The Permission Society

TIMOTHY SANDEFUR OF THE GOLDWATER INSTITUTE has spent years litigating for economic liberty, coming face-to-face with the numerous ways in which our presumption of liberty has been replaced with requirements to ask permission from the government for how to conduct our lives. In October he came to Cato to discuss his new book, *The Permission Society: How the Ruling Class Turns Our Freedoms into Privileges and What We Can Do about It.*

In his 1792 essay "Charters" James Madison writes, "In Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty. This revolution in the practice of the world, may, with an honest praise, be pronounced the most triumphant epoch of its history." What Madison meant was that, unlike the old documents of the English Civil War, or the Glorious Revolution, which purported to give freedoms to the people, the American Revolution was founded on the *opposite* principle—that people are basically free, and create the government through their own agreements.

Contrast, for instance, the opening of the Declaration or Constitution with the language of the Magna Carta. We celebrated the 800th anniversary of Magna Carta last year, and it is a great document—but when you actually read it, the language that it uses is surprising. It says, "John, by the grace of God King of England, to his loyal subjects, greetings. . . . To all free men of our kingdom we have also granted . . . all the liberties written out below, to have and to keep for them and their heirs from us and our heirs." So the Magna Carta is very clear—"I, the King, am giving you the following freedoms"—and it lists out those freedoms.

That's the opposite of the principles of the Declaration or the Constitution, which start out by saying that all men are created equal, all people are basically free, they then create the government by an agreement and give it certain powers, most of which are listed in Article I, Section 8 of the Constitution. The Founding Fathers reversed the older conception of freedom.

We philosophize about what freedom is—"Is a person who is too poor to afford things really free?"—but I think those questions are a distraction from what freedom really is: freedom means *not having to ask permission*. John Locke said, "Freedom is not, as we are told, 'a liberty for every man to do as he lists' (for who could be free when every other man's humor might domineer over him?) but a liberty to dispose and order as he lists his person, actions, possessions and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own."

This was a revolutionary idea in the 1770s, because the older model of freedom was this Magna Carta principle, that we tend to call in the law "prior restraint."

Prior restraint was the old rule when it came to freedom of the press, which is where we normally hear this term. Prior restraint was the rule that said you had to get the government's permission before you could publish something. In the 17th century this was overturned, and it became the pride of British subjects that no prior restraint could be placed on a person before that person published his sentiments or gave a speech. He might be punished afterwards, if he committed slander or threats, but he couldn't be required to ask permission before uttering his views.

If you read William Blackstone's *Commentaries* of the 1760s, Blackstone was very proud that British subjects enjoyed more religious toleration than the people of any other nation. He says, "Why, we even let Catholics own *property!*"—which *was* pretty liberal by the standards of that day. But the principle behind the British system was *toleration*. The king was giving not liberty, but toleration to the people. The Founders repudiated this concept. Thomas Paine says,

> Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, the other of granting it. The one is the Pope, armed with fire and stake, and the other is the Pope selling or granting indulgences.

Jefferson says the same thing in *Notes on the State of Virginia*, writing that our rulers can only have such authority over us

> as we have submitted to them. The rights of conscience we have never submitted. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket, nor breaks my leg.

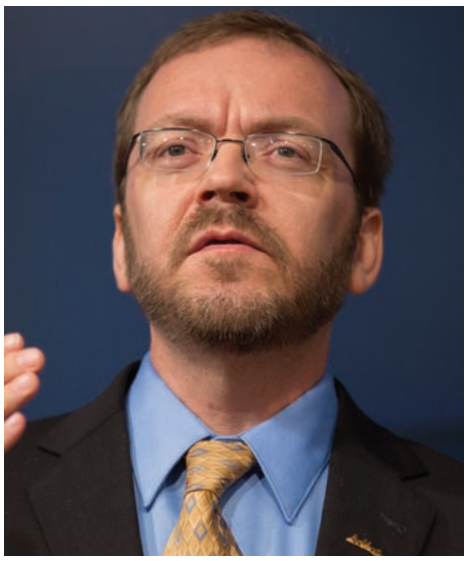
That's probably my favorite Jefferson quote. It neither picks my pocket, nor breaks my leg, so it's none of the government's business.

In his old age, James Madison wrote a little memoir telling the story of when he was young, in his twenties, and served on the committee that drafted the Virginia Declaration of Rights. The primary figure on the committee was George Mason, the respected elder statesman of Virginia politics, and Mason in his original draft wrote that all people would enjoy the total "toleration" of religion. And Madison, this then basically unknown young upstart, jumps up and says "No, no, you can't use the word *toleration*, you must use the word *liberty*." And he persuaded Mason to replace the word. He was very proud of that.

What the Founders did here and elsewhere was to embrace the presumption that we are all basically free. That's reflected in the text of the Constitution, which speaks of *securing* the blessings of liberty, which says that our rights shall not be *abridged*. And of course the Ninth Amendment, which makes clear that the list of rights is not exclusive. Just because the Constitution doesn't say you have the right to run barefoot through sprinklers on a hot summer day doesn't mean that you don't have that right. It says government is not *giving* you freedom, it is simply listing *a few of* your freedoms in the Bill of Rights.

So how have we come to the point where today you need to get the government's permission for a wide variety of the things that you spend your daily life doing? You need a permit to build a house, own a gun, get a job, to buy some things, run businesses, pay your employees—even freedom of speech now often comes with some sort of permit requirement. We have colleges and political conventions setting up "free speech zones," which are basically cages where you're allowed to express your opinion.

