

The Republic of Choice

Law, Authority, and Culture

Lawrence M. Friedman

Harvard University Press
Cambridge, Massachusetts
London, England
1990

To Leah

Copyright © 1990 by the President and Fellows of Harvard College
All rights reserved

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

This book is printed on acid-free paper, and its binding materials
have been chosen for strength and durability.

Library of Congress Cataloging-in-Publication Data

Friedman, Lawrence Meir, 1930-

The republic of choice : law, authority, and culture / Lawrence M.
Friedman.

p. cm.

Bibliography: p.

Includes index.

ISBN 0-674-76260-6 (alk. paper)

1. Law—Philosophy. 2. Sociological jurisprudence. 3. Culture
and law. 4. Civil rights. 5. Individualism. I. Title.

K230.F75R47 1990

89-34329

340'.1—dc20

CIP

On Modern Legal Culture

Cost of technol.
advances

THE MAIN argument here has pivoted about a particular concept of individualism, characteristic of our times. The concept stresses the right of each person to develop himself or herself as an individual; to choose as freely as possible a suitable and satisfying style of life. It is worth saying again that I am talking about general and legal culture—people's ideas and expectations—not necessarily about the truth and reality of the world.

The culture of individualism does not depend on whether people are actually free to choose, or as free as they think they are or would like to be. It is enough that they believe they are. Of course, such concepts of individualism and free choice do not enter people's heads by magic. They reflect common-sense judgments; they seem plausible to people; they rest on aspects of reality of the modern world. Modern technology, very notably, has shaped the environment in which people live, and therefore the way they look at the world. Technology is power—over the material world. It opens up a range of choices; it liberates the individual. An ordinary modern person—a barber, a factory worker, a secretary—has a kind of access to the wider world, at the wheel of a car, talking on the telephone, watching television, or on board trains and planes, that the ordinary person never dreamt of in the past. The world of choices, then, seems real and in some sense *is* real; the persistent drumbeat of advertising makes it appear more real, perhaps, than reality itself. Even people who complain that machines have tyrannized humanity use machines to spread their demands for liberation; the machines have helped create the mental world, the world of unlimited possibilities, that those who feel unfree use to define the freedom they lack.

But if technology is power and opportunity, it is also a source of problems, in ways the Luddites never imagined. A technological world is a complex world; this is a truism, but an important one. The world is complex in the most literal sense: crowded and interactive. It takes technology, including social technology, to sort things out in a human environment crammed with active, working, moving, functioning people and machines; to manage an environment of radical mobility in which individuals have been set loose from ancient bondages and moorings, to take off in all directions. Thus the paradox we began with—that rules, regulations, and laws become dense and pervasive in an age otherwise profoundly individual—seems less of a paradox. Many people believe that society *needs* a thick network of rules and rule-structures for the very purpose of protecting freedom of choice. The average person does not question the need for drivers' licenses, traffic police, stop signs, or speed limits. She values the right to drive whenever and wherever she wants, but that right would be almost useless, she feels, if the streets and highways were left unregulated in a state of anarchy. She also approves of rules to filter out blind, drunk, immature, and incompetent drivers. The right to drive would be much less real and worthwhile if the roads were clogged beyond measure, or were too dangerous. We need rules to prevent these situations. Ordinary men and women may be individualists; they are most definitely not libertarians.

In other words, one reason why there are so many rules and so much law is that some rules are necessary to defend or realize individual choice in the modern world. Rules create the framework of the state and hammer into place the planks and boards of the legal system itself. Secondly, some rules are "traffic" rules, rules of the road, which prevent choice from collapsing into anarchy—a state that would destroy the reality of choice. This is the function of traffic rules, taken in the most literal sense, that is, the rules of streets and highways. We could not get along without these rules, especially in big cities, and on highways and arteries in the countryside. But there is traffic and traffic. Any rules that make for orderly access to scarce resources are traffic rules in a sense. There are innumerable examples of allocation rules and rule-systems in modern law, which have this very purpose; for example, regulation of access to television channels and radio frequencies; air traffic control laws; regulation of wilderness areas; laws about hunting and fishing; laws to protect lobsters,

abalone, fur-bearing animals; laws about energy conservation and energy sources.

This is one root of the multiplicity of laws. Civil rights laws exemplify another type, which also serves to realize individual choice. A vast proliferation of rules has grown up on this subject in many countries. Its fundamental notion is the uniqueness of the individual, the right of everyone to be judged and valued solely on his or her own merits as a person, rather than as a member of some ascriptive group. In the United States, the most pressing issue, historically, was race; and the civil rights movement carried the banner of a race-blind or race-neutral society with stunning success in the years after 1950, and in particular after the case of *Brown v. Board of Education* (1954), which desegregated the public schools.¹ The movement aimed primarily at closing the appalling gap between black and white in rights and opportunities, eliminating American *apartheid* and opening closed worlds of justice and privilege to blacks. In the *Brown* case, Chief Justice Earl Warren delivered a ringing message of praise for education in tones characteristic of his times. Education, he wrote, "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Segregation, on the other hand, "generates a feeling of inferiority," which in turn affects "motivation to learn." The sin of segregation, then, was its failure to allow full development of the souls of black children. The distinct melodies and nuances of expressive individualism echo clearly through the screen of legal language.

The civil rights movement was only the beginning of a trend. Next came a new and revitalized women's movement, followed by the uprising of the "sexual minorities" (notably, gays and lesbians), and by strong claims to benefits and power by a whole cluster of groups: the handicapped, the elderly, prisoners, students, immigrants, and others. In other Western countries there were similar movements, taking of course different forms, moving at a different pace, and enjoying different degrees of success or failure. Each country had its own demographic and ethnic mix, its own special brew of resident minorities.²

The civil rights movement, broadly conceived, has deep historical roots. Its intellectual basis goes back to the Enlightenment, if not earlier. Like most liberation movements, it has framed much of its rhet-

oric in historical terms—the recapture of long-lost rights. The texts and slogans used to buttress or vindicate fundamental rights need not be modern texts at all; some are as old as the American Constitution, or for that matter as old as the Bible. Nonetheless, there are important differences between the “rights of man” as Thomas Jefferson conceived them, and the “civil rights” of the mid-twentieth century.³ The altered form of individualism, the altered meaning of choice, and the peculiarly modern emphasis on freedom to shape and constitute a unique and fulfilling self account for these differences.

Civil rights law and the civil rights movement are crucial illustrations of the theme of this book. Individual autonomy, as an ideal, is incompatible with group stereotypes. Individualism of the contemporary type stresses what is unique about each human being. Groups such as women’s groups, or black groups, apply group pressure on behalf of individual autonomy. The official line in Western countries insists that differences of language, race, and culture do not reach the essential core of human beings and are no excuse for discrimination or oppression. In the real world, of course, group stereotypes are stubborn and persistent. Hatred and war among races, nations, tribes, and language groups are positively epidemic, and in some places threaten to tear the world apart. Everywhere prejudice is strong and ancient; powerful laws are needed to combat it, backed by powerful social movements. The results at best are partial and mixed.

Moreover, groups that claim protection and toleration are often in conflict with each other. Minorities may put forward claims that contradict each other; those who assert rights collide with those who resist rights. For instance, Jews, liberal Protestants, and nonbelievers want the schools to be neutral as to religion; they want an end to preaching, prayers, and indoctrination. Fundamentalists then argue that the secularists have driven God out of the schools, abusing the rights of religious people. A humble Nativity scene on city land touches off an ugly squabble. Society has to cope somehow with this tangle of rights in conflict; and it does so through a hierarchy of traffic rules—rules to monitor and choose among competing claims; to rank them in some logical or popular order; to place them somewhere in a social queue.

A certain contradiction may have arisen between the individualist strand and the separatist strand in civil rights law. On the one hand, there is the claim that blacks (or women, gays, the handicapped, and so on) are “just like everybody else,” and should be treated accord-

ingly. On the other hand, group solidarity develops and takes the form of black nationalism, radical separatist feminism, gay pride, and the like. These are assertions of *group* claims; but of a special nature. They always contain an element of individual choice or affiliation; they reject stereotyping and discrimination from the larger society and assert the right of the black, woman, gay, or ethnic to embrace a total, all-encompassing culture of exclusion. Separatism also usually involves the idea that members of oppressed and wounded groups best develop their selves under conditions of isolation and cocooning. The argument is that the dominant culture is so inveterately repressive, so consciously or unconsciously stained with prejudice, that blacks (women, gays) can reach fulfillment only within a social or spatial enclave. In either case, a framework of civil rights strongly supported by hard-edged legal institutions is a vital necessity; though of course there is endless controversy over what these rights ought to be, and how the institutions should behave.

