

If Ye Are Privy To Thy Country's Fate, Oh Speak: An Answer From Robin Paul Malloy's *Planning For Serfdom* and Classical Liberalism In The Tradition of the Scottish Enlightenment

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We cannot say "the past is the past" without surrendering the future.

Winston S. Churchill
House of Commons, March 14, 1938

Juliana Geran Pilon, writing about an award of the Medal of Freedom by President George Bush to Professor Friedrich A. Hayek, who received the 1974 Nobel Prize in economics, quoted Czechoslovakia's minister of privatization, Mr. Thomas Jezek, who said:

If the ideologists of socialism would single out the one book that ought to be locked at any price and should be strictly forbidden, its dissemination and lecture carrying the most severe punishment, they would surely point to [Friedrich A. Hayek's] *The Road to Serfdom*.¹

There is another book which the ideologists of socialism ought to lock up. It is Professor Robin Paul Malloy's, *Planning For Serfdom*.²

This time, however, the American socialists are better protected. Their first defensive barrier is not their control of university departments, schools, and administrations, or their huge influence in America's book review literature, or its mass visual or print media. They have natural allies, who are unnatural in the social order. These are the managerial elite, or the "public entrepreneurs." They "move and shake" cities, communities, families, schools, universities, and destroy the morality which arises from a spontaneous social order — the social order which their corrosive conduct first defaces and then dissolves. The managerial elite has millionaires, created by the Department of Housing and Urban

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1. Juliana Geran Pilon, *A Great Man — and a Great Idea*, WALL ST. J., Nov. 18, 1991, at A16.

2. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

Development and state and municipal funding programs, elected officials in municipal, state, and federal offices, a river of favorable print and visual media, very powerful and political law firms, accountants, experts, social planners, and an excellent cover: sports and games for the taxpaying public.

What the managerial elite does not have is "values." Values which come from the natural social order, from which also comes the individual's freedom and dignity. Professor Malloy has these values. He understands them. He expresses them. His major opponents are not the varieties of socialists. They really cannot compete against Malloy. His opponents, who protect the socialists, are the elite managers, or the "public entrepreneurs."

Malloy writes about both groups. He concentrates upon the managerial elite of the American cities, and upon Indianapolis, Indiana in particular. The socialists will read and understand that in Malloy they have a "main enemy" (one of their favorite expressions). The public entrepreneurs will not read Malloy. These persons read their statutes, their rules, and regulations, which make them the rich and powerful special class of whom James Burnham wrote in 1941. A class distinct from the legal owners of the instruments of production and detached from responsibility to citizen-taxpayers on whom they impose burdens, duties, and massive debt. This time the socialists have more protection.

This review and comment uses Professor Malloy's words to explain the great concepts of law, economics, politics, and social philosophy which he expresses. His words appear throughout either as direct quotations or in accurate textual use (full sentence and paragraph) or paraphrase, except when the reviewer's thoughts are inserted and expressed.

I. THE SOCIAL CONCERN AND PROBLEM: ACADEMICS, INTELLECTUALS, OFFICE-HOLDING FUNCTIONARIES

In rejecting a natural rights discourse, liberal, CLS and conservative philosophies deny the fundamental reference point of the individual as the creative foundation for freedom. In its place they offer their own distinctive brand of "higher consciousness" which informs their own particular conception of authority.³

Professor Robin Paul Malloy is a very well informed economist and professor of law. This alone makes him unique, but there is more. He

3. Robin P. Malloy, *Toward a New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27, 56 (1991) [hereinafter Malloy, *Discourse*].

is a teaching academic who believes in values,⁴ and that liberty of the individual is among the highest values. There is, he states, a natural or spontaneous social order which will protect and advance the dignity and freedom of an individual.

In today's American legal-academic establishment, Professor Malloy is a rare professorial item. I postulate that if one might make a random selection of 1,000 professors of law from American law schools in 1992, there might be fifty who would seriously explore, without previous political commitment, the meaning which Malloy develops in his use of words such as "liberty," "freedom," and "individual," and his explanation of Smithian morality, economics, and social and political philosophy. These fifty souls would need protection before they would come out from under the ice.

With *Serfdom*, Professor Malloy establishes himself as: (a) one of America's keenest analysts of Adam Smith, and Classical Liberalism from the Scottish Enlightenment; (b) the clear leader in a legal-educational field which is called, "Law and Economics," which he seizes and takes away from others; (c) an essayist of the first magnitude on urban redevelopment in contemporary America; (d) a leading advocate of "liberty" and of those sustaining social values which are independent from "wealth-maximization" and "economic analyses of law"; and (e) a powerful exponent of general rules which restrain special interests, and ideological interests in particular. Professor Malloy is an excellent writer. This volume might be the basis of an entire law school course.

It follows that several persons will not be pleased with this work. Among them are:

1. Judge Richard Posner, on the United States Court of Appeals for the Seventh Circuit, and a chorus of academic Posnerettes who dance to a tune called "economic analyses of law."⁵
2. Mayor William H. Hudnut, III, of Indianapolis, Indiana (who left office on January 1, 1992) and former Indiana Governor Robert Orr.

4. Law and economics does not, therefore, concentrate on analyzing, by economic methods, the efficiency of numerous legal rules generated by a given society. Rather, the primary goal of law and economics should be to investigate how certain values or principles will be affected by changing a community's current social, political, and economic arrangements.

Id. at 32.

5. Judge Posner and Professor Malloy are not cordial antagonists. They show hostility in their continuing debate. See MALLOY, *SERFDOM*, *supra* note 2, at 164-67 & nn.10-19; Malloy, *Discourse*, *supra* note 3.

3. Members of the boards of directors, and their officers, of an assortment of public corporations and private foundations in Indianapolis and Indiana, (and in other cities, too).⁶
4. Several "Urban Development Assistant Grant" (UDAG) and Municipal Bond Millionaires in Indiana and in other American cities and states.⁷
5. A few writers employed by *The Indianapolis Star*, *The Indianapolis News*, and *The Washington Post*.⁸
6. A group of persons who function inside legal education, in a field called "Critical Legal Studies."⁹

6. Several are listed in Robert N. Bell, *Public, Goldsmith Reviewing Use of Money to Promote City*, INDIANAPOLIS STAR, Dec. 22, 1991, at A1, A8-A9, which is printed in Appendix 1.

7. In several places, Professor Malloy discusses UDAG grants. See MALLOY, SERFDOM, *supra* note 2, at 113.

8. An extensive and supportive article about Mayor William H. Hudnut, III, in *The Indianapolis Star*, indicated that he "created an image that's had us hooked." John R. O'Neill, *The Hudnut Legacy*, INDIANAPOLIS STAR, Sept. 1, 1991, at F1 [hereinafter O'Neill, *Legacy*]. *The Indianapolis News* ran a five-day set of articles about Mayor Hudnut, by a competent writer, Kathleen M. Johnston. The first was printed on the evening of Christmas Day, 1991. Kathleen M. Johnston, *Hudnut Was Can-Do Mayor of Can-Do City*, INDIANAPOLIS STAR, Dec. 25, 1991, at A1. This was, perhaps, intended as a late Christmas present to the taxpayers of Indianapolis, because the third article in the series carried a headline saying "[Hoosier] Dome to be Shrine for Hudnut Success." Kathleen M. Johnston, *Dome to be Shrine for Hudnut Success*, INDIANAPOLIS STAR, Dec. 27, 1991, at A1. If so, the Hoosier Dome is a rather large icon. A very favorable article about Mayor Hudnut appearing in *The Washington Post* on November 23, 1991, is discussed in footnote 65.

9. Professor Malloy is, in fact, very fair in his analyses of the Critical Legal Studies group and an assortment of related persons and groups, who do receive much time and much printers' ink in American law reviews. MALLOY, SERFDOM, *supra* note 2, at 50.

My opinions about the persons who subscribe to the Marxist philosophies asserted in the Critical Legal Studies movement are captured by Paul Hollander. He writes a superb review of a great book, *Utopias Elsewhere: Journeys in a Vanishing World*, by Anthony Daniels (Crown, 1991). Daniels, an English psychiatrist and writer, visited Albania, North Korea, Romania, Vietnam, and Cuba, between April 1989 and January 1990. Daniels makes penetrating observations about Western intellectuals, including his fellow tourists. He commented about their conduct at a ceremony honoring Kim Il-sung in North Korea: "There was no external compulsion for these people to behave as they did, to abandon their critical faculties, to lose their identity, to be united in a pseudo-mystical union with a hundred thousand people of whom they knew . . . absolutely nothing." They were people who displayed "one of the besetting sins of Western intellectuals . . . [the] envy of suffering, that profoundly dishonest emotion which derives from the foolish notion that only the oppressed can achieve righteousness." Paul Hollander, *Days of the Iron Curtain*, WASHINGTON TIMES, Dec. 17, 1991, at F4.

7. The powerful special interests which have major influences in state and federal legislatures, and the executive branches of government in the United States.¹⁰

10. See Kathleen M. Johnston & Douglass T. Davidoff, *Taxes Paying One-Third of Sports Corp. Costs*, INDIANAPOLIS NEWS, Oct. 31, 1991, at A1. The journalists state that the Indiana Sports Corporation, which hosts "dozens of amateur sporting events, including the 1987 Pan American Games, was founded in 1979. Sports Corp. helped the city earn an international reputation as a leader in the business of hosting sporting events." *Id.* The Sports Convention is funded by the City of Indianapolis which will give over \$650,000 in taxpayer's money to it in 1992. The money is pledged by the Indianapolis Convention & Visitors Association (ICVA), a public agency. The first "public agency" to fund the Sports Corporation for 1992 was the Capital Improvement Board (CIB), which has paid the Sports Corp. \$150,000 annually since 1983. The CIB operates the Convention Center and the Hoosier Dome, and it has promised to make payments to the Sports Corporation until 2003. CIB also funds much of the budget of the ICVA, and the latter's budget for 1992 is \$4.3 million of which two-thirds comes from CIB's tax receipts. This article describes a Michael Browning, a local real estate developer and chairman of the Sports Corporation, who said that public subsidies are appropriate: "I think the business we bring to the community every year is extraordinary," and "I can't imagine we're not earning our keep." *Id.*

Later public analyses suggest a different imagination. See Patrick Morrison, *CIB May Face Million-Dollar Shortfall*, INDIANAPOLIS STAR, Jan. 22, 1992, at A1. Morrison states that the shortfall is due to fewer travelers, a losing season for the Indianapolis Colts football team, lower attendance at their games, and a slowdown in restaurant business. Morrison states that officials became concerned when they saw these developments:

- The hotel-motel tax collection dropped in 1991 by \$11,686.

- Revenue from the Colts games and other professional sports at the Hoosier Dome fell by \$46,000.

- Food and beverage tax revenue fell short of its expected increase by over \$200,000.

- Other similar reports.

Id. This means, we are told, that if the Indianapolis trends continue, the money which the CIB would receive in 1992 would fall "\$1.25 million to \$1.75 million short of what was projected." *Id.*

The 1992 budget for the Capitol Improvement Board is \$25.8 million. Of this, \$3.4 million is dedicated to the Indianapolis Convention & Visitors Association. The Association uses this money, Morrison states, to "market and promote Indianapolis for conventions and tourism." *Id.*

Others are concerned with the thought whether, as Mr. Browning put it, the CIB is "earning our keep." Another article in *The Indianapolis Star* states that the Indiana House of Representatives passed a measure which would divert up to \$5 million annually from the Capital Improvement Board to a state fund to be used for economic development in all of Marion County, Indiana. Dorothy Petroskey, *House Passes Bill to Divert \$5 Million from CIB*, INDIANAPOLIS STAR, Jan. 25, 1992, at A1. The bill's supporters in the Indiana House said that the legislation is needed because of complaints over how the CIB has allowed tax money to be spent. One House member said that some of the tax money given by the CIB to the Indianapolis Convention and Visitors Association was used for memberships in country clubs for the Association's executives and a contest to

8. All collectivists, whether eighty-ton Lenin-Marxists;¹¹ British Socialist Lords and Ladies of the Tony Benn variety; German Socialists such as Hitler and his assorted criminals; American Hollywood Liberals and Leftists; Maoists; Religious Liberationists in Latin America; Righteous Educationalists throughout the United States; old and new Lincoln Brigadists; or Enver Hoxha, Kim Il-sung, Fidel Castro, Nicholae Ceausescu, Gus Hall, Erich Honnaker (whether in Germany, Russia, or Cuba) and their many kindred spirits.¹²
9. Many Deconstructionists, and especially the reconstructing deconstructed deconstructionists.¹³

promote a convention. This House member questioned whether the foundation of economic development is found in the golf game of the Association officers and officials and in paying their dues and fees. This article states that the bill's opponents are confident of removing this measure when the bill reaches the Indiana Senate. *Id.* at A4.

11. For over 100 years the socialist-marxist community has assailed the conspicuous wealth of "those rich capitalists." This is a commonplace among them, whether referring to a large gingerbread house in 1892 or a large expensive car in 1992. "Tonnage" gives the socialist-marxists their due recognition in return. It refers to their conspicuous and perhaps only real creation: their work of art. This is impressive military tanks. The higher the tonnage, the greater the socialist. An "80-ton Lenin-Marxist" stands very high in the Order of Socialist Knights of the Tank.

12. Malloy refers to this kind of mind in the context of the words "Politically Correct" and persons who would exercise hegemony over alternative and conflicting views. "Such a view, however, merely replaces one historical tyranny with another, suppresses one illegitimate hierarchy with a new one, eliminates one form of political, economic and legal hegemony only to promote a new one." MALLOY, SERFDOM, *supra* note 2, at 52-53.

