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To market, to market . . .

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Have you used this product before?" a clerk in a green coat asks a garden centre customer with a bottle of herbicide. The sale is accompanied by a brief lesson about the "do's and don'ts" of using herbicide.

"Have you used this product before?" a pharmacist in a white coat asks a customer with an antihistamine at the pharmacy counter across the store. The customer gets a brief lesson about using antihistamine as the pharmacist processes the sale.

Such encounters occur hundreds of thousands of times daily, often in stores where the pharmacy counter is found behind aisle after aisle of a cornucopia of consumer goods - especially in large chain stores and in department stores. In these circumstances, it is not difficult to see why people tend to think that a pharmacy is to a patient what a garden centre is to a gardener: a 'point of sale' for specialized products.

"I'm looking for that new German beer I heard about on the radio," says the customer to the cold beer and wine store employee. "Have you got any?" The employee directs the customer to the appropriate shelf, or, if the new beer isn't in stock, suggests a similar brand or something he thinks is even better.

"I'm looking for that new flu medicine I heard about on TV," says the customer to the pharmacist across the street. "Have you got any?" The pharmacist obliges the customer if the product is in stock, or, perhaps, suggests an alternative.

Again, these common occurrences illustrate the fact that interactions between pharmacists and patients more often resemble what takes place in garden centres and cold beer and wine stores than in physician consulting rooms and hospitals. Pharmacists are frequently identified, in the public eye, as employees who further their employers' business interests (or businessmen who further their own) by getting a product into the hands of paying customers. Such opinions are sometimes reinforced by pharmacists themselves.[1] Thus, the ground has been well-prepared for arguments advanced by Professor Robert Vischer of the University of St. Thomas Law School in Minneapolis.[2] These are all the more interesting because they appear to come from a politically and economically conservative perspective.

Professor Vischer makes some valid points. Among them, he comments that even if one believes that "full access" to approved drugs is important, it does not follow that all approved drugs must be carried by all pharmacies.

He also explains that one must distinguish "between inconvenience and lack of access." Only the latter situation, he argues, should trigger state intervention. This leads to a most curious result, given the subsequent development of the argument: that if the state intervenes at all, it should be to ensure consumer access to approved drugs, not be to ensure freedom of conscience for health care workers.

How, then, is freedom of conscience to be ensured?

Expressing a degree of frustration at the "headline-grabbing" activism of the "interest group armies," Professor Vischer suggests that the solution to the problem has been overlooked because of a false premise shared by the opposing sides: the erroneous notion that society consists of only two entities, "the individual, and the state."

In reality, he asserts, American tradition (for he is speaking of the American situation) respects not only individual freedom, but builds upon the "principle of association." Individual citizens associate with one another to pursue common interests, beliefs and outlooks. Thus, he proposes that pharmacies institute their own polices - for or against conscientious objection - and that employees and customers "utilize market power to contest or embrace the morals of their choosing."

The result, he prophesies, will be "webs of morality-driven associations and allegiances" within which individuals with different conscientious convictions can thrive, a "marketplace where multiple conceptions of morality can coexist." He argues that the kind of "ongoing conversation" that must occur in such an environment is more effective in fostering social ties than legislation imposed from above. In brief, his solution to conflicts about freedom of conscience is to be found in a "vibrant marketplace" energized by principles of *laissez-faire* capitalism.

It is at this point that the contradiction involved in Professor Vischer's suggested criteria for state intervention comes into clearer focus. For if it is merely a question of ensuring access to an approved product, surely access is better guaranteed and more efficiently provided by the rules of supply and demand in a free market than by state intervention. On the other hand, the pressures exerted by supply and demand do not necessarily or consistently produce and preserve fundamental human freedoms: witness the institution of slavery in the United States.

It is remarkable that a free-market advocate should assign the state the function of ensuring access to a product - an economic function admirably achieved by free markets - while denying the state a role in the preservation of fundamental freedoms - a political function for which it exists. Happily, it is possible to resolve this contradiction, restoring to the market and to the state the functions proper to each, and to do so in a way that may prove congenial to Professor Vischer.

It is true, as he maintains, that there is more to society than individuals and the state: that the "principle of association" must be taken fully into account, along with (as he implies) the principle of subsidiarity; that is, the state should not usurp or interfere unnecessarily in the functions of lesser communities and associations. What is wanting is recognition of the fact that the individuals who comprise the body politic, including its associations and the state, are not merely individuals, but individual human *persons*. That a human being is simultaneously a human individual and a human person is emphasized by French philosopher Jacques Maritain as the key to a correct understanding of the relationship between the human person and society and the origin of human rights.[3] Maritain's elaboration of this theme leads to a different conclusion than that proposed by Professor Vischer, but,

rather than nullifying his observations, brings to them new and profound dimensions.