Regulation and Individual Choice

Less obvious to the general argument is the relevance of that tremendous body of rules and institutions that regulate or deal with the economy—the apparatus of the modern regulatory state. Still, as one patiently excavates bits and pieces of social history, themes and facts about business regulation come to light that are indeed germane to the republic of choice and very much of a piece with the legal culture as a whole. Regulatory laws have a political history that is often quite complex. Particular kinds of regulation sometimes keep their popularity precisely because they invoke themes and slogans of choice or individualism. The welfare state is a regulatory state, and thousands of rules put shackles and restraints on businesses, employers, and landlords. The public does not in general object; on the contrary, the public agrees that enterprise must be controlled, power curbed, and the public interest asserted. Banks, railroads, and large corporations should be reined in for the sake of small business, or to preserve the independence of farmers, small merchants, shopkeepers, and the consumer.

This theme, very notably, appears in the history of many of the great regulatory laws, for example, the Sherman Anti-Trust Act (1890).⁴ This famous statute was passed against the background of intense agitation, even panic, over “trusts”—giant industrial combines that formed

during the late nineteenth century. There was fear that the great monopolies could squeeze the life out of their competitors, driving small businesses into ruin or industrial servitude and threatening to attain intolerable power over the lives and affairs of ordinary citizens. The same impulses and energies motivated many of the laws directed at the economy. The Robinson-Patman Act tried to tilt the scales toward small business by forbidding price discrimination—discounts and rebates that might “lessen competition”⁵ In the 1920s the rise of chain stores provoked another wave of agitation and legislation. Almost half the states passed special tax laws aimed against these stores. The point was to keep the giant food chains from turning the United States “into a nation of clerks by depriving individuals of the opportunity of establishing their own businesses and, in that way, impairing individual initiative, since standardized merchandising operations tend to make of employees mere routine workers.”⁶ *monopoly*

Whether or not these laws made economic sense or were even effective is not the issue here. It does not capture the cultural meaning of these laws to describe them purely in economic terms. Self-interest, as always, goes a long way to explain the motives of the most passionate exponents of these laws—in fact quite long enough. But proponents always added a broader argument. The laws were necessary to preserve freedom—theirs and other peoples—to keep small businesses alive and to preserve the right to choose one’s occupation. Echoes of this theme sounded in the battle to achieve strong regulation of railroads. Small merchants and farmers cried out against what they saw as the crushing power of railroads. The “little man” was totally powerless against the mighty “octopus”; law was the only countervailing force.⁷ Arguments that stressed choice, independence, and autonomy went beyond self-interest in the crudest sense. Slogans and leitmotifs were so phrased as to appeal to neutrals and enlist them on the side of those who had the most at stake financially. These slogans and leitmotifs were not and could not be random; they had to express basic themes of the legal culture. *P*

Similar themes pop up in the rhetoric surrounding the economic programs most richly represented in modern welfare states. Many countries, for example, subsidize farmers and support the price of key crops. These programs are bothersome economically and politically. The laws are strongly protectionist, yet the ideology behind them draws strength from the myth of the sturdy yeoman—the family farmer, the autonomous peasant proprietor. The propaganda images

and the ethical slogans about a romanticized rural way of life are necessary to recruit political support from city people who, after all, pay the bills for the sturdy yeomen in the form of higher costs for milk, bread, cotton, rice, and tomatoes. The farmers insist that subsidies are guarantees of independence and constitutional frameworks of a way of life, rather than simply devices to cushion them from economic shocks—least of all welfare or charity, which farmers despise and reject.

It would take us too far afield to examine the ideology (or rationalizations) of the welfare state. The welfare state is, in essence, tremendously popular and has spread all over the Western world, yet welfare itself is not popular. Indeed, "welfare" is a dirty word, and more so among working people than among elites, intellectuals, or perhaps even businessmen. To some extent, the concept of "social insurance" acts as a figleaf for welfare in the welfare state. The most popular programs—old age pensions, for example—are presented and accepted as insurance benefits, that is, something paid for, not a handout from the government or anything so degrading as charity. Some programs label benefits as *earned*, that is, as a kind of compensation—for service in the army or navy, for example, or as payment on account of work injuries. Legally, the benefits take the form of entitlements, which cannot be divested and are not subject to bureaucratic whim. They are solid, untouchable *rights*. At the very least, they are transfer payments that support, justifiably, an independent way of life.

In any event, the culture explains and legitimates its subsidies in terms of freedom and autonomy, not welfare or dependence. A minimum standard of living, and social insurance in general, are not charity; they are rights that inhere in human beings because food, shelter, and health are necessary conditions for the uses of freedom. Freedom itself means having many options. Of course hunger, cold, disease, and poverty are evils in themselves. But beyond this, they are enemies of freedom. The average person probably disagrees sharply with those on the left who claim that "bourgeois freedom" means nothing to the poor and the downtrodden. But the same average person would agree that those precious freedoms cannot be realized or enjoyed to their fullest without some sort of guaranteed minimum standard. In this way, an important part of the modern *corpus juris* absorbs legitimacy from the enthronement of choice; the norms that compose it are defined as protecting and fostering choice. Just as the

state provides police, streets, and traffic lights to make free travel a reality, so does it provide programs that guarantee enough money, health care, and shelter to maintain a world in which people have options and can choose their destiny. To argue that these social insurance provisions are reductions of freedom because they regulate and tax would strike most people as profoundly misleading.

The maximization of freedom is, in fact, the very core of the welfare state. This is not a point about historical development—at least not literally. I am not arguing that maximization of choice was the sole or perhaps even the dominant impulse behind the original package of programs, doctrines, and institutions out of which the modern welfare state developed. Each of them, in each country, has had its own special history. From the political standpoint, pride of place may well go to a more primitive impulse: the desire for a decent standard of living, for food on the table, for bread and pensions in old age, for dignity and support for the sick, the unable, and indeed for the average worker. But at some invisible point these impulses melded with the new legal culture, the culture of choices and options, the culture of expressive individualism. The welfare state reconstituted itself in terms compatible with that culture. It became a prerequisite of freedom and of choice.

Some conservatives and libertarians, to be sure, honestly believe in a simple, linear relationship between freedom and law: the more rules and regulations, the less freedom. These people assert that freedom and (regulatory) law are sworn enemies; freedom means holding law at bay, shrinking it to the barest minimum. This minimum is a skeleton framework of law and order, enough to protect property from marauders and to enforce people's contracts. It takes some sort of judicial system, a few jails, and a certain amount of policing, but that is all. Beyond that, the state should do nothing.

In one sense, the basic libertarian proposition is true by definition. Any rule or regulation which tells me what I cannot do, or can only do in a certain way, diminishes my freedom. One classic definition of freedom is the absence of restraint. But freedom may also refer to concrete possibilities, to a range of options, and this, we believe, is part of its meaning in modern legal culture. Of course, a range of options implies an absence of restraint within that range; there has to be freedom to choose. But absence of restraints is only the starting point. Full realization of freedom requires *having* the options—a basket of goods, situations, or activities from which to select freely.

Freedom in the new sense, like many facets of the modern world, arises out of a consciousness shaped by technology, including social technology. Modern men and women live in a world of high technology, and its influence on their lives and minds is simply incalculable. But the technology itself and the institutions that flow from it either demand vast infusions of law, or are at least historically associated with such infusions. An advance in technology which (to put it schematically) increases "freedom" in the sense of creating new options and opportunities will almost certainly evoke or induce a body of rules and regulations as well. In the abstract, then, freedom is lessened, because there are bushelsful of fresh rules, but the increase in options and choices may be far greater than the decrease in freedom which the rules bring about. If so, then it is realistic to think of an increase in freedom at the level of society.