13. Serious comments about Deconstructionism may be found in comparing Robin P. Malloy, *Signs of The Times — Law and Semiotics*, 65 TULANE L. REV. 211 (1990) with Peter Shaw, *The Rise & Fall of Deconstruction*, 92 COMMENTARY 6, 50 (Dec. 1991). The Shaw article states that one of the Godfathers of Deconstruction had an earlier history of support for the Nazis in Europe.

Himmelfarb, a famous historian states:

Another intellectual fashion that is sweeping the [academic] herd may seem to be at cross purposes with [the new] determinism, but actually complements it neatly. This is the philosophy of deconstruction. Where race/class/gender is clearly deterministic, deconstruction would appear to be (and in some contexts is) so undetermined, so unstructured, as to be nihilistic. * * * It is ironic, and pathetic as well, to see these bold, free spirits coming to this doctrine not even second-hand but third-hand, and precisely at a time when it has become *passé* elsewhere. American literary critics took over deconstruction from the French, just as the French began to abandon it. And now American historians are adopting it from their literary colleagues, just as the latter are becoming defensive about it (in part because of the unsavory disclosures about the antisemitic, pro-Nazi past of one of the most revered leaders of that school, Paul de Man).

Gertrude Himmelfarb, *A Letter to Robert Conquest*, 4 ACAD. QUESTIONS 44, 45 (1991).

10. Senator Joseph Biden, Chairman of the United States Senate's Judiciary Committee, who will, we may confidently expect, wave Professor Malloy's book at some hapless court nominee, and make him or her swear that this book will never be read, or cited in a federal judicial opinion as long as the person sits on a federal court.

Malloy's Concern About "Governor Isuzu" and "Mayor Superdome"

Malloy states that a body of knowledge is available which creates and then sustains the spontaneous social order, and that this knowledge should be known and understood by persons who exercise political power. If they do not know and do not understand, then they will establish the conditions in which freedom is extinguished. They will direct the community of persons into an unwanted and unexpected serfdom.

This means, implicitly, that it is economically inane for an officeholder to refer to himself as a "Governor Who Goes to Japan to Get Hoosier's Jobs," a favorite theme of former Indiana Governor Robert Orr, or a "Mayor Who Creates Jobs." Neither person creates anything of the kind. But each is quite capable of creating the social conditions in which there is no social spontaneity, no constraint upon the state and its favorite organs of power which benefit selectively enriched persons and organizations, no capital-creation, no city sustaining import-replacing production, no new employment centers or activities (as distinguished from expensive, publicly-funded employee and employment-transfer centers), and fewer and fewer jobs.

In their place, a Governor or Mayor and the special interests might provide for lots of swimming, diving, bicycling, tennis, jogging, football, basketball, sweating with bulging jugular veins and flared nostrils, corporate jogging competitions, and world-class games without lions to devour the contestant who does not win a medal, flags, pennants, and heavily-greased fast food from vendors which sell a gulp and a slurp to all observers. These activities are led by "very public persons." They float in an ocean of compassion and empathy. This is displayed in the daily press or on "talk-radio programs," or on television (always with the "concerned pose," which at Christmas, or Hanukkah, or when retiring from office, is superimposed upon a panoramic view of the city's skyline with its assortment of new, posh hotels, which are not filled, or office buildings, which have many vacant rooms and corridors.)

This inundating public compassion omits recognition of the standards and criteria which alone sustain good schools, safe parks and streets, and clean, disease-free facilities where persons may recreate in a community in which there is individuality and respected equality. It cannot recognize them. These standards and criteria are derived from the spon-

taneous social order, which the "job-providing" office holder, funded with a deluge of federal and municipal and foundation cash, has all but destroyed. This is Professor Malloy's concern about conditions in the United States.

His concern arises from a remarkable understanding and explanation of the organized economic knowledge which sustains the spontaneous social order. This is Classical Liberalism identified in Smithian Economics, properly understood and explained. He applies these principles to Urban Development, U.S.A. His principal example is Indianapolis, Indiana. He has, thus, two books in one. Actually, there is a third book here, which addresses Comparative Political and Social Theory. It or they are a great read and would be cheap at twice the price.

II. THE SOCIAL CONCERN AND PROBLEM: INDIANAPOLIS, THE EXAMPLE

"But God Never Made Little Green Apples, And This Book Ain't Read In Indianapolis At Anytime."

This volume's theory of law and economics discloses the new serfdom. This new serfdom is illuminated by a specific examination of urban planning and development. Professor Malloy states that late twentieth century America is preoccupied with the public rather than the private; with planning rather than spontaneity; with material projects and objectives rather than spiritual triumphs. As a result the American social order drifts into static quagmires sustained by statist ideology. Planning sustains the assertion of political over economic means. This leads to an age of serfdom, or a condition in which, again, personal status and managerial hierarchy rather than individual talent, creativity, and human dignity, become the measure of one's worth, identity, and personality.¹⁴

In *Serfdom*, there is no assertion of a conspiracy against an individual or persons. There is no Marxist/Communist/Socialist claim of inevitable class struggle with its terror-by-committee system, and the social and economic ruin which that postulation generates and has established. Among these pages, one does not find the extreme Leftism of the British MP, Tony Benn. This is not a Vladimir Pozner or Phil Donahue splashing their infinite sound bite wisdom upon the American television public.

Malloy, a student of Adam Smith, Friedrich A. Hayek, and Milton Friedman, is exactly the opposite. His intellectual distress comes from the transformation of the legal and economic discourse in which new millionaires and their political office-holders speak freely "of public/private partnerships, co-financing, and mutual cooperation in urban

14. MALLOY, SERFDOM, *supra* note 2, at 1.

planning.”¹⁵ They validate norms which are antilibertarian (anti-individualist), which reject natural rights, and ultimately destroy the delicate societal balance “necessary for the preservation of the creative [social and economic] discovery process.”¹⁶ As a result, individual liberty in the classical liberal sense and in the sense of the founding of the American Republic is destroyed. It is replaced with a conception of liberty for the community or liberty for the state. In the community’s liberty and in the state’s liberty, the individual and freedom disappear.

Implicitly Malloy maintains that the immediate threat to liberty and to the individual’s unique development is a “Manager of Co-Financing,” who brings sports stadia to the city or state. A sea of sports entertainment deflects attention away from the expert who is summoned to plan and manage the seemingly anarchistic marketplace.

In return, the individual is provided with a less creative, less expressive, and less dynamic environment in which personal political connections replace formerly impersonal market exchanges. The transformation is profound. It puts power into the hands of the state, which, by virtue of its monopoly on the coercive exercise of public power, presents a far more devastating risk to individual liberty than any perceived weakness in the operation of the free market [or in an immediate threat of a new Gulag].¹⁷

The key to understanding the serious threat which Malloy describes emerges in the recognition of commercial monopoly. His perception of the monopoly is refreshingly different from the economist who sees only inefficiency. He tells us that although

some legal economists argue that monopoly is bad because it is inefficient and it does not make good use of scarce resources, I [argue] that monopoly is fundamentally harmful because it lacks a sufficient counterbalancing power source. Monopoly, in a metaphorical sense, embodies the problems of the unlimited state, wherein individuals are subject to the whims or despotism of the sole exerciser of power.¹⁸

15. *Id.* at 4. In a slightly different setting, Malloy observes, “In this interactive process, however, it is the power to name, the power to organize and describe ideas, the power to structure the way we talk about ideas that gives signifiers power over that which is signified.” Robin P. Malloy, *Introduction to the Symposium*, 42 SYRACUSE L. REV. 1, 4 (1991) [hereinafter Malloy, *Introduction*].

16. MALLOY, SERFDOM, *supra* note 2, at 127.

17. *Id.* at 128.

18. *Id.*

His argument is much more. It is a careful explanation of social forces which always should be encouraged and sustained because they establish a social equilibrium. This condition permits personal development, and creative spontaneity in the social order. It permits a legal system which sustains all persons, because there is an economic climate in which they may function. It is called a "free-market economy."¹⁹

Economics, we are told, is a process and a discourse. It is best understood within the bounds of a particular discussion and with reference to specific examples. For this reason, urban development is examined. Malloy's analysis of urban development is not meant to be a detailed treatment of real estate development, constitutional law issues, or financial programs which establish a new shopping mall, dozens of restaurants and sporting facilities.

The subject of urban development "serves as a point of reference for conducting a dialogue on the proper relationship between law, legal institutions, and economics."²⁰ Indianapolis, Indiana is used as an example because (a) Malloy is very familiar with the city, (b) the impact of \$1 billion is greater in Indianapolis than in a larger and more diversified city such as New York or Chicago, and (c) its political and economic ideology (in the rhetoric) is more defined and cohesive than in the more pluralistic and factional politics of a larger city.²¹

"The Amateur Sports Capitol of America" "You betcha, we have our own 'West Side Story' on the West side of downtown Indy."

Indianapolis is a city of about 1,200,000 persons in central Indiana.²² It comprises eighty-four percent of Marion County's population.²³ In the 1970s and early 1980s, the city experienced a serious decline in its

19. Malloy has observed that,

Hayek tells us that freedom emerges in, and is protected by, the marketplace because the metaphorical marketplace allows individual creativity to blossom through the spontaneous interaction of innumerable autonomous people. It is the dynamic and autonomous nature of the free marketplace that allows us to be free. Freedom for Hayek and other classical liberals is the product of a spontaneous social order that emerges in a fluid environment of infinite, independent exchanges, each informed by community understandings of the value and boundaries "set" by such exchanges.

Malloy, *Introduction*, *supra* note 15, at 215-16.

20. MALLOY, *SERFDOM*, *supra* note 2, at 2.

21. *Id.* at 5.

22. *Id.* at 103 (citing Richard L. Forstall & Don Starsinic, *The Legal U.S. Metropolitan Areas*, *URB. LAND*, Sept. 1984, at 32-33).

23. *Id.* (citing Rita J. Bamberger & David W. Parham, *Leveraging Amenity Infrastructure — Indianapolis's Economic Development Strategy*, 43 *URB. LAND*, Nov. 1984, at 12-18).

commercial and industrial base.²⁴ This experience was very similar to other cities in the nation's "Rustbelt." Between 1970 and 1980, Indianapolis lost about 45,000 residents, and in the three years between 1979 and 1982, the city lost 35,000 jobs in the private sector.²⁵ Despite this decline, Indianapolis continued to pursue active downtown investment and a redevelopment strategy based on the construction program designed to house (a) pleasure-stimulating sporting events, and (b) office buildings, hotels, restaurants, and their supporting facilities. Between 1974 and 1986, approximately \$1 billion was invested in sports facilities and related downtown projects. The downtown business district alone had some forty office, retail, hotel, and related housing projects.²⁶ This occurred because persons who controlled the city's government were willing to engage in and foster public/private partnerships, through which the city became the developer, equity partner, or landlord for almost all of the major downtown projects.

Redevelopment activity placed millions of taxpayer dollars at risk in real estate projects.²⁷ It put millions of dollars into the income accounts (but not necessarily taxable income) of selected developers, lawyers, accountants, financiers, urban planners, public and private officials, and other persons to whom much power was given if they would but agree with the overall activity.²⁸

All of this occurs inside a lavish public relations program which has no boundary. The program sells "can do" rhetoric of free market capitalism, rugged individualism, and appeals to conservative *Republicans and Democrats*. It is city boosterism which proclaims the major accomplishment of the city planners, and movers and shakers, to be the relocation of the Baltimore Colts football team from Baltimore to Indianapolis.²⁹ There is more, however. When Mayor William H. Hudnut,

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 104, 107-08. Malloy cites to articles which indicate that, possibly, several million dollars in Indiana University fees were diverted into construction activities because they were municipal-supporting.

28. *Id.* at 104-07. Open, public discussions are provided. They are shown, in part, in the exchange printed in the Indianapolis magazine, *C.E.O.*, set out in Appendix 2.

29. *Id.* at 109. See also John R. O'Neill, *Sports Put Indy on the Map*, INDIANAPOLIS STAR, Sept. 1, 1991, at F4. "Since 1976, \$168 million in new sports facilities have been built, the Hoosier Dome being the biggest and most expensive. As a result, the city [was] host to at least 230 sporting events, including the 1987 Pan Am Games." *Id.* The city spent \$77 million to build the Dome and expand the Indiana Convention Center. "There is just no substitute in the economic development field for the kind of stature that major league sports give a city," the Mayor said in his speech. *Id.* There were several reasons the Baltimore Colts moved to the Amateur Sports Capitol of the World, O'Neill wrote.

III, left the office on January 1, 1992, the *Indianapolis Star* reported that his name appeared on "30 roadside signs . . . on the outskirts of Indianapolis, . . . [and] on 112 signs in city parks. . . ." ³⁰ Clearly, Malloy might suggest, this man of the people is not to be forgotten. But "Mayor Bill" is not alone. Malloy tells us that:

Spearheaded by seed money from the Lilly Endowment and augmented by various private and public resources, many Indianapolis real estate projects owe their existence, not to the work of an elected body, but to the behind the scenes efforts of the City Committee. The City Committee was apparently established in the late 1970s and only became public in 1989. . . .

. . . .
 . . . The City Committee consisted of about thirty successful male executives, and their task was to plan the future of Indianapolis without exposing their role or presence to public scrutiny. By design or by mere coincidence, the members of the City Committee were the politicians, Lilly Endowment officers, real estate developers, contractors, bankers, lawyers, and other professionals who eventually became primary actors in receiving, directing, and managing various public/private enterprises.³¹

Malloy makes very serious claims about this kind of private/public merger, or monopoly. There is irony, he says, in that the echoes of this kind of city boosterism overwhelm the voices of displaced persons who have lost their homes through condemnation or other cheap purchase, and the unemployed remain unemployed.

