Philosophical Dimensions of Public Policy

Verna V. Gehring
William A. Galston
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Policy Studies Review Annual
Volume 13

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2002 by Transaction publishers

Published 2017 by Routledge

2 Park Square, Milton Park, Abingdon, Oxon 0X14 4RN
711 Third Avenue, New York, NY 10017, USA

Routledge is an imprint of the Taylor & Francis Group, an informa business

ISBN 13: 978-0-7658-0541-6 (pbk)

ISSN: 0163-108X

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Introduction

At the midpoint of the twentieth century, many philosophers in the English-speaking world regarded practical—that is, political and moral—philosophy as all but moribund. Thinkers influenced by logical positivism believed that ethical statements were merely disguised expressions of individual emotion lacking propositional force, or that the conditions for the validation of ethical statements could not be specified, or that their content, however humanly meaningful, was inexpressible (this was the stance of the early Wittgenstein). Those working in the ordinary language tradition asserted that while philosophy could examine the usage of moral concepts in a neutral manner, it was powerless to make judgments about substantive issues of individual or collective morality. Many prominent scholars regarded the classics of moral and political philosophy as matters of historical rather than philosophical significance. To the extent that substantive practical philosophy in the English-speaking world survived the onslaught of positivism and historicism, it was in the form of utilitarianism taken for granted as the common-sense expression of equal concern for all human (or sentient) beings.

The revival of practical philosophy began at roughly the moment its demise was announced, an interesting reversal of Hegel's dictum concerning the owl of Minerva. Philosophers with roots in the German tradition worked to reestablish the contemporary relevance of classic texts. Others offered theories that engaged directly with age-old issues of political philosophy such as distributive justice and moral obligation. Still others, influenced by the antiwar and social justice movements in the United States, began publishing essays that engaged the moral dimensions of specific public policy issues. The positivist impulse in social science soon came under siege from both Left and Right. It was not long before philosophers began to reflect on the relation between general theory and particular practical questions. At roughly the same time, members of various professions—especially law, medicine, and journalism—and even students of politics began to reflect more systematically on the moral dimensions of their respective crafts.

Many regard the near-simultaneous publication of John Rawls' *Theory of Justice* and the founding of the journal *Philosophy & Public Affairs* as marking the formal emergence of a revived practical philosophy. These events also marked a shift away from utilitarianism toward Kantianism and contractarianism as the default modes for practical philosophy. And they offered evidence that a revitalized philosophical liberalism could muster the inner resources needed to grapple with the burning issues of the day.

It was against this backdrop that philosophers Peter Brown (now at McGill) and Henry Shue (now at Cornell) formed the idea of an institution that would give the same careful attention to public policy's moral and conceptual dimensions that

already-existing think tanks gave to its economic, sociological, and political dimensions. In 1976 they persuaded the University of Maryland to host the nucleus of what became the Center (now Institute) for Philosophy and Public Policy. The new center devised a research model that brought policymakers into contact with philosophers and other scholars in working groups that produced timely essays on difficult policy questions. To broaden its reach, the center created a quarterly report (now *Philosophy & Public Policy Quarterly)* that goes to nearly twelve thousand subscribers. From these modest beginnings a quarter century ago, the Institute for Philosophy and Public Policy currently houses ten research scholars who pursue multifaceted research programs, author numerous books, articles, and reports, and organize interdisciplinary conferences and workshops. Through its publications and its web site, the Institute seeks to contribute to public discussion and deliberation—essential constituents of a healthy democracy. Grant awards from foundations and government agencies support these diverse undertakings.

To this day, most studies concerned with public policy are empirical: they assess costs, describe constituencies, and gather data with the goal of making predictions. Though the Institute frames its research questions by looking carefully at empirical data, its work is primarily conceptual and normative. It investigates the structure of arguments and the nature of values relevant to the formation, justification, and criticism of public policy. The Institute examines topics of current interest as well as those that promise to be central to public policy debates in coming years. Research is conducted both by individual resident scholars and by interdisciplinary working groups. Some projects bring together academics and practitioners, including government officials and civic leaders.

The founding of the Institute for Philosophy and Public Policy not only reflected, but also itself contributed to, the revival of practical philosophy. In 1976 the Institute stood almost alone as a university-based center dedicated to clarifying the moral dimensions of a broad range of public issues. Today, numerous such institutions thrive; many are university-based, others freestanding. The Association for Practical and Professional Ethics, founded in the early 1990s, boasts more than seventy-five institutional and nearly five hundred individual members.

The revival of practical philosophy is reshaping pedagogy as well as public discourse. Like several other leading institutions, including Harvard's Center for Ethics and the Professions, the Institute is affiliated with a public policy school that prepares young people as well as midcareer students for careers in public service. Not by chance, the Maryland School of Public Affairs was one of the first to require systematic study of the moral dimensions of public policy. Institute scholars routinely teach core courses (among others) designed specifically to prepare students to address the ethical challenges they will encounter in public service. And Institute scholars helped spearhead the creation of the University of Maryland's innovative Committee on Politics, Philosophy, and Public Policy, which gives Ph.D. students in several disciplines the opportunity to bring together normative, conceptual, institutional, and empirical concerns in their course work and dissertations.

The Institute conceives its contribution to practical philosophy as *public* philosophy, in at least three senses of that term. In the first place, its inquiry concerns public *problems*—those dealt with by legislatures, courts, executive, and administrative agencies (international as well as national), and the manifold

institutions of civil society. Second, the organization of its inquiry reflects a public *intention*, that of altering the terms of public debate and decisions in ways that bring the moral dimensions of public issues more explicitly into the public dialogue. Finally, the results of its inquiry are expounded in a public *manner*—rigorously but nontechnically, in order to be accessible to interested citizens as well as policymakers and their staffs.

As the pages of this volume show clearly, the Institute has pioneered a distinctive method of conducting inquiry into the moral dimensions of public life. Much contemporary practical philosophy simply refines competing moral and political theories. In moral philosophy, deontologists, consequentialists, and virtue ethicists vie; in political philosophy, Rawlsian "political" liberals debate "comprehensive" liberals, utilitarians, communitarians, and participatory democrats, among others. While members of the Institute are engaged in these discussions, they reject the idea that public philosophy simply means reaching into the philosopher's tool kit and "applying" prefabricated theories to particular problems. Rather, they set in motion a dialogue between the distinctive moral features of practical problems and the more general moral theories or considerations that seem most likely to elucidate these problems. In addition, Institute scholars refuse to sever the connection between the moral and empirical dimensions of public problems. Ethical evaluation and judgment can be conducted only in close conjunction with the facts as ascertained through normal canons of empirical inquiry. At the same time, moral reflection helps establish the framework of inquiry within which the significance of empirical evidence can emerge. Despite their many philosophical differences, Institute scholars are united in their reservations about the poorly theorized utilitarianism that often underlies the uncritical recourse to popular methods of policy evaluation such as cost-benefit analysis. And through reflection on public issues ranging from education to the environment, many Institute scholars have come to question the reflexive secularism characteristic of much contemporary philosophy. The exercise of practical reason takes place against the backdrop of religious alternatives.

In many parts of philosophy, the main questions do not change significantly over time, and inquiry can be conducted *sub specie aeternitatis.* Not so for practical philosophy addressed to public problems, whose center of gravity shifts over time; witness the contrast between the contents of the current volume, selected from articles published in the Institute's report over the past decade, and the collection of essays representing the period 1980 to 1990 (Claudia Mills, *Values and Public Policy* 1992). As might be expected, some issues have persisted: family policy, public schooling, moral and civic education, the environment, and the ethical dilemmas of public life, among others. But some issues that bulked large in the 1980s, such as the risks of nuclear power and nuclear war, have virtually disappeared, while others— affirmative action and multiculturalism, intervention, development, reconciliation, and human rights in international affairs, and the challenges posed by the extraordinary advances in medicine and genetics—have taken center stage.

At its best, public dialogue seeks to engage the future as well as the present. Individual articles in this volume peer over the horizon to limn the contours of evolving issues such as global climate change and patterns of population and consumption. No one—certainly not the members of the Institute—can predict just

which issues will emerge in the decades ahead. But we can say with certainty that each will raise a distinctive ensemble of moral concerns, and that the public as well as the philosophical need to clarify them will remain as pressing as ever.

William A. Galston, Director
Institute for Philosophy and Public Policy

Part 1

Politics, Civil Life, and Moral Education

1

The Abortion Dilemma

The *Report from the Institute for Philosophy and Public Policy* devoted its entire spring 1990 issue to the "abortion dilemma." Among other topics, contributors outlined the constitutional decisions that have shaped abortion policies, reflected on the role of technological advances, examined the notion of personhood, and considered several commonly-held stances of proponents and opponents of abortion. The abortion dilemma remains, but some things have changed since 1990. At that time, the Supreme Court had just ruled on *Webster v. Reproductive Health Services* (1989). The case challenged a Missouri law, that forbade the use of public facilities for all abortions except those necessary to save a woman's life. The Missouri law also required physicians to perform tests to determine the viability of fetuses after twenty weeks of gestation, and imposed other restrictions. The Supreme Court upheld these provisions, which opened the door to greater state regulation of abortion.

Two notable Supreme Court cases have shaped the debate since 1990. A 1991 case, *Rust v. Sullivan*, upheld a "gag rule" barring abortion counseling and referral by family planning programs funded under Title X of the federal Public Health Service Act. Under the new rule, clinic staff could no longer discuss all the options available to women, but could only refer them for prenatal care. (President Clinton rescinded the "gag rule" by executive order shortly after his inauguration in 1993.) A year later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court ruled on a set of restrictions enacted in Pennsylvania. The court upheld Pennsylvania's abortion restrictions, but also reaffirmed the constitutional protection for the right to choose. However, in this case, the Supreme Court also adopted a new and weaker test, the "undue burden test," which allowed state regulations to survive constitutional review so long as they do not place a "substantial obstacle in the path of a women seeking an abortion of a nonviable fetus."

At present, many issues remain that will no doubt see litigation. Although abortion clinics are permitted "bubble zones" or buffers to shield their staff and clients from the harassment of demonstrators and the risk of physical damage to clinics, questions remain about how much space constitutes a reasonable buffer, and whether buffers violate the free speech rights of protesters who wish to distribute

leaflets, display signs, engage in protest, or offer education and counseling. Among many other issues in the "abortion dilemma," future debate will concern the constitutionality of states banning specific procedures. The "partial-birth abortion" controversy is only the latest.

The articles of Robert K. Fullinwider, Bonnie Kent, Judith Lichtenberg, and William A. Galston present some of the many considerations discussed in that 1990 issue that endure today. (The full bibliography of citations referred to in the articles is found at the end of the last article.)

Introduction

The building in St. Paul, Minnesota, where Planned Parenthood intended to open an abortion clinic had been picketed, vandalized, and, finally, burned. As viewers watch pictures of the damage flicker on their TV screens, they hear the CBS commentator's ominous assessment: "The politics of abortion has grown ugly. Passionate feelings stir extremist acts. Fierce rhetoric yields to firebombs."

The year was 1977. While clinic bombings have become a rarity since then, the feelings stirred by the abortion issue have hardly cooled. What some see as part of women's continuing struggle for freedom and equality, others see as legalized murder.

Since the Supreme Court ruled on *Webster v. Reproductive Health Services* in July 1989, public controversy over abortion has steadily escalated. By allowing the states to adopt more restrictions on abortion, the court set the stage for bitter political struggles in state legislatures. The "pro-life" movement produced a flurry of bills limiting access to abortion; the "pro-choice" movement mobilized to block them; both groups lobbied furiously.

Because governors can veto abortion bans passed by their legislatures—an option exercised by the governors of Idaho and Louisiana—the abortion issue has drawn special attention in gubernatorial contests. But what, precisely, *is* the issue?

Abortion-rights groups claim that "Who decides?" is the crucial question facing policymakers. When framed in this way, the abortion controversy becomes a debate about whether government should compel a woman to continue her pregnancy, or whether the decision should be left to individual conscience. Anti-abortion groups insist that abortion is murder, so "Who decides?" is irrelevant. The controversy also becomes a debate about whether abortion is indeed murder—whether the fetus is a person with the same moral rights, and hence deserving the same legal protections, as any human adult.

Philosophers began debating these questions long before abortion became a political litmus test for Supreme Court nominees. In this *Report* the Institute's research staff takes a critical look at the vast literature that has resulted—on everything from personhood and women's rights to the tangle of public policy issues connected with abortion.

Feminism and Liberal Individualism

Robert K. Fullinwider

Feminist writing on abortion has mirrored the political and legal struggle for abortion: it is couched in terms of women's "right to choose" and women's "right to control their bodies." This language defines the "pro-choice" position. A good deal of the philosophical literature explores the implications of the "right to choose" and how it can be adjusted to the fetus's alleged "right to life" (language that defines the "pro-life" position). Thomson's much-cited essay (1971) tackles the problem head-on. Concede, she says, that the fetus has a right to life; even so, a woman may be justified in aborting it (with its death as a certain consequence). The right to life does *not* make an individual immune from being killed if it is a threat to another person or is occupying the body of another. The fetus's right doesn't entail the right to use anyone's body, though its survival is impossible otherwise (Overall 1987).

Framing the controversy as a contest of rights puts special weight on deciding what a person—a bearer of rights—is, since a fetus in its early stages little resembles even infants and children. Is it the sort of thing that can have rights? English (1975) thinks that a conclusive answer about the fetus's personhood is unattainable, while Warren (1989) argues against the "single-criterion assumption" that divides the world into those things that have moral rights or moral standing, and those things that do not. The fetus at later stages has some moral status, which changes as it develops, and aborted or miscarried fetuses that are alive may not be killed (English 1975, Overall 1987); but fetuses should not be treated like infants. Whitbeck (1983) shows how in our cultural practices we have always distinguished between early and late fetal stages and infancy.

If the stages between early fetal life and infancy are continuous, then what except birth makes infanticide homicide and feticide not; and how can birth bear such moral freight? Warren (1987) and English (1975) defend making birth decisive for grounding women's rights, for after birth a woman can separate herself from the infant and its needs by means less drastic than killing it. This argument, however, can't illuminate the perplexity about the fetus's personhood, since it focuses on a fact about the mother instead of a fact about the fetus. It does not explain why the continuum of human development results in a person at birth but not before (or after).

However, Warren (1989) and Whitbeck also offer an alternative account that lets birth signal something altered about the infant: its "emergence into the social world." It is only through our social interactions and relationships that we become persons in "the full social sense" (Whitbeck 1983), and once born, the infant has begun a development that is not just physical but also social.

The Right to Choose

This assessment of the fetus's nature leaves room for the rights of women to choose abortion, as part of their "rights to control their own bodies" (Okin 1989).

The "right to choose" secures to women their "basic rights to personal autonomy and physical security" (Warren 1989, Overall 1987). That the issue of abortion is still often put in terms of rights is noteworthy, for feminists also have often rejected much of the apparatus of liberal individualism, and the rights-talk associated with it, as alienating and resting on a false metaphysics namely, that individuals are separate from one another in some very strong sense. Feminists generally want to deny the force of liberal distinctions between public and private, individual and community, self and other. Liberal regimes based on "justice" are rejected for ones based on "caring," "sharing," and "connectedness."

Indeed, West (1988) characterizes the view that persons are physically distinct individuals as "masculinist." Even so, she believes "reproductive freedom ought to be grounded in a right to individuation." Whitbeck (1983), likewise, suggests seeing abortion not from a "rights view of ethics" but from a "responsibilities view." However, the significance of the shift is unclear since she accords to women "the right to control one's body" as a nonderivative, fundamental moral right. Smith (1983) argues that if we abandon the traditional rights approach, we will "see the abortion problem in a new light—as a moral issue of care, nurture, and responsibility, rather than a conflict of rights between woman and fetus—but she offers no clue as to how this new seeing translates into legal and social policies or specific moral judgments. Warren (1989) acknowledges the feminist emphasis on care, relationships, and the social nature of persons, but argues that a "socially perceptive account of rights" is both possible and necessary.

The issue here is of no small consequence, since the feminist attack on liberal individualism implies a politics in which the community may legitimately regulate "personal" dimensions of life. Feminist proposals concerning pornography, marital rape, sexual harassment, wife-beating, and so on, are grounded on this politics. There is no reason in principle why other persons, or the community as a whole, shouldn't have some say in what happens in families, in other intimate relationships, or even in the bodies of persons.

Autonomy and bodily integrity are essential to a person's self-identity only if we presuppose something like the metaphysics of liberal individualism. Such autonomy and integrity are essential only to the self already conceived as separate in a strong sense from other people. If we reject this metaphysics and adopt a more holistic, social metaphysics, then the preferences of a woman about what happens to and in her body needn't always defeat the preferences of others, including the community as a whole.

Feminists, however, typically do not frame the abortion issue this way. They have strategic reasons for using the language of rights, since on their view, the community as presently constituted—with its historical subordination of women and its imbalances of power structured along gender lines—can hardly be trusted to make collective decisions, serving women's interests, about what happens inside women's bodies. Similarly, they appeal to rights partly for political reasons, since the organs of government are more "sensitive to appeals and demands couched in liberal terms" (Harding 1984). It is quite possible, however, that the attraction to rights-language goes deeper still, reflecting unresolved tensions within feminist theory itself.

The Conservative Perspective

Bonnie Kent

The conservative position on abortion depends heavily on one key premise: that "human life begins at conception." A more elaborate but more precise version of this premise has been given by John Finnis (1973): that "the unborn child is, from conception, a person and hence is not to be discriminated against on account of age, appearance or other such factors insofar as such factors are reasonably considered irrelevant where respect for basic human values is in question."

Finnis expressly affirms that the embryo, and later, the fetus, is not only of the same (biological) species as adult human beings, but that it is also a *person*—which is to say that the fetus has all the moral rights of an adult and so should have the same legal protections as well. Finnis highlights the legal implications by spelling out that the fetus should not be "discriminated against on account of age" or other such factors. This political battle is joined: while abortion-rights advocates may cry "sexism," their opponents may cry "ageism." And so both sides stand accused of "discrimination," even as both claim to champion basic American rights—the right to "life" being defended by conservatives and the right to "liberty" being defended by liberals.

By claiming that personhood begins at conception, conservatives avoid many of the moral and metaphysical dilemmas that plague their opponents. Since conservatives don't make cognitive capacities the criterion of personhood, their position doesn't effectively demote infants, brain-damaged adults, and other beings usually regarded to be persons to the status of nonpersons (Callahan 1986). Since conservatives don't make even the *potential* possession of various capacities the criterion of personhood, their position seems likewise to escape the sort of criticisms leveled at "potentialists" and "neopotentialists." John Noonan Jr. (1970) nicely captures the simplicity of the conservative perspective: "Once the humanity of the fetus is perceived, abortion is never right except in self-defense."

Abortion as Murder

If the fetus is a full-fledged person, possessed of the same moral rights as the woman carrying it, then the woman would seem to have no more justification for killing the fetus than she would for killing any other innocent person. Thus abortion would be justified only when necessary to preserve the woman's life; in any other circumstances, including pregnancies resulting from rape or incest, abortion would amount to *murder.* Granted, an unwanted pregnancy may cause a woman great suffering, just as unwanted children may be an immense burden for the mother, the family, and society in general. But from the conservative perspective, these adverse consequences are no more justification for abortion than the suffering caused by dependent elderly parents is justification for killing them. When the alternative is murder, adverse consequences must simply be borne.

Some have argued that even if a fetus is a person, were abortion banned, a pregnant woman would be compelled to act as a "good Samaritan" to her fetus, since our moral and legal tradition does not require us to do nearly as much as this for anyone else (Regan 1979). Judith Thomson argues this point by means of a powerful analogy (Thomson 1971). She asks you to suppose that you woke up one morning and discovered that your kidneys had been hooked up to those of a world-famous violinist who suffered kidney failure. Your doctors inform you that you must remain hooked to the violinist for nine months, after which he will be able to survive on his own. If you are disconnected before then, however, the violinist will die. Thomson's point is that, although the violinist is unquestionably a person, few people would insist that you are required to go along with the arrangement because it would amount to more good samaritanism than is morally required.

Conservatives usually agree that unplugging the unconscious violinist would be morally permissible; they argue, however, that the case isn't truly comparable to abortion. In the first place, having an abortion usually means directly killing the fetus—*not* just refusing to keep it alive. So the comparison should be with (say) strangling or decapitating the violinist, and not just unplugging him. In the second place, while neither the violinist nor the fetus has "a right to be there," the violinist has a duty *not* to be there, whereas the fetus doesn't. As Finnis writes, "It seems fanciful to say that the child is or could be in any way at fault, as the violinist is at fault or would be but for the adventitious circumstance that he was unconscious at the time."

However disturbing some its consequences, the conservatives' position has definite strengths (Wertheimer 1971). It doesn't adopt a criterion of personhood that makes nonpersons of beings we generally regard as persons; it demonstrates profound respect for human life; and it also defends "the equality of human lives," a doctrine with considerable appeal in a democratic society (Noonan 1970). From this perspective, laws permitting abortion are very much like laws permitting slavery: both deny a certain class of human beings the moral status and legal protections of personhood. According to Noonan (1979), "It was assumed by the founders of the American Republic that the law could ignore the biological character of blacks as human beings and treat them as things." From the conservative perspective, our law now allows even worse moral crimes against fetuses than were once allowed against blacks, and it does so from a similar refusal to recognize biologically human beings as full-fledged persons.

On this account, moral personhood is, and legal personhood should be, a simple function of genetic endowment. It doesn't matter what cognitive capacities a being possesses or might develop. It doesn't matter what kind of plans or attachments or future a being might have. What counts is that a being possesses the genetic code characteristic of human beings: the forty-six chromosomes that make an organism a member of our species and, at the same time, a unique individual (Noonan 1970 and 1979, Finnis 1973, Devine 1978).

Some Objections

Despite its strengths, the conservative argument against abortion leaves ample room for objection. For example, the idea that even a two-week-old embryo is a

full-fledged person stands in tension with common intuitions about personhood. Although the differences between slaves and slaveowners were trifling by comparison with what they had in common, the same can't be said of the differences between an embryo and an adult. If we set aside claims based on religious belief, the embryo's genetic code would seem to be just about the *only* characteristic it has in common with those beings we all regard as persons.

Modern biology does little to strengthen the conservatives' case. Since the only means of identifying genetic material as human is by comparison with DNA already identified as human, saying that "a being with a human genetic code is a human being" is like saying "a rose is a rose" (Manier, Lieu, and Solomon 1977). And since our concept of personhood is principally moral and legal, no scientific evidence can prove that a being with a human genetic code is a *person.* Arguments based on the thesis that personhood begins at conception thus seem to assume one of the very points at issue in the abortion debate (Callahan 1989).

If conservatives think DNA is the decisive factor partly because it indicates the *potential* for a certain kind of development—because *most* human embryos will eventually develop certain kinds of characteristics or capacities—then we need to know what the specific potentialities are and why they are judged morally relevant. We also need to know why moral personhood applies to the whole class of embryos and fetuses rather than to individual members of the class (Feinberg 1980). Why, for instance, should an anencephalic fetus, with no potential for conscious life, be regarded as a person?

If what's wanted is a "minimalist" criterion of personhood, so that fetuses, infants, brain damaged adults, and other vulnerable groups will be fully protected by the law, why isn't the same protection extended to other species that feel pain and form attachments but lack the cognitive capacities of normal human adults? Why should *only* human beings have the right to life?

While conservatives cry "ageism" and liberals cry "sexism," animal-rights advocates can and do cry "speciesism" (Singer 1980). If there is no morally relevant difference between a human embryo and a human adult, then perhaps there is no morally relevant difference between *Homo sapiens* and certain other species. The moral blindness of our society might extend further than conservatives themselves acknowledge.

Is There a Middle Ground?

Judith Lichtenberg

Within the abortion debate, two opposing views of abortion might be called absolutist; perhaps "pure" would be a less loaded word. One view says that whatever the property is that renders killing human beings wrong, the fetus shares that property and so killing it is also wrong. Although abortion might be permissible to save the mother's life because this would constitute self-defense—a widely recognized exception to the rule against killing—the vast majority of abortions, on this view, are murder. The opposing view says that the decision to carry a fetus lies entirely with the woman, and that the unborn possess no moral status. Abortion is always justifiable when it expresses the mother's will.

What makes these positions "absolutist" is not simply that they take a strong stand, but that they deny that the arguments of the other side even pose a significant challenge to their view. To believe that abortion is murder or that the fetus has a right to life is in effect to reject in advance consideration of the consequences of abortion for the parents or the future child. To believe that a woman has a right to do with her body what she wills is tantamount to the claim that morally speaking the fetus's interests count for nothing. To frame the abortion issue in these terms, then, as many parties to the debate, as well as the mass media, have done, is by itself to rule out the possibility of compromise.

But it is probably fair to say that most people do not subscribe to either of these pure views. They cannot simply dismiss the antiabortion position, but they also find something in the abortion-rights view persuasive. They think that fetuses have some legitimate moral claims—fetuses are not simply like tumors or appendixes—but they also believe that a woman ought to have a say about what takes place in her body. Abortion is a deeply philosophical issue precisely because the arguments for each side seem simultaneously compelling and seriously flawed. Many people are thus moved centripetally toward the center.

Assuming that compromise is possible—which is not an insignificant assumption—how would we arrive at it? Numerous positions exist between the two endpoints, and we can find people all along the spectrum. There are various methods by which to carve out a middle ground. Let us explore three different approaches—not mutually exclusive—to achieving a compromise position.

Exceptions to a Presumption against Abortion

First, one might begin by acknowledging the power of the antiabortion position and affirm a general presumption against abortion, while admitting various exceptions relating to the causes or consequences of pregnancy. Thus, some people oppose abortion except when the pregnancy results from rape or incest; or where the mother's physical or mental health is at stake; or when the child will suffer serious physical or mental impairment. Different people will draw the lines in different places, but all such arguments take seriously the principles underlying the antiabortion stance.

Just how far can one extend the exceptions while still adhering to the principle that the fetus has a strong moral claim? What do we say about the fourteen-year-old pregnant runaway (not, let us suppose, an addict or alcoholic, so the child's impairment isn't the issue) whose child will be born into extremely difficult circumstances? Given the possibility of adoption, does permitting abortion in such cases sufficiently acknowledge the moral status of the fetus? Perhaps the answer is that we should favor adoption if that is the alternative; but the fear is that it is not, and that the child will grow up with overwhelming odds against it. Carrying a child to term creates a bond that makes it difficult for many women to consider adoption and that may render abortion, however troubling, a less wrenching choice.

Fetal Development and Viability

A different approach to finding a middle ground rests on the development and viability of the fetus. We can outline an argument having two parts, each part qualifying the pure antiabortion and abortion-rights positions respectively. On the one hand, the fetus becomes more and more like a human being the longer it lives, and this appears to strengthen its moral status, its right not to be killed (Sumner 1981). On the other hand, except in unusual circumstances the mother will know she is pregnant by the end of the first trimester (probably most women know long before this time). She will thus have the opportunity to decide at a relatively early stage of fetal development whether she wants to continue the pregnancy, and typically there will be no reason for her to decide after about twenty-four weeks, when the results of amniocentesis are available.

Given both these assumptions—one concerning the claims of the fetus and the other the constraints on the woman carrying it—one might draw a line marking the moral permissibility of abortion somewhere around the middle of pregnancy. This line will be fuzzy, of course, and some people will find this unclarity disturbing and unacceptable. But, as philosophers are fond of pointing out, the existence of fuzzy cases that create ambiguity doesn't mean that all cases are fuzzy. The Supreme Court's analysis in *Roe* v. *Wade* reflects this kind of argument: it permits abortion in the first trimester, allows states to prohibit it in the last, and leaves the middle trimester open to regulation.

The viability of the fetus—the point at which it can survive outside the mother's womb—has seemed to many to present a natural outer limit for the moral acceptability of abortion. So it might be argued that the mother's right-to-her-body claims are not valid once the fetus is viable; at best the mother would have the right to have the fetus removed, not to have it killed.

But such arguments seem to confuse viability with some other property. Sometimes they confuse it with deliverability. To say that a fetus is viable is not to say that if delivery were induced, the fetus would survive; usually it would not. Viability means that the fetus could be sustained in an incubator if it were born naturally (Zaitchik 1981). It follows that viability has no bearing on a woman's freedom and control over her body, for she could not rid herself even of a viable fetus without gravely threatening its life.

Sometimes viability is confused instead with the relative maturity of the fetus. Until recently, fetuses were viable only fairly late in pregnancy, and viability coincided with the fetus's becoming infantlike. Under such circumstances it was natural to conflate viability with maturity, and so to confer serious moral status on the viable fetus. But the recognition that fetuses may one day be able to survive and grow entirely or largely in vitro suggests that the relevant criterion may be fetal maturity rather than viability (Rhoden 1986). As the fetus becomes more personlike, its moral claims become stronger.

Private Morality and Public Policy

A different way of carving out a compromise position is to separate the question "Is it morally permissible to have an abortion?" from the question "What is government's proper role in abortion decisions?" Two kinds of arguments can be distinguished.

First, one might argue that abortion is wrong but that the state should not interfere with a woman's decision to have an abortion. Why would anyone take this position? Perhaps for practical reasons: one believes that a prohibition on abortion would not eradicate it but simply force it underground, with disastrous consequences for women; or that to enforce the prohibition the state would have to adopt measures inappropriate in a democratic society; or that the consequences for children born against their mother's will are not worth bearing.

Some people argue as a matter of principle that abortion is essentially a personal decision, not something appropriate for governments to decide. But to admit this is already to have rejected the essential premise of the antiabortion point of view. For to believe that fetuses have moral claims essentially like those of adult human beings is to believe that they are entitled to just the same kind of protection. Although not everything immoral is or ought to be illegal, threats to life justify state intervention if anything does.

So the argument that abortion is a personal decision and should therefore be insulated from state interference already leans toward the "pro-choice" position, just as the first compromise argument we considered, which carves out exceptions to the antiabortion principle, leans in the other direction. This point suggests a general difficulty in compromise positions on abortion, and it demonstrates why abortion perhaps above all other issues has proved such a divisive and intractable issue: the very premises from which to derive a compromise challenge the fundamental beliefs of those most ardently committed.

A second kind of compromise position, relying on the distinction between the personal and political realms, does not openly favor the abortion-rights position. On this view, abortions ought to be permitted, but the state ought not to subsidize them with public monies, which are collected, in part, from opponents of abortion (Sher 1981). This proposal, however, effectively punishes the poor.

With strong passions on both sides and widespread sentiment in between, compromise on abortion is probably politically inevitable. For those not inclined to accept the pure premises of the absolutists on either side, compromise may be the natural course not only politically but intellectually as well.

Neutral Dialogue and the Abortion Debate

William A. Galston

The public debate over abortion has helped spark a renewal of the classic liberal effort to draw a principled line between human activities that are, and are not, legitimately subject to public coercion. Since the publication a decade ago of

Ronald Dworkin's "Liberalism" and Bruce Ackerman's *Social Justice in the Liberal State*, philosophers' attention has increasingly focused on what has come to be called neutrality of procedure as the most promising way of drawing this line.

Neutrality of procedure consists in a special restraint on reasons that can be invoked to justify public policy. It stands in roughly the same relation to political deliberation as do rules of evidence to trial advocacy. Specifically, an argument is not publicly admissible if it appeals to reasons that have no rightful place in the public sphere, and policies are illegitimate if such reasons form ineliminable elements of their proposed justification.

Three different forms of procedural neutrality have been advanced. The first, and perhaps the best known, appeals to the content of reasons as a way of drawing the line between admissible and inadmissible arguments. In Dworkin's formulation, the liberal state "must be neutral on...the question of the good life...political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life." One of the many difficulties with this view is that in practice public argument cannot move very far in any direction without appealing to particular understandings of the good. Another difficulty is that the effort to preserve state neutrality in Dworkin's sense can be shown to rest on tacit commitments to precisely the kinds of considerations it seeks to rule out.

The second version of procedural neutrality comes closer to explicit recognition of at least one of these commitments, by appealing to the evil of moral coercion, and to moral consensus as a bulwark against it. As recently refined by Ackerman (in "Why Dialogue?") and Charles Larmore (in *Patterns of Moral Complexity*), the argument asserts that public discourse must avoid appealing to controversial moral propositions. As Ackerman puts it, "We should simply say nothing at all about this disagreement and put the ideals that divide us off the conversational agenda of the liberal state." Larmore translates this into what he regards as a universal norm of rational dialogue: "When two people disagree about some specific point, but wish to continue talking about the more general problem they wish to solve, each should prescind from the beliefs that the other rejects."

There are two difficulties with the appeal to consensus in public dialogue. The first is a simple empirical matter: in a society of any significant size and diversity, it is overwhelmingly likely that there will be no moral propositions on which everyone agrees. If so, the effort to avoid moral coercion ends by making public life impossible.

Second, this position embodies an excessively rationalistic account of argumentation, and certainly of public discourse. The point of much dialogue is to invite one's interlocutor to see the world the way you do, or at least to understand what it is like to see the world the way you do. One way of doing that is the reverse of "prescinding" from disputed issues—namely, stubbornly bearing witness to one's stance at the precise point of difference. This process is more analogous to art criticism than to mathematical reasoning. The critic invites others to focus on specific aspects of the work (or issue) and to see them in a new way. Now clearly the critic is not "coercing" me to change. On the contrary, he or she is appealing to something we have in common. But that something is not a premise; it is rather an experience. The implicit logic goes like this: "We may disagree at the level of abstract concepts. But if you see what I see, your judgment will converge on mine." This, I take it, is why "pro-life" advocates display disturbing pictures of second-

trimester fetuses, and why "pro-choice" defenders respond with graphic accounts of back-alley abortions.

The third version of procedural neutrality appeals to the truth-status of publicly admissible propositions rather than to content or consensus. In "Moral Conflict and Political Legitimacy," Thomas Nagel puts the key questions this way: "When can I regard the grounds for a belief as objective in a way that permits me to appeal to it in political argument, and to rely on it even though others do not in fact accept it and even though they may not be unreasonable not to accept it? What kinds of grounds must those be, if I am not to be guilty of appealing simply to my belief, rather than to a common ground of justification?"

Nagel responds to these questions with an account of what distinguishes "public justification" from the "bare confrontation between incompatible personal points of view." Public justification means, first, the willingness to submit one's reasons to criticism in light of a shared critical rationality and understanding of what counts as evidence; and second, the ability to offer a noncircular explanation of the failure of others to share your view—inadequate evidence, faulty reasoning, poor judgment, and so forth. Thus, Nagel concludes, "The appeal to truth in political argument requires an objective distinction between belief and truth that can be applied or at least understood from the public standpoint appropriate to the argument in question. Disagreements over the truth must be interpreted as resulting from differences of judgment in the exercise of a common reason."

Nagel's thesis is exposed to three kinds of objections. First, the whole of science is in dispute. A number of religious groups, for example, object to public school curricula that include the Darwinian theory of evolution but not biblical creationism. The notion that scientific rationality is what our public culture has "in common" cannot survive even casual inspection. Nor is it the case that religious alternatives to scientific rationality can be shown to be "irrational" through an appeal to any common ground that would be recognized as authoritative by the faithful.

Second, the proponents of revealed religion would be compelled to reject as tendentious the distinction between evidence-based propositions and religious faith. Many believers insist that their faith is based on evidence— indeed, on direct personal experience—that is communicable to others. Indeed, they typically try to share it with others, with more than occasional success.

The third objection broadens the difficulty beyond revealed religion. Nagel acknowledges that moral disagreements legitimately falling within the public domain may be irresolvable in fact. More than one conclusion may be reasonable. Still, the distinction between public disagreement and the clash of irreconcilable subjective conventions remains intact: "Judgment is not the same as faith, or pure moral intuition."

Perhaps not. But what exactly is the difference? One possible account is this: public argument delimits the bounds of reasonable disagreement by defining, in each arena of controversy, the kinds of considerations that are relevant to determining judgment. Nonetheless, the relative priority or weight to be attached to the various considerations is typically underdetermined by the totality of available evidence and argument. It is then the role of personal judgment to affirm the relative importance or unimportance, of the considerations commonly acknowledged as relevant.

So far so good. But this approach does not draw the line where Nagel wants it to be. As Kent Greenawalt has recently argued, "There are many issues concerning borderlines of status (such as the valuation of fetuses and animals) as to which shared premises of justice and ordinary modes of reasoning and determining facts are radically inconclusive. Everyone on such questions must rely finally on deep-seated feelings that are not subject to convincing interpersonal argument."

The difficulty is this: if most public problems allow for differing judgments, and if the exercise of personal judgment is influenced by the sorts of private, incommunicable beliefs Nagel wants to exclude from the public sphere, then most of what we understand as public argument will be ruled out by Nagel's criteria of publicity. But this cannot be the right result, for the point of the enterprise was to draw the line between legitimate and illegitimate instances of public coercion, not to justify the proposition that public coercion can never be right.

It appears, then, that neither content-based, consensus-based, nor truth-based accounts of procedural neutrality can vindicate the exclusion of morally charged issues from liberal public dialogue. The dialectic of theory thus recapitulates the movement of practice: for the foreseeable future, divisive and seemingly intractable issues such as abortion will continue to shape our politics, and public figures will be compelled to confront them.

References

Ackerman, Bruce. 1989. "Why Dialogue?" *Journal of Philosophy* 96:5-22.

Areen, Judith. 1988. "Baby M reconsidered." *Georgetown Law Journal* 76:1741-1758.

Audi, Robert. 1989. "The Separation of Church and State and the Obligations of Citizenship." *Philosophy & Public Affairs* 18:259-296.

Callahan, Joan C. 1989. "The Fetus and Fundamental Rights." In *The Ethics of Abortion,* ed. Robert M. Baird and Stuart E. Rosenbaum, 115-129. Buffalo: Prometheus Books.

Callahan, Sidney. 1986. "Abortion and the Sexual Agenda." *Commonweal* (April 25): 232-238.

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

Devine, Philip E. 1978. *The Ethics of Homicide.* Ithaca: Cornell University Press.

Dworkin, Ronald. 1978. "Liberalism." In *Public and Private Morality*, ed. Stuart Hampshire, 113-143. Cambridge: Cambridge University Press.

1989. "The Great Abortion Case." *New York Review of Books* 36:49.

Dychtwald, Ken. 1986. "The aging of America: Overview." In *Wellness and Health Promotion for the Elderly.* Rockville: Aspen.

Ely, John Hart, 1973. "The wages of crying wolf: A comment on *Roe v. Wade?' Yale Law Journal* 82:920-949.

English, Jane. 1975. "Abortion and the Concept of a Person." *Canadian Journal of Philosophy* 5:233-243.

Feinberg, Joel. 1980. "Abortion." In *Matters of Life and Death*, ed. Tom Regan, 183-217. New York: Random House.

Finnis, John. 1973. “The Rights and Wrongs of Abortion.” *Philosophy & Public Affairs* 2:117-145.

Fost, Norman, David Chudwin, and Daniel Wikler. 1980. “The Limited Moral Significance of Fetal Viability.” *Hastings Center Report* 10:10-13.

Galston, William A. 1989. “Pluralism and social unity.” *Ethics* 99:711-726.

Ginsburg, Judge Ruth Bader. 1985. “Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade?’ *North Carolina Law Review* 63:375-386.

Greenawalt, Kent. 1988. *Religious Convictions and Political Choice.* New York: Oxford University Press.

Griswold v. Connecticut, 381 U.S. 479 (1965).

Harding, Sandra. 1984. “Can Social Compacts Emancipate Us from Social Contracts?” In *Abortion: Understanding Differences*, ed. Sidney Callahan and Daniel Callahan, 73-84. New York: Plenum Press.

Harris v. McRae, 448 U.S. 297 (1980).

Heymann, Philip B., and Douglas E. Barzelay. 1973. “The Forest and the Trees: *Roe v. Wade* and its Critics.” *Boston University Law Review.* 53: 165-184.

Larmore, Charles. 1987. *Patterns of Moral Complexity.* Cambridge: Cambridge University Press.

“ Political Liberalism.” *Political Theory* 18:339-360.

Law, Sylvia. 1994. “Rethinking Sex and the Constitution.” *University of Pennsylvania Law Review* 132:955-1040.

Manier, Edward, William Liu, and David Solomon, eds. 1977. *Abortion: New Directions for Policy Studies*, 169-176. Notre Dame: University of Notre Dame Press.

Marquis, Don. 1989. “Why Abortion is Immoral.” *Journal of Philosophy* 86:183-202.

McMahan, Jeff. 1988. “Death and the Value of Life.” *Ethics* 99:32-61.

Nagel, Thomas. 1987. “Moral Conflict and Political Legitimacy.” *Philosophy & Public Affairs* 16:215-239.

National Institutes of Health. 1988. *Report of the Human Fetal Tissue Transplantation Research Panel.*

Noonan, John T. Jr. 1970. “An Almost Absolute Value in History.” In *The Morality of Abortion: Legal and Historical Perspectives*, ed. John T. Noonan, Jr. 51-59. Cambridge: Harvard University Press.

1979. *A private choice: Abortion in America in the Seventies.* New York: Free Press.

Okin, Susan Moller. 1989. *Justice, Gender, and the Family.* New York: Basic Books.

Olsen, Frances. 1989. “Unraveling Compromise.” *Harvard Law Review* 103:105-135.

Overall, Christine. 1987. *Ethics and Human Reproduction: A Feminist Analysis.* Boston: Allen and Unwin.

Pateman, Carole. 1988. *The Sexual Contract.* Stanford: Stanford University Press.

Powledge, Tabitha M. 1981. “Unnatural Selection: On Choosing Children’s Sex.” In *The Custom-made Child? Women-centered Perspectives,* ed. Helen B. Holmes, Betty B. Hoskins, and M. Gross. Clifton: Humana Press.

Quinn, Warren. 1984. “Abortion: Identity and Loss.” *Philosophy & Public Affairs* 13:24-54.

Rawls, John. 1987. “The Idea of an Overlapping Consensus.” *Oxford Journal of Legal Studies* 7:1-25.

1988. “The Priority of Right and Ideas of the Good.” *Philosophy & Public Affairs* 17:251-276.

Raz, Joseph. *The Morality of Freedom.* Oxford: Clarendon Press.

Regan, Donald H. 1979. “Rewriting *Roe v. Wade.” Michigan Law Review 11:* 1569-1646.

Rhode, Deborah. 1989. *Justice and Gender.* Cambridge: Harvard University Press.

