paraphrase Mr. Yandle's well-chosen quotation from John Stuart Mill, the atmosphere is too scanty for unlimited consumption. By late 1975, it was clear that national health-based air quality standards were not being met in many areas of the country and that construction of new polluting sources might have to be curtailed in those areas. The agency's response created a new approach to management of our air resources.

Basically, the EPA's Emission Offset Ruling states that new construction may continue in an area with poor air quality, provided that new operations are well controlled and that offsetting emission reductions are achieved from existing pollution sources in sufficient amounts to make progress toward attaining the standards. These emission reductions can either be accomplished through the traditional regulatory process or through market-like transactions between the new source and existing sources of pollution. This approach not only reconciles the needs for economic growth and air quality improvement, but also allows market incentives to play a role in reducing emissions in problem areas.

From the outset, members of the EPA staff have recognized the potential for markets in the buying and selling of the emission reduction potential at existing air pollution sources. We are anxious to see if the economic incentives within the offset market can tap the creative potential of business to find new, less costly ways of reducing emissions. EPA Administrator Douglas Costle, a strong advocate of the use of economic incentives for achieving environmental goals, has established an EPA task force (which I co-chair along with Darryl Tyler of the Office of Air Quality Planning and Standards) to find out how an offset market can work. The task force will also investigate alternatives both for handling new construction in areas not meeting public health standards and for achieving those standards fairly and effectively.

Although there have been a number of successful offsets under EPA's ruling, there has been a dearth of market transactions. The successful offsets have principally been achieved within plants or through statewide emission reduction programs. . . . The market is not yet fully developed largely because the future of the offset policy has been uncertain. Under the Clean Air Act Amendments of 1977, however, after 1979 the states will be able to choose whether they will utilize an offset policy or a traditional regulatory approach to allow for economic growth within their state implementation plans. The uncertainty should be eliminated when the state implementation plan revisions are submitted and approved by EPA in July 1979. Other market uncertainties might also be eliminated following clarifications of emission offset baselines and provisions for banking of emission reductions (which EPA will soon permit).

Clearly, without additional effort the potential for an emission market may go untapped. . . . Therefore, we are currently

(1) analyzing the impact of offset requirements on growth and air quality in case studies both by region (Houston-Galveston, Philadelphia, Chicago, Denver, San Francisco) and industry (petroleum refining and petrochemicals, iron and steel),

(2) documenting and analyzing government and private experience with the offset policy,

(3) preparing a "concept paper" on offset markets and the elements needed for a new market to flourish,

(4) providing interagency grant moneys for select urban programs to reconcile economic development and air quality improvement efforts, and

(5) helping communities to foster offset markets.

We welcome any opportunity to work with businesses to learn from their experiences with the offset policy.

Cheryl Wasserman,
Environmental Protection Agency

TO THE EDITOR:

Bruce Yandle is to be commended for his lucid discussion of the emerging market in emission opportunities. However, it seems important to point out that what has emerged are *transferable emission privileges*, not air pollution rights, nor property rights in air pollution emissions, nor air emission rights. This is not mere semantics. Policy concerning the natural environment has been unnecessarily confused because of a fundamental terminological problem, and I should like to attempt to clear up some of this confusion by using the Yandle article as a point of departure.

The essential concept of property includes (1) the secure expectation of a stream of benefits over time and (2) the ability to divide that benefit stream as the owner sees fit, including its alienation. When these conditions are met and the property is controlled by one person, we have the familiar private property—although individual property would be a more appropriate term. When these conditions are met and the property is co-equally

(*Continues on page 64*)

(*Continued from page 3*)
controlled by a specific group of individuals, we have common property. The summer pastures of Switzerland, for example, are common property resources: while any number of individuals may be able to hike across them, only a subset of villagers may graze their cattle there, since one use consumes the resource (grass), while the other does not.

We have an approximately similar situation in the air mantle, in that one use (breathing) is nonconsumptive, while the other use (sulfur dioxide emissions) is consumptive and affects those who want only to breath. Prior to the Clean Air Act of 1970, the air mantle was not a common property resource, as is so often asserted (though not by Yandle). It was not property of *any* sort, since no user had secure expectations of a future stream of benefits. And it was certainly not common property since all users were not co-equal: the breathers were at the mercy of the emittors. Rather, it was an o*pen access resource,* simply a valuable resource-service there for the taking. No one had secure expectations, no one could alienate it, no one could exclude others—although the emittors were certainly able to influence its value to the breathers.