In addition, this kind of public/private cooperation destroys the appropriate balance between public and private power sources, which destroys the creative process of and the environment for freedom.³² The

"Among them are: The Colts' 20-year lease with the dome — a sign of commitment to the city. The Colts get the first \$500,000 yearly income from the Dome's luxury suites. The rest goes to the Capital Improvement Board, which oversees the Convention Center, the Dome and Market Square Arena. The board will receive an estimated \$1.48 million in 1992." *Id.* The O'Neill article points out that on April 27, 1981, the Indianapolis City-County Council approved a one percent tax on food and beverages sold in county restaurants. The tax will pay off the \$40 million in bonds funding the Hoosier Dome and the expansion of the Indiana Convention Center. Excess money from the tax is applied to the operating expenses of the finished complex. *Id.* See also Morrison, *supra* note 10 (strongly suggesting that these tax-to-pay for sports programs seem to be turning into financial ashes).

30. John R. O'Neill, *City Will Show Few Signs of a New Mayor for a While*, INDIANAPOLIS STAR, Jan. 1, 1992, at A1.

31. MALLOY, SERFDOM, *supra* note 2, at 108-09.

32. *Id.* at 109.

political success of the Indianapolis programs is based, we are told, on the transference of identification. This process reduces or eliminates individuality by focusing identity on crowd participation.³³ This focus permits the transformation of very important ideological values, in order to validate the emergence of the complex interrelated legal and economic arrangements of the public/private partnerships engaged in urban reconstruction.

The net result, we are told, is that "numerous taxpayers with diverse interests contribute to subsidy programs directed to identifiable and cohesive special interest groups."³⁴ Malloy likens the city itself to a special interest, and advises that the city represents the political vehicle for the expression of the political interests of its key and controlling constituents. In urban development, these persons are politicians and business persons.³⁵ *Cui bono?* Clearly, he says, they may be known.³⁶

The immediate losses in the Indianapolis feeding frenzy are substantial, he says. First, the co-financing activities allow numerous direct and indirect wealth transfers between citizens and taxpayers. This means wealth is transferred from taxpaying persons to rich special political and economic interests. Second, the indirectness of the methods used to achieve this wealth transfer makes it very difficult to obtain good information on the actual costs and benefits of government involvement in co-financing activities, and difficult to measure the real gain and loss in special interest condemnation programs, or the real beneficiaries in acts and programs of targeted subsidies. Third, the political allocation of scarce resources favors the allocation of resources to the established city and to the status quo. More importantly, perhaps, Malloy advises that the use of political means to allocate economic resources does much more than simply transfer wealth from poorer to richer persons: "To the extent that political means redirect the investment and resource allocations of the marketplace, there is a net social loss in economic activity because scarce resources are no longer used for their most valued and, therefore, most efficient purposes."³⁷

Most alarming is the destruction of individual freedom and dignity or the core of Classical Liberalism, as an end-state objective. Elsewhere Malloy states that,

capitalism, free markets, and neoclassical economics are supported to the extent that they are seen as societal constructs

33. *Id.* at 110.

34. *Id.* at 114.

35. *Id.* at 115.

36. Bell, *supra* note 6, at A1. *See also* Appendix 1.

37. MALLOY, SERFDOM, *supra* note 2, at 116.

that support the enhancement of a specific idea of freedom. The market, neoclassical economics, and capitalist social organization are not the ends to be achieved, they are merely the means to another more important end. That end is individual liberty and freedom.³⁸

Malloy is in full agreement with the distinguished economist Israel Kirzner, and with Jane Jacobs, whom he cites.³⁹ They and he say that the true measure of wealth under capitalism and Smithian Economics, and the true measure of economic development is its unleashing of a creative process of discovery and the spontaneous social order. They permit natural genius and its social benefit to arise. This is not related to highrise office buildings, sports centers, corporate joggers, wealthy developers, Mayors, Governors, Ambassadors, U.S. Senators, or games, games, games. Wealth under capitalism is infinitely greater than all of those things combined because it permits a social spontaneity and a natural creativity which the minds of the "movers and shakers" and their committees and planners cannot anticipate or imagine.

Malloy and Jacobs say that regardless of how well-intended the government grant of economic power might be, and regardless of the frequency with which smiling officials are paraded before the public, the process of urban rebuilding will be more successful if achieved by the spontaneous interaction of individuals, rather than attempts to plan and to purchase specific capital goods and developmental outcomes.⁴⁰ This is because individuals, acting for their own benefit, will benefit all in the city or community. In ways which both attract and generate, they will build the goods and services, and reconstruct older capital commitments. This process means that they will have goods and items and ideas with which to trade to persons whose goods, items, and ideas they import for their own use. This creates a truly prosperous import-replacing community with a prosperous creative and interactive process of discovery. This is vastly different from merely enticing a transplant industry with cash gifts from the municipality, or the state, which does not sustain long-term wealth creation and urban development.⁴¹

Malloy (and Jacobs) gives other examples. He shows that the Tennessee Valley Authority (TVA), despite the investment of tremendous amounts of "government money and resources," did not stimulate the

38. Malloy, *Discourse*, *supra* note 3, at 70.

39. MALLOY, *SERFDOM*, *supra* note 2, at 118 nn.13 & 18 (citing JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS* 93-124 (1984)).

40. *Id.*

41. *Id.* at 119. For a discussion of the United Airlines deal, so to speak, for the City of Indianapolis, see *infra* note 44.

emergence of "an import-replacing city."⁴² He explains that the transfer of Lockheed of Los Angeles to northern Georgia and the Atlanta region added nothing more than service and distribution functions to the Georgia area. He says that,

the current range of urban development . . . hardly seems worthy of the task at hand. The subsidized development of downtown office buildings and hotels, or the desire to preserve historic structures by turning them into fast food and retail centers, is hardly the type of activity likely to bring forth long-term gains for a local city economy.⁴³

Obviously, these authorities do not believe that the recent Indianapolis, Marion County, and State of Indiana gift of \$500 million to United Airlines, to entice its transfer of an \$800 million maintenance facility to the Indianapolis Airport will provide long-term gain and wealth creation to Indianapolis, or to Indiana.⁴⁴

Malloy comments that the use of political means to allocate limited resources, rather than the economic means of the market, is self-perpetuating for the special people and their interests, who have captured the power of the state for their own benefit.⁴⁵ Once special interests seize the power of condemnation, non-Euclidian zoning, and co-financing — whether in the form of acquisition, development, and construction assistance (ADC assistance),⁴⁶ or in the form of tax-related assistance

42. MALLOY, SERFDOM, *supra* note 2, at 120.

43. *Id.* at 121.

44. Indiana and Indianapolis were the successful bidders for an airport facility to be constructed by United Airlines in Indianapolis. The initial public comments speak about a \$1 billion facility, with 6,300 well-paying jobs by the year 2004. Mayor William H. Hudnut, who left office January 1, 1992, is quoted as saying on the day of the announcement, "I haven't been this choked up since the day I walked across the floor of the Hoosier Dome with Bob Irsay [the apparent owner of the Indianapolis Colts professional football team]." Brice C. Smith, *City Gets United Repair Center*, INDIANAPOLIS STAR, Oct. 24, 1991, at A1. See Douglas T. Davidoff & Terry Horne, *Air Hub May Cost \$523.3 Million*, INDIANAPOLIS NEWS, Oct. 30, 1991 at A1. Luring United Airlines' maintenance base to Indianapolis will "cost far more than Gov. Evan Bayh and Mayor William H. Hudnut announced a week ago." *Id.*

See also Jon Swantes & Kathleen N. Johnston, *United Deal Done With Words and a Handshake*, INDIANAPOLIS NEWS, Oct. 30, 1991 at A1. The taxpayers are committed to the \$523 million package and unlike other taxpayer-funded projects to buy private industry, such as the Subaru-Isuzu Automotive deal, this money goes directly to United Airlines, and not for the construction of sewers, roads, and drainage systems. Moreover, a \$130 million penalty clause was waived for United Airlines, and there is some uncertainty about the high-paying jobs said to be available by 2004.

45. MALLOY, SERFDOM, *supra* note 2, at 43.

46. *Id.* at 99.

as in tax abatement, or enterprise zones, or tax increment financing, or bonds, or rent control, a group of bureaucrats, technocrats, consultants, and writers emerge. They spend their time, and much money, dealing with the regulations which must exist as a platform for the activity. In turn, they acquire an intense vested interest in maintaining the special interests which originally seized or obtained the intrusive power of the state. Malloy observes that this "success does truly breed success."⁴⁷

Malloy's argument, his great concern, is not limited to the failure which the short-term fix produces (after the persons who create the failure have left their offices). His main focus is not the requirement of a steady and constant infusion of more and more imported cash and goods in order to prevent immediate collapse, adverse public comment, and special-interest qua mass-media generated unrest. There is something

47. *Id.* at 43. There is evidence which sustains Malloy's claims and fears. Indianapolis real estate brokers and developers commented upon the United Airlines deal, another West Side Story [the Indianapolis airport facility is located on the west side of the City]. "The Westside is expected to reap the most development because of its nearness to the United facility. But the highway system's quick and easy access to other parts of the city means the benefits will spread across Indianapolis," said Jim Litten, the president of the residential division of a major Indianapolis real estate selling company. Another, Tom Mullen, director of marketing for another major real estate marketing organization, agreed. But the latter observed that the outlying counties, not part of the City of Indianapolis, and perhaps not part of their principal marketing area, would be required to improve their sewer capacity to handle this new development. Eileen Ambrose, *United Hub to Have Spinoff Effect*, INDIANAPOLIS NEWS, Oct. 24, 1991, at B1.

These authorities did not have the benefit, it seems, of an article entitled, *Travel is Off, Airlines Ailing, but Projects Just Keep Expanding. Boosterism and Bonds Fuel Projects Even as Estimates of Need Are Scaled Back*, WALL ST. J., September 26, 1991, at A1. This article states that the airline industry is reeling from record losses in 1990, which forced 12 major carriers to file for Chapter 11 bankruptcy. Apparently this was not considered in the Indiana full-court press coached by team leader Mayor Hudnut to give a half-billion dollars to United Airlines to bring its maintenance center to Indianapolis. There is a worse-case scenario: this might have been considered by the coach and his team.

Meanwhile, an earlier commitment of huge city funds for the reconstruction of the "downtown," called the "Circle Center" project (or similar names) for the creation of a large covered shopping complex in the center of the City, another achievement of Mayor Hudnut's teams and administration, seems lost in the large holes in the ground in "downtown" Indianapolis, where solid buildings once stood, and in the announcement of the closing of a major retail store, L.S. Ayres & Co. L.S. Ayres had a 119-year-old tradition, but was closed because it "was not productive, it wasn't making money and we don't see any turnaround." Jo Ellen Sharp, *L.S. Ayres Will Close Downtown Location*, INDIANAPOLIS STAR, Oct. 26, 1991, at A1.

The new 1992 Mayor of Indianapolis, Stephen Goldsmith, states that in the years 1990 and 1991, the "city has spent about \$20 million more [each year] than it has received." The deficits were made up by taking money from the city's cash surpluses, but this surplus will expire early in 1992. Patrick Morrison, *City Faces \$15 Million Budget Deficit, Mayor Says*, THE INDIANAPOLIS STAR, January 29, 1992, at 1.

here of much greater moment. It becomes a bright-line issue and question, even if its presence is not discussed in the daily print press or by television oracles.

“The ideological implications of such efforts and a normative evaluation of these methods are [the] important concerns of this book.”⁴⁸ There is a very substantial ideological significance in urban revitalization efforts, and Malloy’s critique asks the reader to consider the underlying values which are being transformed and contorted in order to achieve a short-term, localized benefit.⁴⁹

The surge of special interest, large-cash activity in Indianapolis represents the transformation of the structure and the content of the legal economic discourse, and the destruction of the critical tension between private and public zones of power and economics. The liberty of persons and freedom’s institutions depend on this tension. This is, he states, a real and detrimental effect on the humanity of the society in which we live, and upon Indianapolis, Indiana.⁵⁰

Malloy is a dedicated classical liberal theorist. He and classical liberalism find no comfort in the economic discourse of “public choice theory,” which is the predicate for the actions taken in Indianapolis and in other cities. This theory and its effectuation establish short-term programs which impose identifiable short-term interests of a few over the broader long-term interests of the many. He recognizes, however, that opposing special-interest economics and politics in Indianapolis or at any place will have “transaction costs that far exceed” the benefit to the person who makes the effort.⁵¹ (“Transaction costs” is a scholar’s way of describing the broken careers and broken heads of those persons who might make the effort.)

Moreover, classical liberal theory does not agree with economic theory which establishes wealth-maximization and economic efficiency as an end-point. Classical liberal theory understands those kinds of economic discourse, but rejects their end-state objectives and predictions “as inappropriate social discourse.”⁵² Indeed, in this volume Malloy’s rejection of each is total. It is searing. He takes no prisoners. He knows that the stakes are very high. He does not want a social collapse in America which might be similar to the inevitable collapse of the Soviets in 1991.

Classical liberal theory promotes more important and more “fundamental than end-state norms”⁵³ which, translated for Indianapolis,

48. MALLOY, SERFDOM, *supra* note 2, at 102.

49. *Id.*

50. *Id.* at 111.

51. *Id.* at 41.

52. *Id.* at 40.