Rhoden, Nancy K. 1986. ‘Trimesters and Technology: Revamping Roe v. Wade.” *Yale Law Journal* 95:639-697.

Roe v. Wade, 410 U.S. 113 (1973).

Ross, Steven L. 1982. “Abortion and the Death of the Fetus.” *Philosophy & Public Affairs* 232-245.

Schelling, Thomas C. 1978. “Choosing our Children’s Genes.” In *Micromotives and Macrobehavior,* 191-210. New York: Norton and Co.

Sher, George. 1981. “Subsidized Abortion: Moral Rights and Moral Compromise.” *Philosophy & Public Affairs* 10:361-372.

Singer, Peter. 1980. “Animals and the Value of Life.” In *Matters of Life and Death,* ed. Tom Regan, 338-380. New York: Random House.

Singer, Peter, and Deane Wells. 1985. *Making Babies: The New Science and Ethics of Conception.* New York: Scribner’s.

Smith, Janet Farrell. 1983. “Rights—Conflict, Pregnancy, and Abortion.” In *Beyond Discrimination: New Perspectives on Women and Philosophy,* ed. Carol Gould, 265-273. Totowa: Rowman and Allanheld.

Sumner, L.W. 1981. *Abortion and Moral Theory.* Princeton: Princeton University Press.

Thomson, Judith Jarvis. 1971. “A Defense of Abortion.” *Philosophy & Public Affairs* 1:47-66.

Tooley, Michael. 1983. *Abortion and Infanticide.* Oxford: Oxford University Press.

Wachbroit, Robert. 1987. “What’s Wrong with Eugenics?” *QQ: Report from the Institute for Philosophy and Public Policy 1* (Spring/Summer):6-9.

Warren, Mary Anne. 1973. “On the Moral and Legal Status of Abortion.” *Monist* 57: 43-61.

1987. ‘The Abortion Issue.” In *Health Care Ethics: An Introduction,* ed. Donald Van De Veer and Tom Regan, 184-214. Philadephia: Temple University Press.

1989. ‘The Moral Significance of Birth.” *Hypatia* 4:46-65.

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

Wertheimer, Roger. 1971. “Understanding the Abortion Argument.” *Philosophy & Public Affairs* 1:67-95.

West, Robin. 1988. “Jurisprudence and Gender.” *University of Chicago Law Review* 55:1-72.

Whitbeck, Caroline. 1983. ‘The Moral Implications of Regarding Women as People: New Perspectives on Pregnancy and Personhood.” In *Abortion and the Status of the Fetus,* ed. William B. Bondeson, 247-272. Dordrecht: D. Reidel.

Williamson, Nancy E. 1983. “Parental Sex Preferences and Sex Selection.” In *Sex Selection of Children,* ed. Neil Bennet, 129-145. New York: Academic Press.
Zaitchik, Alan. 1981. “Viability and the Morality of Abortion.” *Philosophy & Public Affairs* 10:18-26.

2

Mandated Service and Moral Learning

Robert K. Fullinwider

In 1992 the Maryland State Board of Education added a new condition for getting a high school diploma: students must perform seventy-five hours of "service." The activities that count as "service" are determined by individual districts, and may include everything from tutoring younger students and visiting nursing home residents to working with nonprofit community organizations. The requirement was built on an already existing voluntary student service program supported by the Maryland Student Service Alliance, a public-private partnership. Although some municipal school systems in the U.S. imposed similar requirements at the time, Maryland was the first to adopt a statewide policy.

Because the policy mandated rather than simply encouraged service, it stimulated considerable comment and some controversy. The *New York Times,* for example, weighed in with an editorial entitled "True 'Service' Can't Be Coerced," questioning "whether mandated service is the best approach." The *Times's* lukewarm reaction to the Maryland program was somewhat curious, however, in light of the fact that on three occasions in the 1980s, the newspaper embraced universal national service for new high school graduates, without letting the possibly compulsory or coercive nature of that service seriously dampen its enthusiasm. This editorial record is peculiar because our natural response about compulsion, I think, goes the other way: we suppose it less morally and legally objectionable to compel children than young adults, rather than the reverse. Indeed, states typically have compulsory attendance laws requiring all children below a certain age to be in school. Children's education is not optional.

Nor is much of their educational experience. At the same time Maryland mandated public service, it also required all high school students to take algebra and geometry, technology education, U.S. and world history, and government affairs courses before graduating. No one editorialized about *those* requirements.

I don't believe forcing students to do some service can be wrong *in principle.* Whether it makes sense to impose a service mandate depends upon its educational purpose and the likely results.

The Educational Purpose of Service

What is the educational purpose? The Maryland Student Service Alliance characterizes "service-learning" this way: "Students learn by identifying and studying community issues, taking action to address them, and reflecting on their experience." This characterization suggests that one point of service learning is better social analysis. By engaging in service, students will better learn to describe social problems, uncover cause-and-effect, and formulate strategies for change.

If mandated service were only a means to developing students' descriptive powers, analytic insight, and strategic efficacy, its educational purpose would excite little comment. Those opposed to service would focus only on its pedagogical effects. More was at stake in the Maryland controversy, however, since the mandated service clearly aimed at more than "service-learning." As state school superintendent Nancy S. Grasmick explained, "I can't think of a better example of character development than the lesson that what we take from the community we give back to the community." The larger goal of the mandated service, then, is to teach a lesson in obligation. In teaching this lesson, service purportedly trains good character. The character of students, and not their analytical adeptness, is at the heart of the Maryland program.

Now, some people think character training is inappropriate in high schools. One irate citizen of Maryland blasted the board of education's "arrogance" in deciding that "students ought to graduate with a better understanding of what it means to be responsible for others. It is certainly not what high school education is or should be all about." The citizen was not alone in his sentiments.

I do not think these sentiments wholly tenable. Schools cannot avoid character training, even if only as a by-product of maintaining order, creating a learning environment, and demanding honest classwork. Schools ought to insist that students respect one another and do their part in contributing to a decent school community. The Maryland mandate goes further, however. It intends to teach students a lesson in obligation toward the larger community, not just toward one another and their school organization. This lesson schools could avoid deliberately emphasizing. They could avoid emphasizing it, but they couldn't avoid conveying it indirectly except by gutting the curriculum, since so much of the literature, history, and civics that students study exhibits the values of mutual aid, relief of distress, and duty to a larger community. The intended lesson in "what it means to be responsible for others" does not seem out of keeping with the civic mission of schools to prepare children for the duties of citizenship.

These remarks are unlikely to mollify the irate citizen, but I do not want to defend further the propriety of having schools teach the lesson of community obligation. Rather, taking its propriety for granted, I want to ask whether *mandating* service can teach the appropriate lesson. Was the *New York Times* right that true service can't be coerced? Does the mandate presuppose a wrongheaded conception of moral learning?

Moral Learning

Acquiring good character—learning to be a good person—is not a matter of learning information or skills; it is a matter of learning *to care* about certain sorts of things. Children don't come ready-equipped with well-formed and appropriate carings, whether moral or nonmoral; they must learn what to care about. They learn by adopting the carings of their elders. They learn by being inducted into a way of doing things.

Children learn to care about brushing their teeth and keeping clean because their parents set them a routine of brushing and bathing, just *like the one the parents follow.* They learn to care about telling the truth because their parents demand truthfulness and practice it: *one just does not lie.* They learn to care about the welfare of others not by being told to care, but by seeing their parents themselves manifestly and uncalculatingly care: *caring for others is just what one does.*

The character of children gets formed and developed as various carings become habituated and fixed. If children are to care about doing their duty, there must be duties to do. When parents and schools set children the task of tending to people in need, or cleaning up common community space, or shouldering necessary but unremunerated collective burdens, they create expectations of proper behavior. They induct children into a way of life.

There are, of course, good *reasons* for helping people in need, cleaning up common space, and shouldering necessary burdens, but these reasons will effectively motivate only those who already care about helping, or who at least care about acting on good reasons—itself a care that children must have picked up from parents, mentors, teachers, and other adults. So, a conception of moral learning that focused *only* on cognitive tasks such as finding reasons, doing analysis, making arguments, and planning strategy would leave out a vital element. It would fail to emphasize the crucial contribution to moral learning of specific practices—practices that structure the carings children will acquire.

That is why some objections to the Maryland scheme go awry. One student, for example, complained that if the schools want to teach the value of service, the proper place for such teaching is in a values-discussion class. The complaint misses the point. Although talking about values is certainly a part of education, *talking about* value is not the same thing as *learning to* value— and it is the latter that the Maryland mandate means to accomplish.

A scheme of public service embedded in the public school curriculum can convey the message that serving others is simply part of the life of a mature and educated person. The Maryland program is not educationally wrongheaded because it is mandatory. It may effectively teach a lesson in obligation and contribute to the good character of students precisely *because* it is mandatory.

Implementing the Lesson

I said the Maryland mandate "may" convey a desirable message and "may" teach a lesson in obligation, not that it does. Two cautions must be noted. First, when I observed that children learn to care by picking up the carings of their elders, I

suggested that the learning derives not from what elders *say* they care about, but from the caring that elders actually manifest. Students, for example, may be told the importance of their grammar exercises, but if their teachers themselves are slovenly in speech and writing and if the larger society puts little value on grammaticality, students are unlikely themselves to care very much about grammatical correctness. They will endure their exercises, not be educated by them.

Students are good at recognizing empty form. They know when teachers and parents are simply "going through the motions," without real conviction or devotion. Consequently, the Maryland mandate may send mixed signals to students. By imposing the service requirement on all the students of Maryland, the state says that adults take service seriously. However, if local school systems simply go through the motions, putting little effort into creating rich opportunities for student service, the service mandate may be seen by students as just one more pointless exercise they must endure.

Though now in effect nearly a decade, no systematic study has been done about the Maryland experiment. Anecdotal evidence suggests that some schools link up students with community efforts to shelter the homeless, for instance, while others let students discharge their requirements by running the copy machine in the school office. It is not yet possible to conclude precisely *what* lesson on balance the Maryland mandate is teaching *which* students.

To introduce my second caution about the Maryland program, let's reflect a moment on the asymmetrical attitudes we take toward compelling children and compelling adults. What we find offensive about mandating certain kinds of public service by adults is this. The duty to serve the community—and let's concede we have one—doesn't entail a specific performance. It only entails that we be sensitive to the community's needs and make some contribution over time to collective burdens. But there are any number of equally good patterns of service that satisfy the duty. For example, I may throw myself into full-time work with nonprofit organizations my first decade out of college, and then taper off my involvement to develop a career and family. You may start a career and family right out of college and later, in your fifties, take early retirement and begin working full-time with nonprofit organizations. A third person may give only a small amount of time each year, but give it continuously over the course of a whole life. Which of us has better discharged our duty to serve the community? I may devote time to helping the homeless, you to supporting local boys and girls clubs, a third person to promoting political activism. Which of us has better discharged our duty to serve the community? I may give mostly financial support, you mostly personal labor, and a third person a mixture of the two. Which of us has better discharged our duty? The answer is that any one of these patterns, and any number of others, satisfies the duty to serve the community.

Consequently, we leave it to adults to work out for themselves how to integrate career, family, religious commitments, community service, and other moral duties into a unique plan of life. We leave it to them because there is no single best plan to impose; because we think adults capable of planning, and disposed to plan, morally responsive lives; and because there are few greater personal goods than giving direction to one's own life.

We exercise compulsion over small children because they don't yet have the capability and disposition to plan morally responsive lives. The capability and the disposition have to be implanted and cultivated, at home and in school.

Between small children and fully autonomous adults, however, lies an intermediate group—teenagers approaching the age of emancipation. Everything else being equal, their educational experience ought to give greater room to choice and personal direction.

Thus, my second caution: mandated public service in high school may teach a lesson in obligation, but mandated service might more appropriately (and successfully) teach this lesson in the early instead of the late years of schooling. The Maryland program might make best sense applied not to grades 6-12 but to grades 1-8. Then it could be followed by encouragement and support in the high school for continued *voluntary* public service. Under this scheme, children would be inducted from the beginning into a form of life that includes service and then, as they approach maturity, given opportunities to experiment with their own, unique morally responsive plans of life.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 12: 3/4 (summer/fall 1992).

References

New York Times, March 13, 1983; December 10, 1986; Jan. 22, 1989; August 2, 1992; *Baltimore Sun*, July 29 and Aug. 18, 1992; *Washington Post*, July 30, 1992; Maryland Student Service Alliance Fact Sheet, "Service-Learning in Maryland."

3

Consultants and American Political Culture

Levine Peter

In past generations, political party officials played a major role in electoral campaigns: they chose candidates, raised money, and provided expertise, labor, and voter lists. Today the parties play a diminished role, but political consultants often operate in their place. Consultants design and produce broadcast advertisements and mass mailings; they conduct fundraisers and contact donors; they maintain lists of voters and contributors; they manage campaign logistics; and they write speeches and position papers. They are major repositories of political experience and employers of skilled labor.

Campaign spending statistics give one indication of the consultants' importance. Some candidates pay consultants fees for advice; others buy advertisements, polls, and related services from consulting firms. According to the *Handbook of Campaign Spending*, political consultants in 1990 charged House and Senate campaigns $188 million in fees and expenses: this was forty-five percent of the total money that congressional candidates spent. The same year, consultants working for Senator Jesse Helms (R-NC) charged him $10 million. Some House candidates spent close to $1 million on consulting fees and expenses. Experts estimate that at least 5,000 people now work as political consultants full-time, and some 30,000 professionals are paid for consulting during peak periods.

Consultants sometimes imply that they could elect a fence post to Congress if they were paid enough money. When surveyed by Pew in 1998, forty-two percent of professional consultants "said it is relatively easy to sell a 'mediocre candidate'." However, it is difficult to verify their implication that they profoundly influence election results. Granted, victorious campaigns generally employ consulting firms, and campaigns that do not employ consultants are generally defeated. But the more significant fact may be that winning campaigns are often many times *wealthier* than unsuccessful ones. In 1998, the average successful House candidate had raised three quarters of a million dollars by election day. Since these campaigns typically

bought broadcast advertising, produced professional mass mailings, and conducted elaborate polls, they almost always employed consultants. On the other hand, more than 127 defeated candidates spent less than $25,000 each. In this spending range, consultants are often unaffordable—but so are broadcast advertisements, mailings, and polls. Thus, the figures do not prove that consultants are a decisive factor in electoral victories. It is even conceivable that well-funded campaigns would be better off spending less on consultants.

Still, the fact that consultants are widely employed by winning candidates suggests that they have a great influence on the *character* of elections, whether or not they affect outcomes. Victorious campaigns pay consultants a great deal of money for advice and services—often more than half their total budgets. The consultants' dearly bought advice presumably carries weight; their products certainly fill our airwaves and clutter our mailboxes during election season. Moreover, candidates act as if consultants are central figures in the electoral process. When a campaign hires a famous consulting firm, it may announce this triumph with a press conference, because the signing of a consultant can seem as important as a party nomination or a major endorsement. Sometimes, simply by choosing to support a particular candidate, consultants may frighten away opponents and attract contributors. For this reason, candidates occasionally pay consultants substantial sums to do nothing but lend their names to a campaign. In other cases, consultants actually recruit citizens to run for office, confident that the individuals whom they select will be able to raise money and attract votes.

Grounds for Concern

The profound influence of consultants invites us to ask whether we should blame them for the rise of certain kinds of campaign tactics that alienate American voters. Admittedly, few of the disturbing aspects of modern campaigns were invented by consultants. Personal attacks, lavishly funded advertising campaigns, the reliance on divisive "hot-button" issues, and similar tactics were all present before the first consulting firm was founded in 1934, and they are still employed even when consultants are absent. It is also true that every form of political organization has disadvantages. The parties that once dominated politics were famous for smoky back rooms, patronage deals, financial corruption, and racial discrimination. Nevertheless, it appears that consultants have reasons to favor and encourage certain unsavory tactics that are now endemic to the political system. In part, this is because for-profit political experts have their own interests, distinct from those of candidates, activists, parties, and voters.

For example, many politicians are motivated by strongly held beliefs and policy commitments, and not only by the ambition to win elections. Although candidates often try to evade politically difficult questions, some will risk defeat rather than ignore or finesse the issues that prompted them to run in the first place. But the subculture of professional consultants is famous for a general lack of interest in ideology or the legislative process. Although consultants sometimes have ideological commitments, their main goal is to ally themselves with candidates who can win: after all, their careers depend upon their ratio of victories to losses. If they are overfussy about the platforms of their potential clients, they may have difficulty

finding work. In fact, few consultants even pretend that they select their clients on the basis of issues or values. Some express contempt for lawmaking; others state that they have chosen to work in campaigns rather than government because they find the legislative process baffling, tedious, or esoteric.

Although consultants sometimes have ideological commitments, they focus on other factors. More than half admit that when they are deciding whom to take as a client, a candidate's financial condition is a very important factor. They also care about their clients' chances of winning, because their careers depend upon their ratio of wins to losses. One firm boasts: "Breit Strategies' seventy-two percent win ratio is even better than it sounds when you know that we're always willing to take on the tough ones." They protest too much. If consultants regularly supported underdogs, their "win ratios" would fall to unsustainable levels; and if they were overfussy about the platforms of their potential clients, they would have difficulty finding work. In the Pew poll, forty-four percent said that they had helped to elect candidates whom they were sorry to see in office.

The consultants' indifference to issues would not matter if candidates set the agenda. But in a 1989 survey, forty-four percent of consultants said: "when it comes to setting issue priorities, candidates are neither very involved nor very influential." If candidates relinquish leadership in choosing issues, then consultants presumably fill that role—even though most consultants themselves admit that they are fairly uninterested in issues except as a means of attracting uncommitted voters. Thus, they will select a campaign theme on the basis of polls and focus groups, and then concentrate on wooing the swing vote through commercials and mass mailings.

Unfortunately, this approach to issues militates against any careful, broad-based discussion of public concerns during an election campaign. In ideal cases, the process of public discussion can cause citizens to modify their initial beliefs as they exchange ideas and weigh pros and cons instead of expressing visceral preferences. However, public discussion of this kind is the last thing that most consultants want to see. After they have identified a divisive "wedge issue" on which their candidate happens to agree with the majority, they often want to *prevent* any shift in public opinion. Thus they are adept at using rhetorical formulas that discourage reflection and discussion, that freeze public opinion in place, and that polarize and inflame voters.

Because consultants have little time to get to know the communities where they work, they often rely on themes and rhetoric that they have found effective elsewhere. Their national experience may compensate for their lack of familiarity with regional issues and values, but the result is a certain standardization of political rhetoric. The consultants' superficial knowledge of particular communities also makes it difficult for them to design positive campaigns, because a positive agenda often involves local issues and interests. Consultants are more adept at discovering weaknesses in opponents' voting records and résumés—so-called opposition research. The result is a heavy emphasis on negative campaigning.

Several factors that sometimes work to keep politicians and parties honest do not apply to consultants. For instance, campaigns have traditionally relied on volunteers, whose motives tend to be principled and even idealistic, and for whom winning a particular election is not always the most important goal. Volunteers can be overzealous at times, but usually they expect campaigns to maintain high ethical standards. Consultants, however, do not rely on volunteers. For one thing, they do

not have the local connections and reputations that would enable them to recruit volunteers effectively. Instead, their major assets are money, national connections, expertise, and technology. James Severin, a consultant who worked for George Bush, has said that it is important to project the appearance that a campaign has volunteer support, but volunteers actually have no substantive role in modern elections. Even if Mr. Severin is wrong, his comment reveals a great deal about consultants' attitudes toward volunteers,

An effective strategy for local parties and politicians is to build a core of support among activists and then broaden it into a majority. Although this approach does not rule out exclusive politics (and even bigotry), at least it encourages a long-term perspective. But consultants lack the time to recruit activists and new voters, to court community leaders, or to change local opinion. Instead, they typically use sophisticated technology to target a small group: habitual voters who are uncertain about whom to support. Sometimes, a poll or focus-group interview of these voters reveals that a particular issue holds the key to victory. In such cases, short-term tactical considerations may determine the whole message of a campaign, and there are no lasting benefits for the community.

A typical consulting firm proclaims its expertise in "Targeting Contributors, Targeting Voters, Targeting Issues, and Automated Dialing to targeted homes." The firm explains, "Automated dialing can be used both to identify supporters and key issues, and...on election day to maximize key voter turnout. Sophisticated databasing techniques including desktop mapping are used to deliver mail and voice messages to specific constituency groups." "Targeting," "tailoring," and "focus," are among consultants' favorite words— along with "aggressive," "hard hitting," and "creative."

According to polls, most people thought that the Republican party had overplayed the Monica Lewinsky sex scandal by November 1998. But two Republican consultants, William Dalbec and Michael Dabadie, recalled "a simple rule: you don't have to appeal to everyone to win. It's a waste of resources. What you need to do is secure your base—make sure core supporters turn out and vote—and appeal to swing voters, those who often split their tickets." They explained that the Republican base was composed of Christian conservatives, while the relevant "swing voters" were politically independent married women. Both of these groups would appreciate advertisements that directly criticized the president. Perhaps Dalbec and Dabadie gave poor tactical advice in 1998, but their approach usually works. It is also a recipe for low turnout, because targeted commercials motivate people who are *already* likely to vote, alienating everyone else. But consultants aren't paid to enhance democracy. They are paid to win.

One of their main jobs is to inject such worldly realism into campaigns. According to the Pew poll, four out of five consultants think that when campaigns turn negative, it is usually because *they* have recommended it—not because the candidates wanted to attack one another. Consultants also remind candidates to raise money, to heed poll data, and to keep their messages simple and popular. Although cynical advice is often valid, cynics do not make good politicians. People who conspicuously lack ideals have trouble appealing to voters, and they usually lack the stomach for public service. Nevertheless, there is money to be made by standing on the sidelines, reminding candidates not to be too idealistic. Thus consultants often serve as moral thermostats, switching off their clients' idealism

when it threatens to ruin their electoral prospects. Dick Morris, President Clinton's svengali in 1996, was only an extreme example of this phenomenon.

Politicians may also be cautious about using obviously disreputable campaign tactics because they wish to retain the loyalty and respect of their constituents over the course of their careers. In the heat of battle, they may be able to get away with distortions, exaggerations, divisive rhetoric, unrealistic promises, or efforts at suppressing the vote. But once elected, they can to some extent be held accountable for these sins. The local media, for example, can investigate the conduct of their campaigns and challenge the accuracy of their statements. Adverse publicity may hurt their effectiveness in office and their chances of reelection; it may also besmirch their personal reputations in the communities where they (and their families) live. Consultants, on the other hand, move on soon after election day. Their reputations, particularly within a local community, are less important to them than their win-loss records.

Of course, politicians are supposed to be the bosses of their own campaigns; they hire the consultants and establish standards of behavior. However, if candidates believe that they can win by listening to consultants, then it is difficult for them to ignore their advice. It is all very well to run an issue-oriented, grassroots, positive, low-budget campaign; but if it appears that such campaigns are almost always defeated by teams of pollsters and media consultants, then they can begin to seem rather quixotic.

Elusive Values

The success of political consultants creates a paradox. Their methods seem to work: voters elect politicians who use consultants, and usually they reject candidates who do not. Whatever the precise impact of consultants on election results, clearly voters do not punish candidates for employing consultants to manage their campaigns. At the same time, however, most Americans view elections in general as shameful exercises in mudslinging, obfuscation, and demagoguery. As individual voters, they apparently respond to the tactics of professional consultants; but as a public, they are alienated by the political culture that consultants have helped to create.

This phenomenon is not altogether surprising. In the economy at large, the individual choices of consumers often produce aggregate results that they dislike; this is sometimes the occasion for government regulation. For instance, consumers may want to see certain products banned as hazards to the environment, but so long as companies are allowed to market those products, people will continue to buy them. In the absence of regulation, there may be no attractive alternatives, and it may seem foolish to shun the harmful products. In the political arena, as in the general economy, regulation is an option. But before we can devise a regulatory framework, we must decide what values we want the electoral process to serve.

Many people assume that candidates should come alone before the bar of public opinion to be judged as fit or unfit for political office. This seems to be the purest concept of electoral democracy—the ideal that is taught in civics class. But in a mass society, it is impossible for candidates to win elections literally on their own. They need at least some of the following: donors, parties, volunteers, the media,

interest groups, other politicians, a personal fortune, matching funds from the government, and professional advisors.

It is not surprising, then, that whenever one form of political organization declines or is suppressed, another always seems to take its place. For example, the dissolution of traditional party structures has created a vacuum that is increasingly being filled by individual politicians who use campaign money to provide expertise and support to candidates in other states or districts. One fairly typical incumbent congressman raised $270,000 to defeat an opponent with a budget of $2,498. Although his challenger posed no threat to him, he paid $109,750 to outside consultants. In addition, he maintained a permanent campaign organization and hired qualified election specialists on a full-time basis, assigning these employees to help other candidates as consultants during election season. In effect, he ran his own consulting service, exacting political influence (rather than money) as his price. A responsible campaign finance reform bill would presumably restrict or abolish arrangements of this kind. Nevertheless, we must accept the inevitability of elaborate political organizations in a mass society, even as we seek to make politicians accountable to the electorate rather than to political operatives.

In addition to distrusting political organizations, many Americans also express a dislike of professionalism in the electoral and legislative processes. There is a widespread suspicion of lobbyists, campaign consultants, and other political professionals. These figures seem unsavory, in part, because they have a reputation for working for the highest bidder. But some people's distrust of professionalism extends even further: they are offended not only by consultants, but also by career legislators and activists. This suspicion may arise from the belief that democratic leaders should not have to acquire specialized skills: politicians ought to be just like everyone else. However, it is difficult to manage a huge modern country without allowing someone— bureaucrats, legislators, lobbyists, journalists, or election specialists—to develop professional expertise. Therefore, the only realistic question is: Who should our political professionals be?

We can begin to address this question by noting that the word "professional" is ambiguous: it can describe someone who is highly skilled and experienced, or it can denote a paid employee as opposed to a volunteer. Some people who are paid to work on campaigns are completely inexperienced and even incompetent, whereas some volunteers are seasoned veterans of past campaigns, and some bring impressive skills from their work in fields such as commercial advertising and journalism. If we object to the fact that candidates pay campaign workers, then we should ask how people are supposed to afford to participate in campaigns full-time without compensation. Surely we would not want to create a system in which only wealthy or retired people can engage in sustained campaign activity. Or, if we object to having people with skills and expertise play any role in campaigns, then we must ask why a culture that values professionalism in so many fields should prefer to entrust the management of political campaigns to amateurs.

Three Reform Proposals

These observations suggest that it is not easy to establish realistic and coherent principles to guide reform. Nevertheless, several concrete reform ideas have been

proposed. Some critics of the consulting industry (the most prominent of whom is Larry Sabato, professor of government and foreign affairs at the University of Virginia) argue that we ought to give power back to the political parties, since their demise led to the rise of consultants in the first place. In principle, a system of strong parties has a number of advantages over a system dominated by consultants. Since parties stand to suffer from criticism of any particular campaign, they may try to avoid disreputable tactics. Unlike consultants, they must develop coherent national agendas. In addition, Mr. Sabato argues that if parties were given greater control over campaign financing, challengers would benefit. Parties have an incentive to allocate resources to their candidates in proportion to their needs, because they want to win as many seats as possible. In contrast, consultants prefer to work for incumbents, who can pay their high fees and who have the greatest chance of winning.

However, the parties' power was curtailed for good reasons. Traditionally, the main source of authority for party organizations was their ability to raise and spend money. This power was reduced after Watergate because of evident and systematic corruption in party fund-raising. Corruption—or at least the appearance of corruption—is inevitable whenever parties solicit and allocate large sums of private money.

Even if the parties were given "clean" public money to allocate, their control of the purse strings would still raise issues of fairness. Party officials would have to make crucial decisions about whom to support (and with how much money), thereby becoming a kind of shadow government. If these officials were chosen by current officeholders, then they would generally serve the incumbents' interests. Although Dr. Sabato believes that parties are mechanisms for improving competition, in fact party officials often channel money to their political patrons, who are usually entrenched incumbents, while slighting the needs of challengers in more competitive races. On the other hand, if party officials were made directly accountable to the membership, then they would have to conduct campaigns for office, complete with contributors and consultants. This would only shift the problems caused by consultants to a new domain.

Another reform strategy is to regulate the consulting industry directly. Many powerful professions (law, medicine, journalism, and so on) operate under a range of institutional safeguards; they have specialized training programs, credentials and licenses, and codes of conduct. A similar approach could be applied to political consultants. The American Association of Political Consultants (AAPC) has in fact adopted a code of ethics, but no one has ever been disciplined under it, nor do consultants have to join the AAPC. "We've never come up with anything that is workable," said the AAPC's founder, Joseph Napolitan. In a 1994 poll, eighty-four percent of political consultants rated their own profession's ethics as either "fairly high" or "very high;" but their standards may not be rigorous enough. In the same survey, sixty-two percent of political consultants said that there was no need for a well-enforced code of professional ethics.

The chair of the AAPC ethics committee, Ralph Morphine, has said that he favors "a real Code of Ethics that's taken seriously." But writing such a code would require a clear sense of what constitutes appropriate campaign behavior. A concept of political leadership must be realistic: politicians operate in a highly competitive field, one that rarely tolerates fastidious ethical standards or unrestrained idealism.

On the other hand, just because saints cannot win elections, it does not follow that all kinds of behavior are equally acceptable. In order to judge political consultants and their clients, we would need a realistic yet demanding concept of democratic leadership. In addition, serious First Amendment and antitrust issues would have to be addressed before any ethics code could be enforced.

A third approach to reform suggests that instead of strengthening political parties or imposing ethics regulations on political consultants, Congress could pass campaign finance legislation that would put consultants out of business altogether. Several existing systems of campaign finance provide public benefits to candidates who agree to limit their spending. This is the arrangement that governs presidential primaries as well as gubernatorial elections in five states and legislative races in seven states. A similar system has been proposed for congressional campaigns. Under these arrangements, almost all candidates opt to receive public benefits in return for obeying spending limits. The benefits take the form of vouchers for mailings, broadcast time, printing, and other expenses. If the vouchers offered to candidates covered a high proportion of their costs, and if participating campaigns were forbidden to use vouchers to pay more than a modest per-hour fee for services, then the professional consulting business would shrink dramatically and possibly disappear. Candidates could continue to hire students and other low-skilled employees, but the experts would be forced out of business. Although a few personally wealthy candidates might choose to forgo the public vouchers, their patronage would not be sufficient to support a consulting industry.

This approach to reform might redistribute power from professional campaign experts to the candidates themselves. Then again, it might also produce a dramatic shift in power toward journalists, lobbyists, bureaucrats, and other experts who could profoundly influence the results of elections in the absence of professional campaigners. The law of unintended consequences governs all efforts at political reform.

The Permanent Campaign

Though many consultants profess no interest in lawmaking or the process of governing, others find that the professional skills they employ during campaigns are also effective after election day. Some consultants now work as lobbyists between campaigns, using their skills to influence legislation and benefiting from their relationships with former clients who now hold office. Several consulting firms have adapted election strategies—and even specific computer software—to lobbying efforts. As in campaigns, the role of political consultants in legislative battles can diminish the importance of the independent citizen, who is now treated as a commodity.

Bonner & Associates, a Washington firm that specializes in “grassroots lobbying,” charges $350-$500 for each letter that it generates from a “community leader,” and $5,000-$9,000 for each meeting it sets up between a community leader and a member of Congress. In 1991, Bonner charged its clients $400,000 to generate 10,000 calls in four days from constituents of House Banking Committee members, thus helping to kill legislation that would have forced banks to lower

their interest rates on credit cards. One advertisement in a magazine for political professionals reads:

> You're known by the company you keep. Many business-oriented ballot issue and public relations campaigns fail because of the company they *don't* keep! A grassroots coalition of thousands of individuals can mean the difference between success and failure. That's why WCG/Claussen builds and manages effective coalitions throughout the nation. So give us a call, and we'll help you start keeping better company.

Most of us understand "grassroots" politics and the process of building "coalitions" in a very different way from that now advanced by political consultants. Confronted with this advertisement, we may decide not merely that consultants have fallen short of our ideals for American political culture, but that they are creating a parody of those ideals. And this perception may persuade us to accept the risks of reforming an unacceptable status quo.

This article first appeared in the *Report from the Institute from Philosophy and Public Policy*, volume 14, number 3/4 (summer/fall 1994).

References

Sara Fritz and Dwight Morris, *Handbook of Campaign Spending: Money in the 1990 Congressional Races* (Congressional Quarterly, 1991); Nicholas J. O'Shaughnessy, *The Phenomenon of Political Marketing* (St. Martin's Press, 1990); Walter de Vries, "American Campaign Consulting: Trends and Concern," in *PS: Political Science & Politics* (March 1989); James P. Sterba, "Democracy Inc.: Politicians at all Levels Seek Expert Advice, Fueling and Industry," *The Wall Street Journal* (September 1, 1992); Pew Research Center for the People and the Press; Common Cause data; David Lee Rosenbloom, *The Election Men: Professional Campaign Managers and American Democracy* (Quadrangle Press, 1973); Gillian Peele, "Campaign Consultants," *Electoral Studies,* vol. 1, no. 3 (December 1982); Breit Strategies Internet site (visited May 1997); Pew Research Center; Mark P. Petracca, "Political Consultants and Democratic Governance," *PS: Political Science & Politics* (March 1989); CelindaLake: "Political Consultants: Opening Up a New System of Political Power," *PS: Political Science & Politics* (March 1989); Larry J. Sabato; *The Rise of Political Consultants* (Basic Books, 1981); Sabato, "Political Influence, the News Media and Campaign Consultants," *PS: Political Science & Politics* (March 1989); Sidney Blumenthal, *The Permanent Campaign: Inside the World of Elite Political Operatives* (Beacon Press, 1980); Direct Marketers of Charleston Web site, visited on May 1,1997; Dalbec and Dabadie (of Wirthlin Worldwide), "You Don't Need Every Vote" (op-ed), *The New York Times*, October 30, 1998; Andrea Spring, "AAPC: The First 25 Years," *Campaigns & Elections* (December/January 1994); Ralph Murphine, "Guest Column," *Campaigns & Elections* (April/May 1993); Common Cause; Peter H. Stone, "Green, Green Grass," *The National*

Journal (March 27, 1993); an advertisement in *Campaigns & Elections* (February 1992).

4

Chastity, Morality, and the Schools

Robert K. Fullinwider

"Abstinence makes the Heart Grow Fonder," proclaimed billboards along Maryland highways a few years ago. At the same time, two hundred thousand placards declaring "True Love Waits" were staked on the mall in Washington, representing chastity pledges by teens across the country. And a full-page newspaper ad, "*In Defense of a Little Virginity"* endorsed programs "to help kids make good sexual decisions."

These by no means isolated examples signaled a developing movement in and out of schools to curb teenage sexual activity, one that received federal endorsement in the Personal Responsibility and Work Opportunity Act of 1996, which offered money to states to run "abstinence education" programs. This movement responds to three effects of changing sexual mores in America since 1960: the steady rise in the rate of teen pregnancies, the spread of sexually transmitted disease among those under twenty-five, and the growing problem of sexual harassment and unwanted sexual pressure among students. The emergence of AIDS has provoked special concern among educators, for, although the rate of HIV infection among teenagers is low, the lethal consequences of such infection lend urgency to efforts at prevention.

But the risk of disease and pregnancy is not the only case the chastity education movement makes against teenage sex. It also makes a moral case: premarital sex is wrong. The two arguments seem to go hand in hand. President Ronald Reagan observed in 1987 that nowadays medicine and morality teach the same lesson about teenage sex: abstain. Likewise, a proponent of chastity education, Thomas Lickona, joins medicine and morality together in arguing that "sexual abstinence is the only medically safe and morally responsible choice for unmarried teenagers." These same ideas are echoed in the 1996 federal legislation.

However, we must take care with the idea that medicine and morality teach the same lesson lest we conflate prudence and morality. The major premise of a *prudential* argument refers to an agent's actual interests, present and future; subsidiary premises indicate how a given course will promote or hinder those

interests. Since people's interest can vary, the courses of action prudence recommends can vary too. For the actor wanting to prolong a lucrative career, expensive cosmetic surgery may be the prudent choice. For the concert pianist who has arthritic hands, a difficult experimental drug therapy may be a reasonable gamble. For an elderly person, susceptible to complications from the flu, getting a flu vaccine makes good sense.

The major premise of a *moral* argument, in contrast, refers to an agent's duties or rights, which may arise from a variety of sources—the agent's place in special relationships or roles (think of a parent's obligation toward a child), or in a scheme of just institutions (think of the juror's duty to render a fair verdict), or in the general human condition (think of the universal reciprocity embodied in the Golden Rule). Medical reasons can enter into moral arguments, since it may be an agent's duty to promote someone's health or not to cause illness or injury to others. For example, the fact that it is prudent for a child to be inoculated against measles gives the child's parents a moral reason for getting the child inoculated, since the parents have an antecedent duty to promote the child's health interests. However, if measles were to be eradicated, the moral reason for inoculation would disappear along with the prudential one.

With regard to abstinence, the situation is different. The moral injunction to abstain from premarital sex would presumably remain in force whatever medical science invented: a cure for AIDS, a vaccine against all sexually transmitted diseases, a foolproof contraceptive method. As a moral ideal, chastity does not stand or fall with the prudential arguments for premarital abstinence. This tells us that medicine and morality aren't teaching the same lesson, even when they temporarily converge on the same recommendation. The commands of morality and deliverances of prudence speak from distinct realms.

Does chastity education teach sound prudential and moral lessons? How does it treat the actual interests of teenagers, and from what moral resources does it draw the duties and rights that underlie its prescriptions?

Prudence

The chastity education movement teaches that sexual abstinence before marriage is the only prudent option for teens (and everyone else): "The *only* truly safe sex is having sex *only* with a marriage partner who is having sex *only* with you," Mr. Lickona advises teens: "Abstinence is the only 100 percent effective way to avoid pregnancy, AIDS, and other sexually transmitted diseases."

Chastity education sets itself explicitly against two other educational strategies. The first, sometimes called "value-neutral" sex education, instructs teens about sexual functioning and how to use contraceptives. In the 1970s, when value-neutral programs were most common, sex education seldom included discussion of abstinence. The second strategy, which Mr. Lickona calls "Abstinence, But," explicitly recommends abstinence to teens but also informs them how to have sex safely if they reject the counsel of abstinence.

Chastity education substitutes a different message: "Abstinence Only." It rejects both the other approaches as resting on the false proposition that there can be safe sex outside marriage. Wait until marriage, it insists, in order to be 100 percent safe.

The adamancy of chastity education's "100 percent safe" argument may dissuade some teens from sex, but a thoughtful student will see that it rests upon two questionable foundations, namely an extreme risk aversion and an unspoken devaluation of sex before marriage—a devaluation that must draw on extra-prudential considerations. Let me explain both points.

First, life is risky. Everything we do puts us in some degree of danger. For example, the only 100 percent safe choice regarding transportation is not to go out at all. Cars crash, trains wreck, ships sink, planes fall from the sky, and pedestrians get run over. Extremely risk-averse persons may shut themselves in and not venture out for any reason, but for most of us the risk of death from driving the highways, say, are worth taking—and worth taking not just for vital or necessary ends like getting to work or putting food on our tables, but for optional and relatively trivial ends such as taking a trip to the beach to lie in the sun or visiting a friend's house to play cards. The risk from driving are pretty minimal to start with (14 deaths per 100,000 people), and we try to minimize them further by driving cautiously, wearing seat belts, and keeping our cars in good repair. Nevertheless, the risks are quite real. More Americans die in motor vehicles each year and a half than were killed in the entire Vietnam war.

But driving isn't the only risky thing we do. The less risk-averse among us climb mountains, race motorcycles, play contact sports, and go skydiving. In short, they take risks—even considerably heightened risks—for adventure, thrill, challenge, and excitement. There is certainly no social consensus that, when they do these things, people act irrationally or irresponsibly.

Thus, a reflective student in a chastity education class, who has just ridden her bicycle to school (700 people are killed on their bicycles each year), might wonder why "100 percent safe" is the appropriate standard to apply to sex when it isn't the standard she or anyone else applies to any other part of life. We always balance risk against gain.

What makes the "100 percent safe" policy seem plausible in the case of teenage sex is an unspoken devaluation of the option it asks teens to forgo: sexual activity. Teens aren't being asked to give up something important by a policy of abstinence. They ought not be having sex, anyway. So, unlike in the cases of driving to work or even driving to the beach, teens shouldn't balance risk against gain. There's nothing to be gained.

But how is this so? How does the thrill of sex differ from the thrill of skydiving? The answer must be that the thrill of skydiving is *morally* indifferent, while the thrill of sex isn't. Teen sex isn't morally proper to start with, so nothing of value morally is lost to teens in forgoing sex.

Thus, the devaluation of sex that's silently at work in the "100 percent safe" argument is a moral devaluation. Chastity education's prudential argument against teen sex doesn't work independently of its moral argument. What, then, is its moral argument?

Morality

Mr. Lickona notes a common question about sexual morality: "Isn't premarital sexual abstinence a religious or cultural value, as opposed to universal ethical

values like love, respect, and honesty?" He replies that "ethical reasoning alone," without recourse to religious doctrine, can demonstrate that "reserving sex for marriage is a logical application of ethical values." Were this so, chastity education would be very much easier for the schools. Controversial religious grounds could be set to one side in making the moral case for abstinence.

Does "ethical reasoning alone" show that sex outside marriage is morally wrong for anyone? Mr. Lickona invokes two central moral values, love and respect, that don't seem to require religious support, and argues that if "we love and respect another, we will want what is in that person's interest." This is certainly true. But unless we take for granted what is in question here— namely, that it is always against anyone's interest to take the slightest risk for the sake of sex—a person's interest will depend in part upon his or her particular preferences and risk policies, and won't always prove an impediment to nonmarital sex.

If a potential sex partner is unwilling to risk disease or pregnancy, does not desire to have sex, or perhaps even subscribes to a policy or ideal of chastity, we would certainly fail to show moral respect by trying to cajole or bully or induce that person to do what she or he is unwilling to do, has no desire to do, or has a policy or ideal against doing. Respect and love provide moral reasons for abstaining in this case. The ground of these reasons, however, consists in the potential partner's simply having his or her particular desires or values, regardless of their moral character. For example, a father who bullies his eighteen-year-old daughter into skydiving against her wishes fails to respect his daughter, but his moral failing here doesn't arise from any moral infirmity in skydiving itself.