Maritain insists that the essential characteristic of a civilized society is "respect and feeling for the dignity of the human person," for which, he adds, "we must be ready to give our lives."[4] The solemnity and force of this assertion becomes more evident when we recall that it was written in the middle of the Second World War, when Maritain's birthplace was in Nazi hands.

"What worth deserving of such sacrifice," he asks, "is then contained in man's personality? What, precisely, do we mean when we speak of the human person?"[5]

> Man is an animal and an individual, but unlike other animals or individuals. Man is an individual who holds himself in hand by his intelligence and his will. He exists not merely physically; there is in him a richer and nobler existence; he has a spiritual superexistence through knowledge and through love. . . and through love he can give himself freely to beings who are, as it were, other selves to him. For this relationship no equivalent is to be found in the physical world.[6]

One finds in the physical world communities of sorts, like ant colonies, comprised of individuals who contribute to a common work that preserves the community (and, thus, the individuals that comprise it) by ensuring access to necessary goods. The individual exists as part of a whole, like a cell that has a function, surely, but no purpose or meaning apart from the organism in which it subsists, and upon which it relies. T.H. White's King Arthur, turned into an ant by Merlyn to learn something about political philosophy, emerges from an ant colony in a rage:

> It was not only that their language was destitute of the words in which he was interested, so that it was impossible to ask them whether they believed in Life, Liberty and the Pursuit of Happiness, but also that it was dangerous to ask them questions at all. A question was a sign of insanity to them because their life was not questionable: it was dictated.[7]

Free market forces might efficiently dictate some of the functional aspects of social and economic life, like the division of responsibilities in labour and production; the market is competent to pass judgement on function. But the nature of the human person and of human society is transcendent,[8] not merely functional, and it is not appropriate to treat human persons as the merely functional parts of a greater whole. This, Merlyn explains to the Badger, "is the totalitarian theory: that men or ants exist for the sake of the state or world, not vice versa."[9]

Maritain not only rejects this totalitarian view, but condemns it as "political perversion."[10] And if one agrees that the human person does not exist for the sake of the state or the world, one should also be chary of the notion that a pharmacist exists for the sake of the pharmacy, or for the sake of a "vibrant marketplace." Thus, Maritain also warns that if human persons are conceptually reduced to the status of mere individuals pursuing individual goods or private interests, the result will be a materialist culture in which the main duty of the state will be to guarantee the freedom of each to follow these pursuits without interference, "thereby enabling the strong freely to oppress the weak."[11] This outcome is all the more likely if society is ordered, not according to principles of justice, but in obedience to the blind forces of economic and social Darwinism administered by Adam Smith's "invisible hand."[12]

The business of the market is the distribution of goods and services. Food, for example, is an essential commodity that can be efficiently produced and distributed in a free market; the state need not assume primary responsibility for it, nor is it likely that the state could successfully mandate and regulate "equal access" to all kinds, quantities and qualities of food. But, in some circumstances - natural disasters, for instance - the state ought to intervene to ensure that minimum human needs are met. This principle can also be applied to drug distribution, though it is more difficult to decide what constitutes a "minimum human need" for that purpose: insulin? Plan B? AIDS drugs? oral contraceptives? cancer drugs? mifepristone?

That difficulty notwithstanding, it is reasonable to acknowledge that the state may intervene in the marketplace in order to ensure that minimum human needs are met,[13] because that is a matter of justice, and the business of the state is justice.[14] State intervention in the practice of pharmacy to ensure access to drugs is thus *authorized* as an *exception* to the norms of a free market. But state intervention in the practice of pharmacy to ensure freedom of conscience is *required* as the *rule* according to the norms of a free country, which insist upon minimum standards for the preservation of human dignity.

This does not mean, as Professor Vischer suggests, that pharmacies must "honour the wishes" of every customer and every pharmacist. In the first place, the goal of "wish fulfilment" does not recommend itself as an ethical principle that ought to govern the practice of medicine or pharmacy. Beyond that, state intervention to safeguard freedom of conscience typically takes the form, not of limitless compulsion, but of limited prohibitions. Employers and others are obliged only to abstain from certain kinds of wrongful conduct, not compelled to do all that legislators or "interest group armies" think desirable. In this respect, protection of conscience legislation is actually less onerous than legislated medical or pharmaceutical mandates. Like laws prohibiting racial discrimination in employment and education, such legislation may be seen as an unwelcome constraint in a free market, but it is a bulwark of liberty in a free country.