53. *Id.*

means athletic stadia and games for all. Malloy strongly defends the political and economic theory which sustains "individual liberty, human dignity, and freedom as creative and spontaneous processes of individual social evolution" and its cognate uplifting spirit and condition.⁵⁴

Malloy explains this way:

The dynamics of this process are significant for our prospects of freedom versus serfdom. One of the great attributes of the modern capitalist age has been the departure from a world of status to an impersonal world of contract and markets. Capitalism has made a more egalitarian society possible precisely because one's abilities rather than one's status is the key to success in the marketplace. On the other hand, the expanding use of the political means threatens the egalitarian principle of equal opportunity by returning us to an age of title, status, and connection as the means to power or success.

In the dawn of this new age of serfdom, not only do we find incentives for people to invoke political means, we find that those who fail to invoke political means may be hindered in the attainment of their goals. Thus, there becomes a market for state power and a tendency to overgraze in this market. A conspiracy is not needed in order to allege an alignment of special interests that works against the fulfillment of others' aspirations. . . .⁵⁵

His book is compelling because he provides a magnificent explanation of Smithian Morality, Social Structure, and sustaining Economics. He gives, in short, a definitive analysis of Classical Liberalism, from which he clearly separates Public Choice theory, and the theories of Wealth-Maximization.

III. THE ECONOMICS OF LIBERTY: SMITHIAN ECONOMICS

*Those tempted to think economics is divorced from moral laws have neither read Adam Smith's "Theory of Moral Sentiments" nor stopped to think how value-laden the terms "goods" and "services" are.*⁵⁶

Malloy, a remarkably honest academic, states that economics and law are affected by the ideological perspective or commitment which

54. *Id.*

55. *Id.* at 43-44.

56. Warren Brooks, *Ultimate Gift of Enduring Value, Goods and Services*, WASHINGTON TIMES, Dec. 25, 1991, at F1 (commentary).

one holds. This affects the structure of legal economic discourse and its content. He does not use mathematical or econometric models to analyze empirical data about urban development. His inquiry follows law and semiotics. Economics is a creative process of discovery, and "it is a structured process of discourse which concerns the appropriate relationship between individuals, the community, and the state."⁵⁷

Thus, market theory economics establishes boundaries for discussion. These are: (1) the central role and function of the individual; (2) the correctness of individual empowerment and decision making; (3) the importance of balancing sources of power, so that an ever-changing creative process might be stimulated; (4) clear recognition that self-interest is incompatible with selfishness; and (5) understanding that the economic form of classical liberal discourse is primarily concerned with the promotion of individual liberty and freedom as an *end*, and thus that capitalism or free-market economics is a *means* to the ends which are individual liberty and freedom; they are not *ends* themselves. This means that economic classical liberalism is *very different from* concepts of "scientific" efficiency or wealth maximization, a la Judge Richard Posner, and others; (6) that classical liberal theory includes recognition of a natural rights discourse, and that several claims relate to a conception of human dignity — claims which, today, are grouped inside the word, "welfare"; (7) recognizing that prior distributions of wealth may not meet the standards of classical liberalism, and are subject to constant reconsideration; (8) understanding that general rules of law and of the social order are preferred, and that they constrain — certainly in the Constitutional Law of the American Founders — outcome-specific rules, and their conspicuous products which are the huge special interests of these times; and (9) understanding that the universe around us, meaning the personal and economic actions of all persons, is never fully knowable, which means (10) that no group of experts, planners, committees, boards, or socialist apparatchicks can plan and control the creative and spontaneous energies of countless individual decision makers.⁵⁸

Malloy explains that Classical Liberals are neither "liberals" nor "conservatives" as these terms are used at the end of the twentieth century. "Classical Liberal" derives from the Scottish Enlightenment, and the tradition identified with Adam Smith and David Hume. It is espoused by such notable contemporaries as Friedrich A. Hayek, Milton Friedman, Thomas Sowell, Ludwig von Mises, Murray N. Rothbard, Walter E. Williams, and Benjamin A. Rogge, Jr., among others of substantial prominence. Understanding Classical Liberalism requires a

57. MALLOY, SERFDOM, *supra* note 2, at 3.

58. *Id.*

foundation in the writings of Adam Smith, and an examination of his work in *The Theory of Moral Sentiments*, *Lectures on Jurisprudence*, and *The Wealth of Nations*.⁵⁹

In Chapter 3, Malloy provides an outstanding summary of Smith's theories in these works. He points out that Smith had a much more complex view of the relationship between law and economics than many persons realize. He was, first, a moral philosopher, and then a philosopher of political economy. He did not detach his views from his interdisciplinary background. To him, democratic government and a capitalist economy were seen as a means for achieving a higher purpose. They were not merely ends in themselves. The value of the division of labor, of capitalism, of material well-being, of law and of government, always is measured by the degree to which it successfully harmonizes his principal concern, which is individual liberty and the morality of our moral sentiments.⁶⁰

Liberty, Smith said, was the one essential ingredient of the good life. It is the one element which satisfies people and makes them equal. It acquires meaning, however, only in a social context, and the need which each person has for all others in the social community. Accordingly, Smith strongly denounced selfishness, and with equal strength, separated it from self-interest. The latter embodies a concern for living with others. Harmonizing individual liberty with social function and cooperation is Smith's theory of moral sentiments. Smith offered a subjective model of human conduct. It suggests that a community of persons view others and themselves on the basis of how they think others view them, from the perspective of the impartial spectator. He allowed an individual to use his or her best efforts in pursuit of personal fulfillment, constrained only by fair play and community and justice. Smith never postulated a selfish survival of the fittest with individuals acting to maximize their own wealth and success. Smith saw the social order comprised of persons who act within the guidelines of social norms which they establish among themselves, which means that individual merit is contingent and dependent upon the merit — happiness — of others. Thus, his theory of moral sentiments and his bases for morality were founded, he wrote, in our natural sense of propriety and merit arising from experience. The general rule is formed by finding from experience that all actions of a certain kind or manner are approved or disapproved.⁶¹

General rules in the democratic social order, those on which a majority would agree, can be maintained only to the extent that they

59. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS, LECTURES ON JURISPRUDENCE, AND THE WEALTH OF NATIONS* (1966).

60. MALLOY, *SERFDOM*, *supra* note 2, at 29.

61. *Id.* at 23.

are known by almost all of society's members. Clearly this means that the twentieth century democrat would have difficulty understanding Smithian principles, because the principles would be confused with majority rule or legislative majoritarianism. Neither meets the Smithian test of generality. Today's sea of special interest legislation in the regulatory state fails the test, utterly.

Malloy says that for Adam Smith the general rules, which the informed majority establish, constrain and restrict the ability of the special interest to create and control by self-serving rules. Today we call these rules statutes and regulations. Smith knew this, and anticipated it. For him, the first purpose of civil government was protection of individuals from the coercion of others. But the democratic process alone is not sufficient to protect individual liberty, if government, in the form of the state or its many subalterns such as committees, councils, and commissars, is able to act in the same coercive fashion as the power elite, and as special interests would act in the absence of government, or do act when they control it.

Preventing government from being a mere substitute for coercive individuals or private entities involves the creation of a power sufficient to constrain governmental power. Malloy advises that Smith envisioned a process of checks and balances between individuals and their government. This requires that extensive sources of capital be in private hands. This creates the critical tension between the state's assertion of power and a power able to restrain the state. In this relationship, liberty and individual dignity are assured and will flourish.

Without a commitment to a strong private sector as a counterbalance to the public sector, the power of the state is unlikely to be adequately restrained.⁶² If this relationship does not exist, the pervasive intrusion of state planning, state regulation, and the increasing reliance on the political rather than the economic means for the allocation of rights and resources in our society occur.⁶³

The forces promoting the use of political means are strong. Politicians, governmental, corporate, and public sector bureaucrats are rewarded with the indicia of power and respect more frequently when they exercise political power on behalf of special interests than when they refrain from action. This gives politicians an opportunity for self-actualization by invoking legislation, or decision-making power (regulations), which promotes and imposes their perceived wisdom, insight, and programmatic changes upon those of others.⁶⁴ This results, Malloy

62. *Id.* at 37.

63. *Id.*

64. *Id.* at 35.

informs us, in the tragedy of treating state power as a "free good" which, when successfully harnessed by a person or by a group, permits either to have a great advantage over its competition. Because the operatives of the state are not reluctant to expand the "good works" of the state [Do you have tickets to the city's subsidized professional football team, in the city-financed new superdome?], there is a tendency of every individual to conclude that they, too, should do something to invoke the power of the state on their behalf.⁶⁵

According to Smith and Smithian economics, general rules of morality are not divinely ordained. They emerge from self-conscious individual introspection by persons who live and pursue their self-interest in the society of others. Thus, individuals do not always act to their own advantage. They are constrained in the pursuit of their own self-interest by their moral sentiments. When they act in their self-interest and create, the act is not selfishness, and it is beneficial to the whole. The benefit may not be intended, just as a person cannot anticipate all of the effect

65. *Id.* at 36. There is a kind of art in this. It involves the image of sacrifice. "I'm only thinking of you," as in the words of a song. An extensive article in *The Indianapolis Star* about Mayor William H. Hudnut indicated that he "created an image that's had us hooked." See O'Neill, *Legacy*, *supra* note 8, at F1.

The Indianapolis Star has shown concern about 16 years of the reign of Mayor William H. Hudnut, III. It wrote against the recommendation of a new court building, which was recommended by a non-elected "review" committee, after the Indianapolis mayoral elections in 1991. (Neither major party candidate discussed the project. Each candidate was a person of substantial public integrity, and it is quite probable that neither person knew that a "review" committee would make the recommendation.) The *Star* editorial writer said, in part:

Taxpayers must surely be flabbergasted by all this. Just days before the building authority study was released, the city formally assumed its share of the huge United Airlines deal when \$140 million in bonds went on sale. The city is already in debt up to its ears due to the stalemated Circle Centre mall.

The economy is in a prolonged slump and social welfare budgets are skyrocketing.

A Court's Building, INDIANAPOLIS STAR, on Dec. 26, 1991, at A12 (editorial).

A very favorable article about Mayor Hudnut appears in *The Washington Post*. See Michael Abramowitz, *Midwestern Revival in 'India-No-Place'*, WASHINGTON POST, Nov. 23, 1991, at A3. The article concludes that Hudnut lost a 1990 state-wide election to become Indiana's Secretary of State because his Democratic opponents, "tarred him for a series of tax increases in Indianapolis." *Id.* Hudnut is quoted: "I paid a price, a big price last year in terms of all but destroying my political career . . . [but] I still think that what I did was right. . . ." *Id.*

A later article in *The Indianapolis Star*, December 20, 1991, suggests that the "big price" which Mayor Hudnut paid for the taxpayer-financed commitment to sports, new office buildings, a downtown shopping center, and an airport maintenance facility, has received more than token repayment. The article states that the Indianapolis Economic Development Corp. will employ the former mayor as its chairman and CEO at an annual salary of \$150,000. John R. O'Neill, *Hudnut Gets Job Bringing Business to Indianapolis*, INDIANAPOLIS STAR, Dec. 20, 1991 at A1.

or good which an initial act will produce. When this occurs, the person's act and creation functions as an "invisible hand" making a distribution to others of the necessities of life.⁶⁶

Moreover, government may function here, because it should protect individual liberty, and it should provide for those traditional activities, such as roads and basic services, which are important to material well-being and are not profitable for private persons. Smith accepted government as an administrator of justice, a provider of police protection, and of military services and security. He would allow government to function and to provide when the marketplace does not, and this is against the background of equality among all persons. The poor, he said, are as worthy as the rich, and he insisted that adequate educational opportunity be provided.

Smith rejected the "social contract" theory of relationship between individuals and the government. He said that the relevant basis for evaluating government's performance is not an alleged contract, but the appropriate norms, moral sentiments, and morality upon which human interaction and individual liberty are based.⁶⁷

Accordingly, wealth-maximization, economic efficiency, and personal recognition according to an arrangement of hierarchical assets or "power positions" is the very opposite of Adam Smith, and Classical Liberalism. Malloy instructs that Smith and classical liberalism are quite different from modern Posnerian Conservatism, the modern Liberal, and Left Communitarian and their approaches.

IV. JUDGE RICHARD POSNER'S CONSERVATIVES, THE LIBERALS AND LEFT COMMUNITARIANS OR MARXISTS

*The traditional political, social, and ethical ideologies that served premanagerial society — individualism, classical liberalism, constitutionalism, states' rights, personal moral responsibility, etc. — will not serve the managerial elite.*⁶⁸

Professor Malloy takes strong issue with the economic-analysis-of-law conservatives who are led by the writings of Judge Richard Posner.

66. MALLOY, SERFDOM, *supra* note 2, at 151.

67. *Id.* at 27-29. Professor Malloy's analysis of Adam Smith is strongly supported by other scholars and writers. Adam Meyerson, in an excellent and brief analysis of Adam Smith, claims that the rudiments of an ideology of "welfare state capitalism" can be found "in the most moving elegy to economic freedom ever written, Adam Smith's *Wealth of Nations* in 1776 . . . [which] also made the case for a number of government programs." See Adam Meyerson, *Adam Smith's Welfare State*, 50 POL'Y REV. 66 (1989). This Smithian analysis is too brief to explore Malloy's main point which is that Smith's economic philosophy and analyses are the basis of individual freedom which is their end-point, and that they are subordinate to the freedom they assist in creating.

