

Lady Chatterley, conkers and entrepreneurial freedom: eliding risks in the pursuit of deregulation.

John Hendry, 2008

I am at a conference on risk and regulation and Sir Paul Judge, past-president of the RSA and chairman of its Risk Commission is giving his standard speech. In the first half he shows how miniscule are the chances of deaths from accidents, especially for children, and argues that through responding to the emotions released by such accidents and their media coverage rather than to hard statistical facts we have grossly over-regulated children's activities. Yes there is a risk associated with adventure activities such as sailing and even with playground activities such as the game of conkers, but it is in reality a very small risk indeed, and whatever benefits we might generate by protecting children from such risks are as nothing compared with the damage we do, both to the children themselves and to the society they will inhabit, by suppressing the spirit of adventure and preventing children from exploring things for themselves.

From children, the argument moves to artists and scientists. They too need to be free from regulatory constraints if their creativity and innovation are not to be stifled, and again the costs of restricting innovation are born both by the individuals concerned and by society at large, for it is through the creative genius of our artists and scientists, often unrecognised in their own lifetimes, that we grow and develop as a society.

From artists, Judge moves to entrepreneurs, his central concern, and the same argument is applied. For the growth of society and the creation of wealth, the preservation of entrepreneurial freedom is even more important than childhood, artistic or scientific freedom. We regulate at our peril.

This general line of argument is by no means peculiar to Judge. Indeed, it has become commonplace in policy circles, both in Washington and in London. It also has a certain merit. The arguments in respect of children are very widely accepted, and rightly so. It is only journalists, who need to sell copy, and politicians who need to win emotional support, who resist them in practice, and even they recognise their force. I have written myself about the similarities between the cultural locations of children, artists and entrepreneurs, and it's flattering to think that one of Judge's researchers might have read my work, even if he has not. Children, artists and entrepreneurs all act in part outside or on the fringes of societal conventions. Children have not yet learnt them, artists seek to break free of them, and entrepreneurs ignore them. Without this unconventionality our society would indeed stagnate and stultify. In every area the dangers of over-regulation are real.

Having said all that, the line of argument represented by Judge's speech and accepted increasingly by politicians of the new left as well as by those of the libertarian right, is both deeply confused and profoundly dangerous. For all their apparent similarities the

cases are not the same, and to treat them as if they were is to conceal, wittingly or unwittingly, some of the most important aspects of risk, regulation and entrepreneurial freedom in contemporary society.

The concept of risk is often treated as if it were some single quantity that could be easily measured: for any given situation, an associated risk, to be captured in statistics. But quite apart from the salience of perceptions (as Ulrich Beck stressed, it really does matter what people's perceptions of risks are, and not just what the statistics say), it matters critically both what the risk is and to whom it applies. And in issues of regulation, the latter point is particularly important.

When people consider the case for regulating the activities of children, their proper concern is primarily for the risk to those children. (Their real concern may of course be for the risks to their own political careers, but that point can be set aside for now.) Similarly, when people argue against regulating the activities of children, it is with the damage that might be done to the children themselves, through over-protection, and the lack of opportunity for physical exercise, discovery and adventure, that they are primarily concerned. There may in addition be some concern with social risks involved, with the kind of society that might develop if all its children are over-protected, but this is generally secondary.

Turn to the case of the artist and the regulation of artistic outputs, and the case is altogether different. The people who argued for the banning of *Lady Chatterley's Lover* were not, on the whole, concerned with the risk posed to D. H. Lawrence. They were concerned with the impact of Lawrence's activities on society, and especially with the impact on society as a whole. To the extent that the debate was framed in a religious context (as censorship debates commonly are), there was a concern that individual readers might be corrupted, but reading books is voluntary and the overriding and proper concern in matters of censorship is not with the risk to individual consumers but with the risk of the corruption of the moral fabric of society. Any society is held together by a moral consensus and anything that threatens that consensus threatens social cohesion. Similarly, while the opponents of censorship often ground their case on some notion of individual freedom, the most telling argument against the censors is that made at the societal level. Moral values are always and have always been in flux, responding like everything else to changing science, changing technologies, changing political realities and changing perceptions of humankind. It is through exploring and debating the work of writers and other artists that we engage with these changes in a manageable way, and by censoring artistic activity we lose the capacity to adapt to them.

Turn now to the case of the entrepreneur and the regulatory constraints on entrepreneurial freedom that Judge and others find so dreadful and it is again entirely different. For in regulating the business entrepreneur we are not concerned either with the welfare of the actor, as in the case of children, or primarily with that of society at large as in the case of artists (though there is a case to be made there). Our primary concern is with the individual members of society whose welfare may be put at risk

by the entrepreneur's activities, and whose encounter with those activities is very often not voluntary, at least not in the way that a reader's encounter with Lady Chatterley's morals is voluntary. Our concern is with the risk to creditors who may go unpaid, to employees who may be stranded jobless or lose their pensions, to customers who may buy products that have been rushed to market without appropriate safety testing, to investors who may be sold a pup, to residents who may suffer from the various 'externalities' created by entrepreneurs in a hurry. Many years ago, one of Judge's own entrepreneurial ventures – a magazine promoting the virtues of entrepreneurial freedom – went bust, and though he had plenty of money himself the law of limited liability came into play and writers and other suppliers went unpaid. There is no criticism of Judge here: he acted according to the rules. But the case argues more for the tightening of regulations than for their loosening.

The third case is different too in its complexity. For whereas in the other two cases the proponents and opponents of regulation can argue largely upon the same ground, no-one is suggesting that by removing constraints on entrepreneurial freedom we might actually benefit directly the various individuals who might be harmed by it: that falling victim to the activities of entrepreneurs is somehow good for one in the long run. The argument is rather that the harmful risks to those individuals are outweighed by the likely benefits to society at large. There are winners as well as losers from entrepreneurial freedom (the entrepreneurs themselves, successful investors and the employees and customers of those ventures that prove successful), and we all benefit, it is argued, from living in a free society and from the wealth creation that results.

There is certainly some merit in this argument, but it is far from straightforward. It is by no means obvious that we should we allow entrepreneurs the freedom to harm innocent bystanders in the interests of wealth creation at the aggregate level. And while it can plausibly be argued that entrepreneurial freedom does contribute to wealth creation it has other societal effects too. Entrepreneurs are rarely driven by a desire to help society. They are driven, mainly, by self-interest and this can all too easily turn to greed. We live in a society in which self-interest already has a degree of social legitimacy rarely, if ever, seen in history before, and in which the forces of self-interest and the traditional and socially cohering values of traditional moral obligation are finely balanced. The threat to the stability and cohesion of our society of Lady Chatterley's morals may be slight. That of an environment in which greed is allowed to flourish and obligations to others can be dismissed in the name of freedom is profound.

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