You also find permit requirements in places where you wouldn't expect it. An example that I use in the book is "architectural design review." Architectural design review occurs when an architect has planned out a building or a subdivision, and he goes before the city zoning board, and the officials look at it and say, "Well, it complies with all our safety codes, but I just don't like the way it looks. I would really prefer that it be colonial, or neo-colonial," instead of whatever other style it's designed in—purely for aesthetic reasons. I hold that architecture is a form of sculpture, it's an artistic expression, and therefore should be protected by the First Amendment as a form of free speech, in exactly the same way that other kinds of sculptures are protected as free speech. No one can walk through a Frank Lloyd Wright building, or a building by Le Corbusier, or a Greene and Greene masterpiece like the Blacker House in Pasadena, without experiencing the aesthetic feelings that great artists seek to convey. Architectural design review substitutes the government's aesthetic preferences for the architect's own. Unfortunately, so far no architect has been found with the guts to litigate that point.



> "You need a permit to build a house, own a gun, get a job."

We are replacing the free society with the Permission Society—a society where you are not free unless the government gives you permission. The model that lawyers use for this is the difference between the "nuisance system" and the "permit system." The nuisance system is built on the ancient classical legal principle that you have the right to use your property as you want, so long as you harm no other person. As opposed to the permit system, which says you are not allowed to do something unless the government allows you.

Now, there are problems with the nuisance system. One is that it's basically reactive. It allows people to commit harms, and then you can sue them or get an injunction against them after they've committed the harm or immediately before they are going to. The permit system proposes to be proactive.

The problem is that there are many more problems with the permit system than with the nuisance system. For example, rent-seeking: the phenomenon where, if the government can hand out benefits to people, it becomes in their best interest to spend their time and money getting the government to do that in their favor.

Another one is the knowledge problem, identified by Friedrich Hayek. No individual, no corporation, no government can possibly know all the information necessary to run an entire economy. The classic example given by Leonard Read is the pencil. Nobody in the world knows how to build a pencil, because to build a pencil you need graphite and wood, to get the wood you have to have lumber, to get the lumber you have to have lumberjacks, to get lumberjacks you have to feed them, which means you have to have farms—a few steps along this reasoning and the entire world's economy is spent building a single pencil. But the way it works is by a decentralized process of decision-making that avoids this knowledge problem. The permit system *causes* this knowledge problem.

To take an example, I litigated a case in Kentucky in defense of an entrepreneur who wanted to start a moving company. And in Kentucky, as in most states, you're not allowed to start a moving company until you first get

permission from all of the existing moving companies in the state. This is called a "certificate of public convenience and necessity" law. You have to prove to government bureaucrats that there is a "need" for a new moving company in Kentucky before they'll give you a permit, and any existing moving company can object and say there is no need for more competition against them. And guess what? They often say that! In the deposition I asked, "How do you bureaucrats decide whether there is a public need, or even worse, a *future* public need for a moving company some way down the line?" And the bureaucrat said, "There are no objective criteria." Well, there you go. That's another problem with the permit system: the vagueness of the criteria with which they usually operate. For instance, in the gun permit area, you can't have a gun unless there's "good cause." What does good cause mean? Whatever the bureaucrats say it means. (Fortunately, we won that case, and the court struck down the Kentucky law.)

But I think that there are even more fundamental problems with the Permission Society. One of them is that it violates the principle of equality. Who has to ask permission? An inferior has to ask permission of a superior. Slaves have to ask permission. Children have to ask permission. Until recently, women had to ask permission—to own property, get jobs, sign contracts, and so forth. To have to ask permission from someone else typically means flattering or appeasing that person, rather than being treated as equal citizens. It substitutes political for economic power. The permit system creates a class of people who have access to the government decision makers and can use that power to benefit themselves. The Soviet Union called this the *nomenklatura* system. There is always a class of people whose cousin served on the board, or whose brother was on the committee, and in exchange for a little something, they might be able to get you some time in front of the bureaucrat.

That's another problem of the permit system: it allows those in power to demand something in exchange for a permit. In the land-use context we often see this, where you apply for a permit to build something, and the government comes back and demands property or even cash from you in exchange. The Supreme Court has said that this is unconstitutional in many cases, but local land-use officials continue to do it nevertheless. I had a case in the San Diego area several years ago where my client was forced to give up his right to vote in exchange for a building permit.

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But the most offensive part of the permission system, across the board, is how it deters innovation. It restricts opportunity simply by existing. Think of an entrepreneur who doesn't have a lot of capital, who comes up with a great new idea, a new innovation. And then he thinks about all the permits he'll have to get, all the hearings he'll have to go through, maybe even special lobbying to get a special law passed to exempt him from an existing bureaucratic regime, and says to himself, "You know, it's just too much trouble." We can never assess that cost, because it vaporizes instantly, it never comes into existence. How much might have occurred, how many jobs might have been created, how much wealth might he have created, and how many other innovations would have come about because of his innovation? As the great poet John Greenleaf Whittier said, "Of all sad words of tongue or pen, / the saddest are these: 'It might have been.'"

The permission system is supposed to impose responsibility. The problem is that responsibility can take two different meanings. It can either mean, "Don't hurt people," which is the nuisance principle—or it can mean, "Do what we say." That's the permit system. I think the nuisance system is by and large the better way to approach social problems, and that means presuming people free, unless they're going to harm some other person. Unfortunately I believe we are sliding more and more into a society that presumes you unfree, unless you get the government's permission. And as we move toward the Permission Society, we're moving away from the principles of freedom upon which our Constitution is based. ■