68. Samuel Francis, *Prophet Sustained*, 16 CHRON. 1, 15 (1992).

Because of Malloy's classical liberal concern with individual liberty, he strongly challenges the dogmatic manner in which Posnerian conservatives employ a neoclassical economic method and model as an end in itself. He explains and challenges the major assumptions of Posnerian conservatives, and the values which sustain their claims. They offer, he says, a view of law and society which is centered around the status quo, and a free-market system as an *end* in itself. Posner's conservatives reduce all rights to numerical calculations and then proceed to balance countervailing claims by means of scientific equations. The thrust of their argument is that an efficient result will maximize wealth, and that wealth maximization produces the best attainable social arrangement. For them, there are no inherent individual rights. Any result that is dictated by the pretensions of scientific calculations is used to justify the treatment of individual rights.⁶⁹ The Posnerian conservative approach uses the image of science, and purports to decide issues rationally and objectively without consideration of morality or of social norms that may be counter to its pseudo-scientific methods. This results, Malloy alleges, in the validation of laws and legal institutions which favor persons already in possession of a disproportionate share of society's political and financial power. The outcomes generated by the conservatives with a Posner stripe favor the power of the state and the groups it will sustain. This process rejects the humanistic principles of economics first established by Adam Smith. Smith's philosophy, unlike Posner and his wealth-maximization constructs, includes recognition of natural rights, human dignity, and certain welfare rights for all members of society.⁷⁰ The Posnerian approach will marginalize and extinguish our conscious participation in moral and humanistic decision making. These approaches, these Posnerian assertions, are conservative, we are told, because they are grounded in, and continue to promote biases which favor prior distributions of wealth, power, and resources.⁷¹

From the Posnerian influenced politicians comes the cry: "We must rebuild the inner city." Or, in Indianapolis, "We have our own West Side Story in the construction programs found on the west side of the downtown area." In all of this moving and shaking, there is nothing more than reorganizing the past because this activity has no creative spontaneity of any kind. In buying and subsidizing the Indianapolis Colts, and their Hoosier Dome, the Indianapolis movers and shakers forced the taxpaying public to purchase an idea which was at least fifty years old. This is not a Silicon Valley or a city administration which is hospitable to new ideas.

69. MALLOY, SERFDOM, *supra* note 2, at 66.

70. *Id.* at 68-69.

71. *Id.* at 70.

Liberals' and Left Communitarians' approaches are more openly subjective and less scientific in their claims than the Posnerettes. All are in accord with Posner, when they reject the concept of an individual's natural and inalienable rights. The Left argues that such a conception of the individual stands in the way of progress in social welfare programs, because too often these conceptions are used to protect the wealth, resources, and positions of people in power.⁷² The Liberal perspective replaces natural rights with a requirement of equality of treatment.

Liberals resolve conflicts of competing claims by appealing to the political process rather than the marketplace. Equality of treatment is deemed necessary to assure protection for individual rights, given a democratic political process with a broad-based participation. In this conception, the state, when pursuing community goals, can legitimately do whatever it wants. The political should protect the individual, but there are no natural rights limitations on the activities the state can undertake. Malloy recognizes some of the major flaws in this kind of twentieth century Liberalism. It ignores the dynamics of special interest influence over the political means. It puts too much power into the hands of those who control the machinery of the governmental process. "In essence, the liberal approach elevates the myth of democratic institutions to the level of legitimizing those actions of the state directed by a liberal statesman."⁷³ We are given this summary:

The liberal economic discourse presumes equality of outcome, a rejection of natural rights, and a rejection of neoclassical economic market justification of resource distribution, and it elevates the political process to center stage in resolving pressing social problems. [Liberal economic discourse] incorporates the assumption that experts are best able to understand and address pressing social problems. . . . [This] conception of legal economic discourse . . . shifts the ideological framework away from Chicago School and Posnerian economic analysis and delivers us into the Keynesian world of market failures, insurmountable transaction costs and externalities, and the need for liberal intervention and management of social institutions for the common good.⁷⁴

The Left Communitarian, or the Socialist or Neomarxist ideologies are discussed, and distinguished from the Liberal. Socialists allow some private property, but use the power of taxation and other forms of state

72. *Id.* at 70-71.

73. *Id.* at 71.

74. *Id.* at 73.

seizure to remove the separateness which is required to make the private sphere a counterbalancing power source to the state.

Marxists seek communitarian ownership, and they are more clear about the consequences of their philosophical vision.⁷⁵ They would place ownership of the means of production in the community, represented by the state, and eliminate the private sector as a base of power. Under this system of analysis the vast array of public goods and resources are by necessity required to run the state in a way that will best serve the needs of "the people." This requires an ability to both know and implement the "best decisions" for everyone in the society. Because this is not possible, the marxist state acts in terms of generalities, and thus must fulfill by its action an ideological vision of class consciousness as opposed to individual self-realization. Because the state owns or controls all significant resources in the marxist system, it is very difficult for it to move in any direction which is contrary to the ideological agenda of people in power.⁷⁶

This permits an observation not declared, but suggested in Malloy's thoughts. When radical socialists attempt to control the social order and individual liberty, then the Gulag Archipelago, Dachau, Treblinka, or Auschwitz, those final solutions and rancid deposits of radical, collectivist doctrine, will appear in a land or nation in which there is no Anglo-American common-law inheritance endowed by the Scottish Enlightenment. Malloy's implicit concern is whether they might appear in a land which has this inheritance and this enlightenment.

Malloy explains the Critical Legal Studies (CLS) movement in American legal education. It is a neomarxist view of law and economics. It views existing law and institutional structure as contingent and socially chosen. From this platform, CLS claims that it can demonstrate the bias in our process of social choice and that this bias reflects class struggle and exploitation. Law and legal discourse are envisioned as an attempt to make current social, economic, and political arrangements appear natural and thus, legitimate. The immediate task of the CLS movement is to "unmask and remove" the current legal order, so that it may raise or impose a new consciousness ("a new social order" as Lenin once said) concerning political choices confronting society. Malloy then discusses the CLS distinction between "rules" and "standards." He says that to engage in this left or neomarxist form of discourse and economics is to promote values antagonistic to traditional neoclassical economics and classical liberal concerns for the individual.

In this book, Malloy identifies CLS and its associated groups. In the main, he is analytical and not judgmental about them, their notions,

75. *Id.*

76. *Id.* at 74.

and their declared purposes. In another publication, Malloy is more specific: "CLS presumes that marxist determinism is the ultimate authority; that class conflict and the communal march of historical destiny require a rejection of individualist thinking, the upheaval of current law and legal institutions, and the deliverance of society to the control of pure political power."⁷⁷

An expression about CLS thoughts is offered in an article by Mr. Irving Kristol.⁷⁸ He surveys Socialism in the twentieth century, and earlier. Kristol begins saying that "it is not a cliché to say that the most important political event of the 20th century has been the collapse of the communist regimes and of the socialist idea on which they ultimately rested."⁷⁹ Then he comments on the intellectuals who desperately attempt to distinguish one from the other. About them and their notions he states:

But political ideas do not have any such Platonic or other worldly status. They live and die in history. They are what they become. It makes no sense to say that such-and-such a political idea turned out badly because human beings mishandled it, or misinterpreted it, or because circumstances conspired against it. If those ideas cannot withstand human mishandling or unforeseen circumstance, they are more accurately described as political fantasies rather than realistic political ideas.

That has been the natural destiny of socialism: A political fantasy incarnated into a reign of terror, a historical nightmare from which humanity has now awakened. But awakened to what?⁸⁰

Malloy provides a brief and keen analysis of the Libertian School, and he discusses the more prominent works of Robert Nozick, and Richard A. Epstein. In reply, he distinguishes Classical Liberalism. He states that the purpose of the state is to "counterbalance the private sphere with the public sphere, and that only in the emergent equilibrium

77. *Id.* at 75-76; Malloy, *Discourse*, *supra* note 3, at 56. Malloy is exactly on the mark in this statement about the legal educationalist CLS group. Theirs is the empire of "pure political power," as Malloy states. Malloy seems to make the point that the CLS group, if given political power, would imitate their late Soviet friends, whether Lenin or Stalin and their KGB. And why shouldn't they? Those Russian Marxists/Leninists had their slave empire and their death camps in which millions upon millions died. The American Marxists/Leninists and their ilk surely are entitled to have theirs too, are they not? I mean, fair is fair!

78. Irving Kristol, *Vision of the Capitalist Future*, WASHINGTON TIMES, Jan. 3, 1992, at F1 (commentary).

79. *Id.*

80. *Id.*

of this balance can individual liberty and human dignity emerge and encompass the greatest measure of personal autonomy and human worth.”⁸¹

This means that classical liberalism is a philosophy that does not believe in capitalism or the free market for its own sake. It is a philosophy that puts paramount value on freedom and individual liberty as the ultimate objective, with capitalism and the free market identified as the best means for achieving and maintaining that objective. This philosophy believes that the capitalist idea and the fulfillment of individual liberty have not yet been achieved. As a result, all law and social policy claims which seek justification on the basis of prior or current political and economic arrangement, are subject to a critical review in light of the moral imperative to protect and advance freedom and individual liberty.⁸²

V. THOUGHTS AND OBSERVATIONS FROM THE REVIEWER

Serfdom is beautifully reasoned and expressed. Malloy writes with genuine fairness to persons who are totally antagonistic to him and will inflict substantial harm or retardation upon him whenever possible. Malloy's tradition is that of Friedrich A. Hayek's *The Road To Serfdom*.⁸³

One may read Malloy and pause. An image appears. It is a classroom on a warm summer afternoon. Upstairs with windows open, a professorial voice floats above drowsy heads which look outside at the tops of gently waving trees. In that room, however, there are two or three students who fully understand that the lecture they hear describes the very essence of the liberty and dignity they enjoy. They consume it. They never forget it. Reading Robin Paul Malloy causes me to think that, years ago, he was one of those two or three students, and that he had one or two great professors. This is all that's needed for a mind such as his.

Malloy is an academic. His use of words which fit the academician and the economist, such as “grazing” or “over grazing” and similar expressions, is delightful. He creates unintended humor because the conditions and the philosophies which he describes are utterly violent in their approaches to each other and to him. But his words, or his kind of academic detachment, seem not to sufficiently notice. This is pleasant and refreshing.

My principal criticism of *Serfdom* and Malloy concerns his failure to make distinctions between *economic* and *political* conservatives, and

81. MALLOY, *SERFDOM*, *supra* note 2, at 78.

82. *Id.* at 50.

83. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

among their respective philosophies and the persons who advance them. Malloy's failure here is conspicuous, and leads to the thought that he knows his enemies but not his friends. In a sentence, if there is a distinction between Bruce Ackerman and his writings on liberal theory, and the Marxist CLS group, which Malloy explains, then he should be able to make distinctions between Richard Posner as an economic conservative and Russell Kirk as a political conservative.

Malloy is very critical of the Reagan Administration's policies, and those of former Indianapolis Mayor William Hudnut or former Indiana Governor Robert Orr because they were not what they said, or were not consistent with their rhetoric. They spoke about public entrepreneurship instead of urban socialism when there was no significant difference. They use, he states, the phrase "public entrepreneurship" because it invites little or no consideration of its values which are contrary to the accepted notions of individualism and free market capitalism.⁸⁴ Malloy blandly assumes that Posnerian *economic* conservatism defines *political* conservatism in contemporary American events and discourse, and that there was no distinction between them inside the Reagan Administration. These two philosophies and their persons violently opposed each other across the entire spectrum of the Reagan Administration.

Initially, *political* conservatism created and defined the Reagan Administration, and it and they were remarkably successful. They correctly claim the collapse of the Soviet Empire as causally related to their philosophical and personal efforts. They established the policies which created excellent economic conditions across the United States. Later, they were ruthlessly replaced by the regulatory statist, or those *economic* conservatives whose only program is office-occupancy preceded by cute slogans such as "read my lips."

An example of the absence of these distinctions appears in Chapter nine, entitled "Comparative Ideology." He is contrasting classical liberalism to the fascist world, especially of pre-World War II. Into this he injects a comment upon the contemporary *political conservatives'* distrust for the American mass print and visual media. He suggests that this is not consistent with other politically conservative positions. He adversely comments on Lt. Col. Oliver North; he says that political conservatives are concerned about restrictions upon police conduct, but do not have similar concerns about individual rights of an accused.

This does not assist his cause because he is incorrect. It tends to isolate him from powerful minds who are political conservatives and who would agree with almost all of his analysis of classical liberalism. I suggest that a political conservative such as a Russell Kirk, a Thomas

84. MALLOY, SERFDOM, *supra* note 2, at 85.

Fleming, a William F. Buckley, Jr., a Paul Craig Roberts, an Edward B. McLean, or a William B. Allen among many others, would rail against Malloy for attempting to move from Malloy's criticism of Judge Richard Posner and a statist, neofascist economics into a broader criticism of political conservatism as Kirk and many others define it. Moreover, there is a certain naivete in Malloy's comments here, or just a simple absence of observation of current events. He seems not to comprehend that a reasonable judgment of Lt. Col. Oliver North, and many other persons like him, is that they are the true victims of a philosophy of government function, and of persons who enforce it, which is determined to create criminality in the conduct of all persons who disagree with it or with them.⁸⁵ For these governmental bureaustatists, the "economic

85. There is a substantial belief that criminalizing public policy issues and disputes has been the main congressional suit for years, and that it is a major effect of the swirling, violent politics occurring before and after Watergate in the 1970s. Among the serious writers on this subject is L. Gordon Crovitz. See L. Gordon Crovitz, *Lecture Topic for Abrams: Special Prosecutors and Legal Ethics*, WALL ST. J., Nov. 20, 1991, at A17 (book review); L. Gordon Crovitz, *Special Persecutors*, WALL ST. J., Nov. 20, 1991, at A16 [hereinafter Crovitz, *Special Persecutors*] (editorial about the funds and the conduct of Mr. Lawrence Walsh, the prosecutor of Lt. Col. Oliver North, Adm. John Poindexter, Mr. Elliott Abrams, and as many others as Walsh might find).