The 1970 act *created a common property situation* where open access had existed before. It established not *private* property rights in air, but *common* property rights, the difference being that no one could exclude any other from the benefit stream. We are all co-equal "owners" of the resource; you may not exclude me from its benefits, nor I you.

Along with that creation of common property, the act also created a special covenant for those (the emittors) whose use depletes the value of the resource for others (the breathers), and it is this special covenant which is the subject of Yandle's article. Yandle was talking about trades among a small subset of co-equal owners—those who deplete the value of the resource for others. He was not talking about trades between the depleting uses and the nondepleting uses. More important, the depleting users do not have a property right in the air mantle—they do not even have property as defined above. . . .

What these firms possess are *emission privileges,* just as cattle ranchers using the public domain in Nevada possess *grazing privileges.* The article, therefore, was about the emergence of transferable emission privileges, not marketable property rights in air pollution emissions. . . .

That efficiency would be served by allowing depletive users to transfer privileges is incontrovertible. But let us be clear that it is privileges they hold, not property rights.

Daniel W. Bromley,
University of Wisconsin-Madison

BRUCE YANDLE responds:

The comments by Cheryl Wasserman and Daniel Bromley appear to be based on somewhat different perspectives of the emerging market for air emissions. Ms. Wasserman offers valuable insights into EPA's effort to learn more about the offset mechanism and about how this new technique can be improved. Professor Bromley, on the other hand, provides a theoretical discussion of property rights, how rights evolve, and describes certain characteristics that might distinguish "rights" from "privileges."

I appreciate their comments and, while their thoughts may seem unrelated, I see them as illustrating the central question discussed in my article: what should we do to support the development of a market for a newly recognized environmental resource? A related—if not equally important—question is this: can regulators anticipate and solve every problem which might be encountered before transactions take place in a new market? In a sense, both Wasserman and Bromley speak to these questions.

A laissez faire philosopher might answer the first question with a terse "nothing!", arguing that property rights to scarce resources evolve on their own—quite possibly along the lines suggested by Bromley. Those who gain by securing property will seek to organize an enforcement mechanism. If they are successful, exchange among interested parties will ensue. A lack of success at any stage in the evolutionary process might suggest insufficient gains to cover the cost of organizing the market. In a few words, the voluntary actions of individuals prove the case for or against a new market. Along these lines, the second question is irrelevant.

In another view, an individual who accepts existing legal constraints might respond by trying to improve allocative efficiency within the framework of law—even if the law precludes the operation of unfettered air quality markets. In this case, can market forces be used beneficially?

In my opinion, the emergence of EPA's offset policy is evidence of the play of strong market forces among demanders and suppliers of scarce environmental quality. In other words, there are gains to be obtained through trade, gains of such a magnitude that institutional rigidities are being forced to yield. The offset mechanism is a response to a market which has long been caged by legislative and regulatory actions. The forces of that market have broken through the concrete.

Since efficiency gains are generally welcomed by those concerned about economic as well as industrial waste, there will likely be continued interest in EPA's new programs. While all this is encouraging to me, a troublesome thought still remains: are the gains from devices like offset markets, emission fees, and effluent charges really significant? Or have we contrived so much scarcity that these much anticipated improvements are mere specks of sand on an inefficient pyramid?

It seems clear that environmental standards can be set so high—by state agencies as well as federal regulators — that extremely high prices would be paid for emission privileges or property rights as the case might be. Indeed, revenue-hungry state agencies might find such a strategy exceedingly attractive. Futhermore, since demanders of clean air and water are not charged directly for the benefits they obtain, the pressures for higher standards are likely to continue to be felt. Unfortunately, the consequences of "too much" environmental quality can be as damaging as "too little." In either case, the cost is paid in human happiness foregone.

The offset mechanism cannot handle all these problems. But given whatever constraints we force on ourselves, things may be improved through some type of market mechanism. In other words, cost can be reduced as we seek to satisfy even the most unrealistic standard.

In my opinion, the offset mechanism represents progress. Let us hope that the progress carries us in the direction of uncovering the real cost of environmental quality. Once the cost is known, decision makers will be better equipped to evaluate existing standards.

If we have built an inefficient pyramid, it is best we uncover it. ■