Respect and love, then, don't provide independent, freestanding reasons for abstinence. If our potential partner wants to have sex, in keeping with his or her more stable values and policies on risk, then respect and love don't require our abstaining. To see how far respect and love alone can make a case for abstinence, consider our responses to his situation: a fifty-year-old divorcée and fifty-year-old widower find themselves attracted to each other and care for each other but for perfectly good reasons don't contemplate marriage. Do respect and love here require abstinence? Only if sex outside marriage is *inherently immoral*, apart from the desire and values of the two fifty-year-olds. And what does "ethical reasoning alone" tell us about *that* question?

We can understand that persons might make chastity a personal ideal, just as we understand that, for example, some people make vegetarianism their way of life. We should extend to vegetarians and the chastity-supporters the same respect for their choices of how to live their lives that we would like from others for our own choices. But respect by itself doesn't require us to go further and take up the vegetarianism ideal itself, nor does it obligate us to take up the idea of chastity. To show that chastity is a nonoptional way to live, we have to press beyond respect and love to identify an independent standard that every person's ideals and interests ought to conform to. To supply that independent standard requires a religious doctrine.

This is particularly evident if we consider what looms central in traditional, religiously based moral views about sexuality. These views typically employ a quite special vocabulary. Instead of speaking primarily in the language of rights and respect, sexual morality speaks in the first instance of *purity* and *impurity.* That, after all, is the language the teenagers used in planting their "True Love Waits"

pledges on the Washington mall: they promised to remain "pure" until marriage. Traditional sexual morality is preoccupied with the body and its uses. It teaches that sex outside the bonds of marriage *defiles* and *degrades* the body; it makes it unclean. Toward others' sexual wrongs and our own we aren't supposed to feel merely indignation or guilt but loathing, disgust, and revulsion. Traditional religious sexual codes, in fact, go hand in hand with related codes having to do with what can be put in the body (for example, certain things cannot be eaten), how the body can appear (for example, parts of the body must be hidden from view; hair must never be cut, or hair clippings must be discarded in a special way), and how the body is to be disposed of at death (for example, a corpse cannot be allowed near a sacred shrine). It is in the context of this language of pollution and purity—a language virtually incoherent outside its religious moorings— that abstinence outside marriage is a nonoptional ideal. In the traditional religious perspective, only marriage sanctifies sex and makes it "clean," as only slaughter in a proper abattoir where the animal is bled properly and the flesh not allowed contact with milk makes meat clean for the Jew, or as only slaughter in which the butcher cuts an animal's windpipe, carotid artery, and gullet while invoking the name of God makes meat clean for the Muslim.

If we drop notions of purity and impurity and consider sex simply as a transaction on a par with any other personal transaction (though of a particularly intimate kind), then sexual morality will reflect just the demands of respect and love, which, as we saw, do not provide independent reasons for chastity. Respect does not show sex outside marriage to be inherently immoral, nor does love, unless it is the love of God and His divine ordinances.

Thus, to sum up: chastity education's "100 percent safe" proposal for teens can't rest on prudence alone. It must morally devalue teen sex so that there is no basis for teens balancing risk and gain, and thus taking some risks. But if chastity education morally devalues teen sex by claiming sex outside marriage is inherently wrong, it will have to invoke a particular religious view. Contrary to Mr. Lickona's hope, it will have to embrace rather than avoid controversy.

Encouraging Abstinence

Does chastity education need to rest on the premise that sex outside marriage is inherently wrong? We can certainly drop the premise and still make a case for abstinence by teens. The case, however, won't be as uncompromising as the one made by chastity education.

Let's revisit the example of the two unmarried fifty-year-olds. If we respond differently to their having sex than to fifteen-year-olds having sex, this suggests that the case for "waiting till marriage" is age-sensitive. Indeed, Mr. Lickona's argument from respect gains some plausibility when restricted to teen sex. The argument then draws on assumptions we make about teens *not being ready* for sex regardless of their desires, ideals, and policies on risk. Its conclusion, "wait till marriage," really means "wait till you're old enough."

In general, teens are not ready for sex in the sense that they aren't ready to make informed, thoughtful decisions about having sex the way, say, fifty-year-olds are. They aren't able to gauge the emotional repercussions and they aren't able to

distance themselves from their immediate desires. Indeed, adults often don't do so well in this respect, either.

The case for encouraging abstinence would rest on the following premises. First, as a general rule, teenagers are imprudent and rash. Excitable, propelled by strong impulses, wanting nothing so much as peer approval, and unable vividly to imagine the full consequences of their actions, teens drop stones off highway overpasses for fun, drive with reckless abandon, play "chicken" with railroad locomotives, and sniff propane to get high. They don't display good judgment, they don't exercise caution, they don't regard other people's interests as they ought.

Second, sex is an especially alluring venue for throwing caution to the winds. In the heat of the moment, little thought is given to the possibility of disease or pregnancy, or more remote emotional and psychological effects.

Sex is also an especially common occasion for moral disregard. Seduction too often takes the form of bullying, cajoling, pressuring, and outright forcing. In light of the ways that matters can go wrong prudentially and morally in teen sex, as a general rule the best policy for any teen might well be abstinence. In conclusion, teens *ought* to be more risk averse about sex than about other things, because about sex their judgment is often especially impaired.

This case for abstinence as a policy doesn't depend on religious premises and might carry some persuasive force for the reflective teenager. However, since it doesn't claim that every teen is incapable of making thoughtful, mature decisions about sex but, rather, asks each teen to take seriously the general tendency of teens to be thoughtless about sex, this case for abstinence doesn't supply the blanket prohibition that chastity education desires to encourage.

But perhaps this is not so important. What students may receive most profitably in courses that emphasize abstinence is *permission*—permission to resist peer pressure and do what they really want to do anyway, retain their virginity. A lot of teens have sex not because they truly want to but because it is the thing to do. Create a climate in which sex isn't the thing to do, and then sex may diminish. A 1994 report by Douglas Kirby and his colleagues for the Centers for Disease Control identified two programs that, by making the delaying of intercourse a "clear goal" while also providing instruction about contraception, "successfully reduced the proportion of sexually inexperienced students who initiated sex during the following twelve to eighteen months." These are modest results, but real ones nevertheless. It remains to be seen whether "Abstinence Only" can do better.

Some observers may wonder how much any sort of education will affect teenage sexual activity overall. In the past, teens were less active sexually not because they listened to reason but because they lived in a very sexually repressive society. The social penalties of unwed motherhood and the stigma of illegitimacy gave girls powerful incentives to avoid pregnancy, and in the era before the pill, avoiding pregnancy meant avoiding intercourse. That repression is gone, not likely to be revived. Nor should it be. But the upshot is a formidable challenge to educators: how honestly to persuade students that abstinence makes the heart grow fonder and that true love waits.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy,* volume 14, number 3 /4 (summer/fall 1994).

References

Thomas Lickona, “Where Sex Education Went Wrong,” *Educational Leadership* (November 1993); “In Defense of a Little Virginity,” a newspaper ad from Focus on the Family; Laurie Goodstein, “Saying No to Sex in No Uncertain Terms,” *Washington Post* (July 30, 1994); National Safety Council, *Accident Facts* (1993); Douglas Kirby, et al., “School-Based Programs to Reduce Sexual Risk Behaviors. A Review of Effectiveness,” *Public Health Reports* (May-June 1994). See also Thomas Lickona, *Educating for Character: How Our Schools Can Teach Respect and Responsibility* (Bantam Books, 1991), and William Kilpatrick, *Why Johnny Can’t Tell Right From Wrong and What We Can Do about It* (Simon and Schuster, 1992).

5
The Holocaust and Moral Education

Lawrence A. Blum

The belief that schools have a responsibility to teach values is a very old idea in American education. In recent years, however, the aims and methods of programs in moral education have become a subject of intense debate. Some critics believe that such programs distract schools from their essential academic mission. Religious conservatives, wary of curricula that they perceive as favoring moral relativism, insist that the teaching of values should be left to parents and religious institutions. Their distrust extends to classroom efforts to foster "critical thinking" by inviting students to discuss their personal responses to texts and historical events.

One of the most widely adopted—and controversial—approaches to moral education addresses the specific issues of prejudice, conformity, and individual responsibility. It does this by examining the rise of Nazism and its culmination in the Holocaust. Facing History and Ourselves, an organization created in 1976, has produced a curriculum and resource book, and conducts workshops for teachers. Its materials are now offered, in some form, to 300,000 students—mostly eighth and ninth graders—each year. The program received an unexpected burst of attention last fall, when a political scientist who had criticized it for not presenting the "Nazi point of view" was named historian of the House of Representatives. Once her comments attracted public notice, Christina Jeffrey was abruptly dismissed. But her remarks provoked a spate of articles and letters in national publications concerning the teaching of the Holocaust.

Most commentators spent little time refuting the charge that Facing History had failed to achieve "balance or objectivity" in its exploration of Nazism. Other, more significant questions about the program—its assumptions and moral purposes—engaged them instead. Was the Holocaust a "unique" event in human history? Is it legitimate to compare the Holocaust to other historical crimes, such as those perpetrated in the Soviet Union in the 1930s, Cambodia in the 1970s, Rwanda and Bosnia in the 1990s? Should the Holocaust be used as a reference point for teaching children about racism and social injustice in general—about scapegoating, intolerance, and prejudice that can occur in any society?

History and Ourselves

The moral education dimension of Facing History and Ourselves has two elements. The first is attention to features of the students' own lives, development, and identities, especially as these bear on issues of moral responsibility and civic engagement. Before focusing on Germany, the curriculum raises issues of group identity and asks how individuals are pressured into acting against their better judgment. These themes are taken up again as the curriculum turns to the period immediately prior to the Holocaust, when a series of laws deprived Jews of rights and status within German society. Students are asked to imagine themselves (to the degree that this is possible) in the place of ordinary Germans, some of whom go along with these Nazi policies, and some of whom resist them. Students are invited to consider how they would and should act in comparable circumstances.

The second moral focus of the Facing History curriculum is a consideration of a broad set of social injustices, linked to elements of the history the students have just explored. The curriculum calls attention to racism in various manifestations, especially, but not only, in the United States, involving prejudice against African-Americans, Native Americans, and other groups. Several small sections of the resource book are devoted to the Turkish genocide against the Armenians. In this strand of the curriculum, emphasis falls on the social and psychological processes that played a role in the Nazi horrors—scapegoating, fear, intolerance, isolation, the definition of "others" as inferior or alien. Students examine these processes in different historical contexts and reflect on their operation in their own lives.

Among the objections that have been made against Facing History, many have been ill-founded and based on a cursory or egregiously selective reading of the organization's material. However, some raise substantial issues for Holocaust teaching, and for moral education. The more important criticisms, not all fully distinct from one another, are these: (1) The Holocaust is a unique event in human history, and Facing History fails to honor this fact. (2) The Holocaust should not be taught in the context of moral education, but as part of the European or world history curriculum. (3) Facing History draws illegitimate comparisons between the Holocaust and other social horrors and injustices, thereby implying that current or historical American treatment of, for example, African-Americans is on the same moral level as the Holocaust. (4) Facing History does not give sufficient attention to anti-Semitism, in its historical and contemporary manifestations. I shall consider each of these criticisms in turn.

The Uniqueness of the Holocaust

The claim that the Holocaust is unique can mean several distinct things. On one level, every historical event is unique: no historical evil is like any other in all respects. The Holocaust is distinct from all other examples of mass murder; American slavery is different from other forms of oppression and even from other forms of slavery (as practiced in ancient Greece, Latin America, or Arabia). Understood in this sense, uniqueness is a quality that always deserves recognition, if only for reasons of historical accuracy.

However, assertions of the Holocaust's uniqueness usually involve more than a claim that the Holocaust is unlike other historical events *in some respects.* The central idea (although it is not always made explicit) is that the Holocaust is *uniquely evil.* Yet this claim is itself ambiguous. It can mean that the Holocaust has evil features shared by no other historical evil, or that, taken as a whole, it is the worst evil ever perpetrated.

Neither of these claims entails the other. It is sometimes argued, for example, that the Holocaust is the only time in recorded history when a state attempted to annihilate an entire people; the concept of "genocide," invented and reflected in the United Nations Convention on Genocide in 1948, is meant to mark the moral difference between this sort of killing and other mass murders. Yet the Holocaust, though it may have given rise to the concept of genocide, is not the only historical instance of genocide. The Turks' violence against the Armenians between 1915 and 1923, the United States' treatment of some Native American tribes, the Hutu government's massacres of Tutsis in Rwanda—all are arguably cases of genocide.

It can, no doubt, be plausibly claimed that the Holocaust is the *worst* instance of genocide—given the number of people killed, and the systematic mobilization of a modern state's resources for the purposes of extermination. Still, it does not follow that the Holocaust is the worst *historical evil.* Consider Stalin's starvation of millions of peasants in the 1930s, during the era of forced collectivization. This is a mass murder that is not a genocide, since it involved the targeting not of a people defined by religion, nationality, or race, but rather of a social grouping defined by status. But does this distinction have greater moral significance than the number of people killed?

It is doubtful that we can achieve any final reckoning of degree of evil. Moreover, even if there is some analytical and historical value in making the attempt, the uniqueness dispute is not of paramount importance to moral education. Indeed, an emphasis on the "uniqueness" of the Holocaust, in any sense other than that shared by other historically significant events, is likely to have deleterious consequences for moral development. One of the primary goals of moral education is to increase awareness of, sensitivity to, and concern for human suffering and injustice. An acute awareness of, and constant attention to, the Holocaust as "unique," as the worst evil in human history, can thwart the development of this moral consciousness. Suppose students are learning about ethnic cleansing in Bosnia, or slavery in the United States. Appropriate moral awareness of the evil and injustice in these situations is an integral part of understanding them. But the constant refrain, "Well, that atrocity is not as bad as the Holocaust," would inhibit this moral understanding. Ironically, some Afrocentric writers use a similar moral move to deflect appropriate moral concern *from* the Holocaust: "You lost six million, but we lost 100 million to slavery." The "more oppressed than thou" gambit is inimical to a proper concern with the sufferings and injustices experienced by groups other than one's own.

Moral Education and History

The second criticism—that the Holocaust should not be taught as part of moral education at all, but only as part of the history curriculum—does not depend on a

uniqueness claim. It does rest on a questionably firm distinction between the teaching of values and the teaching of history. Education about the Holocaust cannot help but be moral education as well. A student who knew in great detail about the Nazi policies that led up to the Holocaust, who was thoroughly familiar with the means by which the mass killings were carried out, but who did not recognize that these events constitute a moral horror, would lack historical understanding of the Holocaust. Similarly, a student who failed to grasp that American slavery dehumanized the people who were slaves would not understand slavery. As students confront these historical phenomena, their moral capacities are necessarily engaged. The Facing History teacher who helps students articulate and explore the bases of their moral reactions is only building on a response that occurs in any case in the teaching of history.

In a recent essay, Deborah Lipstadt, who is director of the Institute for Jewish Studies at Emory University, offers an example of how moral issues arise in the context of historical study of the Holocaust. Describing her university students' reactions to Claude Lanzmann's documentary film *Shoah,* she suggests the inescapability of moral discussion in a Holocaust history class:

> As they listened to contemporary Poles decry the fate of the Jews and then, using imagery from the New Testament, seamlessly slip into explanations of why this was really the Jews' fault, the student sitting next to me groaned. "Blaming the victim. Again." My students recognized both the particular and universal component of what they had seen. For me, the most moving responses came from the Christian students in the class who spoke about the challenge of reconciling what they consider to be a religion of love with the history of contempt which they now recognized as intrinsic to it.

Even at the high school level, some students who learn about the Holocaust will face challenges like the one acknowledged by Professor Lipstadt's Christian students. This will occur whether the Holocaust is taught in history classes or as a component of moral education. In either case, we should expect teachers to offer their students the opportunity to address moral questions they may never have confronted before. Some religious conservatives who oppose moral education appear to believe that *no* classroom should provide such opportunities, lest the students be encouraged to articulate ideas at odds with what they have been taught elsewhere. But this suggests that the true object of the critics' suspicion is not moral education, but education itself.

Making Comparisons

The third criticism holds that education about the Holocaust should not be used to do moral education about matters other than the Holocaust itself, for doing so will necessarily involve drawing false comparisons between the Holocaust and other examples of injustice, oppression, or mass destruction. This criticism is obviously related to the first, which insists on the Holocaust's uniqueness. It is also a criticism relevant to many programs of historical study and moral education, not only Facing History.

Last fall, for example, the Holocaust Memorial Museum in Washington opened an exhibition of documentary photographs from the Bosnian war. The question immediately arose whether the Museum was "equating" ethnic cleansing in the Balkans with the treatment of Jews during the Holocaust. In response, a spokesperson for the museum explained, "Our mandate is to show the contemporary implications of the Holocaust. In Yugoslavia today, we see certain elements of the Holocaust repeating themselves: how genocide can be accomplished by the modern state, how the world can stand by."

For its part, Facing History invites teachers and students to make comparisons between the persecution of the Jews, especially in the years leading up to the Final Solution, and the racial injustices, stereotypes, prejudices, and discriminatory laws directed against African-Americans, Native Americans, and other groups in the United States. Seeing the horrors to which anti-Semitism and other Nazi racial attitudes led helps students appreciate that stereotyping and prejudice are neither innocent nor insignificant. Such lessons can be conveyed without implying that the errors or crimes of all societies are "equivalent." It is only necessary that there be *some* parallels, *some* similarities, not parallels in every respect. Deborah Lipstadt rightly says that teachers must be careful not to impart the message that every ethnic slur contains the seeds of a Holocaust. However, an appreciation of the hurt and danger of racial stereotyping does not, or need not, proceed by way of claiming that the Nazi situation is exactly comparable to that of the United States. Facing History never claims such direct comparability, and frequently suggests that students be asked to think about the differences.

Professor Lipstadt has criticized Facing History for explicitly drawing historical connections and parallels; she wants the students to draw their own connections, leaving to the instructor only the task of ensuring that *distinctions* are appreciated. For junior high and high school students, however, this division of responsibility seems arbitrary; there is no less reason to help these students see the similarities than the differences.

What would be lost if a program like Facing History declined to invite discussion of both parallels *and* distinctions? First, teachers would miss an opportunity to help students become morally reflective and sensitive in a nation and world where such qualities are urgently important. For example, Facing History devotes considerable attention to rescuers and bystanders during the Holocaust. Included in this unit is an account of an African-American man in Los Angeles during the riots that followed the Rodney King verdict. Remembering his victimization by whites as a junior high student, the man rushes to help an Asian-American driver as rioters are throwing bricks and stones at his car. Now of course there are differences between the rescuer's situation in Los Angeles and that of rescuers who saved Jews from the Nazis; in the United States, there is no state policy to murder members of a stigmatized group and their would-be protectors, as there was in Nazi-occupied Europe. But would students be better off if we omitted the story of an ordinary citizen standing up for decency and humanity in the midst of our social disorders?

Beyond the missed opportunities, failing to help students make these connections does them a moral disservice. One thing we rightly expect from a moral education program is an enlargement of moral imagination and a willingness to face uncomfortable moral truths—not only to make well-informed judgments about past horrors. Our pluralistic society, with its tendencies to ethnic fragmentation, is

particularly needful of people able to recognize and acknowledge their ties to and commonalities with others; promoting such recognition is an important goal of moral education.

Admittedly, making valid comparisons and drawing necessary distinctions are by no means simple or uncontroversial matters. Whenever members of a particular group find that their historical experience is being compared with that of another group, they may object that the comparison is an insensitive appropriation of their sufferings and struggles. For example, some African-Americans dismiss the suggestion that the prejudice directed against gays and lesbians is comparable to racial prejudice, and they are indignant when gay rights advocates draw on the language and symbolism of the civil rights movements. Between those who see parallels in the two struggles and those who do not, there is a wide divergence of perception and historical understanding.

There are two lessons here. First, comparisons are politically charged and controversial; for just this reason, we have an obligation to draw them as responsibly as we can. Second, there is no formula for getting either the comparisons or the distinctions right. As Henry Louis Gates, Jr., observes with respect to analogies between the predicaments of African-Americans and gay Americans, the difficulty "isn't that there's simply no comparison; it's that there's no *simple* comparison." We can only proceed according to our own best lights. In any case, we cannot dispense with efforts to apply the understandings we have gained in one area (including our own experience) to another.

Studying Anti-Semitism

Finally, some critics worry that to teach about the Nazi era for the broader purpose of moral education is to "de-Judaize" the Holocaust. In a widely reprinted column from the *Boston Globe*, appearing after the dismissal of Christina Jeffrey, Jeff Jacoby argued that the central focus of a program like Facing History ought to be the anti-Jewish hatred that made the Holocaust possible. "If the Final Solution was about anything," Mr. Jacoby wrote, "it was about the uniquely virulent power of anti-Semitism, a hatred older than and different from any other in human history."

In fact, Facing History devotes considerable space to anti-Semitism, as even a cursory examination of its resource book makes clear. Certainly any study of the Holocaust must include the history of European anti-Semitism. However, those who press for attention in a Holocaust curriculum to *contemporary* anti-Semitism, particularly in the United States but also in Europe, cannot escape the issues of comparison and differentiation that, as we have seen, affect all efforts to link the Holocaust with other examples of persecution and hatred. The continued presence of timeworn anti-Semitic stereotypes in America is no more a portent of, or cousin to, a Nazilike persecution of Jews than is contemporary prejudice against African-Americans a portent of a return to slavery or Jim Crow. Contemporary forms of American anti-Semitism have no *more* claim to relevance in a Holocaust curriculum than do other mass murders, other forms of racism, other forms of state-initiated persecution. Contemporary anti-Semitism is a serious cause for concern, and a course on the Holocaust should certainly attend to it. But those who argue for its

inclusion share the same responsibility for analogizing and disanalogizing that is assumed by those who link Nazism with contemporary forms of racism, stereotyping, and prejudice not specifically directed at Jews.

Oddly enough, the complaint that Facing History's treatment of the Holocaust pays insufficient attention to Jews and Jewish concerns has sometimes come from people who oppose multicultural education on the ground that it emphasizes the distinctness of groups at the expense of unity and common values. Moreover, the idea that the Holocaust is exclusively "about" anti-Semitism, that our central focus must always be on the Holocaust as a Jewish tragedy, is curiously reminiscent of one of the criticisms made by Christina Jeffrey in her 1986 evaluation of Facing History. The program, she wrote, "may be appropriate for a limited religious audience, but not for widespread distribution to the schools of the nation." Defenders of the former position will rightly distinguish their view from Professor Jeffrey's, since they want this Jewish tragedy to be of universal concern, not of concern to Jews only. Nevertheless, a willingness to appreciate the sufferings of others, a lack of possessiveness about a tragedy that affected millions of non-Jews as well, is much more likely to foster this general concern.

This past spring, the Los Angeles Jewish Federation arranged an evening on which five Japanese-American judges reflected on the relocation and internment of Japanese-Americans during World War II, and on the current wave of antiimmigrants hysteria and resurgent anti-Japanese prejudice. The Federation speaker observed that "while no wartime experience could compare with the Holocaust, no group had a monopoly on suffering." There are no such monopolies now. This is a central lesson of moral education programs, and one to which Facing History and the Holocaust Memorial Museum have helped point the way.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 15, number 2/3 (spring/summer 1995).

References

Melinda Fine, *Habits of Mind: Struggling Over Values in America's Classrooms* (Jossey-Bass, 1995); *Facing History and Ourselves Resource Book: The Holocaust and Human Behavior* (Facing History and Ourselves National Foundation, 1994); Berel Lang, *Act and Idea in the Nazi Genocide* (University of Chicago Press, 1990); Deborah Lipstadt, "Not Facing History," *New Republic* (March 6, 1995); Henry Louis Gates, Jr. "Blacklash?," *New Yorker* (May 17, 1993); Jeff Jacoby, "Facing History: What it Really Teaches," *Boston Globe* (January 17, 1994); "Japanese-American Judges Reflect on Internment," *New York Times* (May 19, 1995).

6

Value Pluralism and Political Liberalism

William A. Galston

A free society will defend the liberty of individuals to lead many different ways of life. It will also protect a zone within which individuals will freely associate to pursue shared purposes and express distinctive identities, creating the dense network of human connections often called civil society. But the boundaries of this protected zone are contested. The laws and regulations of the political community can conflict with the practices of voluntary associations.

Consider the case of *Wisconsin* v. *Yoder*, decided by the Supreme Court a quarter century ago. This case presented a clash between a Wisconsin state law, which required school attendance until age sixteen, and the Old Order Amish, who claimed that high school attendance would undermine their faith-based community life. The majority of the Court agreed with the Amish and denied that the state of Wisconsin had made a compelling case for intervening against their practices.

I believe that this case was correctly decided, not only from a constitutional standpoint, but also in accordance with the soundest understanding of citizenship and state power in a liberal democracy. We are familiar with the moral advantages of central state power; we must also attend to its moral costs. If, as I shall argue, our moral world contains plural and conflicting values, then the enforcement of overarching public principles runs the risk of interfering with morally legitimate individual and associational practices. A liberal polity guided by a commitment to value pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of maximum feasible accommodation. This imperative is clearest with respect to faith-based associations, which I will take as my model case.

The Master Ideas of Liberal Thought

The current debate over the relation between value pluralism and political liberalism began when the British philosopher John Gray—an ardent foe of the "new liberalism" represented by John Rawls and company—extended his critique to a paradigmatic liberal, Isaiah Berlin. Berlin is famous for two master ideas. First, he depicted a moral universe in which important values are plural, conflicting, incommensurable in theory, and uncombinable in practice—a world in which there is no single, univocal *summum bonum* that can be defined philosophically, let alone imposed politically. And second, he defended negative liberty, understood as the capacity to choose among competing conceptions of good or valuable lives, as the core value of liberal political thought.

Gray's basic point is that these master ideas do not fit together entirely comfortably. The more seriously we take value pluralism, the less inclined we will be to give pride of place to freedom or autonomy ("negative liberty") as a good that trumps all others. We will recognize that lives defined by habit, tradition, or the acceptance of authority can be valid forms of human flourishing. We will therefore conclude that liberalism—understood as the philosophy of societies in which liberty of autonomy takes pride of place—enjoys only local authority. If value pluralism is correct, liberalism cannot sustain its universalist claims and emerges at best as one valid form of political association among many others.

My argument is that the fit between value pluralism and political liberalism is tighter than Gray supposes, but that nonetheless his objection has important implications for our understanding of the role of deep pluralism within liberal societies. To show this, I'll first attempt to clarify the philosophical claims of value pluralism, and then draw out its political consequences.

Clarifying Value Pluralism

Value pluralism is not an argument for radical skepticism, or for relativism. The moral philosophy of pluralism stands *between* relativism and absolutism. This can be demonstrated fairly quickly:

It is not relativist. From a value-pluralist perspective, some things (the great evils of human existence) are objectively bad, to be avoided in both our individual and collective lives. Conversely, some things are objectively good (recall Stuart Hampshire on the "minimum common basis for a tolerable human life" or H.L.A. Hart on the "minimum content of natural law").

Nor is value pluralism absolutist. There are multiple goods that cannot be reduced to a common measure, cannot be ranked in a clear order of priority, and do not form a harmonious whole. There is no single conception of the good valid for all individuals: what's good for A may not be equally good for B. Nor is there one preferred structure for weighing goods. In our moral as well as material lives, there are more desirable goods than any one individual or group can possibly encompass; to give one kind of good pride of place is necessarily to subordinate, or exclude, others. Some individuals and groups may be morally broader than others, but none is morally universal.

What is the relation between value pluralism, thus understood, and the political philosophy of liberalism?

Autonomy and Diversity

If the moral philosophy of pluralism is roughly correct, then there is a range of indeterminacy within which various choices are rationally defensible. Pluralism is one premise in an argument for a protected zone of moral liberty. The argument runs as follows. Since there is no one uniquely rational ordering or combination of incommensurable values, no one could ever provide a generally valid reason, binding on all individuals, for a particular ranking or combination. And, under what might be called *the principle of rational autonomy*, a generally valid reason of this sort, while not a sufficient condition for restricting the liberty of individuals to lead a range of diverse lives, is certainly a necessary condition.

Note that this case for a zone of liberty is a claim about limits on coercive interference in individual or group ways of life. It is not an argument that each way of life must itself *embody* a preference for liberty. This distinction—liberty within ways of life versus liberty between ways of life—is part of a broader contrast.

There are two quite different standpoints for understanding modern life, with different historical roots. The first of these, which gives pride of place to *autonomy*, is linked to what may be called the Enlightenment project—the experience of liberation, through reason, from externally imposed authority. Within this project, the examined life is understood as superior to reliance on tradition or faith, and preference is given to self-direction over any external determination of the will.

The alternative standpoint, which gives pride of place to *diversity*, finds its roots in what I shall call the post-Reformation project—that is, to the effort to deal with the political consequences of religious differences within Christendom. Within this project, the central task is that of accepting and managing diversity through mutual toleration within a framework of civic unity.

In my judgment, social theorists—especially liberals—go astray when they give pride of place to an ideal of personal autonomy, understood as the capacity for critical reflection and for choice guided by such reflection. The inevitable consequence is that the state takes sides in the ongoing tension between reason and faith, reflection and tradition, needlessly marginalizing and antagonizing groups that cannot conscientiously embrace the Enlightenment project.

Rightly understood, liberalism is about the protection of diversity, not the promotion of autonomy. In practice, liberal societies are unusually hospitable to critical reflection of all kinds. But that doesn't mean that the cultivation of critical reflection is a higher order political goal: liberal societies can and must make room for individuals and groups whose lives are guided by tradition, authority, and faith.

It may be suggested that while autonomy poses clear challenges to faith, the moral philosophy of value pluralism is not straightforwardly hospitable to faith either. This is true. Some faiths purport to establish clear hierarchies of values, with universally binding higher order purposes. Some faiths argue for sociopolitical domination, against the idea of a free civil space. Clearly value pluralism cuts against these claims.

Still, there are zones of overlap between value pluralism and religious belief. In practice, even well-articulated faiths are characterized by internal value pluralism. And once the multiplicity of faiths is an irreversible fact, other considerations—many themselves faith-based—come into play to restrict state coercion on behalf of any single faith. This is a kind of restraint on certain religious practices, and it may well stack the deck in favor of faiths that emphasize inward conscience rather than external observance. Nonetheless, value pluralism establishes a meaningful social space for religious belief and practice.

Political Choices

As this discussion suggests, there is a distinction between pluralism at the level of individual lives and at the level of political institutions. Two differences are key. First, even if there are no binding rational principles guiding individuals' weighing of competing goods, the same may not be the case for political choices. For example, suppose you take as a basic principle of political morality that each person or group is to be treated in accordance with the strength of its valid claims. In the context of value pluralism, this warrants a strategy of compromise and balance to accommodate multiple valid claims. So understood, the politics of compromise is not an unprincipled, split-the-difference tactical pragmatism; nor is it the pursuit of conflict reduction for its own sake, a bare modus vivendi. Rather, it is *the right thing to do* in circumstances of value pluralism. (This is also an argument in favor of the messiness of politics and against a pernicious legalism that absolutizes competing claims and creates winner-take-all outcomes.)

My experience dealing with policy disputes while in government reinforces my confidence in this assertion. In case after case, I encountered many conflicting arguments, each of which seemed reasonable up to a point. Each appealed to an important aspect of our individual of collective good, or to deep-seated moral beliefs. Typically, there was no way of reducing these heterogeneous values to a single common measure. Nor was there an obvious way of giving one aspect of our moral experience absolute priority over others. The most difficult choices in politics, I came to believe, are not between good and evil but between good and good.

For just this reason, value pluralism does not always yield a tranquil or straightforward decision-making process. As Philip Tetlock has argued, conflicts among valued goods generate acute discomfort and typically lead to modes of evasion—particularly when some or all of the values are (in Durkheim's sense) sacred rather than secular, or when decision-makers are enmeshed in processes of accountability that make it costly to acknowledge that trade-offs must be made.

Still, even if we can't reduce qualitatively different claims to a common measure, there may be ways of deliberating about trade-offs among them that allow us to distinguish between more and less reasonable outcomes. For example, the claim that one good should enjoy an absolute or lexical priority over others is typically hard to sustain in a deliberative political context. In situations in which an increment of one good can be obtained only at the cost of rapidly increasing losses of other goods, most people will agree that at some point enough is enough. They also realize that circumstances alter cases. Gray sometimes uses existentialist

language to characterize the politics of value pluralism. But his focus on "radical choice," unguided by reason, seems empirically dubious. There are considerations short of mathematical or logical rigor that nonetheless incline people to agree on a decision.

Narrowness and Capaciousness

We can make a second distinction between individual and social pluralism. While any particular life necessarily represents a narrowing of value— one among many possible rankings and combinations of values and goods—the same is not the case (at least not in the same way and to the same extent) for societies. Some societies may embody a collective narrowing— an individual choice writ large. Others may represent capaciousness—that is, they may encompass a range of ways of life that can neither be commensurated nor combined at the level of individuals.

Does value pluralism entail a preference for social capaciousness over social narrowing? Gray's position is that the preference for capaciousness is a matter of history rather than local entailment; it reflects the central role of autonomy in our culture, and the fact of (increasing) interpenetration of cultures, which in many circumstance can be halted and reversed only through tactics ranging from the coercive to the barbaric. But capaciousness, Gray argues, is not required in circumstances in which homogeneity may be preserved (through tradition, precedent, or authority) unless deliberately perturbed by outside influences.

My view of the relation between value pluralism and social capaciousness is quite different. It rests on a modest proposition concerning what might be called philosophical anthropology. While it is true, as Gray suggests, that we are beings whose good is given only in part by our (generic) nature, it is also the case that the diversity of human types is part of what is given. A narrow society is one in which only a small fraction of inhabitants can live their lives in a manner consistent with their flourishing and satisfaction. The rest will be pinched and stunted to some considerable degree. All else being equal, this is an undesirable situation, and one that is best avoided. To the maximum extent possible in human affairs, liberal societies do avoid this kind of pinching. This is an important element of their vindication as a superior mode of political organization.

Gray has rightly argued that liberal polities are not neutral in their sociological effects; certain forms of life *are* placed on the defensive, or marginalized. Still, there is more scope for diversity in liberal societies than anywhere else. And those societies have it in their power to adopt policies that maximize the possibility of legitimate diversity.

Liberal Politics and Civic Diversity

Within liberal political orders (as in all others), there must be some encompassing political norms. The question is how "thick" the political is to be. The answer will help determine the scope of legitimate state intervention in the lives of individuals, and in the internal processes of organizing that make up civil society.

The constitutional politics of value pluralism will seek to restrict enforceable general norms to the essentials. By this standard, the grounds for national political

norms and state intervention include basic order and physical protection; the sorts of goods that Hampshire, Hart, and others have identified as necessary for tolerable individual and collective life; the components of shared national citizenship; and conceptions of social justice, or of worthwhile human lives, that should guide civil associations as well as public institutions. It is difficult, after all, to see how societies can endure without some measure of order and material decency. And since Aristotle's classic discussion of the matter, it has been evident that political communities are organized around conceptions of citizenship that they are required to defend.

But how much further should the state go in enforcing specific conceptions of justice, authority, or the good life? What kind of differences should the state *permit*? What kinds of differences may the state *encourage* or *support*? This is, of course, a normative issue: What are the principled limits to state power? But it is also an empirical question: Must civil associations mirror the constitutional order if they are to sustain that order?

In a series of recent writings, political philosopher Nancy Rosenblum has answered that question in the negative. Rosenblum asks us to look at different functions of civil associations. They can express liberty as well as personal or social identity; provide arenas for the accommodation of deep differences; temper individual self-interest; help integrate otherwise disconnected individuals into society; nurture, trust; serve as seedbeds of citizenship; and resist the totalizing tendencies of both closed communities and state power.

It is not obvious as an empirical matter that civil organizations within liberal democracies must be organized along liberal democratic lines in order to perform some or all of these functions. Consider recent findings reported by political scientists Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady in *Voice and Equality*: religious organizations—including fundamentalist churches—serve as important seedbeds of political skills, particularly relevant assets such as education and money. There is room for deep disagreement about the policies that many religious groups are advocating in the political arena. But there seems little doubt that these groups have fostered political education and engagement to an extent few other kinds of associations can match, at a time when most social forces are pushing toward political and civic disengagement.

As a general matter, then, the liberal democratic polity should not casually interfere with organizations that don't conduct their internal affairs in conformity with broader political norms. At one level, this point is obvious: I take it that we would agree, for example, that antidiscrimination laws should not be invoked to end the Catholic Church's exclusion of women from the priesthood.

But let's move to a less clear-cut example. Consider the issues raised in the case of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc. A* private fundamentalist school decided not to renew the contract of a pregnant married teacher because of its religiously-based belief that mothers with young children should not work outside their homes. After receiving a complaint from the teacher, the Civil Rights Commission investigated, found probable cause to conclude that the school had discriminated against an employee, and proposed a consent order including full reinstatement with back pay.

As law professor Frederick Mark Gedicks observes, this case involves a clash between a general public norm (nondiscrimination) and the constitutive beliefs of a

civil association. The teacher unquestionably experienced serious injury through loss of employment. On the other hand, forcing the school to rehire her would clearly impair the ability of the religious community of which it formed a key part to exercise its distinctive religious views— not just to profess them, but also to express them in its practices. The imposition of state-endorsed beliefs on such communities would threaten a core function of diverse civil associations—the expression of a range of conceptions of the good life and the mitigation of state power. In this case and others like it, a liberal politics guided by value pluralism would give priority to the claims of civil associations.

Current federal legislation and constitutional doctrine reflect this priority to a considerable degree. Thus, although Title VII of the Civil Rights Act prohibits employment discrimination on the basis of religion, section 702 of the statute exempts religious organizations. In the case of *Corporation of the Presiding Bishop of the Church of Latter-Day Saints* v. *Amos*, decided in 1987, the Supreme Court not only upheld this accommodation in principle but also extended its reach to a wide range of secular activities conducted under the aegis of religious organizations.

This does not mean that all religiously motivated practices are deserving of accommodation. Some clearly aren't. No civil association can be permitted to engage in human sacrifice: there can be no free exercise for Aztecs. Nor can a civil association endanger the basic interests of children by withholding medical treatment in life-threatening situations. But there is a basic distinction between the minimal content of the human good, which the state must defend, and diverse conceptions of flourishing above that baseline, which the state must accommodate to the maximum extent possible. There is room for reasonable disagreement as to where that line would be drawn. But the moral philosophy of pluralism should make us very cautious about expanding the scope of state power in ways that coerce uniformity.

There are two complications for the position I have described. First, the expansion of the modern state means that most civil associations are now entangled with it in one way or another. If participation in public programs means that civil associations must govern their internal affairs by general public principles, then the zone of diversity is dangerously narrowed. There should therefore be some relaxation of the prevailing legal doctrine that the state cannot promote indirectly what is forbidden to do directly.

Second, there is a distinction between permission and encouragement. There is no requirement that the state confer benefits on civil associations that violate important public principles. In my judgment, the *Bob Jones* case (denying tax exempt status to a segregated school) was correctly decided.

A Right of Exit

I want to conclude with a brief discussion of liberty flowing from the pluralist view. Within broad limits, civil associations may order their internal affairs as they see fit. Their norms and decision-making structures may significantly abridge individual freedom and autonomy without legitimating external state interference. But these associations may not coerce individuals to remain as members against

their will. Thus there is a norm of liberty whose promotion *is* a higher order political goal: individuals' rights of exit from groups and associations that make up civil society. This liberty will involve not only insulation from certain kinds of state interference, but also a range of affirmative state protections.

To see why this is so, we need only reflect on the necessary conditions for a meaningful right of exit. These include *knowledge* conditions, offering chances for awareness of alternatives to the life one is in fact living; *psychological* conditions, including freedom from the kinds of brainwashing practiced by cults; *fitness* conditions, or the ability of individuals to participate effectively in some ways of life other than the one they wish to leave; and *social diversity*, affording an array of meaningful options.

This last points to a background feature of the judgment I rendered in the case of Dayton Christian Schools—the existence of employment alternatives for the affected teacher. If that religious community had been coextensive with the wider society—if there were no practical exit from its arena of control—my conclusion would have to be significantly revised. The pluralist concept of liberty is not just a philosophical abstraction; it is anchored in a concrete vision of a pluralist society in which the innate human capacity for different modes of individuals and group flourishing has to some significant degree been realized.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy,* volume 16, number 2 (spring 1996).

References

An earlier version of this essay was presented at the conference, "Liberalism and Its Critics," sponsored by the department of philosophy of The George Washington University, March 1996. John Gray, *Post-Liberalism: Studies in Political Thought* (Routledge, 1993), and *Isaiah Berlin* (Princeton University Press, 1996); Stuart Hampshire, *Morality and Conflict* (Harvard University Press, 1983); H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961); Philip Tetlock, Randall Peterson, and Jennifer Lerner, "Revising the Value Pluralism Model: Incorporating Social Content and Context Postulates" (paper presented at the Eighth Ontario Symposium on Personality and Social Psychology: Values, London, Ontario, August 1993); Nancy L. Rosenblum, "Civil Societies: Liberalism and the Moral Uses of Pluralism," *Social Research,* vol. 61, no. 3 (fall 1994); Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady, *Voice and Equality: Civic Volunteerism in American Politics* (Harvard University Press, 1995); Frederick Mark Gedicks, "Toward a Constitutional Jurisprudence of Religious Group Rights," *Wisconsin Law Review*, vol. 99 (1989).

7

Expert Analysis v. Public Opinion: The Case of Campaign Finance Reform

Peter Levine

According to a national poll conducted in 1997, three-quarters of Americans believe that "many public officials make or change policy decisions as a result of money that they receive from major contributors." Most ordinary citizens suspect that wealthy donors exert disproportionate influence; in fact, seven out of ten say that the government is run "for a few big interests looking out for themselves" and not for "the benefit of all the people." Under these circumstances, the high-minded rhetoric of politicians often rings false, since their views on any particular issue may be calculated to maximize campaign funds. Because the current system seems to many Americans to violate basic moral principles of equity and integrity, large majorities support fundamental reform.

Most political scientists who study campaign financing have a strikingly different view of how politics actually works and how a democracy should function. A task force of nine leading experts found that:

> campaign contributions do not play as large a role in influencing legislative behavior as many believe. A legislator's principles, his or her constituency, and his or her political party, have consistently been shown to be more influential than are patterns of contributions. Accordingly, we conclude that many reformers, relying on simplistic, unidimensional analyses that fail to consider the numerous factors that influence political behavior, make too much of large contributions.