The automobile is a case in point. The automobile was invented around the turn of the century. It was at first a toy of the rich. Gradually, its use trickled down the social scale. By now, in wealthier Western countries, most households own or have access to a car of some sort. This opens up an enormous range of possibilities, which would have been far beyond the realm of hope a century ago. A French worker or farmer can drive to the mountains; live in the suburbs of Paris; vacation in another European country; visit historic sites; drop in on relatives who live in Provence or in Lille; move from city to city without cutting off old roots and ties completely; come and go as she pleases. The automobile also opens up chances for jobs and locales, chances at neighborhood and living conditions, that would have been difficult or impossible before. In a real sense, then, the automobile dramatically extends the range of options. On the other hand, it also generates a huge quantity of rules. There were rules of the road and traffic laws before the automobile, but they were nothing compared to the scope and scale of traffic law today. And the motorized society generates innumerable other rules: about the sale and marketing of cars, about drivers' licenses, about car repairs, gasoline stations, seat belts. The incredible number of cars and drivers forces the state to build and maintain a vast network of roads; this generates still more legal activity, on condemnation of property, highway construction, road repair. And so it goes.

The modern world is a place of freedom and a place of law; this is inevitable in so intricate a society. The complexity of modern society is a cliché, a truism. But what makes society so complex? It is the

range of possibilities, the rainbow of choices, due at least in part to modern technology. This range of possibilities in a real sense is freedom, in the sense of mobility, socially, psychologically, and otherwise. Life has an open texture, at least in comparison to prior societies.

But an open texture has two aspects—subjective and objective. Objectively, stone walls *do* make a prison, and iron bars a cage. A prisoner is not free; the citizen is. Equally important, however, is the subjective sense: the way a situation feels. For most people, beyond a doubt, there are aspects of modern life which are objectively open-textured, compared to life in the great autocracies or in tribal societies, squeezed by the rigid constraints of custom. In *this* sense, people in the West take their brand of freedom for granted; it is all they know; a life of tyranny or tribalism is unthinkable. They are not necessarily complacent, however. They may worry about aspects of freedom that cross-culturalists or scholars who write about the whole sweep of human history would consider rather marginal. Hence the great outcry over threats to extended freedom, the concerns over the fragility of privacy and the more arcane civil liberties. From the perspective of life under Attila the Hun, in ancient Egypt, or in Hitler's Germany, one is surely unimpressed with the flaws of Western civil liberties. But to many of us freedom may seem precarious, a plant in need of constant watering and protection. We are aware of the dark shadows: threats from computerized data-banks, the convulsive effect of market forces on personal security, and the like. Our base of comparison is not tyranny or tribalism, but life in the republic of choice. Hence the need for strong buttresses built up out of rights and law.

A Society of Strangers *(Social Interaction)*

One consequence of modern life is the increased number of interactions among strangers; this may be part of the very essence of mobility. Such interaction generates a felt need for law. I say "felt need" somewhat cautiously; perhaps one should be courageous enough to say that the need is real. There is certainly a strong case for traffic rules. If millions of people in the cities or on country roads drove as they pleased, and when they pleased, racing off in all directions, at great speed, the roads might be jammed with wrecked cars, there would be insupportable carnage on the highways and gridlock

in the cities. There was a weaker case, or no case at all, for stringent and elaborate rules of the road when people went about on foot, creeping along at what strikes us as a snail's pace; or when a few horses and carriages trotted along at a leisurely, upper-class gait; or when people were generally tied to some small, narrow environment, out of which they rarely moved.

A good deal of law, of course, cannot be explained literally or figuratively as rules of the road or rules of welfare or civil rights. In the modern state there are literally thousands of rules and regulations on every subject. There are rules about taxes, about securities regulation, about land use and planning. There are rules about which chemicals, drugs, pesticides can or cannot be marketed, about how much cotton dust is allowed in the air in textile mills, what flowers we are forbidden to pick, what animals cannot be hunted.

Many of these rules are extraordinarily technical. They are designed by experts, and perhaps only experts understand them. But rules in the modern state, no matter how technical, ultimately rest on much broader norms, which may or may not be explicitly stated somewhere in the code-books, or even in the decisions of judges. These broad norms support the whole structure of rules and regulations, even the most technical. Take, for example, a rule that certain chemicals may not be added to food, for highly technical reasons. Such a rule rests on a more general norm, usually expressed in a statute outlawing dangerous ingredients in food products. This norm in turn depends on more general norms—people should not cause bodily harm to other people, and a quick profit in the market is not sufficient reason. And so it goes. Ultimately, all norms are moral norms.

For some purposes, it is useful to distinguish between technical norms and overtly moral norms, the stability of which rests on different footings. A technical norm is vulnerable on technical or factual grounds. If an agency bans a food chemical, a manufacturer can attack the rule by proving that the chemical is actually harmless. Moral norms are less vulnerable on factual grounds; there are no "facts" than can impugn the laws against murder or rape. Yet in all cases legal norms depend on social norms and moral ideas.

It is important to recognize this dependence and to be aware that in this sense, then, there are no purely technical rules. Technical they may be, but never purely. Nonetheless, we are entitled to ask why there are so many technical rules; why legal regulation is so dense

and pervasive. The rule-system must reflect some central features of social life as we live it that is, in a modern and (comparatively) democratic society. (The density of regulation in a totalitarian society may reflect quite different features of life; at any rate, we leave this issue to one side.) Our argument has stressed the fantastic advance of technology; this is linked to the extraordinary interdependence of life in modern society. To be sure, members of every society, no matter how simple its social organization, are profoundly dependent on each other. *Homo sapiens* after all is a social animal. People are agglomerative beings; they live in groups, packs, families; they are not solitary hunters or hermits. But modern society has a feature almost completely lacking in simpler societies: dependence on strangers.

In the contemporary world, our health, our lives, and our fortunes are at the mercy of people we have never met and will never meet. We open packages and cans and swallow food made and processed by strangers, in far off places; we do not know the names of these processors or anything about them. We move into houses that strangers have built—skillfully, we hope. We spend a good deal of our lives locked inside dangerous, swift machines—cars, buses, trains, elevators, airplanes. One false move in the manufacturing process, one simple act of “human error” by pilots or drivers, and our lives are at risk. In a real sense, we as individuals have no power over aspects of life—and they are legion—in which we use machines and machine-made goods. We are in thrall to the machines; hence our lives are also in the hands of those strangers who make or run the machines. There is no direct way to ensure that canned soup will not poison us, that the elevator will not plummet to the ground and crush us, that boilers will not explode in our houses, and that the buildings we work in will not collapse and bury us under tons of rock and steel. There is no guarantee that the strangers who made these things are competent, and they are not bound to us by human ties and normative connections. To prevent all sorts of horrors and calamities, we need powerful methods of control over strangers and their instrumentalities. This cannot be face-to-face control. Nor are people satisfied to leave control to the pressures of impersonal markets. They look for more direct control in advance, through a strong third force—the state. In other words, they want control through law.

To the man and woman on the street, the rules and regulations that embody this control are entirely necessary; they are not inconsistent with freedom, or even with individual choice. In the republic of

choice, modern life presents a situation of weird duality. The republic promises the individual complete control of his life-chances; yet, at the same time it puts him at the mercy of strangers, beyond the ambit of his personal power. Modern society seated us at the wheel of the car, and it gave us the wonderful gift of locomotion. But is the car soundly made? Is the highway safe? Other drivers are racing all around us on the highway; do they really know how to drive? If not, then the freedom and the choices are illusory, or come at too high a price. The way out of the dilemma is through control—control through regulation, through powerful, effective rules of law over all these instrumentalities.

Libertarians, as expected, argue that the rules diminish freedom. A powerful strain of economic thought advances the view that regulation, on the whole, is inefficient and self-defeating. To the average person these arguments seem abstruse, unrealistic. The average person knows very little about efficiency in the economic sense, and, subjectively, does not feel that she or the polity suffer when manufacturers or suppliers are regulated closely. Regulation enhances, in fact, the actual range of options when it requires producers to list their ingredients on the package and prove the ingredients harmless; or insists that drugs sold on the market should be free from poison unless the label clearly says otherwise; or when government controls the training and licensing of airline pilots and bans from the cockpit drunks, drug addicts, and people who have fits of madness. Few of us want or need the freedom to manufacture canned and frozen foods, or to market antibiotics without government regulation; few of us miss the freedom to fly a commercial jet without a license. But almost all of us are consumers, and passengers, and go in and out of tall buildings; and we want to do so without worrying that we are taking our lives in our hands.