Professor Vischer is correct to insist that problems of access to drugs should be left to the marketplace (which is competent to manage the distribution of goods and services), while acknowledging the duty of the state to intervene when and to the extent necessary to ensure that minimal human needs are met. However, deprivation of freedom of conscience is a fundamental injustice, and justice is the primary concern of the state. Thus, the state acts completely within its proper sphere of competence when it intervenes to the extent necessary to protect the dignity of the human person by enacting protection of conscience legislation.

This approach fully respects the different roles of market and state and is not inconsistent with Professor Vischer's insistence that a solution to the current controversy must be in accord with the principles of association and subsidiarity.

Notes:

1. In May, 2000, Canadian pharmacist Gordon Stueck argued against freedom of conscience on the grounds that it would endanger the monopoly enjoyed by pharmacists in dispensing drugs. (Stueck, Gordon, "Here we go again..." *Pharmacy Practice*, May 2000; Project response at

http://www.consciencelaws.org/Conscience-Archive/Commentary/Conscience-Commentary-2000.html#13 July, 2000). Three years later, the Nevada legislative assembly rejected a freedom of conscience measure because it "interfered with business management" (Pearson, Ryan, "Nevada panel: Drugs must be dispensed regardless of beliefs." Las Vegas Sun, 29 Apri, 2003. http://www.lasvegassun.com/sunbin/stories/archives/2003/apr/29/042910293.html?contraceptive Accessed 2006-03-22). In October, 2004, it was reported that the British Columbia (Canada) Pharmacy Association supported the withdrawal by pharmacists in remote areas from the Non-Insured Health Benefits (NIHB) programme. A representative of BC Pharmacists for Conscience expressed surprise at the "overwhelming support being given to pharmacists who threaten to withhold services for economic reasons," in contrast to the lack of support for pharmacists who decline to dispense certain drugs for reasons of conscience. BC Pharmacists for Conscience News Release, *Economics Outweighs Ethical Principles in the Pharmacy Profession*, 18 October, 2004.
http://www.consciencelaws.org/Conscience-Archive/News-Releases/News-Releases-2004-07-to-12.html#Economics Outweighs Ethical

2. Vischer, Robert, *The Pharmacist Wars*. The American Enterprise Online, 14 February, 2006. http://www.taemag.com/issues/articleID.19010/article_detail.asp (Accessed 2006-03-22)

3. Maritain, Jacques, (Doris C. Anson, Trans.) *The Rights of Man and Natural Law*. New York: Charles Scribner's Sons, 1943. Reprinted New York: Gordian Press, 1971. One need not insist that Maritain's is the only philosophy that can provide an adequate response to Professor Vischer. It is sufficient, for present purposes, that it offers a plausible alternative.

4. *Ibid.*, p. 2

5. *Ibid.*

6. Maritain, Jacques, (Doris C. Anson, Trans.) *The Rights of Man and Natural Law*. New York: Charles Scribner's Sons, 1943. Reprinted New York: Gordian Press, 1971, p. 2-3

7. White, T.H., The Book of Merlyn: The unpublished conclusion to the Once and Future King. Boston, Massachusetts: G.K. Hall & Co., 1978, p. 96-97

8. Maritain, Jacques, (Doris C. Anson, Trans.) *The Rights of Man and Natural Law*. New York: Charles Scribner's Sons, 1943. Reprinted New York: Gordian Press, 1971, p. 73-74

9. White, T.H., The Book of Merlyn: The unpublished conclusion to the Once and Future King. Boston, Massachusetts: G.K. Hall & Co., 1978, p. 111

10. Maritain, Jacques, (Doris C. Anson, Trans.) *The Rights of Man and Natural Law*. New York: Charles Scribner's Sons, 1943. Reprinted New York: Gordian Press, 1971, p. 13- 17; Maritain, Jacques, *Man and the State*. Chicago: University of Chicago Press, 1951 (Phoenix Edition, 1966) p. 13

11. *Ibid.*, p. 8, 42

12. Smith, Adam, *The Theory of Moral Sentiments* (Ed. D.D.Raphael and A.L. Macfie). Oxford University Press, 1976 (Liberty Fund Edition, 1982), IV.I.10, p. 184
Smith, Adam, *An Inquiry into the Nature and Causes of he Wealth of Nations* (Ed. R.H. Campbell, A.S. Skinner). The Glasgow Edition of the Works and Correspondence of Adam Smith, Oxford University Press, 1976 (Liberty Fund Edition, 1981), Vol. 1, IV.ii.9, p. 456

13. Given his subsequent arguments, this is probably Professor Vischer's meaning.

14. Maritain, Jacques, *Man and the State*. Chicago: University of Chicago Press, 1951. Phoenix Books, 12th Impression, 1966, p. 19-20