The same experts have expressed positive sentiments about private campaign money. For them, political action committees (PACs) and other organized donor groups are helpful actors in civil society, encouraging participation, disseminating information, and increasing competition. Herbert Alexander, the dean of campaign-

finance experts and chair of a task force, has said, “Political campaign spending should be considered the tuition we pay for our education on the issues.”

Until the mid-1990s, it was difficult to find academic experts who favored significant reforms; several experts testified against spending limits and lower contribution limits. But after the debacle of the 1996 election, hardly anyone remained complacent about campaign financing. Thus members of an expert Task Force joined reform organizations in attacking “soft money” (i.e., unlimited contributions funneled through parties), and they advocated tighter disclosure and enforcement provisions. They also took a “dim view” of independent expenditures (i.e., money spent on communications that expressly advocate a candidate’s election or defeat but are not coordinated with any campaign). Soft money, poor enforcement, and independent expenditures developed into major problems during the 1980s. Thus the Task Force essentially advocated a return to the regime of the 1970s—a system funded by “limited and publicly-disclosed” private money—but with *higher* contribution limits for PACs and individuals, and unspecified public subsidies to help challengers.

This is the mainstream academic approach to campaign-finance reform, but it will not satisfy the majority of Americans who want to rebuild the system from the ground up. (Sixty-five percent of voters say they want to ban *all* private contributions to political campaigns.) Frank J. Sorauf, a political scientist and member of a campaign task force, has written, “the conviction that money is the root of all evil leads to the wish that reforming the flow of money will materially change the nature of representation and policy-making in American legislatures.” But he and his colleagues reject the claim that even fundamental reform would significantly alter the political process, because they doubt that “special interests and large contributors achieve undue influence as a result of their contributions.” Besides, they consider contributions to be a “legitimate form of political participation” that should be increased. These points divide expert from popular opinion and require examination, regardless of what we think about any particular reform proposal.

Empirical Issues

Public dismay at the campaign finance system has been caused, in part, by anecdotes about wealthy lobbyists who appear to wield unseemly power. Reformers often point to the example of Charles H. Keating Jr., owner of the now defunct Lincoln Savings & Loan, who arranged for more than $1.3 million in contributions and financial benefits to flow to the reelection campaigns of five U.S. senators. These senators summoned the government’s chief thrift regulator, Edwin Gray, to a private meeting on Capitol Hill and demanded to know why Lincoln S&L was being investigated. Instead of being sanctioned, Lincoln was granted new federal loans—only to fail, thereby costing taxpayers at least $2 billion. When Keating was asked whether his contributions had influenced the senators to help him, he responded: “I want to say in the most forceful way I can: I certainly hope so.”

Despite such anecdotes, academic experts caution that donors do not hold all the power in their exchanges with elected officials. Firms and organizations may feel compelled to contribute to powerful incumbents. For their part, legislators have so

many potential sources of funds that they can choose their positions with considerable freedom. As Representative Barney Frank (D-Mass.) has said, "There's money any way you vote." Most social scientists who have analyzed the statistical data believe that contributors "buy" relatively little influence from elected officials. The Task Force on Campaign Finance Reform cited "a long line of empirical research" that shows how slight an impact special interest contributions have on "the roll-call behavior of legislators."

The academic literature has indeed concentrated on the relation between money and roll call votes. But it is precisely the emphasis on voting that has led scholars to underestimate the impact of contributions. Compared to other legislative acts, votes are the easiest to analyze, but also the least susceptible to special interest pressure. Since they are public, they can be assessed by party leaders, journalists, constituents, and potential challengers. A vote can be counted, categorized, and compared to previous behavior. Inconsistencies can be unmasked; broken promises can be challenged. Thus candidates are heavily constrained when they vote, and they cannot easily do their contributors' bidding.

If votes are relatively safe from financial pressures, however, they are also relatively unimportant. We have detailed statistics for 1989-90, when only fifteen percent of the bills that were introduced were even reported to committee; just four percent became law—and half of those were uncontroversial "commemorative" resolutions. Legislation that failed after being reported to committees almost always died for lack of scheduled hearings: actual defeats on the floor of Congress were rare. Thus, powerful representatives who wanted to kill legislation could easily do so without risking a recorded vote. Most votes were formalities that House leaders permitted only once they could predict a satisfactory outcome.

There is a second reason not to overemphasize voting. Congress passes more than 7,000 pages of legislation in any two-year period. Only a handful of members help to draft or amend each of these pages; hardly anyone else can say what is in them, let alone influence their details. Particularly in the House of Representatives (where floor amendments are generally prohibited), a vote cannot affect the *content* of legislation.

In order for a specific provision to be included in a bill, to reach a committee, to receive hearings, to survive a floor vote, and to pass unscathed through a conference committee, it must have active sponsors who are either exceptionally dedicated and focused or else powerful. In some cases, writes Richard Hall, "a standing committee of reputed legislative specialists reduces to only two or three players, who bargain among themselves with relative impunity on significant (though not necessarily salient) matters of public policy." What lobbyists need, therefore, is the active and careful attention of a few members who are willing to draft language, move bills through the committee process, and conduct negotiations. In addition, they want their potential opponents in Congress not to interfere until the formality of a final vote.

This is why lobbyists give most heavily to well-placed incumbents who are either especially friendly or else deeply hostile to their concerns. As Hall and Frank Wayman put it, donors want to *"mobilize* legislative support and *demobilize* opposition, especially at the most important points in the legislative process." And they apparently get what they pay for. Hall and Wayman found that PAC contributions correlated with participation in three major legislative battles of the

early 1980s. In general, friendly incumbents who received PAC money attended hearings, offered substitute bills, and negotiated deals. Those opponents who received PAC funds refrained from active participation.

"Screening" and the Limits of Debate

Despite studies showing that money has a weak effect on legislative votes, the journalist Philip M. Stern has produced several charts like the following. This one illustrates the relationship between contributions from the dairy lobby and votes in favor of a dairy subsidy in 1985—a subsidy which (Stern says) cost taxpayers $1 billion a year and added up to 60 cents to the price of a gallon of milk:

Table 7.1

Donations received from the dairy lobby, 1979-1986	Votes for the dairy subsidy in 1985
More than $30,000	100 percent
$20,000-$30,000	97 percent
$10,000-$20,000	81 percent
$2,500-$10,000	60 percent
$1-$2,500	33 percent
zero	23 percent

These raw figures give an obvious impression of corruption. However, Stern does not perform the kind of statistical analysis that the experts on the task force recommend; he does not weigh the relative importance of money compared to legislators' ideologies, their party identities, and the composition of their districts. Even the most sophisticated analysis cannot peer into politicians' minds to determine their motivations. But presumably some members of Congress who vote with the dairy industry (and receive its PAC money) support agricultural subsidies as a matter of principle; and some represent districts that depend on dairy farming.

Public officials typically deny that they ever vote based on promises of campaign money—not even when all the donations come from one side. Rather, they vote their consciences, and then friendly interests reward them financially. Mary Crawford, a spokesperson for the Republican National Committee, explained that donors who paid $250,000 to sit at a head table with congressional leaders did not hope to buy access or influence; instead, they wanted to support the party's historical principles, especially low taxation.

Lobbyists often say the same thing, even within their own organizations. For instance, according to a private General Electric Company memorandum, GE gave $93,000 to members of Congress who had *previously* "contributed to the company's success in saving us over $300 million" in taxes. One representative's efforts to

"protect" a $20 million contract "alone justifies supporting him," the memo said. Likewise, an official at the National Education Association's PAC claimed that representatives "behave as they would anyway, and the money comes after."

Even if this is true, it offers little comfort to ordinary citizens. Those candidates who favor moneyed interests—whether out of a sincere commitment or a desire for campaign funds—generally raise enough money to win reelection; but those who consistently fight special interests are defunded and defeated. Newcomers to politics who lack either personal wealth or affluent friends cannot win office in the first place. In the long run, Congress fills up with members who support the interests of large contributors over the needs of under-financed or unorganized constituencies. Money doesn't influence votes so much as it screens out troublesome politicians, determining who can hold public office in the first place.

There are, of course, exceptions: candidates who win without generous donors. For the most part, however, these are either politicians with personal fortunes; incumbents who were first elected decades ago and have remained popular; or representatives from politically uncompetitive districts in which churches and unions are springboards to public office. These exceptions account for just a small percentage of the total membership of Congress. All the other legislators have survived "screening" by the campaign finance system, which partially explains why our major parties are so similar and so reliably procorporate.

Sometimes, wealthy contributors are able to buy specific action or inaction with their political donations. More frequently—and, in a way, more insidiously—special interest money alters the nature of the political debate. The need to raise campaign funds (and to prevent one's opponent from doing so effectively) discourages politicians from broaching controversial questions on the campaign trail in ways that might offend well funded interests. Most candidates are willing to run afoul of some special interest groups whose views they oppose on principle. But when *any* policy idea that a politician articulates carries a risk of offending a well funded lobby, there is a powerful incentive not to deal concretely and specifically with most issues. And if many issues are ignored in campaigns, then members of Congress arrive in Washington without a mandate or a clear sense of the public's wishes.

It is difficult for candidates who disagree with certain high profile groups, such as the National Rifle Association (NRA), to avoid tangling with them: the NRA often forces politicians to support or oppose gun control publicly, and attacks those with whom it disagrees. Other groups operate more discreetly, yet provide at least as much money to candidates. Organizations such as the National Association of Realtors sometimes contribute to as many as 540 congressional candidates in a single year. Most of these candidates do not take strong public stands in support of the realtors, but neither do they adopt positions that would harm their donors' interests. It is true that the PACs for realtors, developers, builders, and construction workers have conflicting interests, and all give widely. Thus, when these groups find themselves divided on an issue, their money may not carry the day. But there is no PAC for homeowners, renters, or the homeless. Thus candidates have good reason not to invoke *their* interests in any specific and binding way.

Regulation of savings-and-loans is an example of an issue that was ignored until it became a disaster. During the 1980s, Congress quietly deregulated the troubled industry without reducing federal insurance liabilities or creating an adequate

insurance fund. By 1988, insiders knew that a huge bailout would be necessary. The Democratic presidential nominee, Michael Dukakis, had good reasons to make this scandal a campaign issue. However, his running mate, Lloyd Bentsen, Democratic Speaker Jim Wright, and House Banking Committee Chair Fernand J. St. Germain (D-R.I.) had all received savings-and-loan money and had voted to deregulate the industry. Between 1981 and 1990, S&L PACs and owners gave nearly $12 million to members of Congress, funding all but two of the 71 senators and representatives who sat on banking committees. Early in the eighties, the U.S. League of Savings Institutions had spent more than $2,000 *a month* on meals, entertainment, and travel for St. Germain, who co-wrote the main deregulation act. Bentsen and Wright told Dukakis to drop the issue, and St. Germain silenced most of the House Democrats. As a result, the 1988 campaign dealt with flag burning and the ACLU, the death penalty and Willie Horton, but not with an economic issue of vast public importance.

John Barry, the author of a highly sympathetic book about Speaker Wright, has argued that Wright only helped Texas savings-and-loans in their dealings with regulators because he did not understand the nature of the crisis. If this account is accurate, then Wright was less venal than some of the other key players, notably St. Germain. But Barry concedes that Wright's information about S&Ls came almost exclusively from thrift owners and lobbyists, which must have distorted his perspective considerably. Here, then, is a final explanation for the influence of money on politics. As well as preventing dissident politicians from winning office, affecting who participates behind the scenes, and keeping certain issues out of the public debate, campaign contributions also distort the flow of information to political insiders.

Moral Issues

I have argued that the data on campaign finance show evidence of widespread corruption. But perhaps I have overstated the power of contributors compared to that of politicians and other political players. Any issue that involves scores of reciprocally linked variables is open to reinterpretation, and in any case the balance of power must shift from year to year. As Sorauf writes, the campaign finance system :

> is not a simple case of paying the piper and calling the tune. American campaigns are funded by a series of varied and complex exchanges in which different actors seek different goals in different modes of rationality. One cannot easily identify aggressors or exploiters in such a marketplace, for the relationships between contributors and candidates are bilateral and unstable, dependent always on very specific but shifting calculations of cost and benefit.

Nevertheless, I think that the public is right to hold the campaign finance regime in contempt, and that the scholars' more sanguine view illustrates a degraded ideal of democratic politics. It is reasonable for citizens to despise a political "marketplace" in which campaign contributions can purchase even modest amounts of influence. The public should not have to await the results of scholars' multivariate analyses to be reassured that the influence of money in a given area

happens to be tolerably small. Nor should citizens ever have to worry that politicians' statements are mere rationalizations of their money-seeking behavior.

Senator Mitch McConnell (R-Ky.) is an opponent of reform who often cites academic experts. He has written, "The campaign finance reform debate ...is advanced on the premise that special interest influence is pervasive, corrosive, and must be abated at all costs. But the cost of the alleged reforms in terms of constitutional freedoms for all Americans is high. And the special interest premise is deeply flawed." The phrase "special interest," McConnell argues, is just a pejorative way to describe groups that exercise their right to petition government.

The Task Force on Campaign Finance also depicts organized donors as legitimate participants in civil society. "We do not share the animus to PACs that is commonplace among reformers," the members write:

> Rather than rejecting PACs as tools of 'special interests', we view them in the context of the larger stream of American political life which, as Alexis de Toqueville [sic] observed in the 1830s, has often witnessed the creation of new forms of association to further people's interests and goals. We take the view that such activity inevitably comes with a vibrant democracy. PACs represent an aspect of American pluralist democracy which we must accept, and not solely because the rights of association and speech are protected by the First Amendment.

When these scholars describe—and endorse—a political marketplace of organized factions, they epitomize what the Cornell political scientist Theodore Lowi has called "interest-group liberalism." Lowi coined that phrase almost thirty years ago, before the statistical study of campaign financing began. He used it to describe both the ideology of mainstream political scientists and the reality of political life—the former justifying the latter.

According to Lowi, interest group liberalism assumes that interests are "homogeneous and easy to define. Any duly elected representative of any interest is taken as an accurate representative of each and every member." Groups are presumed to maximize private goals by bargaining; they are immune to moral persuasion, but willing to negotiate whenever their rational self-interest demands it. (This is precisely true of corporate PACs, which *must* pursue their companies' financial interests.) Finally, the theory assumes that all interests are represented by organizations, and that public policy results from an equilibrium among these groups. If a group is unrepresented, it will "naturally" organize itself and become a countervailing force. (In Sorauf's words, "the countervailing controls of American pluralism constrain even the most determined PACs"—at least when their issues have high visibility.) On this theory, equilibrium is not only a permanent reality, but also a moral ideal.

Interest group liberalism ignores what Madison called "the permanent and aggregate interests of the community." At first glance, this does not seem true of the Task Force members. "For our part," they write, "we believe that most public officials are genuinely committed to advancing the public good—as they see it." But the scholars' account of the public good is very thin. Some of their models, for example, take the ideological consistency of politicians' roll call votes as a proxy for public spiritedness. Statistics show that many politicians maintain consistent

records despite financial pressures. But legislators who genuinely pursue the national interest might *change* their minds in response to evidence and arguments. Besides, politicians' subjective commitments do not guarantee that the public good is actually realized.

It is instructive to compare elaborate multivariate models of political behavior with the blunter approach used by Common Cause, *Mother Jones,* and many editorial writers. These reformers declare specific bills to be "corporate welfare" or a "giveaway to special interests." They conclude that anyone who took money from the beneficiaries of such legislation and voted for it has abandoned the public good. They may not always be right in their assessment of particular bills. But if wealthy donors support legislation that is patently unfair or harmful—and it passes—then we have reason to suspect corruption, especially if the statute in question also lacks popular support.

The academic experts are proud that they consider more variables than the reformers do. But their analysis omits the most morally salient factors, such as whether each bill has merit or a public mandate; whether good arguments count in Congress; and whether ordinary people have satisfying opportunities to participate in politics. They proclaim that most politicians believe in the public good. But in order to incorporate a concrete notion of the public good in their models, they would have to abandon value neutrality. According to Lowi, neutrality is a hallmark of interest group liberals, who not only seek impartiality themselves, but also assume that the government should be a neutral referee, helping interests to settle their mutual disagreements through peaceful bargaining.

Lowi concedes that interest group bargaining often results in equilibrium. But it does not necessarily achieve an "acceptable level of legitimacy, or access, or equality, or innovation, or any other valued political commodity." The current system of campaign financing conspicuously lacks each of these values. In Lowi's words, pluralism's "zeal... for the group and its belief in a natural harmony of group competition [has] tended to break down the very ethic of government by reducing the essential conception of government to nothing more than another set of mere interest groups."

For the sake of argument, imagine that everyone contributed money to political campaigns and that all the contributions canceled each other out. Then the system would be ideal in the terms of interest group liberalism. But even under these unlikely conditions, consider what would happen to the basic values and principles of democracy—what Lowi calls "the very ethic of government." A policy would be "legitimate" and would serve "the national interest" if statistics showed that campaign money was evenly balanced on all sides of the issue. "Participation" would mean check writing or other activities of comparable market value. "Equality" would imply that everyone had an equal capacity to send a check. "Civil society" would be composed of registered political action committees. "Transparency" and "openness" would mean full disclosure of all campaign money. The "rule of law" would require that overt bribery was punished and that violations of spending and contribution limits were prosecuted. "Principle" would become largely irrelevant; and "deliberation" and "debate" would really mean negotiation among interest groups whose goals were fixed from the start.

Reformers deny that our system of campaign finance is fair, equal, transparent, or legitimate even according to the definitions used by interest group liberals. But they

also believe that the underlying values evident in "realist" political science are morally bankrupt—a charge that no statistical model can refute. Lowi writes of mainstream political science that its "focus on realism, equilibrium, and the paraphernalia of political process is at bottom apologetic....The political scientist is not necessarily a defender of the status quo, but the result is too often the same, because those who are trying to describe reality tend to reaffirm it." This is an abstract complaint, but the field of campaign finance offers a concrete example: political scientists who use their expert authority to dampen the movement for reform.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy,* volume 17, number 3 (summer 1997).

References

*New York Times/*CBS poll of adults, reported in the *New York Times* (April 8, 1997); National Election Studies (http://www.icpsr.umich.edu); "New Realities, New Thinking: Report of the Task Force on Campaign Finance Reform," Citizens' Research Foundation, University of Southern California (http://www.usc.edu/dept/CRF/DATA/newmewt.htm); Ed Crane, president of the Cato Institute, "Campaign Reforms vs. Term Limits," *Washington Times* (June 26, 1996); Gallup Poll, late October 1996; FDIC, "The S&L Crisis: A Chrono Bibliography" (http://www.fdic.gov/publish/slchron.html); David J. Jefferson, "Keating of American Continental Corp. Comes Out Fighting," *Wall Street Journal* (April 18, 1989); Frank Sorauf, *Inside Campaign Finance: Myths and Realities* (Yale University Press, 1992), pp. 172 (on Barney Frank and the "countervailing controls of American pluralism"), 96 (on the political marketplace), and 227 (on the conviction that money is the root of all evil); Mary Cohn, ed., *Congressional Quarterly's Guide to Congress*, fourth edition (Congressional Quarterly Press, 1991), p. 419; Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress* (American Enterprise Institute, 1996), p. 165, Table 6-4; Richard L. Hall, *Participation in Congress* (Yale University Press, 1996), p. 8; Richard L. Hall and Frank W. Wayman, "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees," *American Political Science Review*, vol. 84, no. 3 (September, 1990); Philip M. Stem, *Still the Best Congress Money Can Buy,* revised edition (Regnery Gateway, 1992); Katharine Q. Seelye, "G.O.P. Blithely Seeks Big Donors," *New York Times* (April 17, 1997); Charles R. Babcock, "GE Files Offer Rare View of What PACs Seek to Buy on Capitol Hill," *Washington Post* (June 1, 1993); Larry Makinson and Joshua Goldstein, *Open Secrets: The Encyclopedia of Congressional Money and Politics*, fourth edition (Congressional Quarterly, 1996); p. 1290; William Greider, *Who Will Tell the People? The Betrayal of American Democracy* (Simon and Schuster, 1992); Common Cause data; Jack Anderson and Michael Binstein, "PACs Guide Hill with Reins of Green," *Washington Post* (January 13, 1992); John Barry, *The Ambition and the Power* (Viking, 1989); Mitch McConnell, "Just What Is a Special Interest?" *Washington Post* (February 21, 1996); Theodore

Lowi, *The End of Liberalism: The Second Republic of the United States*, second edition (Norton, 1979), pp. 51 (on the tenets of interest group liberalism), 36 (on the ethic of government), and 312 (on political scientists reaffirming the reality they describe). The Task Force on Campaign Finance does not provide a bibliography, but presumably the "long line of empirical research" cited in its report includes: Henry W. Chappell Jr., "Campaign Contributions and Congressional Voting: A Simultaneous Probit Tobit Model," *Review of Economics and Statistics*, vol. 64 (1982); John R. Wright, "PACs, Contributions, and Roll Calls: An Organizational Perspective," *American Political Science Review*, vol. 79, no. 2 (June 1985); Janet M. Grenzke, "Candidate Attributes and PAC Contributions," *Western Political Quarterly*, vol. 42, no. 2 (June 1989); Grenzke, "PACs and the Congressional Supermarket: The Currency is Complex," *American Journal of Political Science*, vol. 33 (February, 1989); Sorauf, *Inside Campaign Finance*; and Steven D. Levitt, "Policy Watch: Congressional Campaign Finance Reform," *Journal of Economic Perspectives,* vol. 8, no. 1 (Winter 1995).

8

Getting Practical about Deliberative Democracy

Peter Levine

Democracy requires deliberation for at least three reasons. First, discussing public issues helps citizens to form opinions—on matters ranging from HMO regulation to global warming—where they might otherwise have none.

Second, deliberation offers democratic leaders better insight into public concerns than elections do. Did voters choose a representative because of her views on social security, her family life, or the weaknesses of her opponent? To understand the meaning of votes, leaders must listen to public discourse.

Third, public deliberation offers a way—perhaps the only acceptable way— of getting people to justify their views so that we can sort out the better from the worse. If you say, "I demand lower taxes because I don't like paying them," you will persuade no one; but if you argue that you deserve more money in your pocket for some specific reason, then you may build public support for a position. Whether your position is sound can then be tested by other participants in the debate. In short, deliberation encourages people to provide general justifications or reasons, not just private preferences. And democracy works best when the public debates the public good.

But talk of a "deliberative democracy" often implies a lofty, informed, serious, fair, productive, and ceaseless conversation among all citizens—in other words, a fantasy. In Rousseau's ideal society, for instance, "every man flies to the assemblies ....Bands of peasants are seen regulating affairs of state under an oak, and always acting wisely." Instead of Rousseau's peasants, other enthusiasts have envisioned toga-clad sages deliberating in a marble amphitheater or earnest Pilgrims at a town meeting.

These clichés are certainly utopian when applied to a nation of 273 million busy people. They are also somewhat frightening, because they assume that everyone should be of one mind—if not about issues, then at least about the proper methods and styles of debate. But people have (and ought to have) various and conflicting

interests and customs. Besides, there are other things to do in life than to deliberate about public affairs. What we need are practical measures to raise the quantity and quality of public deliberation in a large and diverse society like ours, where most people's attention is focused on private matters. This essay offers five proposals.

Campaign Reform

Political campaigns afford opportunities for public debate. But much of the money that finances American elections comes from groups that do not wish to see their interests candidly discussed. These funds flow overwhelmingly to incumbents to help them stave off competition and thereby avoid confronting difficult topics. Campaigns use their war chests to buy television and radio ads that do not inform voters or encourage disaffected people to become politically engaged. The professional consultants who advise candidates look for divisive "wedge issues" on which their clients happen to agree with the majority; they then try to prevent any shift in public opinion. Consultants are adept at using rhetorical formulas that discourage reflection and discussion, that freeze public opinion in place, and that polarize and inflame voters.

A system of (at least) partial public financing would generate a more robust and unfettered debate. Some of the public money could go toward activities that promote deliberation: for example, printed voter guides and official, televised debates. University of Texas political scientist James S. Fishkin has devised an especially interesting format, Deliberative Polling,™ that could become part of a public campaign finance regime. He writes:

> The idea is simple. Take a... random sample of the electorate and transport these people...to a single place. Immerse the sample in the issues, with carefully balanced briefing materials, with intensive discussions in small groups, and with the chance to question competing experts and politicians. At the end of several days of working through the issues face to face, poll the participants in detail. The resulting survey offers a representation of the considered judgments of the public.

One such gathering took place in Texas during the 1996 presidential primary, with a nationally representative sample of 460 people. The experiment lasted for an entire weekend, during which the participants labored hard to assimilate information and share viewpoints. The national press corps attended in force, and ten million people watched some of the event on PBS, which broadcast it for more than nine hours. Such events could not be covered regularly on commercial television at any comparable length. However, broadcasters could be encouraged—or even required—to televise the period when the informed citizens pose questions to the political candidates. Then viewers would be able to watch the interchange between politicians and people who are like themselves demographically—except that the questioners would have studied the issues and exchanged ideas. Both candidates and citizens would learn the direction of an enriched or deepened public opinion, and everyone would witness a model of deliberation that might prove infectious.

Participants in the Texas experiment agreed that the experience was worthwhile and inspiring. The same year, another exercise in deliberation proved equally satisfying. The Commission on Presidential Debates asked 600 people to meet in groups and help choose the questions that candidates would be asked on national television. According to the *New York Times*, "An unexpected lesson was that participants lauded the sheer experience of post-debate discussion as much as the debates, bonding like jurists with other panelists and compounding their appetite for politics." A political scientist who managed the focus groups, Diana Carlin, said, "We didn't intend this; it just happened."

Public Journalism

The press has a crucial role to play in cultivating deliberation. When we think and talk about public affairs, we initially acquire most of our information from newspapers and television. Letters-to-the-editor pages, radio call-in programs, and television talk shows are forums for public deliberation. At their best, the national media can prevent our local conversations from becoming insular or uninformed. Nothing else can connect our small-scale discussions into what Northwestern University political scientist Benjamin Page calls one "deliberative national public."

Journalists often see their own job as providing information to citizens. But not all facts are equally helpful in promoting democratic deliberation. To dwell on information of the wrong kind can even be damaging. For example, when journalists mostly provide facts about the tactics and fortunes of political insiders, they make citizens seem insignificant. Likewise, information about who is likely to win the next election is of no use to citizens who are trying to decide who ought to win. Too often, these predictions turn into self-fulfilling prophecies that reduce the importance of actual votes.

Facts about "public opinion" can be equally harmful. Surveys often ask a random sample of Americans to answer preformulated questions without first reflecting, discussing, or acquiring background information. The aggregated results are then presented as constraints within which politicians and the public must operate. We are told, for example, that a given policy is "unrealistic," because 65 percent of the public opposes it. Public opinion thus confronts citizens as an alien force, even though it is supposed to be something that they create.

Finally, many news stories "explain" officials' behavior by analyzing the political benefits that are likely to flow from their decisions. The implication that politicians act out of naked self-interest is often plausible—but also unverifiable and largely irrelevant. Motives are always difficult to assess, and in any case the important question is not why a politician votes in a particular way, but whether this position is right. Journalists are taught to keep their values out of their writing. But to limit the explanation of politicians' actions to self-interest is itself a moral judgment. It denies the legitimacy or relevance of any principled reasons that actors give for their decisions, and therefore makes deliberation seem pointless.

Fortunately, during the last few years, a new movement, called public or civic journalism, has begun to transform American newspapers, at least beyond the Washington beltway. This label has been adopted by a loose coalition of reform-

minded journalists with diverse ideals and projects. But a common theme unites many of their experiments: the cultivation of public deliberation.

Public journalists resist stories about the political "horse race" in favor of articles about issues. They also cover the public deliberations that occur in civil society that is: within voluntary associations, neighborhood and civic groups, religious denominations, and universities. In covering these discussions, public journalists do not define "news" merely as moments of sharp disagreement, charges and countercharges, resignations and lawsuits. They also count routine exchanges of ideas as newsworthy.

Finally (and most controversially), public journalists instigate deliberation by convening citizens to talk about public affairs. For instance, during several recent elections, the *Charlotte* (North Carolina) *Observer* and the local ABC television affiliate recruited people to serve on "citizens' panels" that collaborate with journalists to devise questions for candidates to answer. The politicians' responses were published in the newspaper. If a candidate refused to participate, a blank space was left by his name. Reporters from the business, health, education, and religion beats covered topics that the citizens' panel considered relevant to the election. Members of the panel met directly with candidates, and some of their deliberations were televised locally.

Such experiments cross traditional boundaries between objective reporting and activism. But North Carolina's public journalists have never forced candidates to take any particular position on issues. Instead, they have compelled politicians to engage in a dialogue with citizens. Thus public journalists have promoted a particular democratic process, and not a political outcome. Furthermore, it's worth remembering that conventional news stories about campaign tactics and polls are not truly neutral and detached, for they also affect public engagement. The effects of public journalism appear to be better: readers become demonstrably more active in community organizations and more interested in public affairs.

Changes in Civil Society

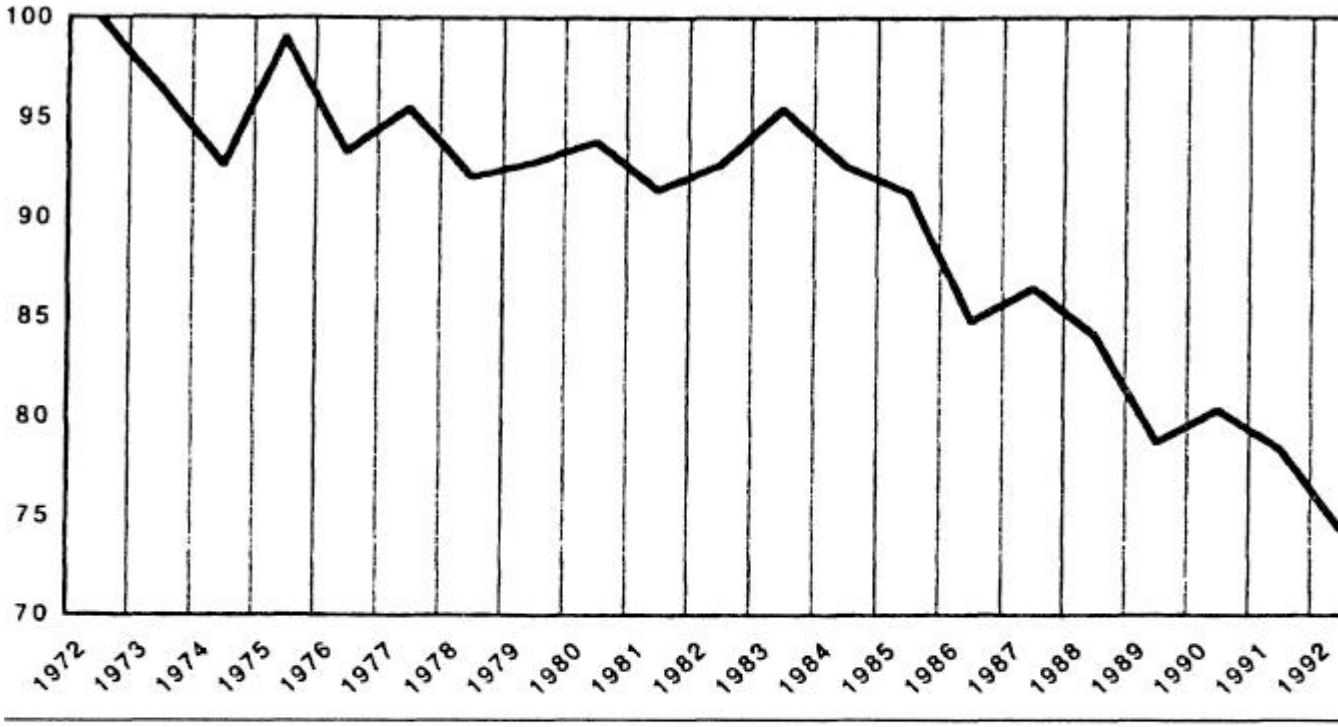
Major institutions in civil society that care about the health of our democracy should make internal changes so that they do more to cultivate deliberation. This is especially true of the "mailing list" organizations that have grown since 1970, as fraternal societies have faltered. Many public interest lobbies are organized democratically, with elected boards, state affiliates, and even referenda. However, members do not communicate horizontally, and most have so little commitment and knowledge that the professional staff dominate. To take just one example, according to John M. Holcomb, the "Center for Science in the Public Interest receives 75 percent of its revenues from over 80,000 members, yet these contributors play no role in directing the affairs of the organization or in determining its goals."

The Harvard sociologist Robert Putnam doubts that mailing list organizations build the interpersonal connections on which democracy depends. "For the vast majority of their members, the only act of membership consists in writing a check for dues or perhaps occasionally reading a newsletter.... Their ties, in short, are to common symbols, common leaders, and perhaps common ideals, but not to one another."

To be sure, mailing list organizations may allow ordinary people to influence public policy (albeit indirectly) and to gain political information at a reasonable cost. Their effectiveness has declined, however, as groups on the Right and the Left have fought each other to a stalemate. To regain power and to strengthen their legitimacy in a democratic society, mailing list groups should consider implementing or emphasizing a chapter structure, borrowing the best models from Amnesty International, the League of Women Voters, the American Civil Liberties Union, the Audubon Society, the National Rifle Association, and the Christian Coalition. To varying degrees, these groups ask local chapters to discuss issues and to initiate action. The chapters then become sites of deliberation and schools of leadership and participation.

Although it is difficult to grow rapidly and raise money with a chapter structure, this arrangement has several clear advantages. First, the traditional methods of grassroots lobbying are losing clout. Politicians are no longer impressed by telephone calls from a few voters, because corporate lobbyists and talk-show hosts can generate these calls almost at will, but they might respect chapters that were active in their districts. Second, local bodies offer social benefits (such as friendship and entertainment) that encourage people to join and to stay active. For instance, many people probably belong to the Sierra Club because of its nature walks and to the National Rifle Association because of its firearms classes. Finally, there is a public-interest rationale for establishing a chapter structure. National membership associations should devolve some responsibility to local bodies in an effort to enhance deliberation and strengthen democracy. The nation’s largest mailing list organization, the American Association of Retired Persons, has already taken this lesson to heart and is trying to increase the civic responsibilities and capacities of its volunteers and chapters.

Table 8.1 Index of Deliberation



This chart tracks the decline of important deliberative activities since a baseline ye 1972 (when the index is arbitrarily set at 100). The activities are belonging to at leas group or attending church services, attending a local meeting, serving as an officer association, serving on a local committee, belonging to a reform group, attending a reading the newspaper daily, writing a letter to the newspaper, making a speech, w an article, being generally interested in politics influencing other people's votes d campaigns, and wearing a button or displaying a sticker. The downward trend is statist significant even if the weight of each component is treated as arbitrary. (Chart ad from Levine, *The New Progressive Era, p. 96.)*

These reforms would be easier if the federal deduction for charitable contributions were replaced with a system of vouchers. Each person would receive a voucher of equal size that he or she could donate to any registered nonprofit organization. This would surely cause a major redistribution of philanthropic money from prestigious national and cultural institutions (traditionally patronized by the wealthy) toward local groups that encourage participation and serve less privileged clienteles. All things being equal, it would be a shame if Harvard University and the Metropolitan Museum of Art lost revenue as a result of a tax reform—but all things are not equal. Given limited amounts of state-subsidized philanthropic money, the lion's share should go to nonelite institutions. Moreover, a voucher system would encourage organizations of all types to recruit active, engaged participants, because people who volunteered for a particular group might also give it their vouchers. As Fishkin has argued, a voucher system would alter the market for civic participation by raising the value of—hence the demand for— people without special wealth or ability.

Regulatory Reform

Ever since the New Deal, Congress has frequently delegated its lawmaking power to executive or regulatory agencies and commissions. For example, Congress has told the Federal Power Commission to "determine just and reasonable rates." The Federal Communications Commission was told to promote "the public interest, convenience, and necessity" in broadcasting. And the Securities and Exchange Commission was told to "prevent an unfair or inequitable distribution of voting power among security holders." Congress has not even attempted to define "just rates," the "public interest," or "unfair voting power." Cornell political scientist Theodore Lowi and others have argued that legislatures should debate values, priorities, and trade-offs in public so that voters can assess their arguments as well as their decisions. Democracy is not well served by statutes that announce the good news (e.g., that the air shall be clean or the workplace risk-free), while leaving it to regulators to spell out the bad news (the costs and who must pay them).

An example shows what damage delegation can do to deliberation. In 1970, Congress enacted the Occupational Safety and Health Act to control hazardous substances in the workplace that impaired workers' health, functional capacity, or life expectancy. Senator Jacob Javits (R-NY) warned that the law "might be interpreted to require absolute health and safety in all cases, regardless of feasibility." He and his colleagues thus faced a profound philosophical question: whether safety should ever be balanced against efficiency, prosperity, employment, equity, or other economic values—and if so, how the balance should be struck. Instead of answering this question, they told the secretary of labor to "set the standard which most adequately and feasibly prevents harm to workers." The Labor Department thereby acquired the discretion to make almost any decision it chose. Congress had violated Locke's dictum that a legislature may make laws, but not legislators.

A recent textbook on administrative law flatly states, "Although there may be academic squabbles over the degree of power that bureaucracies have acquired, there is virtually no disagreement over the fact that the old dichotomy between policy-making and administration is gone and that administrative agencies now perform both functions, fused into one institution." Because they are not elected and have no mandate to decide questions of value, regulatory agencies often hide the political choices they make behind a smokescreen of technical, expert discourse. Technocratic debates about costs and benefits may then eclipse public deliberation about ends and priorities.

In May of 1998, a panel of three judges of the U.S. Court of Appeals for the District of Columbia responded to this problem in an important decision, *American Trucking v. US EPA.* Under the Clean Air Act, the Environmental Protection Agency (EPA) must set standards for air pollution that it finds to be "requisite to protect the public health" with "an adequate measure of safety."

This language makes it far from obvious where to set the standards, since, as the Appeals Court noted, "the only concentration" of pollutants "that is utterly risk-free...is zero." EPA's method has been to ask a group of experts to devise a numerical threshold that they deem adequately safe. In the case of ozone, the EPA's

experts set the threshold at .08 parts per million. In establishing this threshold, the EPA implicitly decided the number of deaths society should be prepared to tolerate. Such decisions should only be reached by elected bodies that deliberate in public. The Constitution, indeed, vests "all legislative powers" in Congress. On this basis, the Appeals Court prevented the EPA from enforcing its ozone standard.

A strict opponent of legislative delegation would demand that Congress judge how many deaths from pollution were acceptable. EPA would then decide (on the basis of scientific evidence) what level of pollution would produce the results that Congress had deemed optimal. The agency would still have a choice to make: it would have to identify the most plausible scientific theory about the effects of pollution on health. But it would not have the discretion to decide how much health is sufficient. Since the Environmental Protection Act does give EPA such discretion, the act appears unconstitutional.

However, the Appeals Court read "current Supreme Court cases" as permitting Congress to delegate some legislative authority to regulators. Therefore, instead of voiding the whole Environmental Protection Act and closing the EPA, the court said that it would give "the agency an opportunity to extract a determinate standard" from the Act. A "determinate standard" apparently means an explicit value judgment that would transform the original statute (which endorses public safety, but only up to an unspecified point) into a clear statement of national priorities. If Congress felt that EPA's values were wrong, it could then respond with new legislation. For instance, if EPA stated explicitly that it considered x chance of y deaths to be tolerable, then its regulation would pass constitutional muster, because it would have "extracted" an explicit value judgment from the statute. To be sure, the agency's judgment would not be the product of congressional deliberation. But at least elected officials and the public could easily debate and change an explicit moral position taken by a regulatory agency, whereas they cannot grapple with myriad apparently technical decisions, such as the EPA's inscrutable rule that the threshold for ozone is .08 parts per million, rather than .07 or 09.

Even if federal courts go beyond the American trucking decision and interpret the Constitution to forbid legislative delegation entirely—thereby dismantling much of the federal regulatory apparatus—state intervention in the economy would not be precluded. Conservatives often assume that unregulated markets work better than regulated ones and that a democratic society would embrace laissez-faire if only bureaucrats were stripped of their authority. I doubt it. The public in the United States—as in every other industrialized democracy—reasonably demands state action in many fields. Thus, if Congress could not delegate its lawmaking authority to executive agencies, voters might ultimately pressure it to adopt simple, efficient, transparent, but ambitious federal initiatives such as vouchers, cash transfers, and a guaranteed minimum income. But of course it would be up to citizens to decide how much federal intervention they wanted.

Partnerships with Local Bodies

I have argued that elected legislatures, not appointed experts, should make important value decisions. But in practice Congress can only set broad policies at the national level; it lacks the time and local knowledge necessary to devise the best

plan for each specific circumstance. A promising strategy is to ask local groups to design legislative solutions appropriate for their own problems. Congress and state legislatures could then enact these agreements into law.

Something similar was attempted during the war on poverty (starting in 1964), when the federal government established community action agencies, local democratic bodies that issued rules and managed some public resources within their areas. But where board members were chosen by voters, community action agencies began to look much like traditional city councils, except that turnout was unusually low in their elections. The alternative was to choose members by nontraditional means, finding the kind of "authentic" community representatives who might not win formal elections. In some cases, this meant choosing established leaders (ministers, association presidents, and the like) to serve ex officio. But often, as writer Tom Wolfe noted, militancy was treated as evidence of authenticity. "If you were outrageous enough, if you could shake up the bureaucrats so bad that their eyes froze into iceballs and their mouths twisted into smiles of sheer physical panic. . . then they knew you were the real goods. They knew you were the right studs to give the poverty grants and community organizing jobs to. Otherwise they wouldn't know."

This was no way to improve accountability or to encourage widespread participation. To make matters worse, community action boards competed with existing elected bodies that should have been forums for democratic self-government.

Intractable disputes about representation arose because community action boards were expected to vote on policies. Thus their decisions might well change if one extra neighborhood representative, professional politician, minority member, welfare recipient, or expert gained a seat on the board— perhaps at the expense of someone else. Today, however, local institutions could be reconceived as deliberative bodies, whose main function is to discover consensus solutions to local problems. These solutions would have no legitimacy unless every relevant group participated and endorsed the results. Thus it wouldn't matter exactly how many participants were associated with any particular group or interest. In fact, no one would have to be excluded from a deliberative body, except perhaps for bad conduct.