In no way, of course, is this an argument that regulation is good, desirable, or efficient in any particular case. It is merely an attempt to understand those aspects of legal culture which support regulation *in general*. The specifics are another story. There is certainly no demand for red tape, let alone an argument that red tape enhances freedom of choice; the very opposite seems obviously true. The case for any particular regulatory regime—control of the airwaves; antipollution measures; restrictions on the marketing of drugs—can be completely misguided, and no doubt often is. In any event, the argument has to be selective. Deregulation of airline ticket prices seemed to promise

greater freedom of choice, but there is no demand to deregulate the stringent rules about airline safety.

Trends and Countertrends

Our thesis is not that everything in modern law, and in modern authority systems, can be reduced to a single proposition about the primacy of choice. That would be, of course, incorrect. The thesis is, rather, that the concept of choice, the desire for choice, and the experience of choice pervade modern life and reconstitute modern law to fit the culture of choice. In some areas the dominance is so great that even exceptions, or countertrends, only confirm the fact of dominance. Nobody reacts against a dead or figurehead king.

Freedom of choice is in fact restricted in modern law in more ways than anyone can count and measure, even if one ignores the libertarian point discussed in the prior section. In some ways the areas of restriction seem to have grown in size, and during the very period in which the republic of choice seems to have won its greatest victories. This is, as we noted, the period of the welfare state. Arguably, the welfare state does not represent the enthronement of choice, but quite the opposite: the quest for security, for a safe harbor, a cocoon, the insurance society, risklessness, and social guarantees; comfort instead of chance. It can be argued that the republic of security is the primary state, and the republic of choice a secondary, lesser phenomenon.⁸

No doubt this point has some validity; the modern state has both aspects, intermeshed so tightly that they cannot be disentangled. My own view is that choice is primary, security secondary; that security can be seen as a framework or prerequisite to choice. The argument cannot be resolved one way or another. Some critics point the finger of scorn at the security arrangements of the welfare state; they sneer at their contemporaries as conformist sheep, they discuss the "escape from freedom," deplore the passing of the true individual, and look back on the golden age of liberty; or, from a similar angle, celebrate the end of the unregenerate market, the passing of laissez-faire's dark ages, and the demise of brutal, untamed capitalism. My aim is to make the other case, to decipher the messages of legal culture so as to demonstrate the underlying culture of choice, which gives meaning to countless aspects of law and life—even aspects that at first glance

seem connected to the contrary impulse, the republic of safety and security.

To take a simple example: occupational licensing laws. Restrictions on occupational choice have an ancient history—the medieval guilds are a well-known example. By 1800 or so, these older restrictions had all but vanished. A person was free to choose to be a doctor, nurse, pharmacist, or architect without special leave, and without a license from the state. Occupational freedom was one of the glories of the liberal state, which buried the guilds and estates. Yet today every modern country restricts occupational freedom sharply. In the typical state in the United States dozens of occupations and professions are closed to the general public. A state board or agency grants licenses to practice these trades, but only to those who have undergone training and passed a test. Tennessee, for example, has state boards for accountants, architects, engineers, barbers, cosmetologists, dieticians, funeral directors and embalmers, general contractors, land surveyors, auctioneers, collection agencies, pest control operators, private investigators, and lie-detector operators, along with doctors, nurses, lawyers, veterinarians, psychologists, speech pathologists, dentists, chiropractors, druggists, and those who practice “the art of body massage, by hand, or with a mechanical or vibratory device.”⁹ This phenomenon is by no means purely American. Occupational licensing is pervasive throughout the Western world.¹⁰ For certain types of occupation, the licensing movement may have peaked, or even entered a period of mild decline. But licensing remains an important aspect of labor law; no one expects it to be eliminated entirely. The major professions, and a raft of occupations, are closed except to the few who are licensed.

Yet to most people, the “freedom” to be a doctor, architect, or a lawyer, or to pilot a jumbo-jet, is not a realistic option. A person cannot choose to be a doctor in the same way she chooses a brand of soap or even in the way that she chooses a hobby, a religion, or an ordinary job. Most people are not doctors; they are consumers of doctoring services; and the services of pharmacists, architects, and so on. People depend on these services, just as they depend on the unseen makers of food products, cars, or elevators. Dependence on strangers, as we have seen, is a cardinal fact of modern society, and it is one of the factors that legitimizes the increased volume of regulation and law. A similar point can be made with regard to dependence on professionals and experts. Thus the ordinary person accepts the idea

that only those with training and skill ought to be doctors; and the unskilled must, at all costs, be kept out. People like the idea of certification—the license tells them that every doctor meets certain standards; otherwise they would be choosing in the dark. Licensing laws, like traffic laws, are also accepted as ways to keep markets orderly, to regulate flow and supply, to sustain quality; and this can be perceived (rightly or wrongly) as the enhancement of sensible choice. What the citizen demands for herself is the freedom to compete for a place in medical school regardless of background, race, age, sex, or sexuality, rather than the naked right to practice medicine. The menu of legal options tends to reflect this point of view.

Occupational choice is a crucial part of the sphere of the work life, but twentieth-century individualism, on the whole, emphasizes most strongly those aspects of life outside of or supplementary to the realm where one earns one's bread: the whole personality, the whole life, not merely the work life. Work of course is important. Ideally, work strengthens the self; ideally it is part of a general scheme that leads to personal fulfillment.¹¹ But that fulfillment, through the exercise of choice, is at all times the primary goal. Moreover, other trends in modern society—for example, the fluid life cycle and the receptiveness to second chances—act as countertrends to the countertrend of regulation; they have opened up new occupational choices for millions of people. These trends more than cancel out the narrowing of choice, which occupational licensing causes.

Occupational licensing began in earnest in the United States in the late nineteenth century.¹² The licensing of doctors and lawyers goes back somewhat earlier. The roots of occupational licensing are no mystery: the laws came out of orthodox logrolling and interest-group politics. Not all attempts to secure the blessings of licensing succeeded. The laws that were actually passed were compromises between contending interest groups; they do not require us to assume some sort of consensus or some fundamental postulate of legal culture. Moreover, the literature of those who fought for licensing is full of themes of general resonance, themes of independence and choice. Lawyers, plumbers, doctors, farmers, and other groups banded together, formed organizations, lobbied for friendly regulation and the like, not because they believed in a corporatist state, but in defense (they claimed) of the public good; they spoke as little as possible of self-interest, and when they did, they defined it in individualistic terms. Excessive or unfair competition were evils because

(among other things) they threatened the independence of the practitioner, reducing a profession to a mere business and a free worker to a serf.

Beyond a doubt, many choices in modern life are subject to what we might call mandatory brokering. There are situations where the law requires you to use a lawyer, a doctor, or some other professional; or leave off doing. For example, one cannot buy many drugs and medicines without a doctor's prescription.¹³ Some brokered choices are controversial, yet on the whole society accepts them with surprising ease. People are aware of their awesome ignorance. A right to choose drugs without understanding what they are, what they do, how to use them properly, what side effects they might have, would strike most people as a hollow choice. When the law requires a prescription, it does so, roughly, on the assumption that no amount of disclosure or explanation would ensure a rational choice, except through the brokerage of a doctor.¹⁴

Thus one could at least construct an argument that prescription laws do not interfere with the power of consumers to make choices. The argument is not necessarily specious. And in general, the doctor-patient relationship has moved in the opposite direction, that is, toward more choice and autonomy for patients. The doctrine of informed consent (Chapter 9) is one sign of this trend. Some women now choose to give birth at home or to use a midwife; in general, one sees a mild trend toward increased independence, increased resistance to professional hegemony.

Brokered choices are bound up with the larger problem or problems of information—the bewilderment of choice, which runs parallel with the virtues and advantages of choice. A Westerner who visits Poland or Bulgaria is usually struck by the wretched state of shops and markets; the helpless consumers have only a few, pitiful choices. People from the Eastern bloc, on the other hand, express dismay at the obscene multiplicity of choices in Western supermarkets; seventeen brands of toothpaste leer and call to them from the shelves. How *does* does one choose? Taste dictates whether we buy mint-flavored toothpaste, or plain; white toothpaste or green. But what brand is best for the gums? Toothpaste is hardly a burning issue; buying a car or a piano or a house is much more serious. The wide array of choices in modern life assumes that the chooser is competent to choose and that no one can do the job of choosing for him. This is obviously true for mere matters of taste, but the domain of

choice is much broader and more serious; it includes many decisions (about sexual behavior or religion, for example) that were once brokered or dictated, socially speaking. People recognize, as they must, that in some areas of life they face decisions they are simply not competent to make, or nowhere near *as* competent as experts. This is because of the complex, interwoven structure of society, the sheer amount of scientific and technical knowledge, and the secrecy in which some social actors cloak their actions.