Mr. Abrams was a high official in the State Department during the Reagan Administration. The Crovitz article states that on the day that a federal appellate court dismissed Mr. Walsh's case against Lt. Col. North, Walsh "needed a scalp to keep his multimillion-dollar operation going. Mr. Abram's would do." Crovitz, *Special Persecutors*, *supra*, at A17. The crime which was at last revealed to Mr. Abrams was in his 1986 testimony to the Congress. In answer to a question, Mr. Abrams told a congressional committee that the "attitude of the [Reagan] administration is that the Contras are doing a very good thing" in opposing the Sandinistas in Latin America. *Id.* The federal judge who received the plea-bargain imposed a sentence in which Mr. Abrams is to lecture "other lawyers on legal ethics" for 100 hours. *Id.* As Malloy might say, in his delightful academic word choice, if not jargon, the "transaction costs in challenging the status quo can place the challenge beyond reach."

To my mind, there is historical analogy available in England. It occurred not long after Adam Smith wrote. It was provided by the Secret Committee of the Lords which was established to persuade Liverpool to agree to introduce a Bill of Pains and Penalties if Queen Caroline was proved guilty of adultery. This produced much expensive litigation, legal precedent which is cited to this day, remarkable evidence, a hold upon the English public's attention, ruined careers of splendid public officials, and eventually, the acquittal of Queen Caroline. Afterward, Caroline was granted an annuity of \$50,000 which, Churchill states, "she was not too proud to accept." WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES, THE GREAT DEMOCRACIES* 21 (1958).

I suggest that it is not likely that the grant-giving Congress of the United States will place an equivalent annuity of about \$130,000 upon Lt. Col. North, Adm. Poindexter, or Mr. Abrams, although their virtue and their innocence, one may argue, are greater than Queen Caroline's. Moreover, the public issues in which they were involved were much more complicated and vastly more important than the Queen's alleged love affair

discourse” of which Malloy speaks may be conducted in a jail cell.

A series of articles by Woodward and Broder in *The Washington Post* about Vice President Dan Quayle states that the Vice President has “infuriated critics such as Rep. Henry A. Waxman, D-Calif., chairman of the House Energy and Commerce Subcommittee on health and environment.”⁸⁶ Waxman has accused Quayle of “setting up ‘an illegal shadow government.’ In an interview, Waxman compared . . . Quayle’s ‘rogue operation’ on the domestic front to the Reagan administration’s secret maneuvers uncovered in the Iran-Contra investigation.”⁸⁷ Waxman does not merely disagree with Vice President Quayle. He sees him as a criminal.⁸⁸ Of course he does. Waxman is an elected governmental bureaucrat in its purer form. He and his kind own the U.S. “House of Representatives.”

Malloy should “wise up” because this jackbooted attitude plainly appears in the American legal academic establishment in which he functions. My friend Alexander Bickel has been dead for almost twenty years, and much of what he represented and we enjoyed in the American academic community — an open pursuit of facts and ideas in a community of informed scholars, followed by a testing of academic propositions and scholarly positions by persons who are free from preceding commitments which are little more than nihilistic incantations and dogmatic self-aggrandizing personal fads or leftist cults — seems to have died in that time, too.⁸⁹

with an Italian Nobleman. Of course, the Queen, her Nobleman, and King George IV might disagree with these opinions. For relevant readings about Congressional criminalization of policy, see Arnold Beichman, *Martyr of a Power Struggle*, WASHINGTON TIMES, Oct. 11, 1991, at F3 (commentary); *Poindexter’s Nightmare*, INDIANAPOLIS STAR, Nov. 20, 1991, at A10 (editorial).

86. See Bob Woodward & David S. Bradon, *Quayle Goes to Bat for Business*, INDIANAPOLIS STAR, Jan. 9, 1992, at A1.

87. *Id.* at A8.

88. In the process, Quayle has infuriated critics such as Rep. Henry A. Waxman, D-Calif., chairman of the House Energy and Commerce Subcommittee on Health and the Environment, who has accused Quayle of setting up “an illegal shadow government.” In an interview, Waxman compared what he called Quayle’s “rogue operation” on the domestic front to the Reagan administration’s secret maneuvers uncovered in the Iran-Contra investigations. “The Council on Competitiveness has usurped power, holds secret meetings with industry groups and violates administrative procedures on public hearings and public access to information on decision-making,” Waxman said. *Id.*

89. A letter from Gertrude Himmelfarb to Robert Conquest contains this thought: Your Soviet friend, Bob, throwing off the shackles of Marxist determinism, must marvel at the readiness of his American comrades (or former comrades) to embrace, voluntarily and with forethought, this new determinism. He may also marvel at the sight of so many liberated souls mouthing the same slogans (computers all over the country must be programmed to produce race/class/

I would hope that Malloy would directly treat others in this work, but their absence is not a suggestion of deficiency. One person who comes to mind is Mr. James Burnham, and his profound work, *The Managerial Revolution: What is Happening in the World*.⁹⁰ Samuel Francis provides this comment on and analysis of Burnham's work:

The theory of the managerial revolution as Burnham formulated it in 1941 holds that Marxism is correct that capitalism, in the sense of privately owned and operated business enterprises seeking profit, is historically in decline. It disagrees with Marxism that what is replacing capitalism and the society capitalism created is a socialist order in which the proletariat will rule. Instead of socialist revolution, Burnham argued that the managers of large corporate firms were beginning to form a new ruling class and they would merge with similar groups in the modern bureaucratic state. The result would be an order in which the state and the economy would be "fused." Formal nationalization of the means of production might or might not occur, but the reality, apart from the formal and legal arrangements, would be a monolithic concentration of power in the hands of the dominant managerial class in state, union, and corporation. . . . The managerial interests are served by collectivist and social rationalist ideologies that de-emphasize the individual, the personal, the local, and the particular and champion the collective, the impersonal, and the universal. . . . The triumph of such managerial ideologies is due not to the decadence of traditional beliefs and those who adhere to them but to the rise of a new social group in the form of a managerial elite that sponsors and promotes them in its own interests.⁹¹

My hunch is that Malloy would agree with this analysis of Burnham, and would say that this is today's social order in many localities such as Indianapolis. It is for this reason, I suggest, that Malloy writes, and will continue to do so.

He writes to identify, and to preserve the monumental values which sustain the individual in a cloak of dignity. He writes to explain that the managers of post-capitalism, and post-Marxism, those "movers and

gender with a single stroke of the key) and a professing to rebel against the establishment while they themselves occupy the commanding heights of the establishment. (Was it Harold Rosenberg who coined that wonderful expression, "the herd of independent minds?").

Himmelfarb, *supra* note 13, at 44.

90. JAMES BURNHAM, *THE MANAGERIAL REVOLUTION* (1960).

91. Francis, *supra* note 68, at 15, 17.

shakers of downtownism," those UDAG millionaires, obliterate the fountainheads of their existence and ours. They destroy those tender criteria, those inherent standards, those delicate rules of moral order and achievement which create excellence in the independent institutions which sustain the social order. These institutions may be either "private" or "public" in a sense of funding and ownership and contemporary American Constitutional Law. It really does not matter. What counts is the independence of the standards and the criteria which daily they use, and which are quite separate from the institutions. The existence of natural and spontaneous criteria and standards are to social institutions as the sound from the tuning fork is to a musical instrument. These standards know quality and principle, creativity and perpetuity, propriety and virtue. They are not material, and may not be bought. They are the social estate which comes from the natural spontaneity in a non-managerial, non-marxist, non-Posnerian society. This estate is our greatest inheritance, our freedom, our dignity, our all.

In Robin Paul Malloy, the spontaneous social order and freedom-loving persons have a powerful advocate, a brilliant economist and writer, a fine law professor, and a gracious person.

APPENDIX 1.

Robert N. Bell, *Public, Goldsmith Reviewing Use of Money to Promote City*, INDIANAPOLIS STAR, Sunday, Dec. 22, 1991 at A1, A8-A9.*

They have operated in virtual secrecy for years.

Yet these five private organizations charged with helping to promote the city of Indianapolis receive millions of your tax dollars.

And now they face the glare of public scrutiny because for the first time the public — and government agencies — are taking a close look at how they spend the money they receive.

Also taking a special interest is Mayor-elect Stephen Goldsmith, who is reviewing all aspects of city government, including its promotional effort.

The five agencies are the Indianapolis Convention & Visitors Association, the Indiana Sports Corp., the Indianapolis Project, the Indianapolis Economic Development Corp. and the Commission for Downtown.

The Indianapolis Star studied the operation of these organizations after an Indiana Supreme Court decision declared their spending records open.

That review found:

- They spent \$6.89 million last year, and \$3.68 million of that was tax dollars.

- The agencies pass money among themselves. In fact, the organization with the largest budget gives some of its money to two of the other groups without any accountability to the public.

- The five separate agencies have some similar duties, but those involved argue vigorously that combining them would not be a good idea.

Not a unique system

Providing tax money to private organizations is not unique to Indianapolis. Columbus, Ohio, a city of comparable size and population, provides tax money to promote the city.

David Bush of the Legislative Research Office of the Columbus City Council said the city provides \$4,125,000 to private organizations such as the Columbus Chamber of Commerce, Downtown Columbus, the Columbus Sports Corp. and the Columbus Countywide Development Corp.

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The majority of the funding here comes from the city of Indianapolis, either through its Department of Metropolitan Development or the Capital Improvement Board. Also providing money are the Indiana Department of Commerce; the Corporate Community Council, a private group made up of city business executives; and Lilly Endowment.

Those in charge of the organizations believe the taxpayers are getting a good return on their investment. But Goldsmith is not prepared to agree — at least not yet.

He wants to see a complete analysis of all the organizations before commenting on their operations.

“We have been in the process of trying to analyze these organizations as investments and attempting to measure the return on the investment.

“The goal is to create a management analysis that would evaluate them, define their purpose and measure how much of a return they make,” Goldsmith said.

Standard of accountability

The mayor-elect added, “It is my view these organizations should be held to at least the same standard (of accountability) as city government.” A cadre of Goldsmith volunteers already is looking at the operation of city government, how it can be streamlined and how money could be saved.

Goldsmith said he already has asked the Capital Improvement Board to limit its contract with the convention and visitors association to one year. The board is scheduled to vote Monday on a proposed four-year contract with the convention association that provides \$2.82 million a year.

The mayor-elect said he asked for the one-year contract in case any changes should be made before the budget is passed next year. He said he also hopes to have information on all the organizations to which the city provides money before the budget is passed.

The State Board of Accounts has reviewed the books of the convention association, and report is expected soon.

Among other things, a review of its records shows the association, which receives \$2.8 million in hotel-motel tax revenues, turns around and gives \$150,000 of that amount to the sports corporation and \$103,292 to the Indianapolis Project.

Goldsmith said he has a concern about the flow of money to the organizations.

But Thomas M. Miller, chairman of the boards of the convention association and the Indianapolis Project, sees no problem as long as an accounting is made to the convention association and the Capital Improvement Board, which gives the association the money in the first place.

Miller is chairman of the board and chief executive officer of INB National Bank and chairman of the Corporate Community Council.

'No problem'

He and many other top civic leaders serve on several, or in some cases all, of the boards of the private organizations. But leaders of the organizations say there is nothing nefarious in the multiple memberships.

They also believe tax money is well spent.

Miller said he believes the money "absolutely is well spent. I would like to think if it wasn't, they (the organizations) would be discontinued."

Michael G. Browning, president of Browning Investments, is chairman of the sports corporation board and sits on the executive committees of the convention association, the economic development corporation and the Downtown commission. He also is on the board of the Indianapolis Project.

He also believes tax revenues have been put to good use.

He said the sports corporation and the convention association "have done an outstanding job of enhancing the image of the community. I have no problem with the use of tax money. I wish there could be that kind of return on all tax money.

"From 1976 to 1978, this city was going no place. It was perceived as Indiananoplace. Employers had trouble attracting people because they did not want to live in this community."

The sports corporation was formed to help change the image. "It wasn't just sports for sports' sake. It was (formed) to make people feel positive about the quality of life here."

He said the same is true of the other organizations.

"Now we have a different problem. Companies move their employees here, and they (the employees) don't want to leave (when the company wants to transfer them). The perception of the city has changed."

Too few volunteers

Donald W. Tanselle, chairman of the executive committee of Merchants National Corp., is another of the civic leaders who serves on more than one board.

He serves on four of the boards and is chairman of the economic development corporation and the Downtown commission.

Tanselle said his multiple board memberships are not by design.

"It's the nature of business organization in the community. The fact is there are few home-based businesses in our community. In general, most volunteers are the leaders of those organizations that are home-based in that community.

"As a result, there is just a smaller group of those who serve. Efforts are constantly being made to expand (the number of volunteers)."

Ironically, Tanselle's bank recently was bought out by National Citicorp of Cleveland.

Browning also sees no design in the makeup of the various boards.

"It [if] there is (a design), then nobody let me in on the grand plan.

"One of the things that is a serious problem is that we have to broaden the volunteer base. You burn guys out and they're not as effective. The community needs to get more people on board," Browning said.

Tanselle said he has been in Indianapolis almost 44 years and has been involved in community organizations for at least 35 years.

Money to other groups

The banking executive also said he had no problem with the convention association's providing the other organizations with money.