In a legislative body, a requirement of consensus would be disastrous, since legislatures must make decisions even when people disagree. But this doesn't mean that seeking consensus outside of a legislature is useless. On the contrary, voluntary deliberation can change minds, refine opinions, and occasionally generate plans that all participants will choose to bind themselves to. Such agreements can make a legislature's work much easier.

Consider a recent example. In the arid west, economic conflicts about water use are exacerbated by differences in ideology and culture among such groups as miners, ranchers, urban consumers, environmentalists, hunters, and Native American nations. To make matters worse, watersheds are sensitive systems that cross state lines; water use or pollution in one place affects everywhere else. Thus each watershed is vulnerable to the behavior of all who own, use, or regulate any part of it. From the outside, battles over land use in western watersheds often look so contentious that no resolution can be reached until the federal government acts forcefully, perhaps using armed agents to administer its unpopular regulations.

But actually all the interests involved are harmed by conflict and would benefit from a consensus, if one could be reached. With this in mind, at least seventy-six local groups across the west have convened completely voluntary meetings of interested parties, known as "watershed partnerships." Anyone who wants to join is invited; anyone who disagrees with the group may opt out without fear of becoming bound by its decisions. But those who choose to participate can work out significant mutual agreements to which they may voluntarily bind themselves. Landowners and corporations can promise to curb unpopular behavior, environmental groups can waive their rights to sue, and government agencies can manage public lands and resources according to the desires of the group. For instance, according to the University of Colorado Natural Resources Law Center, a management plan for the Upper Carson River in Nevada and California was signed by "government agencies, the Washoe Tribe, state assembly members, local community leaders, ranchers, conservation groups and homeowners associations."

A recent and much celebrated example of stakeholder negotiation, the Quincy Library Group, may be particularly instructive. According to a local journalist, this negotiation began as an informal discussion among "sport fishing groups, conservation clubs, wild river clubs, timber companies, county commissioners, land and trails trusts, women in timber chapters, the local Audubon Society, and even one person...who describes herself as a "Quincy resident and independent thinker.'" They met in the Quincy, Calif., public library because libraries forbid shouting. Ultimately, they developed a management plan for the surrounding national forest, presented it to Congress, and saw it become law.

This process could become commonplace. Once local groups had developed generally acceptable and detailed plans, Congress could order federal agencies to enforce them. Instead of asking administrators to pursue ill-defined values, laws would mandate compliance with specific agreements. Federal officials would participate in developing these plans and would articulate the national interest in local debates, but ultimately Congress would decide the law.

It would also be the responsibility of Congress and state legislatures to decide which groups and individuals must consent to a plan to make it a "consensus" document. A particularly thorny problem arose in the Quincy library case when national groups objected to a locally generated agreement. A possible solution is to press such groups to participate in local discussions through their chapters. Dissent by a chapter would certainly refute a claim to consensus, and thus leave legislatures to do their normal job of weighing arguments and interests, and making decisions. But any agreements that did win consensus (as defined by elected legislatures) should quickly become law, and stakeholders should be encouraged to seek consensus through local deliberation. As a beneficial by-product, we might see growth in civic participation, because local self government teaches (in John Adams' words) "the habit of discussing, of deliberating, and of judging public affairs."

Conclusion

Proponents of "deliberative democracy" have argued persuasively that democracies benefit when there is broad discussion of public affairs. But the United

States will never become a perpetual town meeting in which citizens devote most of their energy to debating the public good. Nor can we divide our nation (or any of the fifty states) into small, self-governing units that would function like idealized versions of the Greek polis. Instead, we need practical, institutional reforms that will raise the quality and quantity of political talk in a society like ours. If the public became more engaged, our government would be forced to become more accountable and principled. In turn, better government would increase trust and confidence, and make people more likely to participate in public life. We have certainly seen the opposite: a vicious cycle of official misconduct and public withdrawal, each reinforcing the other. The start of a modest upward spiral should be our goal.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 19, number 4 (fall 1999).

References

Jean-Jacques Rousseau, *The Social Contract,* translated by G.D.H. Cole, revised edition (London: J.M. Dent), book III, chapter 15 (p. 266); book IV, chapter 1 (p. 274); James Fishkin, *The Voice of the People: Public Opinion & Democracy* (Yale University Press, 1995); Francis X. Clines, '"Ask Not'Military-Industrial Complex....' "but Fear Itself..."' *New York Times* (September 23, 1996); Benjamin I. Page, *Who Deliberates? Mass Media in Modern Democracy* (University of Chicago Press, 1996), Esther Thorson, Lewis A. Friedland, and Peggy Anderson, "Civic Lessons: Report on a 1996 Evaluation of Four Civic Journalism Projects Funded by the Pew Center for Civic Journalism" (Pew Charitable Trusts, 1997); Sean Aday, "Does Civic Journalism Work? An Experimental Test Comparing the Effects of Civic and Conventional Journalism on Audience Attitudes, Cognitions, and Behavioral Intention," paper delivered at the University of South Carolina (October 12, 1998); John M. Holcomb, "Introduction" to the *Foundation for Public Affairs' Public Interest Profiles* (Foundation for Public Affairs, 1988-1989); Robert D. Putnam, "Bowling Alone: America's Declining Social Capital," *Journal of Democracy,* vol. 6, no. 1 (January 1995); Lester M. Salamon, *Holding the Center: America's Nonprofit Sector at a Crossroads* (The Nathan Cummings Foundation, 1997), p. 27; James Fishkin, *The Dialogue of Justice: Toward a Self-Reflective Society* (Yale University Press, 1992); Steven J. Cann, *Administrative Law* (Sage Publications, 1995); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States,* 2d ed. (Norton, 1979); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute,* 448 U.S. 607, at 677 (citing the Legislative History), 675; John Locke, *Second Treatise on Government,* section 141, *American Trucking Associations, Inc. v. U.S. EPA,* 175 F.3rd 1027; 1999 U.S. App. LEXIS 9064; Tom Wolfe, "Mau-Mauing the Flak Catchers," in *Radical Chic & Mau Mauing the Flak Catchers* (Farrar, Straus, and Giroux, 1970); Jo Clark, *Watershed Partnerships: A Strategic Guide for Local Conservation Efforts in the West* (Western Governors'Association, 1997); University of Colorado Natural Resources Law

Center, *The Watershed Source Book: Watershed-Based Solutions to Natural Resource Problems* (1995); Mark Sagoff, "The View from Quincy Library: Civic Engagement in Environmental Problem Solving," in *Civil Society, Democracy, and Civic Renewal,* edited by Robert K. Fullinwider (Rowman & Littlefield, 1999), pp. 151-183; Statement of Chairman Don Young (R-AK) during the Committee on Resources mark-up of the Quincy Library Group Community Stability Act (May 21, 1997), available at http:/www.qlg.org/public_html/bill/dyoung.htm; Joseph Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (University of Chicago Press, 1994) (quoting xysJohn Adams).

Part 2

Diversity, Identity, and Equal Opportunity

9

Racism in the Head, Racism in the World

Judith Lichtenberg

We are inclined to think that disputes about words are unimportant. We give up arguing with people when we see that our disagreements turn ("merely," we say) on terminology. It's hard to maintain this view, though, when the word in question is "racism."

Different perceptions among blacks and whites in our society about what racism is, and where it is, constitute an important source of racial tension. For many white Americans today the word "racism" is a red flag. They don't see themselves as harboring animosity toward black people; they believe they hold to an ideal of equality, and of equal opportunity. So they feel insulted to be called racists, baffled by charges that we live in a racist society. A white supremacist would not be so wounded.

But those who say our society is racist are not speaking rhetorically or hyperbolically. The claim that racism is dead or insignificant—in the face of major socioeconomic disparities between blacks and whites, in the face of the state of our inner cities and the crisis of the young black male—produces anger or incomprehension among many black Americans.

In general, white people today use the word "racism" to refer to the explicit, conscious belief in racial superiority (typically white over black, but also sometimes black over white). For the most part, black people mean something different by racism: they mean a set of practices and institutions that results in injustice to, and inequality for, black people. Racism, on this view, is not a matter of what's in people's heads but of what happens in the world.

The white picture of the racist is the old-time southern white supremacist, who proclaimed his beliefs proudly. Your typical late twentieth-century American is, at some important level, an egalitarian who rejects the supremacist creed. In her mind, then, she is not a racist.

That a person is not a racist in this sense makes a difference. Contrary to the pronouncements of some, things are worse when people explicitly believe and proclaim supremacist doctrines, and a special moral culpability attaches to holding such beliefs. But not to be a racist "in the head" is insufficient to prevent injustice and suffering that divides along racial lines.

The alternative view is that the evil we call racism is not fundamentally a matter of what's in people's heads, not a matter of their private, individual intentions, but rather a function of public institutions and practices that create or perpetuate racial division and inequality. Who cares if your intentions are good if they reinforce or permit racial discrimination and deprivation?

Racism as overt or out-and-out racism reflects a powerful strain in our attitudes toward moral responsibility. On this view, you are responsible only for what you intend; thus, if consciously you harbor no ill will toward people of another race or background, you are in that respect innocent. For those who would be deemed the oppressors, such a view is abetted by what psychologists call "cognitive dissonance —essentially, the desire to reduce psychological discomfort. It is comfortable for white people to believe racism is dead just as long as they harbor no conscious feelings of antipathy or superiority to blacks. And, conversely, it is less painful for blacks, seeing what they see, to think otherwise.

In what follows I sketch five kinds of attitudes and practices short of out-and-out racism to which critics are calling attention when they use the word "racism" in the broad way that so irritates many white Americans.

Less-Than-Conscious Racism

Over the last thirty or forty years it has become publicly unacceptable, in most circles, to express racist views openly. (Even this assertion requires qualification. In a recent pair of focus groups conducted for People for the American Way, young whites talked openly about their negative views of blacks. The explicit avowal of racist views is more common than one might suppose, and may be on the rise.) When a view becomes publicly inexpressible, it often becomes privately inexpressible as well: what we won't say to others, we may cease to think to ourselves. It doesn't follow, however, that such beliefs vanish altogether.

How do they manifest themselves? It's common for people to find—even without any awareness on their part—the behavior of a person of another race more threatening or obnoxious or stupid (or whatever) than they would the behavior of a member of their own group. And just as their threshold of intolerance may be lower for negative behavior, they may have higher standards for members of other groups than for their own when it comes to positive traits. Thus the claim that women and minorities have to be "twice as good" as white males to get the same credit. A related phenomenon is what psychologists call "aversive racism." In an experiment by Samuel Gaertner, subjects received a phone call, seemingly a wrong number, from a person who said that his car had broken down, that he had just used his last dime and that he needed someone to call a tow truck for him. Young white liberals —who presumably saw themselves as racially well intentioned—were almost six times more likely to hang up on callers when the voice on the phone "sounded black" than when the person "sounded white."

There is considerable evidence that murderers who kill white people are more likely to get the death penalty than those who kill black people, a disparity that implies the belief on the part of juries that white life is more valuable than black life. In general, you don't have to listen very carefully to hear the prejudices to which people give expression, often quite unawares, in talking about people who belong to other ethnic, racial, and religious groups.

Stereotyping

One way such views spill out is in ethnic or racial stereotypes. The stereotyper doesn't believe (or wouldn't say, anyway) that all blacks are less intelligent, more violent, lazier (choose one or more), or that all Jews are pushy or greedy, only that some, or most of those with whom she or he comes in contact, are. Or perhaps, to use an example of Adrian Piper's, they believe not that most black teenagers in running shoes are muggers but that most muggers are black teenagers in running shoes. In either case, they make an inference about the person coming down the street toward them from a generalization they accept about members of the group to which the person belongs. And that involves picking out some feature or features of the individual (in this case blackness and youth) as most significant or noteworthy.

Two things can be said in defense of the white woman who crosses the street when she sees a group of black teenagers coming toward her. First, she might well do the same if the teenagers were white. In that case, her behavior does not constitute racial discrimination (although it might be attributable to "ageism" for instance, or to some other bias). Second, she need not be thinking "These guys are black teenagers, therefore they are probably muggers." More likely she reasons, "These guys are black teenagers, therefore the probability that they are muggers is greater than if they were_____(fill in the blank: men in three piece suits, gray-haired ladies, school-children)—and great enough to warrant taking the small and relatively inoffensive precaution of crossing the street.

Now the probability of black teenagers being muggers surely is greater than the probability of gray-haired ladies being muggers. The crucial question is: How much *more* probable does it have to be to justify the evasive behavior?

Obviously, questions of this kind have no simple answers. To evaluate behavior based on racial or other group generalization, several matters are relevant. Among them are: (1) The particular behavior in question, and its costs to those stereotyped. Crossing the street is a minimal slight—if it's even noticed—and may be mitigated by a display of ulterior motivation, like inspecting the rosebushes on the other side. (2) This point is connected with another: Is the behavior in question a merely private action, like the individual crossing the street, or is it the activity of a public official or institution? In that case, the threshold will be much higher, if indeed the behavior is permitted at all. A very damaging action done in an official capacity, like preventive detention, will be hardest of all to justify. (3) The costs or risks of not acting in the manner in question. Although the probability that the teenagers are muggers may be low, the risk if they are is great. (4) The available alternatives to the action or policy in question.

Stereotyping is morally problematic because in some forms it seems inevitable, yet at the same time faulty. We can't make our way in the world without relying on

rules of thumb, generalizations that enable us to size up people and situations by correlating their characteristics with predictions about what we can expect to happen. But such generalizations are always flawed, because they attribute particular qualities to some people who don't possess them. To generalize is to overgeneralize.

Yet whatever its complexities, it is clear that the most common forms of racial and ethnic stereotyping are indefensible. It's not, after all, that most Jews are greedy or that most blacks are violent, so that stereotyping merely goes a little too far by failing to recognize exceptions. Such broad, vulgar stereotyping offends by its "reckless willingness to believe"—the willingness to believe, for example, that (as a white college student in the People for the American Way study put it) THEY "have a chip on their shoulders," are "rowdy," "bring it [discrimination] on themselves."

Accommodating Other People's Racism

People sometimes justify discrimination not in terms of their own beliefs but in terms of other people's. A shopkeeper refuses to hire a black sales clerk not because he himself is prejudiced, but because his customers are, and he fears a decline in sales. A corporation refuses to sponsor a program featuring an interracial love affair, not, its representatives say, because they disapprove, but because their viewers do. Suppose for the sake of argument that the shopkeeper and the corporate executives speak the truth: they are not prejudiced, but their clients are. Whether or not we call the shopkeeper himself a racist, there can be no doubt that he perpetuates racism by reinforcing the harmful beliefs of his customers, and by discriminating against black people in his hiring practices. And were he to refuse to accommodate these beliefs, he might help to change other people's attitudes, and so the world.

"Secondary" Racism

Borrowing a term from Mary Anne Warren, we can define "secondary racism" as discrimination based not on race itself but according to race-correlated factors that unfairly affect racial minorities. (The term is misleading if it suggests that such practices are of secondary importance.) Accommodating other people's racism is one kind of secondary racism, but there are many other subtler and apparently more innocent forms as well. So, for example, the practices of hiring through personal connections, or of "last hired, first fired," need not be based on racist beliefs, but they nevertheless affect women and minorities disproportionately and irrespective of merit. The quite natural tendency to favor "one's own kind," which need not involve hostility toward "other kinds," is also a form of secondary discrimination.

Standardized tests may contain biases against some groups that are unintended by and opaque to their creators. For example, if, as social scientist Christopher Jencks argues, black children are more likely to recognize words when they are pronounced with a black accent, a test administered by a white person will underestimate the children's abilities. Crucial to this form of discrimination, which is at least part of what is meant by "institutional racism," is that the requirements or

tests are on their face race- (or gender-) neutral; that they nevertheless have a "disparate impact" on members of certain groups; and that the elements in question are by hypothesis irrelevant to the performance of the task at hand.

The Disadvantages of Being Disadvantaged

This last category has no common name, although it is perhaps the broadest and most intractable form by which racial inequalities are perpetuated. Whereas secondary racism involves discriminating (however inadvertently) on the basis of factors irrelevant to merit, this form employs criteria that are appropriate and relevant.

Most people would agree that we ought to admit people to jobs or schools on the basis of ability and talent, past or potential performance. Yet even if we could purge our screening devices of irrelevant biases, fewer blacks would gain entry than their numbers in the general population would suggest. They will on the whole be less competitive, given past discrimination and deprivation, than their more privileged white counterparts. Appropriate metaphors here are the vicious cycle, the downward spiral, the chicken and the egg.

Even if "racism-in-the-head" disappeared, then "racism in-the-world" would not. One reason is the continued existence of facially race-neutral practices, like seniority systems and the old-boy network, that discriminate unfairly against minorities and women. The other reason is that people who as a historical consequence of overt racism, endure substandard prenatal care, nutrition, housing, health services, and education, people who live in drug-and crime-infested neighborhoods, will on the whole fare less well than those who do not.

Conclusion

"Racism" is inescapably a morally loaded term. To call a person a racist is to impugn his character by suggesting deliberate, malign discrimination, and it is therefore natural that those who think their hearts (perhaps, in keeping with the foregoing metaphor, we should say their heads) are pure should take offense at the accusation.

Even if we were to agree that all racism is "in the head," however, overtly racist attitudes and beliefs do not exhaust its contents. Less-than-conscious attitudes and beliefs still play an important part in our mindsets. And even if individually such attitudes seem insignificant, collectively they add up to pervasive habits of behavior that can wreak injustice on groups of people.

At the same time, an individual whose attitudes and beliefs are not overtly racist, are not even covertly racist, can inhabit a racist society or participate in racist *institutions.* A society or an institution is racist if it discriminates on grounds of race, either "primarily" or "secondarily," or if it perpetuates inequalities produced by primary or secondary racism. Sometimes the society or the institution is so corrupt that a morally decent person arguably ought not to have anything to do with it. More often, however, we hold individuals to less stringent standards. We want to know whether they simply go along with the objectionable practices, or if in the course of their involvement they do something to make the system less

discriminatory. What can they do? How much ought they to do? That's another story.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 12 1/2 (spring/summer 1992).

References

L. Duke, "Racial "Perception Gap' Emerges as Young Whites Discuss Blacks," *Washington Post* (December 24, 1991); G. Ezorsky, *Racism and Justice: The Case of Affirmative Action* (Cornell University Press, 1991); S. Gaertner, "Helping Behavior and Racial Discrimination among Liberals and Conservatives," *Journal of Personality and Social Psychology* 25 (1973) 335-341; A. Piper, "Higher Order Discrimination," *Identity, Character, and Morality*, edited by O. Flanagan and A. Rorty (MIT Press, 1991); P. Singer, "Is Racial Discrimination Arbitrary?" *Philosophia* 8 (1978); M. Warren, "Secondary Sexism and Quota Hiring," *Philosophy and Public Affairs* 6 (1977); P. Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); C. Jencks, "Racial Bias in Testing," in *The Black-White Test Score Gap*, edited by C. Jencks and M. Phillips (Brookings Institution Press, 1998).

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Multiculturalism and Cultural Authenticity

Claudia Mills

Recent years have seen the emergence of two interrelated trends in our cultural politics. First, there has been a call for multiculturalism: for greater diversity in artistic and educational offerings, for a broadening of the spectrum of society's interest beyond the activities and experiences of the dead or living white males. Thus, students demand courses in black, Hispanic, and women's studies; children's librarians clamor for more books about Native American and Asian youth; viewers of all races protest if their stores are not told on television's nightly news and primetime sitcoms. Second, there has been an insistence that those offering representations of previously underrepresented groups be themselves members of the group in question—that courses in black studies be taught by black faulty, books about Native American youth be written by native Americans writers, and reporters covering the Hispanic community be of Hispanic descent. It is this second and more controversial requirement that I wish to submit to examination here.

The thesis that interests me is what I will call the authenticity thesis. The authenticity thesis maintains that the individuals representing the experiences of group A should (generally or even always) be members of group A. The thesis can be put forward in both a broad and a narrow form. In the narrow form, it applies when group A is what we may call a victim group, a group that has previously suffered and currently continues to suffer from oppression and discrimination—for instance, blacks, Native Americans, and women.

In the broader form, it applies to any group A, whatever its history or status. Of course, we will not be able to apply the authenticity thesis without having some clear notion of what defines the boundaries of the group in question and what legitimates claims of membership in it, problems I shall touch upon in closing.

Why should individuals representing or discussing the experiences of group A be As rather than Bs? We may identify four possible arguments here. The first two, the argument from opportunity and the argument from ownership, focus on the

expressive claims of A-group members—the view that they are uniquely entitled to provide representations of their own experience. The next two arguments examine the interests of the audience for representations of A-group experiences: the argument from accuracy focuses on the general audience, made up of both As and Bs; the argument from solidarity focuses on the narrower A audience. I shall discuss each of these in turn, with the aim of demonstrating that together they offer at best qualified support for the authenticity thesis. In closing, I shall suggest why concerns about authenticity are nonetheless difficult to dismiss, and observe how a more expansive conception of group identity might begin to address them.

The Argument from Opportunity

In some cases, where a B is selected for a job that involves the discussion or representation of A-group experiences, this means that some A is rejected for the position in question. In hiring a male professor for an open position in women's studies, a university turns away all the competing female applicants. The director who notoriously cast a Caucasian actor in the role of a Eurasian pimp in his production of *Miss Saigon* denied that role to aspiring Eurasian actors. When women face such keen prejudice in much of academia, why hire a man to teach in a women's studies department? When roles for Eurasian actors are so sparse, why give the one meaty Eurasian role to a Caucasian? So the first argument for the authenticity thesis is that its violation constitutes a denial of crucial opportunities to members of group A. If As cannot get jobs for which their identity or experiences as A-group members would seem to make them especially suitable, what jobs *can* they get?

Where it is applicable, the argument from opportunity seems fairly compelling—as in the *Miss Saigon* example—but it applies in only a limited range of cases. It defends only the narrow version of the authenticity thesis, where A is a victim group whose members face severely limited opportunities elsewhere. And it applies only when some fixed position is to be awarded within a competitive framework, where by choosing one person, I am passing over another. Many applications of the authenticity thesis are not naturally viewed in this way. The white man who writes a novel about a black woman need not be viewed as thereby silencing or stifling black female voices; the editor who accepts that novel for publication may not have received any competing publishable novel from a black female author for that season's list. Objections to violations of the authenticity thesis cannot all be cashed out in terms of the value we assign to equal opportunity.

Its limited scope aside, the greatest danger in the argument from opportunity is that it may appear, rightly or wrongly, to reinforce the authenticity thesis not just in its narrow version, but in the broader one as well. And in its broader form, the authenticity thesis works on balance to limit rather than to expand opportunities for members of victim groups. If the activities and experiences of any group should be represented only by members of that group, then the majority of opportunities for representation will continue to go to dominant-group members. If the bulk of the curriculum concerns dead white males and only (dying) white males are seen as entitled to teach in those areas, this ensures that only a handful of nonwhite males can find employment in the university. Now, if this is our model, it does seem that,

on equal opportunity grounds, the remaining opportunities should go to non-white males. But the model itself should be challenged, on equal opportunity grounds. Actors of color will get more roles through nontraditional casting across color lines than through color-bound casting. Black and Hispanic scholars will teach and publish more widely if we permit all scholars to join voices in examining all subjects with equal freedom. Moreover, even if multiculturalism gives rise to a theater with a more diverse repertoire, or to a curriculum in which the works and lives of dead white males are no longer dominant, the authenticity thesis may still unacceptably limit the opportunities of women and minorities if it reinforces expectations that they will confine themselves to exploring the activities of the victim group to which they belong.

The Argument from Ownership

A related argument for the authenticity thesis proceeds from the claims that A-group activities and experiences are in some way *property* of A-group members, so that members of other groups who seek to imitate or represent those experiences are guilty of a kind of expropriation. Thus, many Native American leaders decry New Age adoption of Native American religious practices as the last in a long series of thefts: first, the whites took the land, then the buffalo, and now, in the gravest assault of all, Indian spirituality. Likewise, when a white author retells indigenous folktales, or writes fiction portraying indigenous life, this may seem a species of plagiarism, of profiting from stories that are not one's own. It is one thing for me to write a novel about my life; it is another thing for *you* to write a novel about my life.

It is not clear, however, that stories, or spirituality, or, in its totality, a culture, are the kinds of things that *can* be owned; I can copyright sentences, paragraphs, and pages, but not plots, themes, or truths. Furthermore, my retelling of your stories or my imitation of your rituals does not violate your right or opportunity to perform them as well. In this sense, I can make your experience my own, without its thereby ceasing to be yours.

In part, however, the charge against B's appropriating A's stories, spirituality, and culture arises precisely because in many cases B himself or herself seems to be treating these as property—as *his* or *her* property, as a commodity that can be bought and sold for a profit, for *his* or *her* profit, in a marketplace that continues to exploit and impoverish A. Sharing in someone's spirituality is one thing; trafficking in it is another. We may feel that no one should be making a profit from certain experiences; and where profit from A's experience is appropriate, it should be A who reaps it, not B. In the Native American example, these concerns are heightened by instances of outright fraud, as when shopkeepers falsely claim that trinkets manufactured in Taiwan are the "authentic" products of Native American artisans.

Sometimes, what sound like simple assertions of ownership actually reflect worries about the misrepresentation or distortion of certain beliefs and practices. In other words, the argument from ownership may look for support to the arguments from accuracy and solidarity, which I discuss below. For example, the *New York Times* recently interviewed an Osage professor of theology who argued that whereas Indian spirituality focuses on the larger community, New Age adaptations

are “centered on the self, a sort of Western individualism run amok.” “The danger,” this professor explained, “is that these mutations of spirituality will make their way back into the Indian world.” If this were to happen, then the attempts of others to make Indian experience their own *would* attenuate Native Americans’ hold on that experience, their capacity to safeguard and perpetuate it.

Nonetheless, where a B-group member represents an A-group experience respectfully and conscientiously, rather than opportunistically, it seems that the argument from ownership in its strongest form will fail to apply.

The Argument from Accuracy

Perhaps the argument invoked most often to defend the authenticity thesis is that members of group A simply do the best job representing the experiences of group A, that “it takes one to know one,” that you have to be a member of group A to *get it right.* This argument focuses on group A membership as an epistemological requirement for knowledge about group-A. Thus understood, the argument defends the authenticity thesis in both its broad and narrow versions: whatever kind of group we consider, dominant or victim, its experiences will be discussed most accurately and knowledgeably by its own members.

The first thing to note about the argument from accuracy is that it is an empirical and not a normative argument. It does not say that only members of group A have the *right* to talk about group A; it merely claims that representations of A by As will be more accurate than representation of A by Bs.

Now, accuracy is not an all-or-nothing affair, and the argument from accuracy can best be understood as pointing to a *likely* difference in the *degree* of accuracy of representation. It does not maintain that *no* B can know *anything* at all about As, but only that As are better placed to gather accurate information about A-group experiences and to submit these to more penetrating analysis and interpretation. This generalization is bolstered by commonsense appeals to the need for firsthand experience of one’s subject; it posits limits to the powers of imagination, in comparison with the vitality and immediacy of “real life.”

As an empirical argument, the argument from accuracy is subject to empirical evaluation. One possible test here might be some form of controlled experiment. For example, we might take novels about black life and experience written by both black and white authors and submit them, in a blind screening, to a panel of black readers. If the black readers succeeded in identifying the race of the author, by noting systematic inaccuracies in presentation, this would provide some support for the argument from accuracy; if they could not detect any telltale traces of the author’s racial background, the argument from accuracy would be undermined. One can certainly point anecdotally both to striking examples of whites getting the black experience wrong (blackface minstrel shows) and of their getting it right (Bruce Brooks’s recent young-adult novel *The Moves Make the Man*, acclaimed by many black librarians). Our conclusion here would seem to be that it is *possible* for Bs to do a good job representing the experiences of As—but perhaps sufficiently unlikely that the argument from accuracy provides good reason to uphold the authenticity thesis as a cautionary standard.

Some defenders of the authenticity thesis would go further and maintain that no B can ever (really) know about As, any more than an A can ever (really) know about Bs. One trouble with this claim is that it may overestimate the extent to which As or Bs know themselves; that is, it ignores our capacity for evasiveness, partiality, and self-deception. That which we have failed to recognize in ourselves is sometimes visible to outsiders. Even though they are bound to approach us with biases of their own, we gain from seeing ourselves as others see us, as well from gazing into our own inner mirrors.

The Argument from Solidarity

The final argument also focuses on the audience for representations of A-group experiences, but now specifically on the A audience. It asserts that the interests of As as an audience for material about their own lives and culture go beyond an interest in merely receiving an accurate representation of these. The provision and reception of such representations is one way to create or foster a sense of community among As, and thus it is important that As can band together with some exclusivity, to provide and receive them.

In this way, a women's studies course serves as more than just another academic offering in a university's curriculum, on a par with mathematics and geology; it is also a protected space where women may engage in a shared journey toward awareness of their own personal and social identities. Thus, female students may feel cheated and betrayed if they arrive on the first day of class to find a male professor, or even male students, in the class.

The argument from solidarity, like the argument from opportunity, seems to provide significant support for the authenticity thesis, but, again, only within certain limits. Group solidarity is arguably most important for victims groups—it seems to have far less (perhaps even negative?) value for dominant ones—and so the argument from solidarity supports the authenticity thesis only in its narrow version. Even among victim groups, solidarity may not be a value of *overriding* importance; in many contexts it may be secondary to some other value. University seminars, for example, serve many functions, only one of which might be to provide the occasion for an identity-forming experience. Moreover, not every representation of group-A activities works as a crucible for the formation of group identity; this effect may be muted, for example, when individuals experience a representation in isolation from each other, as readers engage books in essentially private rather than shared space.

Finally, we might want to encourage a vision of the possibility of forms of social solidarity that cross fixed racial, gender, and ethnic boundaries. It is important to belong to some community; it is less important, and perhaps ultimately undesirable, that these communities be defined solely in racial, gender, and ethnic terms.

Larger Identities

Whatever the force of these four arguments in favor of the authenticity thesis, one may feel that they fail to capture something of the sheer unseemliness of a member of group B waltzing into a room, waving his or her A-ish syllabus or novel

or painting, having the nerve to think that he or she can successfully discuss or represent the experience of group A.

In our initial negative response to such nervy Bs, we may hear first an echo of the argument from accuracy. Given the daunting magnitude of the task in question—to step outside the boundaries of your own group and accurately and sympathetically represent the character of another's group—how *dare* you think you have gotten it right? But if our response above to the argument from accuracy is a good one, some members of B *will* get the A-group experience right, even if most will not. I believe it was Dizzy Dean who said that braggin's only when you ain't got nothing to back it up. If a white male author purports to have created a vivid, vital, black female character, and actually has done it—well, more power to him.

And yet... it seems that there is still something troubling about a member of group B trying to tell a member of group A what it is like to be an A—when B takes upon himself or herself the superior role of teacher, adviser, consciousness-raiser, and so forth. I find myself drawn here to challenge B's standing to speak to A on the subject of A-ness. I am tempted to say that B has no *right* to speak to A about A-ness, that there are subjects that are simply closed to those who have not—actually, not imaginatively—experienced the necessary initiation. If a victim group is characterized in part by its shared sufferings, then those who have never felt any wounds have no business holding forth on the general subject of scars.

But while this objection strikes an emotional chord, I think it fails to stand up to closer scrutiny. While it may be arrogantly inappropriate for a B to claim that he or she fully understands the scope and depth of the sufferings of A, it remains the case, if our reply to the argument from accuracy holds true, that he or she may be able to provide accurate accounts of and enlightening commentary on A-group experiences. Ten or twenty years of intense scholarly study may give a professor some claim to be able to educate students even on topics closer to their historical experience than to his or her own.

Finally, one may want to say to the white man toiling importantly away on his wrenching novel about a black woman dying while giving birth to her eleventh child: Write your own story! And many would say the same thing to the black women writing her novel about a white man. We may be drawn to the general authenticity thesis in part because we believe that people should not try to pretend to be something they are not. Why try to tell someone else's story, when your own story is right there, staring you in the face? I once had a male friend whom I found rather pathetic in his attempts to be one of our group of women, in his yearning identification with everything female. His girlish giggle was particularly irritating. Oh, just give up and admit you're a boy!

But the principle that each of us should tell our own story cannot entail that this story must be the story of our own gender or race or ethnic group. It may seem naive at this moment to assert the existence of relations and commonalties that cut across these divisions; yet the effort to identify the experience and qualities we share may well be an urgent cultural task in its own right. True, the authenticity thesis receives some qualified support from the argument from opportunity, the argument from ownership, the argument from accuracy, and the argument from solidarity. But finally, the thesis is not compelling as a response to our current cultural conflicts. For the more we make good on the hope that our authentic identity can transcend our physically and socially assigned group characteristics—

the more the authenticity thesis in the end proves to be false—the better off we, as individuals and as a society, will be.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 14, number 1/2 (winter/spring 1994).

References

Dirk Johnson, "Spiritual Seekers Borrow Indians' Ways," *New York Times* (Dec. 27, 1993); Dirk Johnson, "Indians Complain of Religious and Cultural Theft," *New York Times* (June 12, 1993).

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The Merits of Merit

Judith Lichtenberg and David Luban

How should people be chosen for jobs and educational opportunities? Opponents of affirmative action draw a sharp contrast between two possible approaches: on the one side, employment and admissions procedures based on merit; on the other, affirmative action programs that dilute the merit principle. Either we can select the best candidate regardless of race or gender, or else we can allow group membership to influence our decision.

The ideal of "careers open to talents" dates from Napoleon's time, when it formed a centerpiece of the liberal assault on nepotism and hereditary privilege. To nineteenth-century reformers, the opposite of merit-based selection was not affirmative action for previously excluded groups; it was the awarding of posts on the basis of pedigree and connections. In one sense, today's merit principle is the reverse of the historical merit principle. During the age of aristocracy, the merit principle *was* a kind of affirmative action for previously excluded groups— the talented sons of middle-class families—whereas contemporary affirmative action is most often defended as a way for women and minorities to overcome the lack of pedigree or connections.

In another sense, however, the principle remains the same: then and now, it insists that what matters is what you know, not whom you know or what group you belong to. Former California Governor Pete Wilson has argued that it is a bedrock principle of American society that "individuals should be rewarded on the basis of merit." If Wilson is right, affirmative action programs are un-American and unjust, and the merit principle must reign supreme.

Critics of affirmative action like Wilson believe they know what merit is and how to find it. The defense of affirmative action, on the other side, is often understood to mean that "there is no such thing" as merit, or that merit is "socially constructed." Some critics of merit do make such claims. In so doing they tend to alienate those of us who hold the common-sense beliefs that some people really are more talented at various endeavors than others, that ability is not a purely subjective thing, and

that neither talent nor differences in talent are entirely the product of culture or politics.

But these common-sense beliefs do not prove that opponents of affirmative action are right. Ability is a complex and problematic notion, and the merit principle, which identifies ability with entitlement, is doubly complex. Because it figures so prominently both in defenses of and attacks on affirmative action, merit demands sustained and careful analysis. In what follows we pose three sorts of challenges to the "meritocratic" ideal:

1. *Detecting merit.* Even if we assume that there is such a thing as merit, and that we agree about what it is, the methods and procedures employed to detect merit may be flawed or biased, *even when they function properly.*
2. *Defining merit.* Disagreement exists not only about what procedures best uncover merit, but also about what *constitutes* merit for a given job or for a coveted place in the freshman class. In general, we argue, "meritocrats" are wedded to an oversimple and overnarrow view of what constitutes merit.
3. *Establishing merit's proper sphere of influence.* We defend two claims. First, small differences in merit often get reflected in large differences in reward, violating a principle of proportionality that ought to be part of a reasonable merit principle. Second, merit, however defined, should not be the only factor employed in allocating jobs or admissions slots.

Detecting Merit

Assume for the moment that jobs and admissions slots ought to be distributed purely on the basis of merit. Assume also that agreement exists on the criteria of merit for these jobs and places. The criteria of merit might be simple or complex; of course they will vary from job to job or from field to field. Leaving aside these details, let's call whatever it is we believe constitutes merit "M." M, we'll suppose, gets measured on the *M-scale.* And let's call that which merit is merit *for*—the particular job or admissions slot—a "post." The merit principle says that posts rightfully go to the highest M applicants. The question facing us, then, is how best to locate M.

The critique of meritocracy often begins with the observation that—leaving affirmative action programs aside—we don't in fact live in one. Coveted posts are often won not by those possessing the most M, but by those whose good connections have brought them to the attention of those with posts to distribute. A high school graduate whose mother works at the utility company hears about a job and has an in. The alumnus of Ivy College learns through friends or the alumni association of a recent graduate looking for a job and is pleased to strengthen the collegiate connection.

Often these processes are innocent, in the sense that it's natural, and even in many ways praiseworthy, to let someone you like know of a good job, and to help him or her get it if you can. Sometimes they are not. Whether innocent or not, we may think them largely inevitable; social institutions couldn't operate smoothly without personal contacts greasing the wheels. But connections and old-boy networks surely violate the principle of meritocracy— that was the original point of

the career open to talents—and affirmative action programs can serve to counteract their power. In so doing, affirmative action can sometimes enhance the relationship between merit and posts, not diminish it, as critics imply.

But the role of connections in the acquisition of posts goes deeper than these remarks suggest. To see why, consider this example. The top-ranked law school in the country has no class rankings and grades its students pass-fail. Yet these students have no difficulty getting great jobs at top law firms. Why?

There's no mystery from the law firms' point of view. They know that the law school accepts only five percent of its applicants. The firms are willing to take the law school's word for it that these students are loaded with M. The students' applications were read by a team of talented law professors; for a firm to conduct a similar evaluation would cost tens of thousands of dollars. So the firms are willing to free ride on the law school's prior search.

We might describe the method used by the law firms in identifying attractive associates as a *rational search procedure.* It's not the search procedure that provides the most detailed and accurate information about the M of all possible candidates. But it provides very good information about M at low cost, and that makes it rational.

The important point is this: a rational search procedure will regularly select some candidates with less M than others it passes over. For the procedure will give only perfunctory glances at candidates from lesser law schools, some of whom have more M than those from top-ranked schools. That doesn't mean the procedure is irrational: from the firm's point of view, the slight gain in accuracy from a more inclusive search isn't worth the added cost.

Still, we are justified in rejecting or modifying certain entirely rational procedures if we find that they have unacceptable *social* costs. If minority candidates from disadvantaged backgrounds are likely to have lesser credentials that do not always reflect lesser M, that is a reason to adopt affirmative action programs to counteract this flaw in rational search procedures.

The instruments employed to detect M may be deficient in other ways as well. The controversy surrounding standardized tests has become familiar. Some critics argue that a strong cultural bias against women and minority groups infects tests like the SAT; others think this view is merely politically correct. Perhaps more significant than possible bias in the tests themselves is that higher income students, among whom blacks and Hispanics are underrepresented, attend high schools that self-consciously teach to the SAT, and they further boost their performance with expensive test-preparation courses that raise scores while presumably leaving M untouched.

Such flaws in procedures designed to reveal M need not reflect ill will or personal prejudice toward women or minorities. Indeed, they show that the controversial term "institutional racism"—invoked to support the view that discrimination does not always disappear when personal bias does—can have a well defined meaning.

On the other hand, some obstacles to evaluating a person's M objectively *can* be located in people's (not necessarily conscious) attitudes, rather than in procedures and institutions. For example, surveys of male managers, business students, and college professors show that, in Stanford law professor Deborah Rhode's words, "identical résumés are rated significantly lower if the applicant is a woman rather

than a man." Other studies indicate that "both male and female subjects have given lower ratings to the same artwork or scholarly articles when the artist or author is thought to be a woman."

Even if there is such a thing as M, and even if we agree about what it is, finding out who has it isn't always easy.

Defining Merit

The most familiar objections to the merit principle challenge the very idea of merit, arguing that there is no such thing, or that it is "socially constructed." (Rightly or wrongly, these two assertions are often taken to be equivalent.) We shall defend a more modest view. Modest or not, however, it is a view that critics of affirmative action implicitly deny.

First, M is not a single property; for practically any post, there are several ingredients that contribute to doing well in it. Second, there can be legitimate disagreement both about what the appropriate ingredients in M are and about their relative importance. It follows that comparing the M of two candidates for a post is always a matter of weighing the relative significance of different qualifications; the comparison sometimes involves disputes about whether particular qualifications are relevant at all.

Take the example of an academic job in a large state university. Such a position involves both teaching and research responsibilities; thus evidence of merit in each of these areas is relevant. There is, of course, disagreement about the relative weight each should bear, with some people arguing that teaching ability should count for more, and research for less, than it usually does in appointment decisions. But beyond this fundamental division are other points of dispute: what counts as good research (quality, quantity, subject area, degree of specialized interest or relevance); the variety of settings in which a person might or might not be a good teacher (small, medium, and large classes; introductory or advanced students; graduate students and undergraduates); collegiality, administrative ability, and general reliability. To think it is generally clear who has the most M, and that the question is only whether to hire *that* person rather than someone else who satisfies other criteria (such as "diversity") quite distinct from merit, is to be confused by a very narrow view of merit. (Our own experience suggests that many academics are confused in this way, not only favoring a highly restricted view of merit but insisting that it alone captures M objectively. These are the people who talk about how "smart" candidates are and how nothing else really matters, and who act as if they can peer into candidates' brains to see them percolating.)

An important conclusion to be drawn from this example is that merit is always a *functional* notion. Many people hold a picture of merit that is wholly individual and personal: the person with the most merit is the *smartest,* or the *fastest,* or possesses some other quality that can be defined without reference to the role these qualities play. But this picture is false. You can't decide what merit is for a university teaching position, for example, without knowing what the purposes to be served by such a position are. And that in turn requires an account of the goals and roles of a university and the services it provides. Needless to say, such questions are controversial.

Once we look at merit in this way, however, it becomes clear that some considerations opponents of affirmative action contrast with merit may be a legitimate part of it. For example, being a member of a certain group should count as a qualification or "plus factor" for a given post when members can serve as role models. The role-model argument is especially relevant to educational institutions, whose mission may include shaping students' values and aspirations. It isn't simply that a black teacher, say, can provide a motivating example to black children. That idea was rejected by Justice Powell, in *Wygant* v. *Jackson Board of Education,* on the grounds that it would provide a rationale for segregation. Rather, the argument is that a black teacher plays an exemplary role not only for black children but for all children, as well as for parents and the larger community. (Likewise for the male elementary school teacher.) Moreover, contrary to the view of some critics, this argument does not rest on stereotyped judgments about the beliefs or attitudes of group members. The example of a female professor affirms possibilities of achievement and recognition, whether or not she holds what are thought to be the right political views.