Thus an unavoidable tension builds up, at various points of the legal order, between the dictates of choice and the facts of consumer ignorance. Sometimes the norms tilt toward brokered choices; sometimes toward a sink-or-swim freedom to choose. Often, too, we find some sort of middle way. When we buy a car or a piano on the installment plan, modern law tends to dictate various forms of disclosure; sellers must tell consumers what they ought to know but have trouble finding out on their own. Under the truth-in-lending laws,¹⁵ sellers are required to set out precisely how much interest they charge, and what happens when a buyer misses payments. Securities law insists on full, fair disclosure to the investing public. The consumer does not view such laws, of course, as in any way restricting choice, but rather as the enhancement of choice, since they provide him with information that would otherwise be hard and costly to get. (Truth-in-lending laws probably have little impact on consumer behavior; securities regulation, on the other hand, may have a strong effect on the market in stocks and bonds.) Rules that dictate what must be told, and how—that concern the flow of information—are felt to be necessities in a world of unrestricted choices. A chaos of choices, like chaos on the highways, generates a situation that breeds, legitimates, and supports rules of the road.

A person who goes on trial for murder or is about to be cut open for a coronary by-pass is in a much more serious situation than someone shopping for a car. Legally, these situations of deadly earnest are likely to be the situs of brokered or monitored choices. Only the trained professional is allowed to do heart surgery or handle the defense for an accused murderer; and the patient/defendant understands the need for this kind of brokered choice. The patient/defendant may retain control of the ultimate decisions, but day-by-day *technical* decisions are taken out of his hands.

In the broadest sense, information and access to information are essential to free choice; hence problems of the free flow of informa-

tion are pandemic in the republic of choice. The public understands this; it is one of the arguments that justifies an unimpeded flow of speech on any and every subject. Originally, the justification for freedom of speech was largely political; current law of course goes much further than political speech, and the culture tends to support this expansion. The state cannot suppress argument and expression on *any* subject. It is even hard to ban pornography (this subject of course remains highly controversial). What Jefferson or Locke would have thought about pornography as a problem of "free speech" can be readily imagined. But today an enormous range of sexual options has been legitimated; hence information about these options, and even pictures of them, claim legitimacy.¹⁶ The law has also blurred the line between information (in the sense of facts) and expressions of emotions, fears, and desires. Jefferson and Locke were thinking primarily of rational argument, of works of serious art, of the "market place of ideas;" but freedom of expression in the modern world has raced past these conceptions. The right of expression now concerns the market place of *selves* and their various components.

Choice, Contract, and the Welfare State

No social trend in the Western democracies, over the last century or so, has been so important as the rise of the welfare-regulatory state. Country after country has retreated from the "liberal" policies of the nineteenth century—away from the minimal state, the state that does not interfere in markets, especially labor markets. In each country there is now a vast corpus of protective labor legislation on hours of work, conditions of work, vacations, benefits, pensions, unemployment, and minimum wages. Country after country has enacted huge, expensive programs of welfare; in some countries, the state administers benefits from cradle to grave.¹⁷ At birth, the child gets (indirectly) a tax break or subsidy as a reward for entering this world; old age is cushioned with pensions; death triggers a final burst of cash for burial. The United States is supposed to be a welfare laggard compared to England or France, but it has in fact moved quite far in this general direction. The New Deal of the 1930s was a great watershed; in retrospect, it was only the beginning of a massive infusion of welfare and social insurance. In all societies of the West, all strata of the population, with the exception of a few diehards, accept the idea of minimum standards, guaranteed by the state and paid for out of

taxes. A decent society does not let anybody starve; it provides free schooling for all its children; it guarantees, in some countries, basic housing, and in most, some sort of medical care.

The regulatory apparatus of the modern state is also impressively large and growing larger. Typically, a massive labor code controls the terms and conditions of the labor contract; there are also laws on consumer safety, environmental protection, anticompetitive behavior, occupational licensing, and a host of other subjects. In the famous passage already quoted, Sir Henry Maine (1861) spoke of the evolution, in "progressive" societies from "status" to "contract." Maine wrote with the classic liberalism of England in mind. Some scholars detect or decry a strong trend backward toward status, or, in any event, away from the regime of free contract.¹⁸ Every regulation of business, to a degree, diminishes the realm of free contract for that business or industry.¹⁹

True and yet not true. As we argued, regulation can be and often is felt to be an enhancement of freedom, in a society of interdependent individuals. What about the regime of contract itself? It is commonplace to assert that this too is in decline; that the welfare-regulatory state is its mortal enemy. Grant Gilmore has written about the "death" of contract.²⁰ Patrick Atiyah, in his masterly book on the rise and fall of freedom of contract, more or less agrees. Over the past century, he writes, there has been "a continuous weakening of belief in the values involved in individual freedom of choice." He notes one "paradoxical" exception: "all matters concerned directly or indirectly with sexual morality." Here there has been "a significant increase in the respect accorded to individual freedom of choice."²¹

But perhaps Atiyah has missed the mark here. One could argue the very opposite case: that is, the "values involved in individual freedom of choice" have gotten more robust over the years. Either thesis probably overstates the point or runs the risk of slighting counterexamples. But "contract," in the sense that Maine and Atiyah use the term, has three distinct meanings. One is the sense of the formal, lawyer's law of contract—contract as it is studied in law school and described in treatises of law. There is also the actual regime of contract—agreements in the real world, especially business agreements. Atiyah may have blurred the line between these two; "decay" or "decline" in apparent freedom of choice in the highly atypical cases that populate law school texts or are decided by high courts is not at all the same as "decline" or "decay" in the regime of

contract, in the real world of affairs.²² Moreover, there is another sense or at least a cluster of overtones, in which the essence of contract is choice; contract means free and voluntary movements and arrangements, so that a social order based on contract is a social order which exalts the individual and his options above all else, a regime in which individual choice is the measure and legitimator of all things.

Atiyah's statement implies a definition of contract and of choice that runs counter to definitions implied in modern legal culture. The problem arises if we equate business regulation or the apparatus of the welfare state with restrictions on choice. Regulations in one sense do restrict choice, but some of the innovations and restrictions have, as we have seen, quite the opposite feel; and in many regards the range of options permitted by law and supported by custom and culture is much greater in the 1980s than in the period when "freedom of contract" ruled the roost. Choice holds a position of much greater value than it did before. The case of "sexual morality," then, is not some weird anomaly; it comes closer to the norm in the republic of choice than Atiyah realizes.

In the struggle for, and about, the welfare-regulatory state, contract has, to be sure, been a major (ideological) actor. Liberal economists made a fetish of freedom of contract, which they saw as the cornerstone of liberty and the touchstone of the market. Since the nineteenth century, the critics of classical economics have subjected the ideology of freedom of contract to a constant barrage of criticism. But most of those who criticized the norms and institutions of contract law as it developed in the nineteenth century, and who criticize it today, have never in principle opposed a regime of contract in the sense of free, voluntary choice among alternatives. In mainstream thought in Western countries, choice and consent are rarely attacked directly, and there is no particular quarrel with free bargaining when it occurs. The critics argue, rather, that in certain crucial contexts choice is illusory; or the bargaining is unreal or coerced; that people are placed in morally objectionable situations, or their options are exercised under circumstances such that one cannot truly speak of voluntary choice. A worker with a choice between starvation and a dangerous, dirty job, has no real choice at all, at least as modern culture defines it.