"First of all, you have to recognize that the ICVA has the resources through the hotel-restaurant tax.

"Then look at the relationship between the sports corporation and the Indianapolis Project. They certainly strengthen and support the mission of the ICVA.

"The project keeps our name out front, and the sports corporation brings and promotes sporting events.

"I suppose they both could be a part of the ICVA. But since their missions are so specific . . . I think some degree of independence is necessary, particularly in the case of the Indianapolis Project, whose efforts have been very helpful in the mission of the IEDC (development corporation)."

The fact that the convention association gives some of its money to related organizations does not bother Browning, either.

Merger not wanted

And Browning says he does not believe that putting all the organizations under one umbrella group would help.

“Centralization would be counterproductive. Our focus (sports corporation) is to bring events here and to make sure they are successful. I know what it takes just to do our piece of the thing. I don’t think it would help to be part of a centralized organization.

“It’s the same story for the ICVA and the Commission for Downtown,” Browning said.

He said each has a special role, and it “is all a part of the strategy to enhance the quality of life.”

Tanselle also says he would not favor a merger of the organizations.

“That’s an age-old argument. There isn’t any question there would be some administrative savings with such a consolidation. But the organizations are so heavily dependent on volunteers, you would lose some of the enthusiasm of the volunteers. They would get lost in the bigger pot,” Tanselle said.

Miller thinks “it is better to have smaller units. It’s easier to keep track if different people are on different organizations.”

Goldsmith also said centralization may not be the way to go.

“I think simplicity in funding is important,” but he said he would not want to do anything “that does reduce the number of people participating.”

Indianapolis' top civic leaders and the organizations they serve

These 22 executives serve on many of the same boards. The organizations represented here, though private in nature, promote the city and attract businesses and special events.

Movers and shakers	ICVA*	IEDC*	IPI*	ISC*	CFD*	Other
Gerald L. Bepko Chancellor of IUPUI	Board member	Board member	Board member	Executive committee		
Thomas W. Binford Chairman of board of Binford Associates, management consulting firm	Executive committee	Board member	Vice Chairman			
Phillp C. Borst City-County Council member	Board member	Board member	Board member	Executive committee	Board member	
Michael G. Browning President of Browning Investments	Executive committee	Executive committee	Board member	Chairman of board	Executive committee	
David E. Carley President of Demars Haka Development Corp.			Board member		Board member	
James E. Dora Chairman of General Hotels Corp.	Executive committee		Board member		Board member	President of CIB*
David R. Frick Managing Partner of Baker and Daniels	Board member	Board member	Board member	Board member		Treasurer of CIB*
Terry Hardy Certified Public Accountant with Ernst & Young		Treasurer	Assistant Treasurer			
Mike Higbee** Director of Indianapolis Metropolitan Development Department		Board member			Board member	
William H. Hudnut** Mayor	Ex officio board mem.	Ex officio board mem.	Ex officio board mem.			
William K. McGowan Jr.	President & CEO		President & CEO	Vice President	Board member	
Thomas M. Miller Chairman of the board and CEO of INB National Bank	Chairman of the board	Executive committee	Chairman of the board			Chairman of CCC*
James T. Morris Chairman and CEO of IWC Resources Inc.	Executive committee		Board member	Executive committee		
John A. Myrland President of Indianapolis Chamber of Commerce	Executive committee	Board member	Board member			
Frank O'Bannon Lieutenant Governor	Ex officio member	Ex officio member	Ex officio member			
Robert H. Reynolds Partner of Barnes and Thornburg	Executive committee	Executive committee	Executive committee			
Gene Sease Chairman of board of Sease, Gerig & Wilcox	Executive committee		Executive committee		Executive committee	
Jerry D. Semler President of American United Life Insurance Co.	Executive committee			Board member	Executive committee	
Jack R. Shaw Managing partner of Ernst & Young		Board member	Treasurer, executive committee		Treasurer	
Donald W. Tanselle Chairman of executive committee of Merchants National Corp.	Board member	Chairman of board	Board member		Chairman of board	
Marjorie Tarplee Executive Director of Central Newspapers Foundation	Executive committee				Executive committee	
Rev. Charles Williams President of Indiana Black Expo	Board member		Board member	Vice President		

Acronyms represent the following organizations: Indianapolis Convention & Visitors Association, Indianapolis Economic Development Corp., Indianapolis Projects Incorporated, Indiana Sports Corp., Commission for Downtown, Capital Improvement Board, Corporate Community Council.
**Leaves office Jan. 1

Source: Above organizations.

Flow of funds for city organizations

These local organizations are for the advancement and enhancement of indianapolis as a city. More than half of their total budgets come from tax dollars.

Recipients:

ICVA
 Indianapolis Convention & Visitors Assoc.
 88 board members (19 are officers or on executive committee)
 Total budget: \$3,822,375

IEDC
 Indianapolis Economic Development Corp.
 28 board members (15 are officers or on the executive committee)
 Total budget: \$738,597

IPI
 Indianapolis Projects Incorporated
 24 board members (9 are officers or on executive committee)
 Total budget: \$657,642

ISC
 Indiana Sports Corp.
 37 board members (13 are on executive committee; 37 vice presidents)
 Total budget: \$866,508

CFD
 Commission for Downtown (CFD)
 55 board members (24 are officers or on the executive committee)
 Total budget: \$810,000

Contributors:

- Capital Improvement Board (CIB)
- City of Indianapolis, Department of Metropolitan Development
- State of Indiana, Department of Commerce
- Corporate Community Council (CCC)

Source: Above organizations

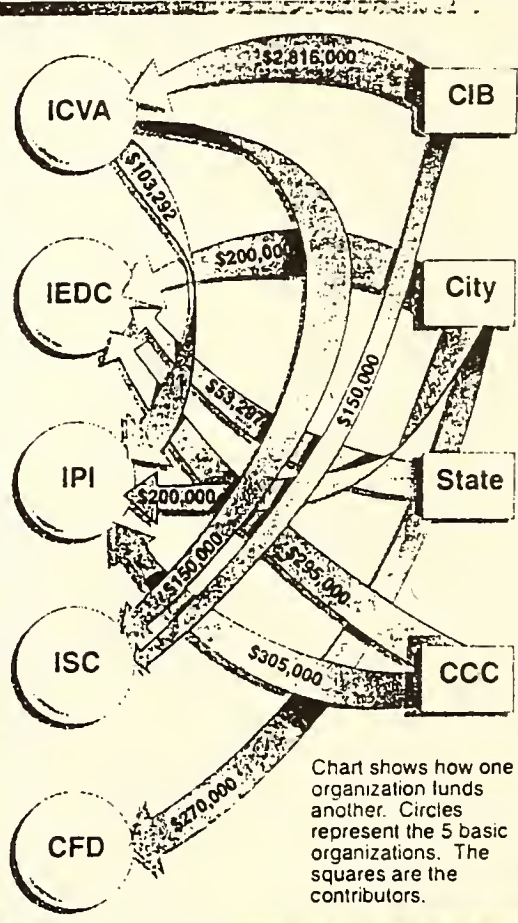


Chart shows how one organization funds another. Circles represent the 5 basic organizations. The squares are the contributors.

APPENDIX 2.

Downtown Development: Keeping the Momentum, CEO Roundtable, 4 INDIANAPOLIS C.E.O. 6, 18-67 (Nov. 1991).*

N. Cotterill: If we could, I'd just like to start out with Harold and Bill's concepts of how important the Circle Centre mall is to other downtown development projects.

Garrison: Well, my view of that may come from a little different angle due to my architectural background. I look at cities as a whole. And sometimes when we talk about development we tend to isolate buildings as if there is no relationship to one another. So, in reference to the mall as part of the city, rather than as a building, I think it's important to the other projects because we don't have a fabric without it — the fabric of retail, office and housing, etc., to create what a city really is. And we have plenty of history to tell us that without the right fabric, a city will deteriorate, and it also creates an economic catastrophe. You can point to cities around the world that have the right fabric and they have succeeded over centuries. So, when I think about the mall, to me it's a missing link. How it relates to an individual office building is intangible — because it isn't that a person is going to sign a lease in one of our buildings or anyone's buildings because the mall is across the street. But the relationship is in the psyche of saying, "Do I want to be downtown and be part of an environment?" Without it, I think you are constantly faced with the black image of a Detroit and some of these other cities that constantly just deteriorate over time.

N. Cotterill: Speaking as primarily a downtown developer, has the potential of the mall already had an effect?

Garrison: I think tremendously. I believe that most of the lenders around the country have always viewed it as very positive, because I think they have seen that when you have a *total* community, everything succeeds. I know its viewed positively with people coming into town looking to locate here — I know when we've talked to them — it's right up at the top of the questions that are first asked.

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Moore: I think Harold is talking about creating something of a lifestyle downtown, certainly a retail element downtown is a vital piece of the pie . . . not only for local residents but for visitors as well. I was talking to the manager in St. Louis' downtown mall and he said that they are doing approximately a third of their volume from their convention visitors.

N. Cotterill: But, are they doing enough *total* volume?

Moore: I think they would like to do more, but I think it's a successful mall. St. Louis has seen its downtown literally move out over the last 20 years. Its population, I believe, is down to almost half of what it was. Today, that mall provides an amenity that attracts people that want to work downtown and visit downtown St. Louis.

In our case, it's hard — it's the chicken and the egg question: What comes first? We have heard talk that the mall needs a 24-hour population nearby. But the mall in itself will make it much more desirable for people to seek housing in the central business area. You do need a good hotel base, a good convention base which obviously creates good opportunities for fine restaurants. These are all necessary amenities that, I think, are definitely taken into consideration by people choosing office space locations.

N. Cotterill: From what everyone is saying here, the mall is integral to other downtown projects, and yet there have been persistent concerns about whether the mall would be built and whether financing was falling through. As you know, Mike Highee had planned to be with us today and sent John Labaj in his place because he was at one of the "emergency" meetings. John, can you shed any light on what's happening at all?

Labaj: I would say that you have to realize that there are a number of different levels of negotiations that are being negotiated right now which is very complex. We have a level of negotiation that is between the city and Melvin Simon & Associates on the project that is very important, which is at the top on our list. And the second most important one is Melvin Simon & Associates' negotiations with the limited partnership on the partnership agreement — another very important negotiation. The third level of negotiations is between Melvin Simon & Associates and the major anchor

department stores. Without the major anchor department stores, this project is not going to happen. And fourth, there is also a negotiation for the actual construction financing. All of those negotiations are happening at the same time and all have to be somewhat at the same spot in order for one of them to work. All of those have to happen at the same time, and that is what is causing the delays right now. It's the complexity of it and making sure all of those elements are roughly in the same spot so that each portion or level feels comfortable enough to keep on going on.

N. Cotterill: Are you comfortable with the idea that it is not going to hit another major snag at this point?

Labaj: I don't believe it's going to hit a major snag. We have so many attorneys involved you never know. But, no, I think we are really past the point that a major snag can happen, as far as the actual major overall structure of the business transaction.

N. Cotterill: Maybe you can shed some light on where exactly the mall stands.

Murphy: I was at that meeting. I just came directly from that meeting earlier this morning. There was basically a presentation to the corporate partners on where the mall stands and what needs to be done to finish the project.

N. Cotterill: Who are the corporate sponsors?

Murphy: Well, there are 13 right now which represent the major corporate and economic structure of the city including Eli Lilly (and Co.'s Retirement Plan), Indiana Bell, American States Insurance, and others.* We could have probably signed an agreement with the city at the end of June, early July. But, the credibility and the weight that agreement would have carried is increased greatly by continuing negotiations with the corporate partnership. (*Included in the list of corporate sponsors are: American United Life; Associated Insurance Cos. Inc.; Banc One Indiana Corp.; Conseco Inc.; DeMars Corp.; Haka Inc.; INB Financial Corp.; Marsh Supermarkets Inc.'s Retirement Plan; and Merchants National Corp.)

N. Cotterill: They are financially tied in at this time?

Murphy: Absolutely. When they sign this agreement, they will be. The department store relationships are sold. Herb was out at Nordstrom last week, and he talked to The Limited

this morning, they are dealing day in and day out with Lazarus and all three of those leases are out for signature. And all of them are very happy with the progress we are making, not only on the agreements but on the designs and everything else.

N. Cotterill: Is Lazarus a done deal?

Murphy: The lease is out for signature. It's not a done deal until it is signed. We are absolutely confident that it will be a done deal very soon. Probably the most exciting development since early spring and since the formation of the partnership is the evolution of the design, and probably 50 percent of the meeting today at Lilly was to present — for the first time even to some of our corporate partners — some new ideas and some new evolutions in the design of the project.

As you know, we have gone through many designs to the point where we quit producing renderings after a while because it was very expensive. There will be, by the time this is published, hopefully, some announcements in relation to the design of the project which I think will provide a very, very dramatic — we have been using the term “signature piece” to the mall that the city will be very proud of and very excited about.

N. Cotterill: Architecturally?

Murphy: Architecturally, functionally. Then, again, I'm not at a point right now where I can talk about it in detail, but I think Harold will be very excited about what this means for the city, and I think all of us will be. On a more practical level, the design has been improved, as well as from a business standpoint and from a retail standpoint so that we have more leasable area. We have done things like we have moved Nordstrom all the way south of Georgia Street now along Meridian. The area footprint on the mall has increased on the first floor. The hotel has been moved from Georgia Street up to Illinois Street so its actually opposite Merchants Plaza now. We are going to move the movie theaters, we think, to the south side of Maryland Street, if I'm correct.

Labaj: Yes.