There is a further argument for sometimes counting group membership as an element of merit. Affirmative action opponents frequently argue that the market will eventually eliminate discrimination. A business that discriminates against women and minorities will be at a competitive disadvantage, it is said, because it will lose capable employees to firms that don't discriminate. Over time, businesses that wish to remain competitive will be compelled to cease discriminating.

We think this argument is naive. But even if market pressures *were* sufficient to eliminate discrimination, the argument leads to conclusions that would dismay opponents of affirmative action. Common sense suggests that very few women want to be the *only* female employee in a business, just as very few minorities want to be the *only* minority employee. Even someone who doesn't mind anomaly and isolation will justifiably suspect that an employer with very few women or minorities in responsible positions has a glass ceiling. Having minority or female employees in responsible positions thus gives firms a competitive edge in the recruitment and retention of women and minorities. But that implies that being a woman or minority is, in and of itself, a valuable asset—a component of merit—for those positions.

All of which is to say that the distinction between merit and group membership, or talent and connections, is far more dubious than proponents of the merit principle suppose.

Merit, Proportionality, and Reward

Even *if* we agree about what merit is, and *even if* we agree about how to find it, merit alone is an inadequate distributive principle, for two reasons. In this section we discuss the first, in the next the second.

Consider that associated with various posts are a range of attractions, including salary, pleasant working conditions, security, fringe benefits, enhanced future opportunities, and social status. Let's bundle all these together and call them *rewards.*

Every post requires a certain amount of M to do the job successfully; let's rank posts on the *P scale* according to how much M they require. Then one version of the merit principle says that the higher you are on the M scale, the higher you deserve to be on the P scale. Let's assume, further, that rewards can also be ranked, on the *R scale*: higher Rs mean higher salary, status, and the like.

Now it certainly isn't true that posts ranking higher on the P scale necessarily rank higher on the *R scale* as well. Classical philology, which requires a working knowledge of at least five languages, is a lot harder than legal scholarship—it's higher on the P scale—but law teachers do much better than philologists on the R scale. Indeed, the *starting* salary for beginning law teachers approximately equals the maximum salary for a full professor of classics.

It probably *is* true, however, that within professions, and to some degree across professions, there is some rough correlation between the P scale and the R scale. The extent of this correlation will depend, in part, on how widely and unevenly dispersed the range of rewards is in a given economy. The U.S., for example, has a more polarized distribution of incomes and wealth than other industrialized countries; the rich are richer and the poor are poorer. (And according to economists Robert Frank and Philip Cook, rewards are becoming increasingly dispersed in our "winner-take-all" society.) Ben & Jerry's used to insist that its highest paid executive would never make more than seven times what its lowest paid worker makes. In large firms, however, the CEO often makes 300 times what the lowest-paid worker makes.

On one construal, the merit principle says that people who rank higher on the M scale should rank higher on the P scale. This reading of the merit principle best corresponds with the notion of careers open to talents. Should people higher on the M scale also rank higher on the R scale? Perhaps. But suppose one person has slightly more M than another. By the merit principle, he or she should end up with a job slightly higher on the P scale. The best anthropology graduate student should get the job in the first-tier department, and the less capable should go to lower-tier departments. In a winner-take-all economy, however, the difference in rewards between two people differing slightly in M can be unjustifiably great. The slightly more talented student lands the increasingly scarce tenure-track job, where, with a moderate teaching load, she or he can do research and get tenure; the only slightly less talented student moves from one temporary job to another and never has the time or security to establish a career.

The process by which small differences in merit lead to large differences in reward can be relatively simple, as in the case just described, or it can be more complex and iterated. To see the latter, recall our notion of a rational search procedure: a procedure used by an employer or a school that provides good information about candidates cheaply by attending to easy-to-detect surrogates for quality. On this model it's rational, for example, for a professional school to rate applicants from first-tier colleges higher than those from lesser schools, even though some applicants from the latter may be better than some from the former.

Unfortunately, the use of such procedures tends over time to magnify the discrepancies between merit and success. Consider a high school senior (let's call him Gold) who barely squeaks into an Ivy League college. Perhaps he is a shade more talented than his closest competitor (let's call *him* Bronze); or maybe his father is an alumnus. Whatever the reason, on graduating he has a much better

chance of being admitted to a top-flight law school. And this credential, in turn, bolsters his chances of obtaining a prestigious internship, and then a federal clerkship, and ultimately a successful legal career. Meanwhile, the less fortunate Bronze finds himself at a disadvantage at each of these thresholds. We see in this tale the cumulative effect of one rational search procedure after another, which amplifies a minute difference in ability into enormous differences in posts and rewards. A reward at each stage becomes a credential for the next.

It is of course possible that the difference in M between Gold and Bronze actually increases over time. Gold may have benefited from a superior education, better fellow students and teachers, and a more intense intellectual environment, so that even if Gold and Bronze began college with virtually indistinguishable M, they are no longer so similar. In that case, however, their story speaks to the enormous advantages conferred by prestigious and high-powered environments that are capable of producing M; and it speaks against the idea that M is some pristine quality immune to alteration. Given the opportunity to inhabit such environments, the less advantaged can also enhance their M, and therefore can deserve their excellent posts even on the most exacting use of the merit principle.

Those who care about merit ought to care about proportionality between merit and reward. Indeed, the most plausible interpretation of the merit principle says that a person should be rewarded *in accordance with* or *in proportion to* merit. But in many contexts in our society, small differences in merit translate into large differences in reward. This is merit run amok, and ought to disturb anyone who genuinely cares about the merit principle.

Putting Merit in Its Place

Disproportionate rewards provide one reason to think that merit has been given too large a role in conferring benefits. The other is that merit isn't the only value or principle that plays or ought to play a part in the distribution of posts.

Plays or ought to play: the phrase may catch us up. Which is it? The defender of meritocracy seems to argue that merit is the only principle that ought to play a part, even though we know that others do in fact. Yet part of the argument for the view that merit ought not to be the only factor in such decisions is that it never has been and that no one really believes that it should be. To believe that merit alone should rule is to say that we should abolish seniority and veterans' preference in employment decisions; it is to say that we should disregard geographic diversity and preference for the children of alumni in college admissions.

Now it may well be that some of these policies ought to be abandoned. Legacy preference—the policy of elite colleges giving preference in admissions to the children of alumni—is a form of affirmative action that favors the already favored. It must serve as an embarrassment to meritocrats, who suggest that but for affirmative action the merit principle would reign, supreme and alone. But few people would deny that some weight should be given in employment or admissions decisions to seniority, veteran status, or geographic diversity. In accepting these practices, we implicitly admit that other values count besides merit.

Almost no one, then, really believes that—to put it as Barbara Bergmann has—*only* the merit principle has value and that it should never be traded off for any

other consideration. The question is rather which other values or principles count, and how much. If geographic diversity is a legitimate value in college admissions, why should racial or ethnic diversity be less legitimate? Given our history, we may well think that accepting more black students will better help a college create a cosmopolitan campus environment than accepting more students from North Dakota. Merit (properly detected and properly defined) ought to count a great deal, but a pure meritocracy is a society that is difficult to imagine, and one that few of us would care to inhabit.

Report from the Institute for Philosophy and Public Policy, volume 17, number 1/2 (winter/spring 1997).

References

Barbara Bergmann, *In Defense of Affirmative Action* (Basic Books, 1996); Robert Frank and Philip Cook, *The Winner-Take-All Society* (Free Press, 1995); Deborah Rhode, *Justice and Gender* (Harvard University Press, 1989) (for sources on studies of unconscious bias).

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The Affirmative Action Debate

Controversy about affirmative action has tormented American politics for over a quarter century, and it continues to arouse intense passions, spawn litigation, and frustrate public dialogue. The *Report* devoted its winter/spring 1997 issue to the affirmative action debate. Presented here are two (of the original six) articles which address some of the salient features of the controversy. In his essay on the subject, Robert K. Fullinwider takes up the argument that "diversity" justifies affirmative action policies in the university. David Wasserman, in his article on diversity and stereotyping, addresses some of the more stringent objections to the pursuit of institutional diversity.

Diversity and Affirmative Action

Robert K. Fullinwider

Item: After the Board of Regents of the University of California System voted to forbid racial preferences in admissions a few years ago, Charles Young, the chancellor of UCLA, remarked that "UCLA would not have achieved its current level of diversity without affirmative action." He observed that more than two-thirds of entering students in 1996 belonged to ethnic minorities, in contrast to 1980, when two-thirds of the freshmen were Caucasian. "We are a much greater university today," he concluded, "in large measure because we are more diverse."

Item: After a federal court in 1996 struck down the policy of the University of Texas law school that reserved a portion of its entering class for blacks and Mexican-Americans, the law school petitioned the Supreme Court for review. It urged the Court to reassert the right of colleges and universities to give racial and ethnic preferences in order to promote diversity on their campuses. The Supreme Court declined to review.

Two Kinds of Diversity

The word "diversity," which echoes in every campus debate about affirmative action nowadays, joins ambiguity to ubiquity. On the one hand, the word has become simply a term of art that means the same thing as "minority and/or gender representation." When Chancellor Young spoke of UCLA's "current level of diversity," what he referred to was the two-thirds ethnic minority representation on his campus. When universities list their diversity policies, set up offices of diversity affairs, and measure their progress in achieving diversity, the word in every case is a synonym for minority /gender representation.

On the other hand, when the University of Texas law school asked the Supreme Court to allow colleges and universities to take race and ethnicity into account in selecting students, it invoked a second sense of diversity as a justifying reason. It appealed to the idea that a university, given the kind of institution it is, needs a diverse faculty and student body. This second sense of diversity refers to the mix of viewpoints, opinions, talents, and experiences that enrich the university and facilitate its mission.

In a widely circulated report in 1996, Neil Rudenstine, president of Harvard University, justified Harvard's commitment to diversity in this second sense by invoking John Stuart Mill, who stressed the value of bringing "human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar." A diverse student body, argued Rudenstine, is as much an "educational resource" as a university's faculty, library, and laboratories. Consequently, Harvard takes great pains to assure that its admissions process results in such a student body.

Elizabeth Anderson, a philosopher at the University of Michigan, makes a complementary argument. It parallels Rudenstine's, but emphasizes epistemic rather than educational considerations. "A knowledge claim gains objectivity and warrant," Anderson insists, "to the degree that it is the product of exposure to the fullest range of criticisms and perspectives....Universities [should] recruit students and faculty to ensure broad representation of people from all walks of life, so that the products of inquiry are open to critical scrutiny and influence from the widest range of viewpoints, and so that the subjects and direction of inquiry are responsive to the widest range of interests." But Anderson goes further than simply commending broad representation. She maintains that :

> [t]he internal knowledge-promoting aims of the university call for measures to promote equality of access by all groups in society to membership in its ranks. This is an argument for affirmative action in university admissions and faculty hiring that recognizes the positive contributions that members of oppressed groups can and do make to enhancing the objectivity of research. Equality of access through affirmative action policies is not, therefore, an external political goal that threatens to compromise the quality of research. It is a means to promote the objectivity of that research.

Here we have an explicit linkage drawn between diversity of viewpoints, opinions, talents, and experiences, on the one hand, and diversity of race and

gender, on the other. The latter diversity, in turn, gets parsed by Anderson as "equality of access," and equality of access gets equated with affirmative action.

Is there such a tight linkage between the two kinds of diversity? Does pursuit of perspective-diversity provide the right sort of reason for pursuit of the racial/gender proportionality that preoccupies affirmative action? For all its facial plausibility, I think the way Anderson links diversity and affirmative action collapses under scrutiny. In order to see why, let's explore a bit further the educational/epistemic value of perspective-diversity. What sorts of considerations augment such diversity on campus and what are we prepared to do about them?

Valuable Perspectives

Consider, first, some of the different perspectives that may or may not be "broadly represented" in the university.

- *Age.* The way we look at the world varies considerably by age, so a broad representation of views should be sensitive to this dimension.
- *Region.* This was one of the first dimensions of "diversification" embraced at Harvard, as Rudenstine notes in his report. Though more so earlier in our history, even now people from different regions of the country possess somewhat different values and perspectives.
- *Political affiliation.* People divide deeply and sharply on matters of politics. Political views play a very important identity-defining role in individual lives. And taken together, political views profoundly affect the direction of collective life.
- *Nation.* This factor was prominent on the list of "diversities" of an earlier Harvard president. Certainly, foreigners bring to our universities customs, experiences, and viewpoints very far removed from our own.
- *Occupation.* Whether we labor with our hands or minds, with tools or concepts, on teams or individually, occupation affects our values and outlooks.
- *Urban v. rural upbringing.* Life in big cities is very different from life on a farm or in a small town remote from large urban areas.
- *Historical experience.* People who have lived through economic collapse, war, natural disaster, mass migration, or political convulsion are marked by their experiences and often possess different values and perspectives than people who have not had such experiences.
- *Religion.* People's religious (and philosophical) views support their attitudes toward politics, education, community, justice, war, family, work, and the like. Furthermore, their religious (and philosophical) views underwrite the very meaning of their lives.
- *Military service.* The experience of being a soldier shapes people's outlooks in both predictable and unpredictable ways.
- *Special aptitudes and skills.* Being a pianist, painter, cook, chess master, competition swimmer, or skydiver counts in your favor from the point of view of diversity, since you exemplify a particular excellence and model a particular vocation that can inform and inspire others.

There are many more items we could add to this list, but let's stop here to make a few crucial observations. First, the items are not strictly ranked in importance. Second, they are desiderata, not imperatives. Third, they admit to trade-offs. Let me explain.

Trade-offs

Take the example of age. As it turns out, two very important age groups are not represented at all in the university—the very young and the very old. There is virtually no one in the campus community under sixteen or over seventy-five. The student body, in particular, is heavily skewed toward the 18-30 range of ages. Now, these failures of representation derive from structural facts about the university: university studies demand a prior preparation unlikely to be possessed by anyone under sixteen; and faculty past seventy have retired and left the university. We are willing to live with these facts. Although two very important age perspectives don't get represented on campus, we don't consider this failure of representation important enough to take special steps to cure it. Indeed, we even exacerbate it with some of our policies, such as encouraging early retirements among faculty and formally or informally kicking them all out the door at seventy. We do this to make room for younger faculty.

This last observation points up the fact that we make trade-offs in realizing the desiderata on the list above—both internal and external trade-offs. With respect to faculty age, for example, we trade off the gains of having faculty in their seventies and early eighties for the gains of having more faculty in their thirties and early forties. Our exclusion of very young people from higher education involves a trade-off as well. After all, we could get 12-year-olds in the university if we wanted, but to compensate for their greater immaturity we would have to change the university in many ways, such as lowering the intellectual level of many courses. We're not willing to do this. Moreover, we may not think that learning and research suffer all that much from the exclusion of 12-year-olds. Or 75-year-olds.

But, then, if research and education don't suffer much from these exclusions, perhaps age-perspective might be sacrificed in many other ways as well without degrading the overall quality of education or research. And if age-perspective can be sacrificed in many ways, perhaps other perspectives can be sacrificed as well.

The "broad representation" of people and views demanded by good education and research may allow a lot of variation as to how the representation is composed and may even allow considerable omissions. This is certainly suggested by the way Rudenstine describes the admissions process at Harvard. What seems crucial is that each entering class be *richly diverse*, not that its diversity always reflect the *same pattern.* Thus, one year there may be more concert pianists and fewer rugby players in the class, the next year more rugby players and fewer pianists. Or perhaps both get shorted some years for more student government leaders or an unusually rich crop of Zen Buddhists. The point is, each of these mixes would be roughly as good as any other.

We find, then, that although a good student body or a good faculty will be diverse along many of the dimensions on the list above, exact mixes will vary. Nor can we expect "proportional representation" of diversities to be a useful standard. With respect to some items on the list, such a standard would be meaningless. (What

would it mean to take in foreign students "proportionately"?) In other cases, we don't expect universities to undertake the efforts that would be required to attain proportional representation. We may regret that there are hardly any farm girls and farm boys among the professoriat at large, but no one proposes taking vigorous measures to alter this fact.

We do expect a university to be more concerned about some of the dimensions on the list than others, especially those—like religion and politics— most closely correlated with vital differences in value and opinion. A university probably will feel more concerned about a faculty overwhelmingly Protestant or Democratic than one overwhelmingly urban. It will regret the absence of certain minority political voices more than the absence of students from the Rocky Mountains. To make sure that particular political views get a hearing on campus, admissions officers might even admit young socialists or anarchists in greater proportion than they occur in the general population.

This suggests that the critical factor in university admissions is not demographic proportionality but, instead, what Rudenstine refers to as "critical mass." There needs to be enough of a group, he says, so that its voice gets some attention on campus, its views get taken account of. In some instances, critical mass may require overrepresentation if the group to be represented is a very small, though intellectually important, fraction of society. In other instances, critical mass will be achieved even if the group is underrepresented in relation to its numbers in the larger society. Even if only twenty five percent of the students on campus are Republicans rather than thirty-five percent, we don't worry very much that the Republican voice won't get an adequate hearing.

Race and Gender

We haven't yet taken up the "diversities" most talked about these days: gender and race. Add them to the list. What should we say about them? Unquestionably, many of our experiences and views are deeply affected by our own race and gender. A university committed to "broadly representing" different views and experiences among its student body would take race and gender into account in its admissions process just in the same way it takes account of region, aptitudes and skills, political affiliation, religious views, and other factors. Or would it? A university concerned to foster the best environment for creating objective knowledge would take account of gender and race in choosing a faculty just in the same way it takes account of other factors. Or would it?

One thing is clear. Universities *don't* treat race and gender the way they treat the other dimensions of diversity we've been talking about. Race and gender are objects of *affirmative action* in the university, and affirmative action imposes an acute concern about *proportionality.* Affirmative action requires the university continually to ask itself, "Are women faculty being hired in proportion to their possession of the Ph.D.?" "Are African-American students being admitted in proportion to their numbers in the applicant pool?" and the like. Further, this concern about proportionality has an *imperative* quality, unlike the university's concerns about the desiderata on our initial diversity list. The university is rightly willing to make trade-offs among those desiderata. It acknowledges a very loose fit between any particular desideratum and good education and research; consequently,

it is willing to forgo some kinds of diversity for others, or for the sake of particular educational missions. The university can decide it would rather have a lot more pianists than rugby players; it can decide to emphasize getting students from foreign countries rather than from different regions in the U.S. And so on. But affirmative action seems incompatible with this sort of approach. Universities can't say: "Well, we have different priorities; we'd rather have a lot of regional diversity than racial diversity," or "We've decided to emphasize political variety over gender proportionality."

Now, this difference in the way universities treat race and gender occurs either because (i) in regard to good education and research, race and gender are different from the other dimensions of diversity; or because (ii) the way universities deal with race and gender under affirmative action is premised upon a different ground altogether than good education and research.

Representation and Objectivity

To see what can be said in support of the first explanation, let's recall the views of Elizabeth Anderson that I set out earlier. Her argument forges a direct link between the university's educational/research purpose and affirmative action. We can reconstruct her argument as follows:

Premise 1: Objective knowledge is a product of the fullest range of perspectives. Broad representation, Anderson tells us, offsets bias. When the community of inquiry is broadly representative, individual biases are less damaging, since then no particular bias will unduly influence the community's acceptance of some theory or finding.

Premise 2: The historic absence from the academy of minorities and women has been particularly damaging to the goal of objective knowledge. Though regional or age bias, for example, may be problems, regional groups and adult age groups have not been excluded from the academy in the way that women and minorities have. Scholarship over many generations has built a huge edifice more or less oblivious to the perspectives women and minorities might bring to the table.

Premise 3: The academy, in furthering the goal of objective knowledge, ought to be especially concerned to include minorities and women. At our historical moment, it is more urgent to offset racial and gender bias than other kinds.

Conclusion: The goal of objective knowledge supports affirmative action in order to guarantee equality of access for minorities and women throughout the university.

Now, clearly, premises 1-3 have considerable force. We cannot look back over the changes in scholarship in the last thirty years without conceding the significant changes wrought by the growth in the number of minority and women scholars. Still, we might wonder how tight the fit is between premises 1-3 and conclusion. Let's look at the places in this argument where dispute might arise.

First, premises 2 and 3, which underwrite the urgency of including minorities and women in the academy, make a "lumpy" situation seem more uniformly smooth than it is. The premises, for example, don't make any distinctions among fields. Yet, some areas of study seem more affected by the inclusion of minorities and women than others. Moreover, the nature of the effects of inclusion varies.

For example, the impact of gender on writing history seems more profound than the impact of gender on doing astronomy. The writing of history has been

transformed in many ways in the last thirty years. Women historians have driven home the fact that although women have always constituted half the human race, ninety-nine percent of written history from time immemorial has recorded the deeds and thoughts of men, not women. Furthermore, "gender" has become an important concept through which to interpret historical events. Thus, even the deeds and thoughts of men can be given new and interesting interpretations when set against the backdrop of "gender." Finally, the new historical research leans less heavily on "official" documentary sources and more on "unofficial" documents as well as material artifacts, bringing not only the past of women more readily into view but that of marginalized classes and groups, as well.

On the other hand, women haven't had the same impact on astronomy or the other hard sciences. Of course, women haven't gone into these sciences in the same numbers they've gone into history. But what reason is there to think that even larger numbers would affect astronomy the way their numbers have affected history? Sandra Harding, in her book *The Science Question in Feminism*, argues that modern science is deeply "anthropocentric" (male-centered), suggesting that the entrance of women throughout science would provide a welcome corrective. But all of Harding's examples of "anthropocentrism" are drawn from the biological and social sciences rather than mathematics, physics, chemistry, or astronomy. Although she rightly says we cannot rule out a priori that mathematics and all the hard sciences are gendered, she can't point to any actual problem, concept, theory, language, or method of mathematics, physics, chemistry, or astronomy as an example of such gendering.

This same observation holds true if we focus instead on racial and ethnic minorities. My point is not that science isn't gendered or racially biased; my point is that, right now, claims about the likely impact of more women and minorities in some fields of knowledge are contentious and far from settled. My point is that objectivity of knowledge as a goal doesn't obviously dictate a decision to get women and minorities uniformly and proportionately in all fields across the board. It may guide us, rather, toward getting more women and minorities—even disproportionately more—in some fields. Or would it?

From Perspectives to Groups

This last question arises out of a second problem about premises 1-3, this time a problem with the move from "perspective" in premise 1 to "group" in premise 2. Let me stick with the example of gender and use Harding again. What Harding wants to pit against modern science is an "oppositional consciousness"—that is, feminism (or certain feminist theories). It is not women per se that will change science, but oppositional theories. The gendered nature of science won't be modified by adding more women scientists who already buy into the standard masculinist assumptions and research programs. Once we take this point to heart, it becomes harder to insist that the objectivity of knowledge demands we get more *women* into certain sciences, because we can't equate *women* and *feminism.*

The same is true regarding race and ethnicity. Although it is very popular these days to talk about "group perspectives," it is also dubious to talk this way. Women don't share a single perspective, even on matters of gender. Blacks don't share a single perspective, even on matters of race. When someone claims to represent a

"group perspective," that perspective is mostly a construction of the one who claims (and of like-minded persons), privileging certain propositions about society, justice, and the group's interests.

Now, this is not an objectionable or regrettable process. On the contrary, if knowledge advances through the pitting of views and outlooks against one another, the creation of oppositional perspectives is a vital activity. Moreover, these oppositional "group" perspectives are never created out of whole cloth. They will obviously reflect (and reciprocally influence) the views of many within the respective groups. But it is the *perspectives* that are crucial, given the goal of objective knowledge. Since there isn't a tight connection between a particular "group perspective" and members of that group, the goal of objective knowledge doesn't speak as unequivocally in favor of proportional representation of group members—the concern of affirmative action— as it does in favor of critical representation of perspectives.

The Primary Motive

Suppose, then, we were persuaded that greater inclusion of women and minorities actually wouldn't make a real difference to astronomy. Would we, then, withdraw our support from affirmative action efforts to get more women and minorities into astronomy, including such efforts as creating special fellowships reserved especially for members of these groups?

No, because our primary motive, in the first place, isn't to get women and minorities into the hard sciences for the sake of these sciences but for the sake of women and minorities (and their opportunities). From an affirmative action perspective, the reason we want to lodge a critical mass of women and minorities in the hard sciences is our belief that, absent a history of exclusion, women and minorities would have flourished in these fields, and we want to change the momentum of past exclusion so that women and minorities seek and find opportunities there in the future.

This primary impulse is plain enough, I believe, if we draw the following parallel. From an affirmative action perspective, we are concerned about proportional representation of women and minorities in various academic disciplines in exactly the same way we are concerned about equality of pay for comparable women and men, or comparable minorities and whites. Concern about equality of pay has nothing to do with the objectivity of knowledge or good learning, and everything to do with antidiscrimination and fairness. So, too, with the concern about representative numbers of women and minorities in various fields of study and in the university as a whole: it has to do with anti-discrimination and fairness. That is why the concern has an *imperative* quality, and why trade-offs are out of place.

The educational/epistemic argument for diversity is not wrongheaded or unpersuasive. It certainly might sometimes justify the university taking race and gender into account in selecting students and faculty (to the extent such taking into account is permitted by law). But it doesn't justify taking race and gender into account in the way affirmative action demands they be taken into account. We can't fully and properly justify the affirmative action concerns of universities by starting from premises that talk only about good education and objective knowledge.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy,* volume 17, number 1/2 (winter/spring 1997).

References

Elizabeth S. Anderson, "The Democratic University: The Role of Justice in the Production of Knowledge," in *The Just Society,* edited by Ellen Frankel Paul et al. (Cambridge University Press, 1995); Sandra Harding, *The Science Question in Feminism* (Cornell University Press, 1986); Neil Rudenstine, "Diversity and Learning," Report to the Board of Overseers (January 1996), http://www.harvard.edu/presidents_office/home.html, excerpted in the *Chronicle of Higher Education* (April 19, 1996).

Diversity and Stereotyping

David Wasserman

There are, as my colleague Robert Fullinwider has pointed out, far more compelling rationales for affirmative action than the diversity of the workplace and classroom. Diversity, however construed, does not require proportionality, often regarded as a hallmark of affirmative action policies, or even the significant representation of any particular minority group. It lacks the moral urgency of arguments for corrective justice or social reconstruction. Moreover, one can reasonably argue that diversity is not as important in some contexts as in others.

Some of its advocates readily concede the limited scope of the diversity rationale. Law professors Akhil Amar and Neal Kumar Katyal, for example, believe that diversity has greater appeal in areas like education, where there is sustained interaction among the members of a community, than in areas like subcontracting, where interaction is limited. For this very reason, they argue, a Supreme Court that has struck down minority set-asides in government contracting may yet decide to uphold affirmative action in university admissions. A modest justification may also prove to be a resilient one.

There are other reasons to endorse the diversity rationale, despite its limitations. Even if diversity does not demand proportionality or confer enforceable rights on marginalized groups, it may increase opportunity and access in settings where even small gains in representation would constitute significant progress. Moreover, it appears to be a less divisive rationale than corrective justice or social reconstruction, especially where it emphasizes the benefits of greater minority participation to the larger society.

Acting on Generalizations

There is, however, another objection to the diversity rationale that would deny it even such a modest role. Critics argue that the very benefits it offers are predicated on objectionable forms of stereotyping.

It is readily apparent that most familiar uses of the diversity rationale involve generalizations from race, gender, or ethnicity. An urban police force wants to hire

more black and Hispanic officers because it thinks that they are likely to have far better rapport with the disaffected and wary youth of those neighborhoods than their white counterparts. A corporation recruits women and minorities for its sales force on the assumption that they will generally be better than their white counterparts at pitching its products to female and minority customers, and that these customers are more likely to give their business to salespeople of their own race or gender. An urban school system wants more black and Hispanic teachers because it thinks they will generally be better than their white counterparts at spotting talent in, and motivating, alienated black and Hispanic students, as well as relating to parents and the broader community.

In each of these examples, the diversity rationale appeals to generalizations about the strength and influence of group loyalties, or about the degree of fellow feeling and understanding between group members. Some of the generalizations concern the response of community members or clients to a diverse force of teachers or police officers or salespeople; others concern the likely attributes of the teachers, police officers, and salespeople themselves.

Such generalizations are not, of course, intended as universals. But even where they are carefully qualified, and exceptions duly noted, critics of the diversity rationale often find them troubling. In particular, they object to the use of race or gender as a proxy for skills, attitudes, and behavioral dispositions.

Certainly one can imagine instances where such use would be unacceptable. Suppose an organization hires more blacks in order to get a more athletic workforce. In that case, the underlying generalization is offensive, associated with a long history of invidious discrimination, and unnecessary, since the employer can test all applicants for the desired skills rather than relying on race as a proxy.

In the more familiar examples above, however, the underlying generalizations are less offensive, as well as less dispensable. Certain attitudes and behavioral dispositions, like rapport with a wary or alienated population, are difficult to test for, and their association with race and ethnicity does not have the invidious character of generalizations about talents. Still, generalizations about attitude and behavior, or so I will argue, can have significant moral and social costs. In contrast, generalizations about experience may be less troubling. I will explore these two kinds of generalizations as they apply to the pursuit of racial diversity in higher education—the venue which, according to Amar and Katyal, is the most hospitable to any diversity rationale.

The Campus Mix

Consider a standard argument for diversity among students and faculty. Advocates claim that it is important for colleges and universities to increase the representation of blacks on the ground that they are likely to have attitudes, experiences, and values desirable to include in the campus mix. Although those attitudes, experiences, and values are neither unique to blacks nor shared by all blacks, blacks are, by virtue of their upbringing and treatment, more likely than other people (specifically white males) to possess them.

Again, there are two grounds for opposing such generalizations. First, critics argue that the generalizations are dubious or unreliable. This complaint has some sting to it, since advocates of diversity are often eager to point out the implausible

or poorly established claims embedded in other people's generalizations. Weighing the value of diversity against other considerations that enter into admissions decisions, Amar and Katyal note that "SAT scores and grades are at best a crude proxy for a student's potential to teach other students." But then, race or gender is also a proxy for that potential. *How* crude a proxy depends, as we will see, on what minority students are expected to teach their classmates.

The critics' second complaint is that racial generalizations are inherently objectionable, and that in endorsing them, proponents of the diversity rationale are guilty of a fatal inconsistency. Abigail Thernstrom makes the complaint in these terms:

> Affirmative action proponents seem to want Americans to indulge in racial stereotyping for some purposes (the drawing of district lines, the classification of applicants into victim and nonvictim groups for purposes of admission to institutions of higher education, etc.), but violently object when they view such stereotyping as a danger in other contexts [such as news coverage reporting the race of crime perpetrators or suspects]....One is tempted to ask, which way do you want it, folks? Is a high degree of race consciousness beneficial or pernicious?

As it is framed, Thernstrom's challenge might seem easy to meet. A high degree of "race consciousness" is pernicious when it hurts the members of stigmatized groups; it is more defensible when it helps them. A negative generalization about the violent or criminal behavior of young black men is objectionable in part because the burdens of its overbreadth fall so clearly on the innocent, law-abiding members of a vulnerable and disadvantaged community. It is true that the overbreadth of positive generalizations—for example, that black college applicants have shown perseverance and resilience in the face of pervasive bias—will confer a competitive disadvantage on nonminority applicants who do not enjoy a similar presumption. But this might reasonably be regarded as a less egregious injustice.

Such a response to Thernstrom, however, overlooks the less obvious burdens that even the most favorable racial generalizations may impose on blacks themselves. Some critics of the diversity rationale contend that generalizations regarding race, however positive, harm their subjects by perpetuating one of the most oppressive features of their stigmatization: to be seen primarily as representatives of a group rather than as individuals.

A Burden of Expectations

Jim Chen, for example, argues that generalizations about the experience or perspective of minority candidates for faculty positions function as ideological straitjackets. "Under affirmative action," Chen writes, "the mind of the minority professor becomes *res universitatis*, something belonging not only to the academic community that she has voluntarily chosen, but also to an external, race-based community to which she or he has been ascribed. Her mind is no longer her own, having been conscripted in large measure for service to both of these communities." Of course, any successful candidate, minority or not, may be measured against the expectations under which she was chosen. But the burden of such expectations is greater for minority candidates, since the contribution they are expected to make to

diversity is understood not with reference to their individual talents or interests, but rather to their membership in a particular group.

Chen may be justified in claiming that the diversity commonly sought by universities pressures those hired under its rubric to adopt minority views, pursue minority research, and engage in minority advocacy. The standard terms used by proponents of diversity, such as "viewpoint" and "perspective," are ambiguous, covering, on the one hand, the experiences one has had and the culture one has absorbed; on the other, the positions and opinions one has adopted or is likely to adopt, and the interests and commitments one has acquired or is likely to acquire. The latter understanding of "viewpoint" or "perspective" diversity, which emphasizes belief and behavior, may well be the one that informs most academic and corporate policies. And it is easy to see why such expectations would be terribly constricting.

It may be, however, that valuable kinds of diversity can be pursued with less offensive generalizations. I want to suggest that generalizations concerning background and experience are less constricting and oppressive than those about behavior or attitude. The case for diversity becomes less problematic when it focuses on what a candidate has experienced rather than on what she or he has done or is likely to do.

Experience and Background

In an academic setting, diversity does not require us to favor minority candidates because they are likely to express acceptably unorthodox views, or to engage in approved forms of activism. Rather, the preference for minority candidates may be based on an expectation that they will bring to the community important types of experience to which most of its members have very little exposure. These types of experience may include the candidate's firsthand encounters with certain social facts, such as poverty or exclusion, and her or his knowledge of a culture which exposed her or him to a broad range of such experiences and gave a variety of ways of understanding and coping with them. A preference for diversity in life experience and culture would favor candidates not only from "Title VII minorities," but also from insular Appalachian and Amish communities, as well as Islamic and formerly communist countries. It would overlap with a preference for geographical diversity to the extent that geography shaped the candidates' upbringing and experience.

The pursuit of this sort of diversity is not premised on the expectations about opinions, interests, and commitments, which Chen finds so objectionable. Far from relying on the "direct equation of] race with belief and behavior" denounced by Justice O'Connor in *Metro Broadcasting*, it may well challenge any such equation. Part of the educational value in such diversity comes precisely from seeing the complexity and indeterminacy of the relationship between experience and culture, on one hand, and beliefs and commitments, on the other.

Of course, the extent to which race or ethnicity is associated with distinctive experiences and culture will depend on how much commonality there is to the life experiences and culture of group members, and this will obviously vary with time and place—Jews in late twentieth-century America, for example, undoubtedly share far fewer significant experiences than did Jews in seventeenth-century Poland. There is certainly room for disagreement about the commonalities in the

experiences of African-Americans, women, and other underrepresented groups. Conservatives and optimists, for example, tend to think that the end of legal segregation and the increase in economic opportunity has created a black middle class that has much more in common with its white counterpart than it does with the poorer blacks left behind in the inner city. Many middle-class blacks, like Ellis Cose in *The Rage of a Privileged Class,* would argue that race continues to be a dominant and pervasive factor in their lives.

People may disagree about not only the extent but also the value of the experiences and culture shared by members of a particular group. Army brats may well share a lot of experience associated with transience and dislocation, but we may not feel that it is critical to include people with such experiences in our academic community. In contrast, we may regard an academic community as impoverished if it does not include people who have experienced certain kinds of exclusion or stigmatization. This kind of diversity may be especially valuable in a community whose members have largely led sheltered, privileged lives, lives that may incline them to moral complacency.

A pair of epistemological assumptions lies behind a preference for diversity of this kind. The first is that the actual experience of exclusion and stigmatization (mediated by the culture of the excluded and stigmatized group) yields knowledge and insight of a kind rarely obtainable by other means. The second assumption is that sustained personal interaction—rather than, say, reading books or watching movies—offers the best chance to convey something of this knowledge and insight, however imperfectly, to others. If the first assumption were false, the community would not need firsthand accounts of exclusion and stigmatization; if the second were false, it could get them from books.

Although the first assumption seems plausible, it is still an empirical generalization with notable exceptions. As philosopher Claudia Mills points out, individuals who are not members of minority groups can sometimes achieve, through their own powers of empathy and imagination, a vicarious understanding of the experience of group members. The second assumption is also plausible, but it may seem a peculiar one for a university to make. University education is premised on the effectiveness of books and other comparatively impersonal, noninteractive forms of communication in giving students insight into things they will never directly experience. While a university can also recognize the educational benefits of sustained personal interaction, its commitment to those benefits may be suspect. It is belied not only by the official tolerance of self-segregated dorms and classes, as Amar and Katyal point out, but also by an increasing and uncritical reliance on less personal (and social) educational media, like the Internet.

Burdens and Opportunities

Whatever criticism we may raise against the generalizations that sponsor the pursuit of experiential diversity, it seems clear that they do not strait-jacket minority candidates as severely as generalizations about beliefs, opinions, and commitments. They do not involve treating individuals as members of groups from which, in Yale law professor David Bromwich's words, "all one's relevant supposed interests and opinions can be projected." Nonetheless, they may still have psychological and moral costs.

In the first place, being valued for one's group-specific experiences can be awkward or demeaning. It is something of an insult to have a host or friend turn to you and ask how you feel about some recent event as a black, a Jew, or a woman. This may be true even if the query assumes not that blacks, Jews, or women have a single view of that event, but merely that your reaction to it will be *influenced* by your being black, Jewish, or female. The second assumption, I would argue, is less offensive than the first. But the distinction between them is hard to maintain, especially if you are the only black, Jew, or woman in a dorm, class, or department. A minority of one is more likely to be treated as a representative or spokesperson for her or his group.

Second, even if minority students are recruited in sufficient numbers to discourage their typecasting, the pursuit of experiential diversity appears to assign them an educational responsibility not shared by other students. While they might ideally see this more as an opportunity than a burden—a chance to make their classmates less insular and complacent—such an educational process can be quite irksome: minority students may feel that they are expected to remedy the ignorance, or gratify the curiosity, of people who ought to know better. In practice, the commitment to diversity may degenerate into an interest in the exotic. Moreover, those minority students who have led lives of inclusion and privilege may resent the expectation, however innocent, that they have unusual tribulations to share.

Finally, there is a danger that educational institutions—buffeted by competing pressures from federal regulators, alumni, and their own faculty and students—will be neither willing nor able to limit their recruitment, admissions, and hiring policies to the experiential generalizations I have tried to defend. Given the difficulties in distinguishing acceptable from unacceptable generalizations, there is reason to fear that the distinctions will be obscured in practice, if they are ever made. And even if conscientious administrators attempt to maintain them, these distinctions may well be ignored or rejected by the people who are affected by university admissions policies, from the minority students and faculty selected under them to the university community at large. If diversity will inevitably be seen as a rationale that supports the recruitment of minority candidates as representatives of, or advocates for, their groups, or as a smoke screen for other controversial agendas, its advertised benefit as a less divisive rationale for affirmative action may prove illusory.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 17, number 1/2 (winter/spring 1997).

References

Akhil Reed Amar and Neal Kumar Katyal, "Bakke's Fate," *UCLA Law Review*, vol. 43 (1996) Abigail Thernstrom, "Voting Rights: Another Affirmative Action Mess," *UCLA Law Review*, vol. 43 (1996); Jim Chen, "Diversity as Damnation," *UCLA Law Review*, vol. 43 (1996); *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990); Ellis Cose, *The Rage of a Privileged Class* (HarperCollins, 1993); Claudia Mills, "Multiculturalism and Cultural Authenticity," *Report from the Institute for Philosophy and Public Policy,* vol. 14, no. 1/2 (Winter/Spring 1994); David Bromwich, *Politics by*

Other Means (Yale University Press, 1992); Patricia Elam Ruff, "Private School, Private Pain," *Washington Post* (February 23, 1997).

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Counting Race and Ethnicity: Revising the U.S. Census

Judith Lichtenberg, Suzanne Bianchi, Robert Wachbroit and David Wasserman

During the late 1990s, the Office of Management and Budget (OMB) considered revisions to its system of racial and ethnic classification. That system was embodied in Statistical Directive 15, issued in 1977, which governed the collection and reporting of racial and ethnic data by federal agencies, including the U.S. Census Bureau. Directive 15 recognized five basic categories in reporting race and ethnicity: American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, black, and white. Among the proposals for change was to add a "multiracial" category; another was to allow respondents to "mark one or more" categories instead of forcing them to choose one. Others participating in the debate argued for maintaining the status quo.

The following essay was based on a memorandum submitted by the authors to OMB in May 1997.

Long before Tiger Woods drew public attention to the problem of characterizing Americans of "mixed race," the federal government had begun to reconsider the classification scheme employed by the Census Bureau and other agencies in collecting and reporting data on race and ethnicity. The existing scheme, created in 1977 under Office of Management and Budget Statistical Directive 15, recognizes five basic categories. The use of additional categories in data collection is not precluded by Directive 15, but the reported results must be "organized in such a way that the additional categories can be aggregated" into those on the basic list. On the census form— surely the most visible instrument for federal data collection on race and ethnicity—respondents must select only one of these basic categories, or else choose the nondescript "Other."

Recently, the Census Bureau has conducted surveys testing alternative schemes, including one that includes a separate "multiracial" category. As this issue goes to press, OMB is preparing to release a report by an Interagency Committee for the Review of the Racial and Ethnic Standards, recommending whether this change or

some alternative should be implemented in time for the 2000 census. After a period of public comment, a final decision will be made this fall.

Much of the impetus for a multiracial category has come from two organizations: PROJECT RACE (Reclassify All Children Equally) and AMEA (Association of MultiEthnic Americans). These groups argue that the current Census form forces those with parents of different races to deny or suppress part of their heritage. For an increasingly large number of Americans, they say, the government's insistence that individuals fit themselves into one of the existing racial categories constitutes an unreasonable or even a repellent demand. On the other side, opponents of a multiracial category argue that the advantages of granting recognition to a small class of people are far outweighed by its administrative and social costs.

Unfortunately, the debate between these two camps has been governed by the assumption that the *only* alternative to the present scheme is a menu of exclusive categories augmented by the multiracial option. But there is a third alternative, which we believe is preferable to either maintaining the status quo or adding a multiracial category: namely a "mark one or more" option that allows respondents to check more than one box, but does not offer a new category for mixed race.