The case law, statutes, and treatises on contracts today reflect these ideas. They are full of discussions of "inequality of bargaining power"; special rules govern contracts with tricky fine print; and the

law has become sensitive to the danger of sharp operators and fast-talking salesmen who take advantage of customers, especially poor customers.²³ One useful concept has been the *contract of adhesion*, a European term which successfully crossed the Atlantic.²⁴ A contract of adhesion is a take-it-or-leave-it contract; in modern case law, the adhesion contract is legally weaker than the freely bargained contract, and it is subject to more regulation. Lawyers and jurists have depicted it not as the expression of choice but as the negation of choice, as a set of terms imposed on buyers of goods or services. Friedrich Kessler, in a classic article which introduced the concept into American jurisprudence, spoke of contracts imposed by the strong on the weak; these standard contracts allowed "enterprisers" to "legislate by contract . . . in a substantially authoritarian manner" and threatened to become "effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."²⁵

Within this somewhat overblown language is the heart of the critique of contract law. This critique has itself been criticized as economically and conceptually vacuous, but of course we are not concerned here with the rights and wrongs of the critique. What is interesting is the nature of the argument itself. The form (so goes the critique) is the form of free choice, but the substance is imposition of will and negation of choice. The helpless, ignorant buyer does sign the contract, lease, or bill of sale, and a signature usually indicates consent; but in these cases consent is doubly unreal—the buyer has no real choice in the first place, and in the second place, neither knows nor understands what he is signing.²⁶ Yet few people in the West, though they may level devastating criticism against the "myth" of freedom of contract, seriously question freedom or contract as such; they do not argue for a system in which tenants are bound to their landlords, unable to leave the apartment when their lease runs out; or a system in which workers are not totally free to quit their jobs. Few if any people in the West like the idea of internal passports or other trappings of societies which in fact *do* reject mobility and free choice as ruling principles.

Those who favor government regulation or welfare state programs speak much the same language of individualism and choice as do those who speak out on the other side. But "interventionists" tend to claim that under this or that condition no real choice is possible; that

certain forces and powers have squashed or stifled the freedom which should be the people's birthright; unless these forces and powers are brought under control, true freedom cannot be realized. Farmers and small merchants in the American Middle West made such arguments when they demanded regulation of railroads, grain elevators, banks, and insurance companies. They never portrayed themselves as enemies of free choice and individualism; they expressed themselves on the whole in conventional, nineteenth-century terms. The hated monopolies blocked choice and threatened economic independence. Perhaps there was an element of self-deception, or even hypocrisy. But one senses a core of sincerity: true independence, true individualism, required the framework of policy they demanded. The same culture underlies, generally speaking, the rhetoric (perhaps also the reality) of most nineteenth-century struggles over law and the economy. The Sherman Anti-Trust Act and occupational licensing laws can be cited again as typical examples.

(social)

Individuals or Entities: The Paradox of Choice

Nineteenth-century legal (and social) theory conceptualized choice in a characteristic way. In labor relations, for example, the worker had the right to come and go as he pleased; he could hire on to the job or leave off, as he saw fit. No free man, it was felt, ought to be bound to the job; slavery was an anomaly and an abomination; other forms of bound labor—indentured servitude, apprenticeship—rapidly decayed after 1800. But the employer had a correlative and symmetrical right: the absolute right to hire and fire. Both worker and boss were individuals who had full freedom of choice. To many people this seemed a perfectly realistic way to look at employers and workers. Businesses at the time were mostly small. Moreover, free contract stood in sharp contrast to older systems where apprentice, servant, or slave were bound to the job; custom circumscribed the employer's or master's rights, but these rights were much greater than the servant's or worker's rights; the two statuses were definitely not symmetrical.²⁷

Larger-scale business changed the social meaning of the neat, symmetrical rules of the nineteenth century. Increasingly, employers were wealthy and powerful corporations; formal symmetry no longer seemed fair, the scales seemed tilted toward the employer's side. During the nineteenth century workers organized into unions,

and a labor movement developed. The unions voiced demands for job security, higher wages, better work conditions, and social justice in general. In England and the United States unions waged battle in the courts as well as on the streets.²⁸ But nineteenth-century judges, drawn as they were from the upper levels of society, were often hostile to the interests of labor.

In a number of important cases in the United States, courts showed their hostility by striking down protective labor laws as unconstitutional. The law formally recognized the rights of corporations. Corporations were "persons" and their liberty and property, like those of other persons, were under the sheltering wing of the Fourteenth Amendment. No legislature could infringe or impair those rights without "due process of law," an elastic phrase which the Supreme Court and many state courts expanded magically. They discovered inside the phrase hidden powers to block pro-labor legislation.²⁹ In a few egregious cases "due process" was construed, for example, to mean that the constitution protected "liberty of contract." Hence any law that regulated work conditions had a shadow cast over it; any such laws cut down the "right" of workers and employers to enter into contracts. In the infamous *Lochner* case (1905), the Supreme Court struck down a New York statute which, among other things, set maximum work hours for bakers: not more than sixty hours a week, or ten hours a day. "There is," said the majority, "no reasonable ground for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker." The Court declared the statute void,³⁰ over a famous dissent by Oliver Wendell Holmes, Jr.

Interestingly, some of the most notorious cases used language which stressed the *worker's* rights in the very process of striking down laws which organized labor had fought for. In *Godcharles v. Wigeman* (1886), the highest court of Pennsylvania declared void a law that required mines and factories to pay their workers in cash. The law, said the court, was an "infringement alike of the right of the employer and the employee . . . it is an insulting attempt to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen . . . He may sell his labor for what he thinks best, whether money or goods."³¹

In time the welfare state, without curtailing in any way the worker's right to quit his job at will, cut back on the "individual" rights of employers to deal with workers as they pleased. "Freedom

of contract" died as a constitutional principle in the United States.³² The result was an apparent asymmetry. The worker had "freedoms" which the employer lacked. But the average person sees nothing inconsistent or unfair about this imbalance. On the contrary, it seems perfectly natural and just.

The reasons lie in the legal culture. The beliefs and attitudes of most people do not necessarily cohere or hang together; are not necessarily correct, if by correct we mean some sort of rigorous correspondence to the facts; and do not by any means live up to standards of logical analysis. People think of freedom, choice, and individual worth primarily in terms of individuals, or people like themselves; they do not think of them in terms of organizations or business enterprises except for small and personal ones—a mom-and-pop grocery, for example. This is an important point about legal culture, since, after all, laws that enhance the freedom of "individuals" often do so by restricting the freedom of businesses or government agencies.

This is strikingly true with regard to civil rights laws. These laws were passed to protect rights and extend opportunities for racial minorities, women, offbeat religions, gays, the handicapped, and so on. They laid down rules about "equal opportunity" in housing, jobs, and public accommodations. They created new bureaucracies and agencies to enforce and implement the laws. This legal activity certainly extends the range of choice for blacks, women, gays, and others who suffered and still suffer from discrimination. It forces open doors that had been tightly shut before. But from the standpoint of large landlords, business corporations, and government agencies, civil rights are not rights but duties—not privileges, but burdens. Civil rights laws are full of commands to do this and not do that, restrictions on hiring, firing, leasing, evicting, serving customers, and controlling business decisions in general. Companies can no longer simply indulge the whims of their managers; implementing the rules imposes, at the very least, a mound of red tape on industry. The zone of freedom and discretion for managers of companies is definitely circumscribed.

But General Motors or Fiat are not "individuals" whatever their legal status may be, and people do not think of them that way. Putting a straitjacket of rules on giant corporations is simply not the same as telling individuals what they can or cannot do, regardless of what economists or economic theologians may think. Curtailing a landlord's right to throw out tenants is not the same as taking away the

tenant's right to shut the door in the landlord's face. This is especially so when the "landlord" is not a person, but a mega-corporation, which may own or run apartment buildings thirty stories high and with thousands of tenants. Landlord and tenant simply stand on different planes.³³

When economic conservatives and libertarians argue against civil rights laws or rules restricting landlords or the like, they tend to phrase their arguments in terms appropriate to ordinary individuals. The rhetoric is significant. They might argue (for example) that a landlord should be able to rent space in "his home" to anyone he wants. Similarly as to employers: the state should not tell me whom I can or cannot hire to work in "my store." In one notorious case (1908) the United States Supreme Court struck down a law which, among other things, made it a crime for a railroad to fire a worker for joining a union. Government, said the Court, should not "compel any person, in the course of his business and against his will, to accept or retain the personal services of another," or "compel any person, against his will, to perform personal services for another."³⁴