Murphy: What we are doing is changing Illinois Street into what our architects call a 24-hour street. It is a bridge between the office environment from the Circle and up to Ohio Street and the environment along Georgia Street.

N. Cotterill: I think the person passing through our downtown area right now, though, is wondering when they are going to see something other than shovels at work. When are they going to see something coming out of the holes?

Murphy: I think John can speak to that.

Labaj: We have a lot of parking garages to construct down there in the holes for awhile, because we know that this mall has to have quick and easy parking access, probably quicker and easier than you actually have in a suburban location. And what you see happening now are the concrete, shoring and hopefully finishing up construction on those parking garages in 1992.

J. Cotterill: Is it too early to say when you think there will be some kind of opening for the mall?

Murphy: We are looking now at April to August, which I know is a large window, but April or August of '94. A lot of it depends on things going right from here on out.

N. Cotterill: If you had to put your own money on that, would you say that date is going to be moved again?

Murphy: I would think not. I think most of the major hurdles are behind us. We still have to finance the project. We have hired Goldman Sachs to market the deal nationwide and internationally. There have only been a couple of malls financed in the entire United States this year. One was in Nebraska and another one was in Montgomery, Maryland, and that required a consortium of three European banks. And it was a smaller deal than this. So the financing is not to be trivialized at all.

J. Cotterill: Let's pursue that issue. In as simple terms as possible, how many dollars does it take? Where does it come from? What is the city's commitment?

Labaj: The city's commitment was \$150 million and that was basically raised through taxes and financing mechanisms and also from a loan to the city from the state's Rainy Day Fund. That commitment was on the table in the beginning, and that is it. Before that, we handled the property acquisition to put together three-and-a-half blocks of downtown real estate. We felt that that was appropriate re-development activity for the city to try to make these types of developments happen. They are quite different than one or two owners in a corn field.

In constructing an urban mall, we have multiple owners and tenants who have essentially the city's commitment of \$50 million to assemble the land. That was really the trigger. And the rest of those funds are for such as parking - to construct the parking underground as we need to in the mall as something that would not happen within a suburban location.

N. Cotterill: This is Mayor Hudnut's "leveling the playing field . . ."

Labaj: Right. The exact concept. That and the connectors between the three-and-a-half blocks for the preservation and architectural elements in detail are also in that "150 million." I think we can turn it over to Mike for —

Murphy: Well, the private sector financing has changed so much over the past few years. It used to be that we could start a mall without any financing because we knew that we would get it before the mall would open. Obviously, that is not the case anymore. If you can get financing, they require a heavy infusion of equity, anywhere from 30 percent to 50 percent. In this case, we are looking at between \$120 million and \$150 million for the private sector part of the mall. As part of that, we are looking for \$50 million to \$70 million from our corporate partners which then leaves you with maybe another \$70 million to \$80 million to finance other ways. That is what we'll be marketing through Goldman Sachs after the agreements are signed later this month.

Weedman: You know there is something else. You talked about the St. Louis mall. Wasn't that about a 24-year project before it finally got built?

Murphy: I'm glad you brought up the St. Louis project, because people ask us about that. It's one of our first downtown projects. But, it's really a bit unfair to compare our project here in Indianapolis. In some ways we would compare much more favorably.

Weedman: And this particular project has run into the whole debacle of retail bankruptcy, the recession, everything in the world that could really — I suppose most of us would have said, "I give up," a long time ago.

Murphy: You are right.

Weedman: I think it's a major credit for the Simon's and the city that they kept at it. About everything that could have happened, has happened, and it's still going.

Murphy: Even though historically we date Circle Centre back to the late 70's. The true nuts and bolts planning began in about '82 or '83, so it is really only an eight-year project to this point. I want to get back to St. Louis Center for a minute, because not only is it twice the size of — the retail portion — of what we will have here in Indianapolis, but it is anchored by two very — I shouldn't say average, but very —

Labaj: Mid-level.

Murphy: . . . Mid-level department stores in Famous Bar and Dillard's department stores that are available in every single suburban mall in the St. Louis area. There is nothing in that project to distinguish itself from the suburban market. In essence, there is less to draw the shopper out of the suburbs to that project. Here with Nordstrom with theater complexes, with the type of things we are planning on. There will be much more — the potential is much greater for success here. And St. Louis is rather a successful town.

N. Cotterill: I would like to bring up one of the reasons that Sid is here, although, he is now a banker —

Weedman: I'm just an observer.

Labaj: Most bankers are.

N. Cotterill: Sid is now an observer. But as we all know, before he was an "observer" he was the Executive Director of the Commission for Downtown, and the Executive Director of the White River Park Commission, and as I heard Harold talk about the fabric of the community and of the downtown area, particularly, White River Park jumps to mind as an important entity. Can you give us your perspective of where that is? What would you like to see happen there?

Weedman: I think it's in its dormant stage and will be for a while for several reasons: Money being the primary reason. The park was part of this whole synergy that was going to take place. Harold cannot isolate any one of these projects on its own. If you remember, the Union Station project was just dead in the water for probably 20 years. Right, John?

Labaj: Right.

Weedman: Everybody tried, but nobody could get anything done until almost the day they started excavating for the

Hoosier Dome. And all of a sudden, Bob Borns started moving Union Station ahead to become a reality. And then 60 restaurants opened up in the next two-and-a-half years within the dead area south of Washington Street. So all this symbiotic — one project makes another project work which makes a whole lot of other things happen. The White River Park was part of that synergy. There's been 65, 75, 120 acres of land — set for redevelopment. There is about 40 of it that hasn't been done yet. And it's 40 prime acres. I think as the economy changes, things get better, and the mall progresses, somebody is going to take a look at that and say, "We can't let this continue to lie dormant." And it will happen.

N. Cotterill: Do you think that the state is going to revive its interest in it? I mean, it is an unpopular subject right now in the legislature.

Weedman: I think if you had a terrific project and major investors walk in and say, "OK, state of Indiana, this is what we are going to do and this is the pro forma and this is the money, this is the equity, this is the financing and you are to do your share," which is whatever it is. I don't think any rational legislature or administrator could walk away from that.

N. Cotterill: You don't see the legislature as an obstacle?

Weedman: Not as long as there is a deal.

N. Cotterill: Let's talk about the deal. We thought for a while that Knottsberry Farm was going to be the group to come in and put in place the park that we envisioned. Do you have any special perspective on that? Can you enlighten us as to what you think went wrong?

Weedman: The original idea way back in '78 or '79, was: Let's get Disney to do this park. If you had Disney in here, everybody would be running in and throwing money at it. They would want a piece of it. But even with the name value of Disney, that didn't happen.

N. Cotterill: Disney didn't think we had enough acreage for them. Right?

Weedman: Right. And they wouldn't have put up big money anyway. Not when France is giving them \$2 billion to build a park. They're not going to put any money into White River Park. So we went through a period where there were not

what you call very credible people coming up with plans. In my opinion, the No. 2 firm in the United States would be Knottsberry. They were not going to put up any money. It was the credibility of them as an operator, them as an park designer, as an entertainment leisure-time business that would attract other types of money to come in. So they didn't put any money on the table, other than maybe a \$150,000 in design fees. So they were not a deal as such. They were the catalyst for the deal. And the state — I think even if you had someone with the money, the state would have had to postpone getting involved because of the recession, because they have so many other pressures.

N. Cotterill: Do you see that reviving soon? Do you think that the mood and the economy is going to turn quickly enough to hang onto what we have already accomplished?

Weedman: My hope is that, in the best of all worlds, nobody gets panicky and does anything with the 40-some acres on this side of the river, like somebody comes in and says, "I want to build a warehouse." And some member in charge says, "Fine. That's money. Let's take this." That would be a disaster.

N. Cotterill: That land is now owned by whom?

Weedman: State of Indiana. If they would just land bank it and be cool about it, I think sometime in the next five to seven years, we are going to see something happen.

N. Cotterill: Correct me if I'm wrong, gentlemen — but I don't believe downtown developers and others would be anywhere near as upset if the White River Park project didn't happen as they would be if the mall didn't happen. Would you agree with that? I mean retail is something we have — or had — downtown. A park of that nature is not.

Weedman: I think that the difference — I think you may be right. But the primary difference is that where the mall is concerned there are an awful lot of open spaces right in the heart of downtown where everybody expects there to be buildings, regardless of whether there is building. The park sits over there, and it was already a lot of open space. So I think it's: "Well, we have torn down all of those buildings to build a mall and we have all of these construction fences where I want to walk to get to my lunch." That creates a more immediate need to get this mall built and things cleaned up.

Garrison: I don't think the park development is over. You know, this is going to go on for generations to come. I was telling John that I haven't been to a dinner party in a year where the question doesn't come up, "Harold, when is the mall going to get built?" Well, I'm not doing anything with it, but it has to be built. That has been my answer. People think, "Well that is not a very businesslike — I mean, why should the city spend money, etc.?" But, they don't understand. If we don't do it, what are we left with? How are we ever going to be a city? You have to replace vacant dormant buildings with something. No action is not an answer.

Garrison: One of the best things to look back on, Bill, is when we first started downtown in 1980, we were told never to go south of Washington Street. You were a fool to buy a building in that area. We were looking at the Century Building, because no one would go south of Washington Street. I mean, if you were to take a photograph of the skyline just exactly a decade ago and you think, "Well, what drove it to this point?" And I am personally proud of what we have. You know, traveling around the country and even around the world, Indianapolis is now recognized. People were embarrassed to say they were from Indianapolis at one time. So I think sometimes you just need to look back and see what we have accomplished. I think as we look forward, really, the agenda is dictating the completion of the mall. But, I still have another agenda and it's housing. I keep trying to remind the city of it. I know it's a need that is there. And then you think of White River Park and other downtown projects, housing included . . . I don't think we should think of those as the end. There is still more of the same to come. We are just preparing for the next phase.

N. Cotterill: I think there is a little "If you build it, they will come" mindset kind of left over from building the Dome, I also think that we are a city that got used to instant gratification. We'd announce a project and it happened. It was the right time for those kinds of things to happen instantly. Then we ran into roadblocks with the park and the mall. It is hard to re-educate the public and there's no getting around the fact that the problems came as a shock to them.

Garrison: That is perception, though. People believe that is happened quickly. A lot of these things that you point to, really took a lot of years to put together, but, you know,

the general public and everyone forgets. Truth is the Dome didn't happen overnight. Union Station didn't happen overnight. Nothing has happened that quickly. It's just that people forget.

Weedman: How many people remember that your 10 West Market, that gorgeous 25-story building . . . that it wasn't very many years ago — five years ago, that there was a kind of cut-rate drug store and a shoe store in there?

Murphy: That's right.

Weedman: And everybody walks by there today and they just take that for granted. Time compression and perception is a huge part of all of this.

N. Cotterill: In the life of a city, it's not really not very long at all.

Labaj: That is one of the things about being a city official here. It's about making no small plans. I mean, my predecessors took a really big risk back in the '60s and '70s, and said, "We have a problem here. We can just ignore it or we can, you know, make the grand plans. Make no small plans; and let's, as a city, try to solve these problems and do something about them." You know the other side of this is the abyss. And the abyss is Detroit, New York, Gary. We all know what the abyss is. We can just kind of ignore that and just hope that the abyss doesn't happen, or we can make the big plans. We can dream and dreams. And, as long as those dreams and plans are in place, you are always going to have market downturns and upturns, but you have to ride through them. Because you have to have the plans and the vision there. If you don't have that vision for your community, I don't think your governing correctly.

N. Cotterill: Governing is the issue. That is what happened to those cities. They had no leadership, which leads me to a question that I have to ask: Is the continuum there? We are going to have a new mayor very soon. How much of this depends on the support of our new mayor?

Murphy: I can say that a tremendous amount has depended on Mayor Hudnut because of his vision and his leadership, and quite frankly, the courage he has displayed over the past several years. But we have been assured by both Mr. Mahern and Mr. Goldsmith that their commitment to the mall is

resolute and that the responsible action for the next mayor to take is to follow in Hudnut's steps and make sure this mall is completed. The one point that people I think need to understand is that we didn't have a stagnant situation downtown. We had a deteriorating situation and it continues to deteriorate. One time we had 85 percent of our retail dollars spent downtown, and now it's 2, 2 1/2 percent. It's getting worse. Stores are closing up all the time and trying every effort to survive.

You mentioned the idea left over from the Hoosier dome, just build it and they will come. I don't think we have to think that way in this case, because we have a fairly new existing downtown mall at Columbus, Ohio, that is proof that it will work. That mall is bringing 40,000 people a day into downtown that don't normally come to downtown Columbus. And during the month of December last year it averaged 80,000 a day.

N. Cotterill: What kind of numbers would we like to see for the Circle Centre mall?

Murphy: I think we can do better than Columbus. I hope John agrees. I think the draw of Nordstrom will be higher than the draw that they have over there, and even though we are very similar demographically to Columbus, there are several factors in our favor. Our cost of living is lower, our average income per household is higher, which in our minds translates a more discretionary income. We are growing faster — neither city is growing quickly, but we are growing at a faster rate than Columbus is. There are several demographic and market factors that point to us having better chances for success than Columbus.

N. Cotterill: Have retail sales had an upturn of any note? I mean, are you heartened by any of that?

Murphy: We are heartened by the emerging stability of the department store chains. We think that several of them will emerge from bankruptcy yet this year or early next year. We think that the small shop situation in the Midwest is pretty stable. But retail sales as you may have seen just this past week, Sears and Wards and some of the other companies are saying that the back-to-school sales, which are a barometer of Christmas attitudes so to speak, have been disappointing.

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