To see why this is the best alternative, it will be helpful first to explore the ethical and policy issues surrounding racial and ethnic classification. We will consider the reasons why data on race and ethnicity are collected in the first place, as well as the grounds for assessing the adequacy or appropriateness of a classification scheme. We will then examine the case for creating a multiracial category, sifting through the arguments on both sides of the public debate. While some objections to the multiracial category seem to us misplaced, we conclude that the creation of such a category would have serious drawbacks. We argue finally that the "mark one or more" option avoids these drawbacks and is thus the superior option.

Purposes and Constraints

Any ethical or policy analysis of Directive 15 must begin with the recognition that there is no such thing as *the* correct classification scheme for race and ethnicity (or for anything else, for that matter). A classification scheme based on skin color is not more or less correct than one based on ancestry; a scheme containing a composite category—e.g., Asian or Pacific Islander—is not more or less correct than one that instead breaks the large category into several smaller ones. Classification schemes are constructed for particular purposes, and so there are at least as many classification schemes as there are purposes for classifying.

It follows that it is impossible to assess a classification scheme without a clear understanding of the purposes for which it is designed and (not always exactly the same thing) the uses to which it is put. Although, in terms of a given purpose, one classification scheme can be better than another, no single scheme can claim to be *the* correct grid that articulates our diversity.

What purposes, then, are served by the collection of data on race and ethnicity? One is statistical or demographic: the government tracks trends and shifts in population growth and distribution, as well as correlations between different racial and ethnic groups and a variety of socioeconomic, health, and educational indicators, to meet the needs of statistical agencies such as the National Center for

Health Statistics. A second purpose is legal and political: it is to meet the needs of federal agencies responsible for civil rights monitoring and enforcement. These two purposes are to some extent related; federal agencies are interested in correlations between race and various indicators of wealth or well-being because they want to track the persistence and effects of racism and discrimination. But since differences between racial or ethnic groups in characteristics such as disease incidence may arise from sources other than racism and discrimination, the two purposes are least partially independent.

We shall argue that a change in Directive 15 need not impede agencies in carrying out the statistical and civil rights purposes of collecting data on race and ethnicity. At the same time, it is important to realize that the *significance* of a racial classification scheme extends beyond these purposes. Two considerations lead us to this view. First, the Census is mandatory: all Americans are required to respond to it. Second, there is an obvious sense in which the Census conveys the official view of race and ethnicity—granting recognition to certain categories but not others, establishing a framework for thinking about diversity and social policy. For these reasons, its classification scheme becomes a prominent social fact in its own right. As such, it has *expressive* or *symbolic* significance beyond its explicit purposes.

It is in terms of this expressive and symbolic significance that we can best understand the demand for changes in the present classification scheme by Americans who regard themselves as of mixed racial or ethnic heritages. While we recognize that self-expression is not a purpose of the Census, it is essential that the classification scheme in use not force people to violate their own sense of their racial identity or that of their children. Given the expressive and symbolic role of the Census, members of PROJECT RACE and AMEA are right to insist that official survey forms not compel them to misrepresent their racial self identification. That an increasing number of people in our society genuinely, and reasonably, feel tied to more than one racial group is a powerful reason for rejecting any framework requiring exclusive identification.

Some have sought to trivialize the failure of Directive 15 to accommodate people who regard themselves as belonging to more than one category by arguing that the number who so regard themselves is insignificant—less than the margin of error in the Census count. But although the number may be *statistically* insignificant, it is not *socially* insignificant. The present classification scheme reinforces a view of racial identity as exclusive and rigid—a view that has serious political and cultural consequences beyond the Census itself.

Enforcement Issues

Defenders of the status quo have argued that the suggested changes to Directive 15 would subvert the purposes of the racial classification scheme and have troubling symbolic implications. One major concern among civil rights advocates and enforcement agencies is that the inclusion of a multiracial category would hamper the government's antidiscrimination efforts. They fear that significantly fewer people would classify themselves as "black," thereby creating a distorted picture of the magnitude of racial discrimination.

The expectation of a large shift may be exaggerated, however. Results of test surveys suggest that only a minute percentage of people who now classify themselves as black would shift to the multiracial category. (The effect of including the category is greater on people of other racial mixes, but that is not a primary concern of the civil rights community.) While the shift in self-identification among African-Americans could be greater in future censuses as people became accustomed to the new category, it would probably have only a very slight impact on the racial data available for civil rights enforcement in the next decade.

Beyond this, we suspect that concerns about lost information rest on a misunderstanding of the multiracial category—one that has not been addressed by its proponents. The public debate would lead one to think that the multiracial category was "opaque"—that it provided *no* information about constituent races. But in fact, the multiracial category being tested asks respondents to list their constituent races. Even if many people who now classify themselves as black switched to multiracial, almost all who did so would list "black" as part of their racial mix. Thus, there would be no lack of information about their racial composition. (The same would be true, obviously, for the "mark one or more" approach, which by definition would allow respondents an opportunity to provide information about all the races with which they identify.)

These facts alone, however, are not enough to assuage civil rights concerns. Even if detailed information about race continues to be *collected*, this will hardly matter for enforcement purposes if this information is not *reported* or *presented* in ways that serve those purposes. Unfortunately, proponents of change have had little to say about this critical issue.

Here is one possibility. Suppose that a classification scheme allowed people to list all the racial categories to which they felt they belonged—whether under a multiracial category or by marking one or more. At the data presentation stage, instead of reporting "the number of blacks with household incomes over $60,000," the Census might report "the number of people with household incomes over $60,000 who listed 'black' as *one* of their constituent races," as well as "the number of people with household incomes over $60,000 who listed *only* 'black' as their race." It has been argued that civil rights enforcement requires exclusive, single-race data presentation—that we must be able to assign people who check multiple races to one of the existing categories. But which one? And what about purposes other than civil rights enforcement?

Clearly, the collected data would have to be transformed in some way. Such a transformation would involve "assignment rules," so that individuals who checked more than one race would, *for certain purposes*, be assigned to a single race for data presentation. Thus, for example, a person who listed "black" and "white" as constituent races could be considered "black" for civil rights purposes, but would not need to be reported as black for other purposes, such as health statistics.

Proponents of change might well object to this strategy. They could argue that the government was taking back with one hand what it gave with the other—offering the multiracial category or "mark one or more" as a sop to critics of the present scheme, while continuing to relegate multiracial Americans to the Directive 15 categories. The civil rights community might object just as strongly. For if a strategy classifies people as black for civil rights purposes *either* if they classify themselves as exclusively black *or* if they list black as a constituent race, that

strategy might appear to rely upon a version of the notorious "one-drop-of blood" rule, which says that a person with even a single black ancestor is to be classified as black.

These objections, however, can be answered. If, in monitoring civil rights enforcement, a federal agency counted as black those who listed themselves as both "black" *and* "white" or as "multiracial: black/white," it would not be deciding that their self-identification was mistaken—that they *really* belonged to a racial category other than the one they had chosen. It would merely be recognizing that anyone with black ancestry *is at risk of* discrimination because of broad social acceptance of the one-drop-of-blood rule. The pool of at-risk voters or job-seekers should not be regarded as comprised exclusively of blacks, but of people *with black ancestry.* There is no inconsistency in counting a person as a member of this pool while deferring to self-identification as multiracial, or as white *and* black.

Of course, assignment rules would not be devised only for those who listed "black" as a constituent race. In looking at employment or housing discrimination against Asian-Americans, for example, one would consider all those who listed Asian as one of their races, since "Eurasians" are likely to be subject to the same prejudices and resentments as "pure" Asians.

We believe that it is a virtue, not a flaw, of a proposal for racial classification that it recognizes the legitimacy of grouping people differently for different purposes. For example, a person with one black and one white parent could be counted among the growing number of multiracial Americans for purposes of tracking intermarriage among traditionally segregated groups, but also regarded as being at risk of antiblack discrimination in a society where racial bias still follows the one-drop-of-blood rule. To object to such multiple groupings is to embrace a spurious objectivity about race, which allows classification in only one racial group for any purpose whatsoever. If we become accustomed to employing different groupings for different purposes, we may learn to see racial identity as more fluid, indeterminate, and superficial, with the ultimate effect of reducing race consciousness. In our judgment, that would be a good thing.

Social Impact and Symbolism

Opponents of the multiracial category have raised other objections, however, that are more difficult to dismiss. While some of these objections are overstated, they suggest that inclusion of a multiracial category may have a disturbing symbolism and a divisive social impact. The "mark one or more" option, we shall argue, avoids or significantly mitigates these problems.

First, some civil rights leaders argue that the multiracial category would undermine the solidarity of a victimized community. They fear that it would encourage African-Americans with mixed ancestry and/or lighter skin to deny their commonality with other black Americans in the hope of acquiring a more privileged status. As we have seen, test surveys suggest that in the short term, inclusion of the multiracial category would not result in widespread defection by people who formerly classified themselves as black. Over time, however, the shift in self-identification could grow more significant.

Critics also fear that the mere inclusion of the multiracial category would symbolically denigrate "unmixed" and darker-skinned blacks. In their view, the multiracial category would be perceived as an insertion into a racial hierarchy in which "black" is negatively valued, and "white" positively valued. Instead of challenging these implicit valuations, it would help sustain them by offering an apparent refinement of the classification scheme—bolstering its spurious claims to objectivity by making it seem more accurate, like the elaborate "scientific" schemes of overtly racist countries.

One might think that the eclectic composition of the multiracial category—encompassing many different racial and ethnic combinations—would prevent it from contributing to an official or implied hierarchy of racial types. But the history of the "colored" category in apartheid-era South Africa suggests otherwise. A category that includes a variety of combinations might still be viewed as holding an intermediate value between black and white.

Proponents of the multiracial category naturally take a different view of its symbolic import. For them, a central tenet of American racism has been the one-drop-of-blood rule, which conceives of blackness as much in terms of taint as in terms of hierarchy. It is this racial outlook that helps account for the historic American obsession with miscegenation. And it is *this* outlook, some proponents say, that the multiracial category would symbolically repudiate, since it would defy the principle that any trace of black ancestry defines a person as black.

This disagreement about the symbolic effect of the multiracial category is difficult to adjudicate, since the two sides are emphasizing different aspects of American racism. We believe that an official scheme of racial classification should strive to repudiate *both* the one-drop-of-blood rule and the appearance of a racial hierarchy. In our judgment, the "mark one or more" option succeeds best at meeting this challenge.

The Case for "Mark One or More"

Like the addition of the multiracial category, the "mark one or more" approach would free respondents who regarded themselves as racially mixed from having to choose between their affiliations (or their parents). However, it would *not* offer up a new category that might be construed as intermediate between black and white. It would allow lighter-skinned blacks, or people with one black parent, to opt out of an exclusive identification as black if they wished, but it would not give official status to a new, competing affiliation.

In the public debate, that status is in fact what proponents of the multiracial category have called for: they insist that being multiracial is itself a distinctive identity. "People with a combination of racial and/or ethnic origins *are* multiracial/multiethnic people," leaders of PROJECT RACE and AMEA have written. These groups affirm "the individual's right to be called multiracial/multiethnic." And they specifically reject the "mark one or more" option by insisting that any listing of constituent races on the Census form appear "under the 'multiracial' umbrella." Otherwise, they say, the "multiracial population" will be "undercounted, miscounted, or rendered invisible."

We agree that mixed-race people should be free to identify with every part of their racial heritage. But the insistence on a separate multiracial identity goes too far. A multiracial category would lump together people with very disparate identities. One cannot assume that a multiracial black/white has a great deal in common with a multiracial Asian/American Indian. Even their experiences of dual identity, divided loyalty, and cultural diversity may be significantly different. Admittedly, this could change over time: multiracial people might develop more commonalities, more of a distinctive identity, as their ranks swell. And the introduction of a multiracial category could even help *engender* such an identity. But at present, a multiracial category would misleadingly give a single name to an extremely diverse group of people.

Consider those respondents who see themselves as "black *and* white" or "black *and* white, but socially black"—the locutions used by many people with parents of different races. For them, there would be some distortion in choosing the multiracial option from a list of exclusive categories. These people regard themselves as having dual racial identity, not as belonging to a mixed or hybrid group that includes many other racial mixes. Again, the test survey results suggest that few people currently identify as "multiracial" to the extent of checking that category on an exclusive list. This suggests that while the "mark one or more" option would be slightly less appropriate than the multiracial option for a small number of people—those who now identify themselves as multiracial—it would better fit the large number—those who identify with more than one race without identifying themselves as multiracial.

Equally important, by not reifying a multiracial identity, the "mark one or more" option would avoid some of the symbolic and social effects of that dubious refinement in racial categorization. Like the multiracial category, the "mark one or more" option appears to repudiate the one-drop rule. But it does so, we believe, without any suggestion of a more refined racial hierarchy. It can be seen, instead, as decomposing racial identity, by implying the legitimacy of composite descriptions.

Some opponents of any change to Directive 15 worry that a "mark one or more" option, and the plurality of counts of different racial groups that could result, might confuse and anger the public even more than the current system's failure to recognize multiple racial identities. They argue that the American people need and want the federal government to provide one number, one set of racial "facts."

Clearly, public education would have to accompany the change we are proposing. But it is an untested assumption that the public (or the courts or whoever the relevant audience is deemed to be) could not comprehend the complexities of multiple counts for multiple purposes. Social reality is complex. Racial identity is complex. Each generation of Americans is better educated than the one before it, and it is not unreasonable to think that the average American's ability to understand nuance and complexity might also be rising. And if it isn't, then perhaps it is time to improve comprehension of the complexity of racial identity and classification—its meaning, its purposes, and its implications.

In addition to supporting the "mark one or more" option for the purpose of data collection, we believe that federal agencies should have the latitude to tabulate racial data in a way that seems most appropriate to their purposes in gathering that data in the first place. Federal programs would benefit if their racial classifications were more closely tailored to the purposes they were intended to serve, and if agencies had to make explicit the assumptions they used in adopting particular

assignment rules. In classifying people differently for different purposes, agencies would be disabusing the American public of the recalcitrant notion that there is an overarching "fact of the matter" about racial identity across the many purposes for which racial data are collected.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 17, number 3 (summer 1997).

Postscript: The Office of Management and Budget ultimately adopted, and the 2000 Census incorporated, the "mark one or more" option.

References

"Standards for the Classification of Federal Data on Race and Ethnicity," *Federal Register*, vol. 59, no. 123 (59FR 29831-35), June 9, 1994; "Standards for the Classification of Federal Data on Race and Ethnicity," *Federal Register*, vol. 60, no. 166 (60FR 44674-93), August 28, 1995; *Spotlight on Heterogeneity: The Federal Standards for Racial and Ethnic Classification, National Research Council, Committee on National Statistics* (National Academy Press, 1996); joint letters to the Office of Management and Budget from PROJECT RACE and AMEA (September 29, 1995, and January 6, 1995); "Coalition Statement on Proposed Modification of OMB Directive No. 15," submitted by Lawyers' Committee for Civil Rights Under Law, National Association for the Advancement of Colored People, National Urban League, and Joint Center for Political and Economic Studies (Nov. 18, 1994); U.S. Bureau of the Census, "Results of the 1996 Race and Ethnic Targeted Test," Population Division Working Paper No. 18 (May 1997).

14

Convention and Competence: Disability Rights in Sports and Education

Anita Silvers and David Wasserman

In early 1998, federal district courts issued decisions in two highly publicized cases alleging discrimination on the basis of disability. In one, the Professional Golfers Association (PGA) was ordered to allow Casey Martin, a talented contender with a serious leg impairment, to use a golf cart in its championship tournaments, in contravention of its existing rules. In the other, Boston University (BU) was permitted to maintain its foreign language requirement without exceptions for learning-disabled students after a court-mandated faculty committee determined that the requirement was "fundamental to the nature of a liberal arts degree" at that university.

Both cases were brought under Title III of the Americans with Disabilities Act (ADA), which prohibits discrimination in "public accommodations," a term which covers a wide range of facilities, institutions, and organized activities. Both addressed the same issue under Title III: Was the proposed exception a "reasonable modification," or would it "fundamentally alter the nature" of the good, service, or activity in question?

The drafters of the ADA expected the meaning of "reasonable modification" to be fleshed out in the courts, and the two rulings were made in the context of the distinct bodies of case law governing organized sports and higher education. Still, the cases *look* similar, at least from the distance of a newspaper report, and so it may seem puzzling that they were resolved differently. Why should the PGA not be allowed to decide that walking is fundamental to tournament play, if BU is allowed to decide that a foreign language requirement is fundamental to its liberal arts program?

Several explanations suggest themselves. The courts may be more deferential to the judgment of faculty committees, given the greater prestige of academics and the

long tradition of university self-government, than to professional athletic associations. The nature of Casey Martin's disability was clear and undisputed, while the diagnosis of "learning disability" on which the BU students' ADA claim rested remains deeply controversial. Finally, the opportunities available to the plaintiffs in the two cases were strikingly different. While there is only one PGA tour (the most prestigious of the four tours offered by the PGA, and arguably the most prestigious in golf), there are lots of places to obtain a liberal arts degree—some more prestigious than BU, and many not requiring two years of a foreign language. For these reasons, the courts may have been more inclined to require inclusiveness and accommodation on the part of the PGA, while holding BU to a less demanding standard.

Ultimately, however, we cannot explain the appearance of inconsistency, or assess the merits of these decisions, without some understanding of how the ADA defines discrimination and what it requires for its redress.

What the ADA Demands

In enacting the ADA, Congress found that people with disabilities had been systematically denied "the opportunity to compete on an equal basis" by pervasive discrimination, involving not only "outright intentional exclusion" but also "architectural, transportation, and communication barriers," "exclusionary qualification standards and criteria," and the "failure to make modifications to existing facilities and practices." The ADA thus treats discrimination against people with disabilities as, in part, a sin of commission— the imposition of exclusionary practices and standards—and, in part, a sin of omission—the failure to remove barriers and to make reasonable modifications. This understanding of discrimination reflects a recognition that our society has deliberately or negligently excluded its disabled members from a wide range of activities by structuring those activities in a way that makes them needlessly inaccessible.

Eliminating such structural discrimination often requires significant changes in the physical and social environment. The most visible accommodations required by the ADA are the design features that ensure access for people in wheelchairs or people who are blind: curb-cuts, ramps, accessible entrances and bathrooms, braille signs, and computers that read their own screens aloud. But the ADA also requires less tangible accommodation, in the "design" of jobs, tasks, and activities. As one recent law review article observes, "By contrast to earlier prohibitions against discrimination, the ADA incorporates a more explicit understanding of the contingency of existing job configurations: that they need not be structured the way that they are. Rather than taking job descriptions as a given, reasonable accommodation doctrine asks how the job might be modified to enable more individuals to perform it."

The demand for restructuring may make the ADA look more "affirmative" than other civil rights laws; the measures required to accommodate people with disabilities appear more extensive, and less directly linked to the redress of prior intentional discrimination, than those required to protect the rights of women and minorities. But in fact, the changes mandated by the ADA are more circumscribed than those mandated by other civil rights legislation. For example, the ADA

requires job restructuring only for those disabled individuals "otherwise qualified" to perform the job's "essential functions." Moreover, it requires modifications only if they are "reasonable," if they do not impose an "undue burden," and, to bring us back to the present cases, if they do not "fundamentally alter the nature" of the activity, good, or service being offered.

These exceptions make the anti-discrimination mandate of the ADA a good deal more conservative than it initially appears, but they still demand a bracing exercise in institutional self-examination. They require employers, public and private service providers, and, ultimately, the courts to decide what constitutes the essential functions of a job or the fundamental nature of an activity, good, or service. Because the functions of a job, the requirements for a degree, the rules of a game or social practice depend to a large extent on convention, habit, and the practical imperatives of bygone eras, it will often be difficult to say whether they are essential, or why. And because the ADA places the burden of proof on those who seek to maintain exclusionary practices, the difficulty of establishing that such practices are essential will often work to the benefit of those demanding accommodation.

Demonstrating Competence

If the implementation of the ADA has been complicated by uncertainty about the essential nature of various activities, goods, or services, it has also been complicated by uncertainty over what constitutes competence or qualification in those persons who are excluded from them. Formally, the second concern might not appear independent of the first: the competence or qualification of a person with a disability would seem to depend on the essential requirements of the job or the fundamental nature of the activity. But competence is not always assessed with reference to the requirements of a particular task or job. We will sometimes be more certain about a person's talent for achieving the outcomes associated with an activity than about the activity's fundamental nature; even those who claimed that walking was fundamental to the PGA tour conceded that Casey Martin had already shown himself to be a formidable golfer. It may also be that our understanding of an activity's fundamental nature will be decisively *shaped* by our convictions about an individual's achievement. If we are more certain of the consummate skill that Casey Martin displays in playing golf than we are about the specific skills which golf requires, we may deny that the highest level professional golf could possibly require any skill that Martin lacks. Along with his defenders, we may conclude that the PGA tour is essentially a shot-making competition.

There is a second reason why the assessment of competence is so uncertain: competence is more likely to have been attained and exhibited in some domains than in others. This may be the most striking contrast between the PGA and BU cases. Golfers who seek to compete in the PGA tour will have had abundant opportunity to demonstrate their talent in other tournaments, while students at a liberal arts college most likely have promise rather than actual accomplishments to show. Admittedly, some college students can boast a Westinghouse Science Prize or a poem published in the *New Yorker.* But they are the exception. A liberal arts education offers few venues for precocious achievement, and talent in its specific

domains may simply take longer to cultivate and display. The PGA case thus appears closer than the BU case to the ADA's paradigm injustice of a talented person with a disability denied an opportunity to "participate in, and contribute to, society."

In saying this, we do not mean to suggest that the ADA requires plaintiffs to display competence as clearly as Casey Martin did. Indeed, most people who claim discrimination based on disability will probably fall somewhere between Martin and the BU students, with achievements more concrete than the students' but less compelling than Martin's. Our suggestion is simply that in close or disputed cases —particularly cases where the fundamental nature of the activity is at all uncertain —plaintiffs are more likely to prevail if they can clearly display competence or qualification in the activities from which they have been excluded.

The "Fundamental Nature" Test

However unfair Casey Martin's exclusion from the PGA tour might have appeared, it might not have been illegal if walking were indeed fundamental to the highest level professional play. On this point, there was conflicting and ambiguous evidence. The PGA rules clearly stated that contestants were to walk the course, and some players regarded that as a formidable challenge in hot, humid weather and difficult terrain. But walking was not (otherwise) part of the competition: players did not get lower scores for faster walking, and no minimum pace or time was specified. Moreover, many players felt that walking was actually advantageous, giving them a feel for the course they would lack if they rode in a cart. Finally, the fact that other tournaments permit carts did not settle the issue of how to regard the walking requirement in the PGA tour. That requirement may be seen as gratuitous, since walking is deemed essential in no other tournament, or, no less plausibly, as a defining requirement of the PGA tour, distinguishing it from other tournaments.

Behind this specific clash of interpretations lies the more general question of how the courts could ascertain the fundamental nature of a conventional activity like PGA tour golfing. This question invites comparison with the inquiry mandated under Title I of the ADA as to whether a given requirement is an "essential function" of a job. Title I prohibits employers from refusing to hire or retain "otherwise qualified" individuals on the basis of their disabilities; an individual is otherwise qualified if she or he can perform the "essential functions" of the job with reasonable accommodation. If the person with a disability cannot perform an essential function even with accommodation (such as the provision of assistive technology), the individual is not qualified.

Alhough many of the functions that people with disabilities cannot perform are clearly incidental to the jobs they seek to do—such as walking up a flight of stairs to work as a computer programmer—there is often disagreement about whether a particular function is incidental or essential. For instance, is the ability to quickly analyze a fact pattern and apply complex rules essential to lawyering, or is speed incidental, and extra time on bar examinations therefore a reasonable accommodation for applicants with learning disabilities? Such questions—which were rarely asked before civil rights laws forced employers to address them—will at times be difficult to answer. But generally they can be resolved by examining a

company's past practice, its productive and financial goals and constraints, and the practice of similar organizations: Does the employer really need this employee to perform this function in order to maintain its productivity or market share, comply with OSHA or EPA standards, or increase its dividends?

The inquiry may be less straightforward when a person with a disability seeks access to an activity, good, or service rather than a job. Formally, the language of Title I (regarding employment) and Title III (regarding public accommodations) is quite similar. Where the former requires "reasonable accommodation," the latter requires "reasonable modification;" both make an exception for undue burdens. And much as an employer is not required to accommodate a person with a disability who cannot perform the essential functions of the job, an organization is not required to modify the activity, good, or service it offers if that change would "fundamentally alter [its] nature." If walking indisputably had as incidental a role in golfing as it has in computer programming, the Casey Martin case would be an easy one under either section of the ADA.

The demand for reasonable modification suggests that the ADA recognizes the same contingency in the "existing configurations" of activities like sports and education as it does in employment. But the contingency in such activities is different from that found in jobs. Sports are conventional in a way that jobs are not (or are not generally thought to be). Their features are not dictated by the external objective of making a product or a profit, but are shaped by the tacit consensus and informal practice of the participants themselves. Education falls somewhere in the middle: closer to employment if we see it in more instrumental terms as job training; closer to sports if we see it as a constituent of a good, cultured, or civilized life, e.g., "Part of being an informed and cultured member of our society is having learned (or at least having been exposed to) a foreign language or the Classics of Western Civilization."

The more conventional character of sports, and arguably of education, may appear to make them more flexible, more amenable to modification, than the production- or profit-driven operations of a business. But their conventional nature is double-edged. The rules and practices that define a sport or a liberal arts education may be in some sense arbitrary, but they may also acquire a noninstrumental value that few job descriptions possess. The ADA's exemption for modifications that fundamentally alter the nature of an activity, good, or service can be seen as protecting, perhaps too categorically, the attachments and expectations that develop around conventional activities.

In the BU case, the court deferred to the considered judgment of a faculty committee that the foreign language requirement was essential to a liberal arts education at Boston University. There was ample precedent for this deference in other cases addressing the fundamental nature of an academic or professional program, based in part on the tradition of academic autonomy. (Indeed, that deference might have been greater if the BU president had not provoked the controversy with a wholesale attack on his school's program for students with learning disabilities and on the very idea of accommodating such disabilities.) Such deference may look elitist if we see the nature of a liberal arts degree as no less conventional than a golf tournament—Why should academics be allowed to judge which of their conventions are fundamental while sports organizers must yield to the court's judgment? It will look a little less elitist if we see the requirements for a

liberal arts degree as instrumental—developing the skills needed to succeed in civic or commercial life outside the academy (or within it, as professors). But the university might be reluctant to justify its foreign language requirement in instrumental terms. If the question is whether students perform better at various life pursuits with the minimal proficiency that two years of a foreign language confer, the BU faculty has no more expertise than other educators in providing an answer. Rather, the university may see the foreign language requirement as an essential constituent of a liberal education *as BU defines it.* In that case, its authority to impose the requirement is a matter of prerogative, not expertise.

Protected Values

We would like to conclude with some reflections on the values that may be protected by the "fundamental nature" exception of Title III. If the law were simply concerned with equitably distributing the costs of reasonable accommodation and modification among people with disabilities, employers, public accommodations, and the larger society, it is not clear why it would need such an exception in addition to that for "undue burden," as well as the overall requirement of reasonableness. If a public accommodation can modify its activity, service, or good without undue burden, what does it matter that the modification alters its fundamental nature?

This impatience with convention is found in some feminist writing on sports, which challenges the need for rules that limit the participation and success of women. Thus, Janice Moulton maintains:

> As it is now, athletes are used to adjusting their play to rule changes, and systems of scoring now exist to allow players at different levels to compete together. Informal games of many kinds are played with whoever shows up, and every school athlete has played in such games. The rules are freely revised to take into account the number of players, the playing field ... the level of skill, and anything else that is considered important. People who object to making changes in the standard rules may not realize how very often such rules are altered in practice.

As anyone who has followed the protracted controversies about rule changes in many sports will appreciate, however, players and spectators are often fiercely attached to the status quo, and regard even minor changes as threats to the integrity of the sport. Changes far subtler than those needed for the inclusion of people with various disabilities might well alter the style of play and the character of the game. The point is not that such changes would make the sport intrinsically better or worse, or would impose any tangible burden on the players, spectators, or organizers, but that they would alter familiar and cherished conventions. Moulton recognizes how sports talk pervades our social lives and civilization, but fails to recognize how much of that talk concerns the very details she would so readily alter in the interest of greater inclusiveness. It is not the improvised pick-up games that are debated in the barbershops and the tabloids; it is organized sports with highly specific rules and other conventions, a knowledge and acceptance of which is presupposed in the spirited discourse Moulton observes. This hardly renders those

conventions sacrosanct, but it does suggest that changes can be wrenching and disruptive.

Moreover, one does not have to be a fetishist about existing conventions to worry about the broad post-war trend, in work, school, and sports, toward specialization. American sports used to place a premium on endurance and versatility, just as American universities once imposed a comprehensive liberal arts curriculum. A football career required a full sixty minutes on the gridiron, on defense and offense; a B.A. once required not only proficiency in Latin and Greek, and a familiarity with the classics of Western civilization, but also an ability to swim several laps in an Olympic-size pool. The specialization that has overtaken many domains may be a welcome trend for those with finely honed but narrow talents and capabilities. But in these domains, many well-intentioned people fight to preserve an emphasis on versatility or well-roundedness, lest the participants become technicians instead of scholars or athletes. And even those not disposed to rearguard actions may feel some sense of loss when excellence in golf is confined to making shots or when pitchers no longer have to come to the plate to face their opposite numbers on the mound, leaving that task to designated hitters. Whether or not we believe that the law should attempt to take cognizance of such costs, it must recognize the danger of deforming a practice so extensively that it is no longer one in which previously excluded or included people wish to participate. At that point, the attempt to reshape the practice becomes self-defeating.

If the ADA does give weight to convention in exempting public accommodations from changes that would fundamentally alter the nature of their activities, goods, and services, this is consistent with the generally conservative and incremental character of that statute. The ADA is committed to opening up existing employment, facilities, activities, goods, and services to people with disabilities, but it was not designed to equalize opportunities in more radical ways. While the interests of people with specific disabilities might be well served by the creation of new sports emphasizing skills in which they were likely to have developed compensatory superiority—the rough analogue of a proposal made by Jane English for reducing sex inequality in sports—or of more universities like Gallaudet, the ADA requires nothing of the sort. Rather, it calls for the maximum feasible integration, and leaves it to the courts to decide whether what is of distinctive value in an enterprise can be preserved by changes that permit people with a given disability to participate, and even to compete and win. Will the singular virtues of the highest level professional golf be compromised if players use carts to go from hole to hole? Would a BU liberal arts degree lose its special character if it were conferred without two years of a foreign language? Such questions will often be difficult ones, both for disabled individuals who seek inclusion and for institutions pressed to change. Nevertheless, they provoke a valuable exercise in institutional appraisal.

Afterword

Making Exceptions

One issue close to the surface but rarely discussed in cases like these is why we should have to choose between excluding people with disabilities from an activity,

or altering its rules and conventions for everyone so that people with disabilities can be included. Why not simply make an exception to those rules or conventions for participants with disabilities? What does it matter if a few people are allowed to depart from the conventions that govern a sport or an academic program?

The most obvious concern is that exceptions would give some participants an unfair advantage, thereby imposing an undue burden on the others. Suppose that Casey Martin won a game on the PGA tour by one stroke, pulling ahead on the final hole to beat a player exhausted by walking a long course on a hot, humid day. Or suppose that the two top seniors at BU had otherwise equal GPAs, but that one was a learning disabled student who had gotten As in foreign culture but would probably have gotten Cs or Ds in a foreign language, the other a non-LD student who had gotten Bs in a foreign language but would probably have gotten As in foreign culture. Would it be fair to award Casey Martin the trophy, and to make the learning-disabled student valedictorian?

A second concern is that exceptions would alter the fundamental nature of an activity. Clearly, this could happen if an "exception" were available to all—and if there were some advantage to nondisabled participants in the alternative way of engaging in the activity. But it could also happen even if the exception were limited to disabled participants, since our notion of what constitutes achievement in that activity would be affected by their success. BU, for instance, would be hard pressed to claim that two years of a foreign language were integral to its conception of a liberal arts education if several of its recent valedictorians were learning-disabled students who lacked that coursework.

Operating in a legal framework somewhat different from the ADA, an Ontario court faced both of these concerns when it was asked to decide whether the province's Youth Bowling Council could exclude Tammy McLeod, a girl with cerebral palsy, from tournament play. Tammy aimed and released the ball down a ramp rather than holding it in her hand. The judge concluded that the girl was "not able, because of handicap, to perform the essential act of bowling—manual control and release of the ball." Under the ADA, such a finding would have settled the matter: by analogy with Title I, the employment section, the bowling council would not be required to include Tammy if she was unable, even with accommodation, to perform the essential functions of the sport. But under the Ontario Human Rights Code, as the judge interpreted it, the bowling council *was* required to include her. A person with a disability is entitled to accommodation whether or not she can perform the essential functions of an activity, so long as the accommodation does not impose a hardship on the organizers or on other participants. In this case, the judge ruled that there was no hardship: Tammy's device gave her "no competitive advantage over others" (since it did not allow her to impart speed or spin to the ball), and her use of it did not require other bowlers to alter their manner of play in the slightest.

The judge went on to say, however, that if use of the ramp *had* given Tammy a competitive advantage, or if she were to adopt a more sophisticated device, the bowling council might well be allowed to exclude her. In effect, he ruled that Tammy could participate as long as she was not competitive. He gave her permission only to engage in a loosely parallel activity alongside real bowlers, in which she was unlikely to obtain a higher score than the real bowlers, and unlikely to be regarded as having won a bowling game even if she did. Though she could be

a participant in some attenuated sense, she could never be a contender. This resolution is ironic in a case where the judge emphasized the inherently competitive nature of sports: “All sport at all levels involves competition; all participants strive to win.” It may have been a fair resolution for a youth tournament, where winning is not the only thing, but if so, the decision was fair for reasons that belied its stated rationale.

It will, of course, be as difficult to say when an alternative way of performing an activity confers an unfair advantage as it is to say whether it departs from the fundamental nature of that activity. From the moment he began to dance around Sonny Liston in Las Vegas, to the moment he had the ropes loosened in the Kinshasa ring to defeat George Foreman with his rope-a-dope, Muhammed Ali was accused of gaining unfair advantage or threatening the fundamental nature of heavyweight boxing; he is now almost universally regarded as having improved the sport. A cart on a PGA tour golf course is surely closer to looser ropes in a boxing ring than to ramps in a bowling alley. But closer cases and difficult judgment calls will inevitably attend the integration of people with disabilities.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 18, number 4 (fall 1998).

References

Pamela S. Karl an and George Rutherglen, “Disabilities, Discrimination, and Reasonable Accommodation,” *Duke Law Journal*, vol. 46, no. 1 (October 1996); Ruth Shalit, “Defining Disability Down,” *New Republic* (August 25, 1997); Michael Grunwald, “U.S. Launches Drive for Disabled Golfer: Justice Dept. Invokes ADA in Martin Case,” *Washington Post* (August 24, 1998); Janice Moulton, “Why Everyone Deserves a Sporting Chance: Education, Justice, and College Sport,” in *Rethinking College Athletics,* edited by Judith Andre and David N. James (Temple University Press, 1991); Jane English, “Sex Equality in Sports,” *Philosophy & Public Affairs,* vol. 7 (Spring 1978); *Youth Bowling Council of Ontario* v. *McLeod*, 75 *Ontario Reports* (2d).

Part 3

Human Rights, Development Ethics, and International Justice

15

Income and Development

Jerome M. Segal

The term "development" and terms such as "less developed," "undeveloped," and "underdeveloped" are universally used in talking and thinking about change in the Third World. There are journals of development economics, textbooks on the process of development, organizations devoted to development. It is therefore striking that for all that has been written about development and how to achieve it, relatively little attention has been given to the basic question: What is development?

The notion of development suggests something of a natural process that an entity goes through. Thus we might speak of the development of an acorn, or of a child, but not the development of a stone or of a bookshelf. Moreover, the process envisaged is not a matter merely of change, but involves the working out of the *potential* of the entity. When an acorn develops into an oak tree, the change that takes place is coming from within; outside elements serve only as an environment within which the oak can develop into itself and in so doing fulfills its potential. The notion of development, then, carries within it the complementary notions of actualization, growth, maturity, fullness of being.

Given these particular features of the concept of development, it is striking that we speak of nations, economies, and societies as developed and undeveloped. Just what we mean by "potential," "maturity," or "fullness of being" when discussing economies and societies is elusive. Thus economists, planners, and decision-makers typically turn to some notion that can be more easily articulated and more readily used as a guide to policy choices. The notion of economic growth is appealing in this way. An economy has grown if and only if the pile of goods and services produced by that economy (the total or per capita output) in a given time period is larger than the pile it produced in the previous time period.

But we cannot equate development with growth. Simply growing larger carries with it no notion of maturity. In principle, a mature elephant could get larger and larger, yet we would not say that the giant elephant was more advanced or had more fully realized its potential than had normal sized elephants. Similarly, economic

growth does not necessarily imply that the society is becoming more developed, or even that the economy is becoming more developed.

Economic *development*—as an ideal Third World countries are supposed to be striving toward—must depend on something broader. An economy is more developed, not if it produces an ever larger pile of goods and services, but if it more fully contributes to the development of the society as a whole. And a society is developed insofar as it makes possible the development of the human beings within it. It is the notion of human development that is our central concept.

Income versus Basic Needs

How is one to link an appraisal of societies to judgments about the kind of human beings they give rise to? Almost all modern thought about development is egalitarian in the sense that there is concern with the *breadth* of human development rather than the *depth*. It does not measure development by the heights of human greatness achieved in a given society, but by the general level of human well-being. But within a general egalitarian framework, the distinction is made between three broad approaches to economic development that go under the rubrics: "trickle down," "equitable growth," and "basic needs." These three views adopt different understandings of what counts as development progress, of what it is for an economy or a society to *be* developed. They also differ with respect to *how* to achieve development—but that is not our immediate issue.

For both the equitable-growth and trickle-down conceptions the central good to be attained is higher income. Moreover, while it is clear that equitable development advocates care about the distribution of income, the trickle-down conception is also concerned with distribution. The point of arguing that higher levels of overall GNP *will* trickle down through the society is to attempt to show that aggregate economic growth benefits *everyone.*

The two views have a fundamental difference with respect to the goals of development, however. The claim that economic benefits trickle down contains an implicit suggestion that so long as everyone, or almost everyone, ends up benefiting, all is well. The question of *how much* trickles down to *how many* is generally not raised by trickle-down advocates. It is sufficient that most people have higher incomes, whether or not there may have been some broad increase in inequality.

On the equitable-growth orientation, an increase in most people's—or even everyone's—income does not automatically constitute progress. Whether or not progress has occurred is a matter of the balance between the gains in income and the loss of equality. If there is a broad increase in inequality of income, then the growth in income for the poorer classes would have to be significant; not any increase is adequate.

Now let us compare these income-based orientations to the basic needs approach. The basic-needs theorist makes two observations. First, having more income is not a good in itself; what is important is satisfying basic needs. And second, we cannot assume that needs are better satisfied at higher income levels. A great deal depends on the composition of output, on the quantities and prices of the goods and services that are available for purchase with private income, and on the extent and quality of

a wide variety of goods and services that are typically provided by the government (health services, education, water quality).

Both the trickle-down orientation and the equitable-growth orientation are prepared to accept income and its distribution as adequate indicators of developmental progress. They argue that income allows people to satisfy their preferences, and that there is no valid basis for giving priority to some other pattern of consumption than that actually chosen by the individual (and the public sector to which the individual is subject). The basic-needs orientation is unwilling to take income as an index of developmental progress. It insists on looking at the extent to which basic needs have actually been met, at the extent to which problems such as hunger, malnutrition, illiteracy, infant mortality, and disease have actually been overcome.

Earlier I maintained that a concept of societal development rests on something more fundamental, on a notion of human development. What basis is there for going from the claim that people have a higher level of income or basic-needs satisfaction to the claim that they have achieved a higher level of development?

Orientations that view income as ultimately significant regardless of the extent to which it results in need satisfaction will be hard pressed to establish the connection. But there is a logical link between the notion of needs and the notion of development. To see this, consider how it is that we distinguish between something that someone *needs* and something that someone *wants.* People want all sorts of things; but there are only a limited set of things that they need. Moreover, they need these things whether or not they want them. Basic needs are no mystery, consisting essentially of food, shelter, clothing, health care, and education. To call something a basic need is to say that in its absence the most basic physical and intellectual development of the individual will be blocked. Thus, a basic needs conception of development understands by developmental progress the elimination of conditions of mass deprivation that prevent the fuller development of the individual. Income approaches to development can make this connection only insofar as income is taken to be a reliable indicator of basic needs satisfaction, and this, of course, is a highly questionable assumption.

The Case against Getting Richer

Once basic needs have been taken care of, however, what is the relationship between human development and increasing wealth? One school of thought is that beyond a certain point the relationship is antithetical: accumulation leads to greater taste for accumulation, appetite merely begets further appetite, and in the end human development suffers as we become further engaged in the processes of accumulation and consumption. Few of us in the rich societies have not, at least for some brief moment, paused to wonder if in fact our involvement with “things” hadn’t gone too far, hadn’t in some ways taken us away from some undefined pursuit that is more important.

The case that can be made for economic progress well beyond the level of pure subsistence does not have to do with the value of things, but with the value of time. The greater value of higher levels of productivity is not that they make possible higher levels of consumption, but that they make possible lower levels of labor. The

impoverished are forced to spend an enormous amount of time in activities that are ultimately destructive of their human potential. What the rich have, at least potentially, is the time to devote themselves to those things that are worth doing for their own sake. Their time—that is, their life—is no longer a means to the attainment of the means of staying alive.

If someone spends a major part of their waking hours engaged in activity that fails to serve as a vehicle for personal expression, does not embody their values, does not provide for them either the esteem of others or their selfesteem, and is not a vehicle for their personal growth, then participation in economic life is destructive of development, except insofar as it provides a person with the resources and leisure time to pursue that development in other spheres of life.

Put in different terms, there are two possible notions of a developed economy. In both, a developed economy is one that contributes to the development of the human beings who participate in it. The distinction is between extrinsic and intrinsic impacts on human development. The primary extrinsic impact on human development is the provision of income and financial security. The intrinsic impacts have to do with the wide range of direct effects economic activity has on psychological, intellectual, and moral development.