Of course, such arguments strike us as somewhat specious, when the "home" is a forty-story apartment building, the store is Macy's or Harrod's, the "business" is not a fruit stand but a giant interstate railroad, and the expression "personal services" does not exactly fit a factory worker; but conservatives insist the principle is exactly the same.³⁵ They appeal to symbols and talismans of individual choice, personal privacy, and integrity.³⁶ Thus Milton Friedman reduces race discrimination to a question of individual "taste," which trivializes it as a social problem and makes it a matter of personal preference, like choosing a partner at a dance. "Is there any difference in principle," he asks, "between the taste that leads a householder to prefer an attractive servant to an ugly one and the taste that leads another to prefer a Negro to a white or a white to a Negro, except that we sympathize and agree with the one taste and may not with the other?" Of course, Friedman is aware that businesses and institutions discriminate, as well as individuals with "tastes," but organizations that discriminate do so merely as conduits or vessels for their constituents; they are "transmitting the preference of their customers or their other employees."³⁷

Whatever the validity of such arguments, they are out of step with the legal culture, not to mention the actual course of legal and social development. The contemporary person does not define choice and

taste as Friedman does, but thinks of free choice as a noble right that inheres primarily in individuals as individuals, and relates to whatever touches their lives and personalities. The converse is also important: an entity which is not an individual, which is not literally a human being, a personality, does not have, and need not have, the same free range of choice.³⁸ And, as we shall see, the moral basis of antidiscrimination law is very much in tune with the general legal culture. A taste for prejudice is not the same as other tastes because it restricts and injures *individuals*—it prevents them from exercising their own options. It stunts and ghettoizes them for being black, a woman, gay, or in a wheelchair—aspects of the person which have no basis in individual choice. Hence we must consider the issue of ascriptive or unchosen status, and its place in the republic of choice.

Organizational Man (and Woman)

The central argument here concerns the rise, flowering, and dominance of a certain form of individualism. But the golden age of that individualism—our times—is also, quite obviously, the age of the organization, especially the large organization. How are these two social facts to be reconciled?

The role of organizations in modern society is a large and difficult topic. Certainly, most individuals today work for big entities—government, or giant corporations—rather than for a family business, a farm, or for themselves. Many people live in large apartment houses; others tend their own garden, own their own nest, but even so, the chances are that nest and garden are mortgaged, and that the mortgage is held, not by Uncle Harry, but by a large or largish bank. Everywhere in society public life moves and works through organizations; labor unions may be past their prime, but they are mighty still, and so are the various trade associations and farmers' groups. Some scholars even see a kind of neo-corporatism afoot, especially in Europe.³⁹

This does not, I believe, impair the central thesis; indeed, it strengthens it. These organizations and groups claim only parts of peoples' lives; they are not "total institutions"⁴⁰ like prisons or nunneries; they demand a pound of flesh or a lease on the soul, but never all the flesh and soul, even in Japan. In traditional society, the individual was locked inside the prison of the primary group. Nineteenth-century "society," with its rigid norms and its emphasis on

discipline and control, was a kind of total organization in its own right.

Many of the groups and organizations of modern life are voluntary; moreover, they are *horizontal* interest or status groups. They act as vessels for expression or mobilization of the self, whether they are clubs of stamp collectors, radical feminist study-groups, or a league for the advancement of rice farmers. (There is more on the subject of these horizontal groupings in Chapter 7.) There is also a great variety, a veritable riot of organizations of these horizontal types; much of the job of expressing the self takes the form of choosing from this market place of organizations. This is to a certain extent true even of work choices—IBM, Phillips, or Shell are not identical in culture, structure, or habit. In general, group identities of all sorts, as Richard Merelman puts it, becomes “matters of individual choice, which can be changed without stigma.”⁴¹

There is, to be sure, such a thing as the “organization man” and, more and more, the “organization woman”: pressures to conform, rigidity, and petty tyranny on the job, not to mention bureaucracy, red tape, and the constant nibbling of minor regulation. Millions of workers suffer the subjection to red tape and bureaucracy. Alienation at or from work is common enough, though we leave to others to sort out exactly *how* common. But such alienation, whether mild or severe, makes the contrast between work life and nonwork life all the more vivid; the domain of expressive individualism swells by virtue of the very fetters that work settings impose. The radical separation of domains, to be sure, presupposes enough space—enough money and leisure—to indulge the self outside the work setting. The nineteenth-century factory worker, whatever his inner inclination, simply spent too much energy and time, from dawn to night, day in and day out, to afford those inclinations, nor did he have the safety net to encourage them. The twentieth century is incomparably richer and fuller in this regard.

Birth, Status, and the Immutable

The culture stresses choice, but some aspects of the individual are or seem to be beyond the realm of choice: race, sex, age, birth, height, general appearance, body structure (to a degree), color of eyes, and everything else that comes as part of the genetic package. I have no control over whether I am white, or black, or Asian; male or female;

young or old, and so on. These are so-called "immutable" characteristics.

Immutability as a concept has played a part in American constitutional law. In a sex discrimination case, for example, the Supreme Court duly noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁴² The fundamental laws of Western nations, generally, outlaw discrimination based on race and other ascriptive bases. It is possible to analyze modern rights laws in terms of immutability. No person should suffer disadvantage because of race, sex, and other inborn traits. And why? *Because they are immutable, or, in other words, because the culture does not see them as matters of personal choice.* It is one thing to turn down a job applicant who has no skill, no training, and a fistful of bad references; these are his own "fault"; they are matters of choice (or are thought of that way). Race is beyond the worker's control. Here too the solemn discussions at the top of the legal system distill ideas that have a more popular origin. As individualism, with its emphasis on contract, choice, and consent, pervades legal culture, it becomes the body and blood of living law. The rules reflect this master principle: disadvantage should not flow from situations or from aspects of the self that are not within a person's choice or grasp.

In fact "immutability" is not so obvious a concept as it seems at first glance. Popular beliefs and legal culture cannot be equated with facts, the real world, or even with the way sociologists construe the world. Analytically, we can distinguish three senses in which an aspect of the self may be immutable. To begin with, *brute fact is immutable; something which simply is, or which has happened once and for all and cannot be undone.* That I was born on such and such a day, in Chicago, Illinois, is this kind of brute fact. Once the event has occurred, I can in no way undo it; consequently, it would be "unfair" to penalize me because I was born there, because my mother was twenty-five or thirty-five when she gave birth; or because my family lived in an apartment instead of a house.

Race is immutable in a different, more complicated way. It involves two other meanings of "immutable," one biological and one social. The two are intertwined. Most people think of race as biology, pure and simple; racial identity is immutable because it is inborn, genetic. But race is basically a matter of social definition. In the United States, the child of a white mother and a black father is black; even a single black grandparent is enough to make the child black. This clearly has

nothing to do with genetics. It would be just as logical to call the person white; more accurate to call her mixed. In American society people of mixed blood are automatically black. With regard to ethnicity, the situation is different. The child of an Italian mother and an Irish father might simply say "I'm half Irish" or "half Italian." But there is no such thing as "half white." In England, whites lump Pakistanis and Indians together with blacks, which defies conventional (scientific) classifications of race.

The decision to attach consequences to certain genetic traits and not to others is almost entirely social. Nothing turns in society on whether you are brown-eyed or blue-eyed—traits which are in fact genetic—but the cluster of traits defined as "racial" is exceedingly significant. Race is a basic social category; race has played a crucial, tragic role in the history of nations and in the destiny of individuals. Other aspects of the self may be biologically determined and carry social consequences, precisely because people do not see them as utterly beyond choice. For example, there is a great deal of discrimination, conscious or unconscious, against fat people, but for millions of suffering dieters, body fat either is genetic or might as well be. It is the social definition that counts, not the genetic situation.

Sex differences are biologically rooted in a way that is deeper and more significant than race, but the same cannot be said for sex roles. These are largely, if not entirely, sociocultural. In fact, most immutable characteristics are not biological at all; they are simply defined that way. But the idea that these characteristics are defined socially, not biologically, is a bit too sophisticated for many people; they prefer to think of race, sex, and so on, exclusively in biological terms. Social definitions, at least in the short run, are as pervasive and difficult to change as biological facts; they are thus equally "immutable" from the standpoint of the person in question. The massive power of some social definitions—race or gender, for example—is more than any woman or black can overcome in the course of a lifetime. In the past such definitions consigned women and blacks to fixed and inferior roles; in many ways they still do so—egregiously so—in many countries. The law, however, defines traits as "immutable" precisely to draw one notable consequence: they lie beyond the power of individuals to choose. In modern legal culture choicelessness, like choice, is a fateful fact. A norm of growing power, working its way in the direction of consensus, posits something to this effect: it is not right to

infectious disadvantage on people by reason of aspects of life that are completely immutable, that is, beyond the reach of choice.

To many of us living in the 1980s this seems self evident; the very cornerstone of morality; it is hard to think of another, competing ethic. But in fact the social and legal consequences of immutability are fresh developments—products of contemporary legal culture. What was immutable in, say, the eighteenth century did not thereby become the subject of civil rights law. Quite the contrary: it simply fixed a person's place on the social ladder, usually beyond any hope of alteration. Immutability of traits and factors did not signal an ethic of nondiscrimination; rather, it was the key to one's station in life, not to be questioned or altered. In a society with primogeniture birth order was one such trait; sex roles were generally fixed in most societies; caste, race, or ethnicity was determinative in other societies; religious affiliation in the Ottoman Empire and elsewhere. The United States and most Western countries have today largely reversed this situation. Large bodies of law and great systems of rules purport to outlaw discrimination on the basis of race. These rules play their most prominent role in the United States and other countries with large racial minorities. Sex discrimination, too, is an almost universal subject of concern. Western countries generally lay down rules that mandate equal pay for both men and women⁴³ and outlaw other forms of sex discrimination.

A growing body of rules extends the principle to other groups. Religious discrimination, for example, has been widely put to the ban. The same principle can be extended to ethnicity, sexual preference, and physical handicaps.⁴⁴ Each of these is a vast subject in its own right, and has its own plateful of political and social complications. Each occupies a special niche in the cultural fabric of the republic of choice. Religion, for example, has a peculiarly double aspect. It is, in the first place, a matter of birth. Almost all of us are born into specific religious heritages. For many people religion borders on ethnicity, so that it is hard to disentangle the two. Judaism is a prime example; neither Jews themselves nor antisemites bother to distinguish between practicing Jews and born Jews. The Third Reich defined Jewishness as a racial category and sent everyone who had Jewish ancestry, whether atheists, Christian converts, or orthodox rabbis, to a common end in the gas chambers.

In the United States and other Western countries religion still often

has this ethnic, ascriptive flavor. This is true for many minority and non-Western religions—Buddhism or Islam. But, as we note again in Chapter 9, religion has also become a matter of personal, individual choice. People choose freely from a broad menu of spiritual and cultural patterns. Religious discrimination is thus condemned on two distinct, somewhat contradictory counts: first, because for many people it is *not* a matter of choice, but rather of immutable destiny; second, because for others it *is* a matter of free choice—an aspect of their style of life, an elected pattern of belief and behavior, which the modern republic is bound to protect.

Sexual preference, too, is a mixed aspect of personal status. The basic sex drive is believed to be instinctual. It is not clear what determines sexual orientation, but in any event it develops early in life. People in the West have grown somewhat more tolerant of minority patterns of sexual behavior. They are less likely to condemn homosexuality as mortal sin. “Sodomy” was once punishable by death; it has now in many places been totally decriminalized. The subject still arouses passions on both sides, to be sure. The Roman Catholic church and conservative Protestant churches are bitterly opposed to any further laxity; they want the laws and customs to condemn homosexuals and homosexual behavior. Many people who may or may not approve of same-sex relationships believe that the behavior is the product of personality defects, illnesses, neuroses, some sort of malfunction in the human machine, perhaps arrested development, but in any event beyond a person’s control.

Yet sexual preference, like religion, has also taken on something of the flavor of voluntary choice in modern society; it has become, for certain people, an elected “life-style.” Thus though the basic idea is “can’t help it,” an element of choice comes to be associated even with fundamental patterns of sexuality. The phrase “sexual preference” hints at this element. And indeed it is true that the precise menu of sexual acts—and the cast of characters eligible for partnership—is often literally a matter of preference or choice; by no means is this only true for “sexual minorities.” After all, even the “sexual majorities” though they take their “partners” from a socially approved list, were once much more limited, legally speaking, as to which partners they could choose and when, and what to do with them. Free choice of sexual practices was hardly the nineteenth-century ideal. In modern legal culture, it becomes harder and harder to argue with free choice.

Discrimination on the basis of *wealth* has been one of the trickiest legal issues in American constitutional law. The Supreme Court moved boldly, after the 1950s, to ban race discrimination and, after 1971, sex discrimination. It based its decision on the Fourteenth Amendment, which guaranteed to everyone the "equal protection of the laws." The question arose: did the Constitution also forbid legal distinctions based on income or wealth? Were these too denials of "equal protection," or of due process of law?

Wealth discrimination is pervasive in Western society—one might even say fundamental. Thus it is no surprise that the Court has treated the subject quite gingerly. In a number of cases, starting in the 1950s, the Supreme Court seemed to be groping toward some sort of principle which limited the right of the state to discriminate against people without money, or to favor those who had it. In the famous cases of *Gideon v. Wainwright*,⁴⁵ Gideon, accused of a crime in Florida, was too poor to hire a lawyer. He demanded that the state pay a lawyer to defend him. Florida law said no, but the Supreme Court said yes. In another case, the Court declared the poll tax unconstitutional.⁴⁶ The Court struck down a number of laws as offensive to the Constitution because they discriminated on the basis of wealth. These decisions rested on this or that clause of the Constitution, read in a somewhat creative way. But the Court was never willing to go the limit and find in the Constitution a *general* ban on wealth discrimination.⁴⁷ The case-law moved hesitantly a few steps toward this goal; the Court stalled, back-tracked, and the theory vanished from the stage of doctrine.

The reasons are obvious. The Court cannot strike down wealth discrimination in the same way it can strike down laws that discriminate against women or blacks. Taken literally, a ban on wealth discrimination would turn the whole social structure topsy-turvy. Wealth discrimination is unavoidable; it is a permanent form of inequality in Western societies. Law and social policy may set a floor under misery and poverty, or a ceiling on woe; they can guarantee, or try to guarantee, basic decencies of life. But legal action cannot, as things stand, eradicate the advantages of a fat bank account, a sound portfolio, and (perhaps most important) a privileged upbringing.

What legitimates these inequalities in society? This is a complex issue, and there are many answers—including, of course, the observation that for some people *nothing* legitimates inequalities. Yet many people, even poor people, do seem to endorse the system of

inequality and label it as more or less fair.⁴⁸ They do so for a number of reasons. One justification is worth noting here. In myth and story, and in the opinion of at least some people, wealth is the product of merit—it is earned, in other words. Of course most family wealth in society (perhaps 80 percent) comes from inheritance;⁴⁹ in the past the percentage may have been even higher. There is also accidental wealth (winning the lottery). Finally, there is earned wealth, created wealth, self-made wealth, one-generation wealth. A popular theme in literature is the rise from rags to riches. Inherited wealth fascinates the general public, and the very rich have celebrity status (see Chapter 7). But popular culture prefers to focus on forms of wealth specific to mobile societies. In fairy tales and older myths, the poor shepherd boy and the servant girl turned out as a rule to be foundlings, lost heirs, princes and princesses of the blood. Success, wealth, and honor were matters of breeding; “princess” was an ascriptive, inborn status, whether in a hovel or a palace. Blood will out. Today’s rags-to-riches story leaves out this ending; the shepherd or frog never turns into a (literal) prince. Princedom is more or less something plain money can buy, and so is celebrity status. If one is rich enough, after all, one can always *buy* a palace.

A good start in life—a middle-class or upper-class background—is still tremendously advantageous; similarly, to be born into a poor family, especially in the slums or ghettos of big cities, is a tremendous handicap, which only a heroic handful ever surmount. But popular literature and popular opinion tend to gloss over or ignore this point; it is buried beneath the rubble of an ideology stressing merit, choice, and desert. In one American survey more than twice as many people felt that people who fail “are lazy and lack self-discipline,” than felt that such people “weren’t given a good enough chance to begin with.” The rich, on the other hand, were “models to be admired and imitated,” rather than selfish, ruthless, ambitious men.⁵⁰ Thus the rich are defined on the whole as people who have deservedly “made it,” who have earned what they have; and the culture reinforces this basic ideology in hundreds of large and small ways.

(Pro. ethic lives
on)