Human health is precarious—activity that is not intrinsically healthful cannot be undertaken for long before it harms the individual. A developed economy which rests primarily on the extrinsic contribution of economic activity is possible only if work time is reduced to a relatively minor portion of a person's time. An extrinsically developed economy would provide the economic resources and financial security that allow individuals to pursue that which is worthwhile in itself with only, say, ten hours of work a week. The wealthiest economies today have this potential. In fact, however, these economies operate within a broader social life that does not permit individuals to avail themselves of this potential. The central dynamic is that at the income and consumption levels that would correspond to ten hours of work a week, the individual can rarely achieve self-esteem or the esteem of others. A person who works ten hours a week and lives on the average income that ten hours provides would be a misfit in our society. Periodically certain subcultures attempt to free themselves from material attachments—to develop an alternative shared understanding of the bases of personal and social esteem. But without cultural change that redefines the meaning of income and consumption, only isolated individuals can take advantage of the potential for extrinsic economic development that wealthy societies provide.

The other notion of a developed economy is one that provides for human development intrinsically, through forms of work and organization that are inherently enriching and thus promote rather than stunt human development. On a mass basis no such forms have yet emerged. Indeed, many have argued that we have moved toward forms of economic life that are intrinsically destructive of human development.

In general, over the last fifty years, Americans have taken most of the increase in labor productivity in the form of higher income rather than in the form of less labor time or more self-developing forms of labor. *Our economic life is neither extrinsically nor intrinsically developed.* And just as we have been undone by the rising level of income and consumption all around us, which has changed the social meaning of lower levels of income, so today the world is being enmeshed in our

consumption styles. There is no Third World country today in which the life style of the rich countries is not known, and in which the tastes of the poor are not shifting toward appetites for what they do not have and will never attain. The implications of this are horrifying. The table 15.1 shows the number of years it will take various developing nations, at current growth rates, to catch up to the income levels of the rich counties.

What we need is an egalitarian concept of development that will function to advance the genuine development of the poorer nations. The notion of equitable growth will not do this. Even at rapid rates of equitable growth, the vast mass of mankind will be engaged indefinitely in pursuit of the income levels of the rich countries. We need a type of development that will allow the masses of humankind quickly to overcome the most debilitating aspects of their poverty and then to avoid transforming themselves into a mere means for the advancement of their incomes. In short, we need a notion of development that will permit the overcoming of the worst poverty-induced obstacles to human development and at the same time will articulate what it is to have a developed society and to be a developed human being at low levels of income. I have argued that a basic needs conception of development is a central part of this notion. Basic needs can be satisfied at relatively low levels of income, but only if a society deliberately seeks a development path that will do so.

Table 15.1

The GNP Race

Country	$ GNP per Capita 1983*	Annual Growth Rate GNP/Capita 1965-83*	Number of Years Until Gap Closes in 1965-83 rates
Industrial Market Economies	11,060	2.5	
Korea	2,010	6.7	42
Brazil	1,880	5.0	73
Syria	1,760	4.9	79
Yemen Arab Rep.	550	5.7	98
Ecuador	1,420	4.6	101
Indonesia	560	5.0	124
Egypt	200	4.2	167
China	300	4.4	196
Philippines	760	2.9	687.5
Morocco	760	2.9	687
Sri Lanka	330	2.9	907
Cameroon	820	2.7	1,334.7
Costa Rica	1,020	2.1	Never
Kenya	340	2.3	Never
India	260	1.5	Never
46 other developing countries (e.g., Bangladesh, Zaire, Burma, Tanzania, Haiti, Pakistan, Bolivia, Peru)			Never

*Source: *The World Bank, World Development Report*, 1985 gap calculations by author.

It may be objected that this is all very nice for those in rich countries to espouse because it leaves them at the top and tells the rest of humankind to settle for less. This objection misses the point. The prescription of low incomes and high leisure is not offered merely to the poor. It also represents the direction that we in the rich countries should go in, if we are to become not just rich, but truly fully developed.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 5, number 4 (fall 1985); the article is condensed from a longer working paper, “What Is Development?”

16

Population Policy and the Clash of Cultures

Judith Lichtenberg

When people talk about population as something for which "policies" are needed, they are likely to be talking about population policy for developing countries. According to one recent report, 123 developing countries have adopted such policies over the past two decades. These policies have often involved the participation of developed countries, which, through public agencies as well as private donors, have provided resources and expertise to help establish family planning programs.

Yet wariness among people in developing countries surrounds these international family planning efforts. Critics suspect that they represent a continuation of the colonialist legacy, and that Western nations are once again attempting to exercise power over the fate of peoples who have been subject to them for centuries. Concerns of this kind might be valid even if it could be shown that the motives of the donor nations were largely admirable; for if we acknowledge the worth of national self-determination, then high-minded paternalism is one of the forces it must be defended against.

But of course the opponents of population programs do not often agree that Western motives are benign. They are likely to argue instead that developed nations are pursuing their own economic or political interests when they support efforts to limit population growth in developing countries. Other critics, even more suspicious, may claim that population programs are racist or even genocidal in intent. And some may insist that indigenous cultures must remain inviolable, particularly in an area as intimate as people's reproductive choices.

How telling are these criticisms? Let us examine them more carefully.

Identifying the Self in "Self-Determination"

Concerns about Western involvement in population programs in developing countries are sometimes expressed in terms of national self-determination: the idea that nations have the right to determine their own destiny without interference or domination by foreign elements. Those who frame the issue in these terms may worry that developing countries cannot throw off the yoke of colonialism without repudiating Western involvement in their population programs and other internal affairs.

In light of their historical experience, developing countries' suspicions are understandable. For this reason alone, quite apart from any others, external efforts to influence fertility, if they are to have any hope of succeeding, must be undertaken with care and sensitivity.

Yet there is still a substantive question lurking beneath these claims of self-determination. Is there an ineradicable conflict of interest between developed countries that would provide family planning assistance and developing countries that would receive such aid? If not—if developing countries want what developed countries want to give them—the claim of self-determination might pose no bar to international efforts.

But this way of putting the issue is obviously inadequate. It oversimplifies the problem in at least two respects. First, it suggests that the relationship in international population programs consists of two and only two parties, "foreign initiator" and "domestic target." And second, it implies that each of these parties possesses a distinct and unified set of interests.

In fact, much of the assistance for population programs is channeled through multilateral organizations, including United Nations agencies that are by no means dominated by developed nations. On the other side, many developing countries have taken the initiative in creating their own family planning programs, and it is widely agreed that the success of such programs often hinges on the strength of internal initiatives and on local participation in program design and management. Accusations that population policies violate a nation's right to self-determination sometimes overlook these facts.

Just as the agents initiating population programs constitute a diverse group with different interests, so too do developing countries. National boundaries in the world today do not—as strife around the world reminds us—necessarily coincide with cultural or ethnic boundaries. Even within distinct cultures, conflicts of interest exist between different political and ethnic groups and between rich and poor, men and women, adults and children. The question, one might say, is "Who is the *self* in self-determination?"

When we recognize that there is no single self but rather a variety of selves with different and often conflicting interests, two difficult tasks remain. One is to sort out these interests and, sometimes, to decide which among them are most pressing. For example, in many traditional societies women tend to be more interested than men in limiting family size. We might argue that in such instances women's health and freedom outweigh men's interests in preserving their authority to make such

decisions and in conserving the existing social order. In addition, we will be influenced by how this view fits with other arguments for limiting population size.

At the same time, while recognizing the illusion of the single self in self-determination, we should not forget the real issues of perception and politics surrounding relations between developed and developing countries. Developing countries have every reason to be on their guard when developed countries "take an interest" in them. We must take the political leaders of those countries seriously, and, unless they engage in gross violations of human rights or otherwise overstep the bounds of tolerable behavior, we must allow them to speak for the nation—even though we know that, like political leaders everywhere, often they do no such thing.

Charges of Racism and Genocide

The accusation of genocide has been made against population programs in some African countries, such as Kenya. The charge may seem misplaced, because birth control measures do not destroy life, but simply prevent its coming into being. Thus, it seems, these measures can hardly be said to be morally equivalent to murder. (For present purposes, we may exclude abortion from consideration; the claim that population programs promote genocide is not grounded in views about the moral status of the fetus.) Yet this point will not mollify those who believe that even if the means are different, the aim of population policies is indistinguishable from the aim of genocide: the disappearance of a targeted people. Quite apart from the intricacies of defining "genocide," the specter of racism is difficult to dispel.

Nor is it much help to point out that Westerners who promote family planning in, say, Mexico or Kenya bear no particular animus against Mexicans or Kenyans. What arouses the fears of some in the developing world is a sense that the West regards its own population rates differently than it does that of its poorer, and generally darker or racially "other," neighbors. Perhaps Westerners have nothing against Mexicans or Kenyans in particular; but is it false to say they have something against these groups as instances or parts of the larger class of nonwhite peoples? How, it may be asked, can developed countries such as France and Germany support policies to increase birth rates at home while arguing that developing countries are producing too many people?

Of course, one might argue that economic, geographical, and environmental factors determine the optimal population size in different regions, and that although France can support more people than it now has, Mexico cannot. Such arguments shift the ground of population policy in an important way; they suggest that the problem is not too many people in the world, but rather too many people in some parts of the world.

On the other hand, the growing animosity toward immigrants in many developed countries with low fertility rates can only reanimate suspicions of racism. Do developed countries with policies encouraging population growth want more people, or just a particular kind of people—their own?

Cultural Integrity and Cultural Change

To alter existing population trends in a country often means abandoning traditional practices and thus changing the way of life of its people. Concerns of this kind—about threats to a set of traditions that characterize or define a given community, society, or culture—are often framed in terms of cultural integrity. If, for example, large families are essential to an indigenous culture, there appears to be an inescapable conflict between cultural integrity and policies aimed at reducing fertility: one cannot enact such policies without at the same time violating the culture. This does not mean that the policies are therefore unacceptable, but it does suggest that they come with an unavoidable cost.

One trouble with this view is that it rests on a static conception of culture. A culture is not an eternal, unchanging entity, impervious to influences from without or within. Rather, it is a complex set of practices in which we find constant tension between the old, as expressed in ideological or social norms, and the new, represented by people's attempts to create new patterns of thought and action. Some of these new patterns arise from cross-cultural contact which, in the contemporary world of telecommunications and mass transportation, is pervasive and inescapable. To criticize family planning programs on the grounds that they violate cultural integrity ignores the heterogeneity within cultures, and the creation of social relationships across them.

Given the capacity of cultures both to resist intrusion and to adapt to new circumstances, issues such as the transfer of reproductive technology turn out to be more complex than is commonly supposed. On the one hand, people in developing countries often actively resist technological innovations that they believe are inimical to their interests or that do not meet their needs. Though these people may be stereotyped as "backward" or "conservative," closer study indicates that in fact they are behaving in accord with "Western" notions of rationality: they are acting to hold on to resources or improve their chances of survival. Their behavior helps to explain the failure to win acceptance for innovations ranging from modern agricultural implements to large-scale projects such as dams. It also accounts for some of the documented failures in the dissemination of contraceptive technologies.

Moreover, even when people do accept technological innovations from foreign sources, it does not follow that they accept the values of the culture exporting the technology. Sometimes people incorporate new technologies into the meaning systems and social organization of their own cultures. In Northern India's Punjab region, for example, women who employ amniocentesis will sometimes choose abortion if they learn the fetus is female, reinforcing the indigenous value attached to male children in a highly patriarchal society. Similar use has been made in China of sonograms (despite their lesser reliability in predicting the sex of the child). Far from changing values, then, technology can reinforce local belief patterns and practices in ways contrary to the values of those who introduced the technology.

It seems clear, then, that an undifferentiated appeal to cultural integrity ignores the plasticity of culture, and distracts us from more complex and important questions concerning the degree of change a given policy will create, and how far a culture may adapt or innovate without ceasing to be the same culture.

Defending Tradition

How seriously should we take inroads into cultural integrity, anyway? To answer this question we need to know why traditions ought to be respected in the first place. That something has been done in a certain way for a long time may give it value in the eyes of a traditionalist, but this alone hardly seems an adequate justification. The mere longevity of discrimination or poverty carries no moral weight at all against efforts to overcome them. Traditions must have some intrinsic value, or at least no intrinsic disvalue, if they are to be worth preserving.

A more plausible account of the appeal of tradition rests on what we can broadly characterize as aesthetic grounds. Traditional practices often seem to possess a richness and depth, a meaning and spiritual quality lacking in industrialized mass society. We regret the loss of these traditions both because of their intrinsic appeal, and because we value diversity over the encroaching homogenization that modernization brings.

Such concerns are important, but they can never be decisive in themselves. In gauging the impact of cultural change, we must always ask what is at stake besides the aesthetic value of the tradition—including, most centrally, the interests of those within the culture. Otherwise, we may find ourselves in the position of a certain French anthropologist who, in philosopher Martha Nussbaum's description, regretted that "the introduction of smallpox vaccination to India by the British eradicated the cult of Sittala Devi, the goddess to whom one used to pray in order to avert smallpox."

In general, our assessment of a tradition requires examining the divergent interests of the individuals and groups who are involved in or affected by it. So, for example, it is crucial to ask whether and how men and women fare differently in cultures where large families are the norm. It is women who carry and bear children, and who are primarily responsible for rearing them. In societies with inadequate nutrition and health care, the burdens associated with raising a large family are especially acute, even after the countervailing benefits are taken into account. Yet the needs of women, and their greater interest in family planning, are likely to be overlooked in arguments for cultural integrity. Such arguments are inherently conservative, and often the cultures they would conserve are patriarchal ones that subordinate the interests of women to those of men.

Of course, how women view their interests will itself be culturally determined, at least in part. In Hindu and Muslim societies, for example, where menstruation has a complex cultural and religious significance, women may feel it is in their best interest not to use modern contraceptives that interfere with the menstrual cycle. Because some of these contraceptives are associated with breakthrough bleeding, they will be unacceptable in a culture where bleeding renders a woman ritually unclean and interferes with normal marital relations. At the same time, because a woman's value to her husband in these societies depends upon her capacity to reproduce, cessation of the menstrual cycle will seem to deprive women of an essential element of their identity.

One way of addressing the needs of these women is to continue research into alternative contraceptive technologies. Another is to try to recoup and revitalize

indigenous strategies of fertility control—long periods of breastfeeding, which postpones ovulation; postpartum abstinence from sexual relations; herbal birth control techniques—that have been lost under Western influence. (Some of these approaches might also be adopted in industrialized countries, where "alternative medicine," with its connections to traditional cultures, is growing in popularity.) Health workers might also begin encouraging people to think about reproduction differently—not by preaching to them from a Western point of view, but by invoking concepts and values from their own systems of belief. It is this option we must now consider more closely, as we look at the strategies for implementing population policies in the developing world.

The *How* of Population Policy

Thus far we have been considering the view that the very existence of a population policy is problematic. Assuming that such policies unavoidably alter traditions, we have asked how we might weigh that fact against other considerations. But the threat posed to cultural integrity by the mere existence of a population policy may be easily overstated. The more plausible criticism might be not that population policies as such violate a culture's integrity, but rather that such policies as they have been promoted and implemented have often been insensitive to the specific practices and traditions they encounter.

Critics have argued, for instance, that population programs in some countries have employed a top-down bureaucratic style that does not adequately involve indigenous people in the processes of decision-making. The Western approach often clashes with local customs and ignores traditional structures, such as medical programs and practices already in place. To raise questions regarding the "how" of population policy may seem a way of avoiding the central question of their inherent justification. But matters of implementation are hardly trivial. For it is by looking at implementation that we can tell how such policies are understood, both by those who are responsible for them and by those for whom they are designed.

This point can be illustrated by looking at the relationships, real and perceived, between policies aimed at reducing fertility in a developing country and policies aimed at improving maternal and child health. It is clear, on the one hand, that while there is no necessary connection between the two, reducing fertility is likely to improve maternal and child health. Maternal health will improve because the bearing of many children imposes enormous emotional and physiological stress, especially where women have access only to substandard nutrition and health care. Children's health will improve because, other things being equal, the fewer children a family or community has to care for, the better it can care for them.

In turn, improving maternal and child health will reduce fertility to the extent that high fertility in developing countries responds to, or is a vestige of, high rates of infant and child mortality. It is also true that when health workers win the confidence of mothers by treating their children's illnesses and teaching them to administer unfamiliar medicines, they have greater credibility when they raise the subject of family planning. For these reasons, many agencies have decided that family planning programs can best be implemented in conjunction with programs that focus on maternal and child health.

Now to join the two in this way might seem cynical and instrumental—a deceptive repackaging of one's true goals in the place of straightforward appeals for fertility reduction. But this need not be the case. First of all, maternal and child health are centrally important values in their own right— so important, indeed, that they can hardly be overemphasized. Moreover, a commitment to these values, either as means or as ends in themselves, will have genuine practical implications: policies that incorporate these values will differ substantially in their impact on individuals from those that do not. For example, they will consider more carefully the health effects of contraceptive methods—effects that did not receive sufficient scrutiny during earlier efforts to limit population growth in developing countries.

These observations should be understood both as moral criticism of the styles, approaches, and methods of many past population programs and—not coincidentally—as an explanation of their limited effectiveness. When the argument takes this form, its gist is practical: if you want a population program to succeed, begin with an understanding of the culture for which it is designed; take its traditions seriously; treat its people with the respect you would accord your own.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 13, number 4 (fall 1993).

References

Kerry Lauerman, "Still Ticking," *Mother Jones* (March/April 1993); Martha Nussbaum, "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism," *Political Theory,* vol. 20 (1992); Donald Warwick, *Bitter Pills: Population Policies and Their Implementation in Eight Developing Countries* (Cambridge University Press, 1982); Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control and Contraceptive Choice* (Harper and Row, 1987); Barbara Miller, "Female Infanticide and Child Neglect in Rural North India," in *Gender in Cross-Cultural Perspective,* Caroline B. Brettell and Carolyn F. Sargent, eds. (Prentice-Hall, 1993); Nicholas D. Kristof, "Peasants of China Discover New Way to Weed Out Girls," *New York Times* (July 21, 1993).

Acknowledgment

The author is indebted to anthropologists Alaka Wali and Lynne E. Greabell for their contributions to the section on cultural integrity and cultural change, and for providing many useful examples.

17

"Asian Values" and the Universality of Human Rights

Xiaorong Li

Orientalist scholarship in the nineteenth century perceived Asians as the mysterious and backward people of the Far East. Ironically, as this century has drawn to a close, leaders of prosperous and entrepreneurial East and Southeast Asian countries eagerly stress Asia's incommensurable differences from the West and demand special treatment of their human rights record by the international community. They reject outright the globalization of human rights and claim that Asia has a unique set of values, which, as Singapore's ambassador to the United Nations has urged, provide the basis for Asia's different understanding of human rights and justify the "exceptional" handling of rights by Asian governments.

Is this assertion of "Asian values" simply a cloak for arrogant regimes whose newly gained confidence from rapidly growing economic power makes them all the more resistant to outside criticism? Does it have any intellectual substance? What challenges has the "Asian values" debate posed to a human rights movement committed to globalism?

Although scholars have explored the understanding of human rights in various Asian contexts, the concept of "Asian values" gains political prominence only when it is articulated in government rhetoric and official statements. In asserting these values, leaders from the region find that they have a convenient tool to silence internal criticism and to fan anti-Western nationalist sentiments. At the same time, the concept is welcomed by cultural relativists, cultural supremacists, and isolationists alike, as fresh evidence for their various positions against a political liberalism that defends universal human rights and democracy. Thus, the "Asian value" debate provides an occasion to reinvigorate deliberation about the foundations of human rights, the sources of political legitimacy, and the relation between modernity and cultural identity.

This essay makes a preliminary attempt to identify the myths, misconceptions, and fallacies that have gone into creating an "Asian view" of human rights. By

sorting out the various threads in the notions of "cultural specificity" and "universality," it shows that the claim to "Asian values" hardly constitutes a serious threat to the universal validity of human rights.

Defining the "Asian View"

To speak of an "Asian view" of human rights that has supposedly emanated from Asian perspectives or values is itself problematic: it is impossible to defend the "Asianness" of this view and its legitimacy in representing Asian culture(s). "Asia" in our ordinary language designates large geographic areas which house diverse political entities (states) and their people, with drastically different cultures and religions, and unevenly developed (or undeveloped) economics and political systems. Those who assert commonly shared "Asian values" cannot reconcile their claims with the immense diversity of Asia—a heterogeneity that extends to its people, their social-political practices, and ethnic-cultural identities. Nonetheless, official statements by governments in the region typically make the following claims about the so- called "Asian view" of human rights:

Claim I: Rights are *"culturally specific."* Human rights emerge in the context of particular social, economic, cultural and political conditions. The circumstances that prompted the institutionalization of human rights in the West do not exist in Asia. China's 1991 white paper, which stated the official position of China on human rights, stated that "(o)wing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights." In the Bangkok governmental declaration, endorsed at the 1993 Asian regional preparatory meeting for the Vienna World Conference on Human Rights, governments agreed that human rights "must be considered in the context of a dynamic and evolving process of international normsetting, bearing in mind the significance of national and regional peculiarities and various historical, cultural, and religious backgrounds."

Claim II: The community takes precedence over individuals. The importance of the community in Asian culture is incompatible with the primacy of the individual, upon which the Western notion of human rights rests. The relationship between individuals and communities constitutes the key difference between Asian and Western cultural "values." An official statement of the Singapore government, *Shared Values* (1991), states that "(a)n emphasis on the community has been a key survival value for Singapore." Human rights and the rule of law, according to the "Asian view," are individualistic by nature and hence destructive of Asia's social mechanism. Increasing rates of violent crime, family breakdown, homelessness, and drug abuse are cited as evidence that Western individualism (particularly the American variety) has failed.

Claim III: Social and economic rights take precedence over civil and political rights. Asian societies rank social and economic rights and "the right to economic development" over individuals' political and civil rights. The Chinese white paper (1991) stated that "(t)o eat their fill and dress warmly were the fundamental demands of the Chinese people who had long suffered cold and hunger." Political and civil rights, on this view, do not make sense to poor and illiterate multitudes; such rights are not meaningful under destitute and unstable conditions. The right of

workers to form independent unions, for example, is not as urgent as stability and efficient production. Implicit here is the promise that once people's basic needs are met—once they are adequately fed, clothed, and educated—and the social order is stable, the luxury of civil and political rights will be extended to them. In the meantime, economic development will be achieved more efficiently if the leaders are authorized to restrict individuals' political and civil rights for the sake of political stability.

Claim IV: Rights are a matter of national sovereignty. The right of a nation to self determination includes a government's domestic jurisdiction over human rights. Human rights are internal affairs, not to be interfered with by foreign states or multinational agencies. In its 1991 white paper, China stated that "the issue of human rights falls by and large within the sovereignty of each state." In 1995 the Chinese government confirmed its opposition to "some countries' hegemonic acts of using a double standard for the human rights of other countries...and imposing their own pattern on others, or interfering in the internal affairs of other countries by using 'human rights' as a pretext." The West's attempt to apply universal standards of human rights to developing countries is disguised cultural imperialism and an attempt to obstruct their development.

Elsewhere and Here

In this essay I address the first three claims that make up the "Asian view," particularly the argument that rights are "culturally specific." This argument implies that social norms originating in other cultures should not be adopted in Asian culture. But, in practice, advocates of the "Asian view" often do not consistently adhere to this rule. Leaders from the region pick and choose freely from other cultures, adopting whatever is in their political interest. They seem to have no qualms about embracing such things as capitalist markets and consumerist culture. What troubles them about the concept of human rights, then, turns out to have to do with its Western cultural origin.

In any case, there are no grounds for believing that norms originating *elsewhere* should be inherently unsuitable for solving problems *here.* Such a belief commits the "genetic fallacy" in that it assumes that a norm is suitable only to the culture of its origin. But the origin of an idea in one culture does not entail its unsuitability to another culture. If, for example, there are good reasons for protecting the free expression of Asian people, free expression should be respected, no matter that the idea of free expression originated in the West or Asia, or how long it has been a viable idea. And in fact Asian countries may have now entered into historical circumstance where the affirmation and protection of human rights is not only possible but desirable.

In some contemporary Asian societies, we find economic, social, cultural, and political conditions that foster demands for human rights as the normsetting criteria for the treatment of individual persons and the communities they form. National aggregate growth and distribution, often under the control of authoritarian governments, have not benefited individuals from vulnerable social groups—including workers, women, children, and indigenous or minority populations. Newly introduced market forces, in the absence of rights protection and the rule of

law, have further exploited and disadvantaged these groups and created anxiety even among more privileged sectors—professionals and business owners, as well as foreign corporations—in places where corruption, disrespect for property rights, and arbitrary rule are the norm.

Political dissidents, intellectuals and opposition groups who dare to challenge the system face persecution. Meanwhile, with the expansion of communications technology and improvements in literacy, information about repression and injustice has become more accessible both within and beyond previously isolated communities; it is increasingly known that the notion of universal rights has been embraced by people in many Latin American, African, and some East and Southeast Asian countries (Japan, South Korea, Taiwan, and the Philippines). Finally, the international human rights movement has developed robust non-Western notices of human rights, including economic, social, and ethnic, and religious violence. Together, these new circumstances make human rights relevant and implementable in Asian societies.

Culture, Community, and the State

The second claim, that Asian value community over individuality, obscures more than it reveals about community, its relations to the state and individuals, and the conditions congenial to its flourishing. The so-called Asian value of the "community harmony" is used as an illustration of "cultural differences between Asian and Western societies, in order to show that the idea of individuals' inalienable rights does not suit Asian societies. This "Asian communitarianism" is a direct challenge to what is perceived as the essence of human rights, i.e., its individual-centered approach, and it suggests that Asia's community-centered approach is superior.

However, the "Asian view" creates confusions by collapsing "community" into the state and the state into the (current) regime. When equations are drawn between community, the state, and the regime, any criticisms of the regime become crimes against the nation-state, the community, and the people. The "Asian view" relies on such a conceptual maneuver to dismiss individual rights that conflict with the regime's interest, allowing the condemnation of individual rights as anticommunal, destructive of social harmony, and seditionist against the sovereign state.

At the same time, this view denies the existence of conflicting interests between the state (understood as a political entity) and communities (understood as voluntary, civil associations) in Asian societies. What begins as an endorsement of the value of community and social harmony ends in an assertion of the supreme status of the regime and its leaders. Such a regime is capable of dissolving any nongovernmental organizations it dislikes in the name of "community interest," often citing traditional Confucian values of social harmony to defend restrictions on the right to free association and expression, and thus wields ever more pervasive control over unorganized individual workers and dissenters. A Confucian communitarian, however, would find that the bleak, homogeneous society that these governments try to shape through draconian practices—criminal prosecutions for "counterrevolutionary activities," administrative detention, censorship, and military curfew—has little in common with its ideal of social harmony.

Contrary to the "Asian view," individual freedom is not intrinsically opposed to and destructive of community. Free association, free expression, and tolerance are vital to the well-being of communities. Through open public deliberations, marginalized and vulnerable social groups can voice their concerns and expose the discrimination and unfair treatment they encounter. In a liberal democratic society, which is mocked and denounced by some Asian leaders for its individualist excess, a degree of separation between the state and civil society provides a public space for the flourishing of communities.

A False Dilemma

The third claim of the "Asian view," that economic development rights have a priority over political and civil rights, supposes that the starving and illiterate masses have to choose between starvation and oppression. It then concludes that "a full belly" would no doubt be the natural choice. Setting aside the paternalism of this assumption, the question arises of whether the apparent trade-off—freedom in exchange for good—actually brings an end to deprivation, and whether people must in fact choose between these two miserable states of affairs.

When it is authoritarian leaders who pose this dilemma, one should be particularly suspicious. The oppressors, after all, are well-positioned to amass wealth for themselves, and their declared project of enabling people to "get rich" may increase the disparity between the haves and the have-nots. Moreover, the most immediate victims of oppression—those subjected to imprisonment or torture—are often those who have spoken out against the errors or the incompetence of authorities who have failed to alleviate deprivation, or who in fact have made it worse. The sad truth is that an authoritarian regime can practice political repression and starve the poor at the same time. Conversely, an end to oppression often means the alleviation of poverty—as when, to borrow Amartya Sen's example, accountable governments manage to avert famine by heeding the warnings of a free press.

One assumption behind this false dilemma is that "the right to development" is a state's sovereign right and that it is one and the same as the "socioeconomic rights" assigned to individuals under international covenants. But the right of individuals and communities to participate in and enjoy the fruit of economic development should not be identified with the right of nation-states to pursue national prodevelopment policies, even if such policies set the stage for individual citizens to exercise their economic rights. Even when "the right to development" is understood as a sovereign state right, as is sometimes implied in the international politics of development, it belongs to a separate and distinct realm from that of "socioeconomic rights."

The distinction between economic rights and the state's right to development goes beyond the issue of who holds these particular rights. National development is an altogether different matter from securing the economic rights of vulnerable members of society. National economic growth does not guarantee that basic subsistence for the poor will be secured. While the right to development (narrowly understood) enables the nation-state as a unit to grow economically, social-economic rights are concerned with empowering the poor and vulnerable,

preventing their marginalization and exploitation, and securing their basic subsistence. What the right of development, when asserted by an authoritarian state, tends to disregard, but what socioeconomic rights aspire to protect, is fair economic equality or social equity. Unfortunately, Asia's development programs have not particularly enabled the poor and vulnerable to control their basic livelihood, especially where development is narrowly understood as the creation of markets and measured by national aggregate growth rates.

A more plausible argument for ranking social and economic rights above political and civil rights is that poor and illiterate people cannot really exercise their civil-political rights. Yet the poor and illiterate may benefit from civil and political freedom by speaking, without fear, of their discontent. Meanwhile, as we have seen, political repression does not guarantee better living conditions and education for the poor and illiterate. The leaders who are in a position to encroach upon citizens' rights to express political opinions will also be beyond reproach and accountability for failures to protect citizens' socioeconomic rights.

Political-civil rights and socioeconomic-cultural rights are in many ways indivisible. Each is indispensable for the effective exercise of the other. If citizens' civil-political rights are unprotected, their opportunities to "get rich" can be taken away just as arbitrarily as they are bestowed. If citizens have no real opportunity to exercise their socioeconomic rights, their rights to political participation and free express will be severely undermined. For centuries, poverty has stripped away the human dignity of Asia's poor masses, making them vulnerable to violations of their cultural and civil-political rights. Today, a free press and the rule of law are likely to enhance Asians' economic opportunity. Political-civil rights are not a mere luxury of rich nations, as some Asian leaders have told their people, but a safety net for marginalized and vulnerable people in dramatically changing Asian societies.

Universality Unbroken

The threat posed by "Asian values" to the universality of human rights seems ominous. If Asian cultural relativism prevails, there can be no universal standards to adjudicate between competing conceptions of human rights. But one may pause and ask whether the "Asian values" debate has created any really troubling threat to universal human rights—that is, serious enough to justify the alarm that it has touched off.

The answer, I argue, depends on how one understands the concepts of universality and culturally specificity. In essence, there are three ways in which a value can be universal or culturally specific. First, these terms may refer to the *origin* of a value. In this sense, they represent a claim about whether a value has developed only within specific cultures, or whether it has arisen within the basic ideas of every culture.

No one on either side of the "Asian values" debate thinks that human rights are universal with respect to their origin. It is accepted that the idea of human rights originated in Western traditions. The universalist does not disagree with the cultural relativist on this point—though they would disagree about its significance—and it is not in this sense that human rights are understood as having universality.

Second, a value may be culturally specific or universal with respect to its prospects for *effective (immediate) implementation.* That is, a value may find favorable conditions for its implementation only within certain cultures, or it may find such conditions everywhere in the world.

Now, I don't think that the universalist would insist that human rights can be immediately or effectively implemented in all societies, given their vastly different conditions. No one imagines that human rights will be fully protected in societies that are ravaged by violent conflict or warfare; where political power is so unevenly distributed that the ruling forces can crush any opposition; where social mobility is impossible, and people segregated by class, caste system, or cultural taboos are isolated and uniformed; where most people are on the verge of starvation and where survival is the pressing concern. The list could go on. However, to acknowledge that the prospects for effective implementation of human rights differ according to circumstances is not to legitimize violations under these unfavorable conditions, nor is it to deny the universal applicability or validity of human rights (as defined below) to all human beings no matter what circumstances they face.

Third, a value may be understood as culturally specific by people who think it is *valid* only within certain cultures. According to this understanding, a value can be explained or defended only by appealing to assumptions already accepted by a given culture; in cultures that do not share those assumptions, the validity of such a value will become questionable. Since there are few universally shared cultural assumptions that can be invoked in defense of the concept of human rights, the universal validity of human rights is problematic.

The proponents of this view suppose that the validity of human rights can only be assessed in an intracultural conversation where certain beliefs or assumptions are commonly shared and not open to scrutiny. However, an intercultural conversation about the validity of human rights is now taking place among people with different cultural assumptions; it is conversation that proceeds by opening those assumptions to reflection and reexamination. Its participants begin with some minimal shared beliefs: for example, that genocide, slavery, and racism are wrong. They accept some basic rules of argumentation to reveal hidden presuppositions, disclose inconsistencies between ideas, clarify conceptual ambiguity and confusions, and expose conclusions based on insufficient evidence and oversimplified generalizations. In such a conversation based on public reasoning, people may come to agree on a greater range of issues than seemed possible when they began. They may revise or reinterpret their old beliefs. The plausibility of such a conversation suggest a way of establishing universal validity: that is, by referring to public reason in defense of a particular conception or value.

If the concept of human rights can survive the scrutiny of public reason in such a cross-cultural conversation, its universal validity will be confirmed. An idea that has survived the test of rigorous scrutiny will be reasonable or valid not just within the boundaries of particular cultures, but reasonable in a nonrelativistic fashion. The deliberation and public reasoning will continue, and it may always be possible for the concept of human rights to become doubtful and subject to revision. But the best available public reasons so far seem to support its universal validity. Such public reasons include the arguments against genocide, slavery, and racial discrimination. Others have emerged from the kind of reasoning that reveals fallacies, confusions, and mistakes involved in the defense of Asian cultural exceptionalism.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 16, number 2 (spring 1996).

References

The Straits Times, Singapore (November 21, 1992); John Gray, "After the New Liberalism," *Social Research,* vol. 61, no. 3 (Fall 1994); Yash Ghai, "Human Rights and Governance: The Asian Debate," Occasional Paper Series No. 1 The Asian Foundation's Center for Asian Pacific Affairs (November 1994); Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *On Human Rights—The Oxford Amnesty Lecture*, 1993 (Basic Books, 1993); Bangkok NGO Declaration on Human Rights (March 27, 1993); *Human Rights in China*, Information Office, the State Council of the People's Republic of China (1991), and *The Progress of Human Rights in China* (December 1995); Michael Davis, ed., *Human Rights and Chinese Values* (Oxford University Press, 1995); Amartya Sen, "Our Culture, Their Culture," *The New Republic* (April, 1996).

18

Negotiating Jerusalem

Jerome M. Segal

Of all the final-status issues to be dealt with by Israeli and Palestinian negotiators, there is none as difficult as Jerusalem. The Palestinians claim East Jerusalem as the future capital of a Palestinian state; the Israelis maintain that they alone will remain sovereign over the entire city. Moreover, these do not appear to be mere negotiating positions. The claims asserted by the PLO and the government of Israel are expressions of attachments that are rooted in the aspirations, identifications, and self-understandings of the two peoples.

For Jews, having Jerusalem is symbolic of the entire project of "return." When ancient Israel was conquered by the Babylonians, it was from Jerusalem that Israelites were taken into captivity. When they came back from exile in 538 BCE, their paramount task was to rebuild the temple that Solomon had built. When the Israelites revolted against the Romans in the first century CE, it was Jerusalem that was the fortress of resistance. And when the Romans finally defeated them, the symbol of that defeat was again the destruction of the temple. Following a second revolt, the city itself was rebuilt and renamed as a Roman city, Aelia Capitolina, from which Jews were barred. And when the Roman Empire adopted Christianity, Christian hostility toward Judaism was expressed through strict adherence to the ban forbidding Jews to live in Jerusalem. The return to Jerusalem has been throughout the centuries the central symbol of the attainment of Jewish self-determination. It is toward Jerusalem that religious Jews pray. It is Jerusalem that is mentioned three times a day in those prayers, and it is with the words "next year in Jerusalem" that Jews the world over have concluded the Passover seder.

To Muslims, however, Jerusalem is an Islamic city. For the most of the history of Islam, Jerusalem has had a predominantly Muslim population, and it has been under Islamic rule for most of the thirteen centuries since the Christian patriarch surrendered the city to the Caliph Umar in 638 CE. The primary exceptions were the twelfth century, during the ninety years of crusader rule, and the twentieth century, especially the post-1967 period. It is to Jerusalem that Mohammed is said to have been transported, and from the rock beneath the Dome of the Rock on the

Temple Mount that he is said to have ascended to Heaven to receive his final revelation. While less significant to Muslims as a whole than Mecca and Medina, Jerusalem surely is the most important city for Palestinians, be they Muslim or Christian. Within it live one in eight Palestinians in the West Bank. Geographically central, Jerusalem is the heart of their educational, religious, and cultural life.

Whose Jerusalem is it rightfully? This is an area of moral indeterminacy. Even if there were agreement on all the facts (itself highly unlikely), there are no widely shared moral principles which would be sufficient to assess the relative merit of the two claims.

Religious Jews believe in a covenant by which the land was given to Abraham's descendants through Isaac. What weight are we to grant to these beliefs? Even if one dismisses as religious mythology any notion of God-givenness with respect to the land, the fact remains that for thousands of years people have understood their relation to the land in these terms. Muslims, on the other hand, dispute the centrality of the Abraham-Isaac relationship and instead emphasize Abraham's relationship to his first son, Ishmael, from whom they see themselves as descended. Moreover, Palestinians also claim to be descended from the Jebusites, the pre-Israelite inhabitants of Jerusalem. How are we to judge between them?

Religion aside, what importance do we assign to the sheer fact of possession of the land and to issues of dispossession? Does it matter who possessed the land first? How does the passage of time strengthen or erode a people's claim to ownership? How much significance do we give to the dominant Muslim presence in Jerusalem for most of the last 1,200 years, or to the existence of a Jewish majority within the Old City for a significant part of the last century, or to that of a Muslim majority within the Old City for the last fifty years? The unanswerable questions go on and on.

Moral Recognitions as Motivation

Given that the achievement of moral agreement is a hopeless quest, there is a general tendency among those working for peace to put aside moral issues and to focus instead on arguments of national interest for both Israelis and Palestinians, hoping to convince both sides that it is in their interest to compromise. Thus, the Israeli peace movement almost always couches its arguments in terms of Israel's interest in achieving peace and security. Only rarely does it raise the issue of Palestinian rights. And if anything, this same pattern is more dominant among Palestinian moderates.

However, those seeking to promote a willingness to compromise may have reached exactly the wrong conclusion from the futility of efforts to assess who has the stronger claim to Jerusalem. The complexity of the issue, and the absence of settled principles for resolving it, actually point to one conclusion that could emerge as a widely held proposition for both Israelis and Palestinians: namely, that the other side has *some* legitimate rights with regard to the city.

Once said, of course, this proposition appears obviously true to most outside observers, but of little import. First, it is believed that among those actually engaged in the conflict, only the peaceniks would agree that the other side has any rights to Jerusalem. Second, it is widely doubted that such recognition carries with it any

substantial motivation to compromise. An individual's intellectual recognition of the rights of another people tends to be viewed as an epiphenomenon when it conflicts with the rights and interests of one's own people.

Yet recent studies of Israelis and Palestinians suggest that this "realist" vision is wrong on both counts. For instance, thirty-nine percent of Israeli Jews answered affirmatively when asked, "In your opinion, do the Palestinians have any sort of legitimate rights with regard to Jerusalem?" Among those who identify with the Labor Party, the figure rises to fifty-five percent. Some recognition of Palestinian rights with regard to Jerusalem was also affirmed by twenty-seven percent of those who belong to the Likud Party, and by more than twenty percent of those who identify with the far right parties. Among those Israeli Jews who believe that Palestinians have some rights to Jerusalem, forty-one percent belong to the right or far-right parties. So it is not the case that only peaceniks can see some validity in the claims of the other side.

A stranger to Israeli politics might draw a discouraging lesson from these findings. Since many Israeli Jews who acknowledge some legitimate Palestinian rights with regard to Jerusalem nonetheless vote for Likud, one might conclude that moral recognition does not affect willingness to compromise. But this would be a mistake. People identify with Israeli political parties for many reasons, some having little to do with the Israeli-Palestinian conflict. Moreover, supporters of Likud are not necessarily averse to compromise. For instance, thirty-five percent are willing to seriously consider Palestinian sovereignty over peripheral areas of Jerusalem such as Um Tuba and Sur Bahir, and twenty-six percent would seriously consider joint administration of the Old City, provided that Israel did not yield its claim to sovereignty.

To ascertain the motivational force of believing that Palestinians have some legitimate rights with regard to Jerusalem, one recent study divided Israeli Jews into four groups, depending on their views as to a) whether Palestinians have any legitimate rights with regard to Jerusalem and b) whether a peace agreement with the Palestinians will lead to long-term peace. The first group takes a positive view of both questions; the fourth group, a negative view of both questions. As one might expect, the first group is very open to various compromise proposals, while the fourth group is strongly opposed to compromise. Our interest lies mainly in the two other groups: those who believe that Palestinians have rights but don't believe real peace is possible even if a peace treaty is signed, and those who believe real peace is possible but don't believe Palestinians have any legitimate rights with regard to Jerusalem.

If it were true, as realists assert, that recognition of another people's rights is little more than a motivational epiphenomenon, then one would expect to find far greater willingness to compromise on Jerusalem among those in the second group than among those in the third group. Belief in the prospects for long-term peace would be a much more powerful motive for compromise than an acknowledgment of some legitimacy in the other side's claims. But in fact, it turns out that for these two groups, the willingness to compromise is virtually identical, across a wide variety of compromise proposals. [See Appendix, p. 189] Just as important, holding one or the other belief appears to make Israeli Jews in these groups significantly more open to compromise than those who hold neither belief. These data suggest that recognition of the other side's legitimate rights is a powerful motivational factor, quite possibly

equal in strength to believing that achieving a peace treaty with the Palestinians will really lead to long-term peace.

Does the realist view fare any better when Palestinian opinions are surveyed? According to one recent study, seventy percent of Palestinians support genuine peace with Israel, provided that there is a Palestinian state with East Jerusalem as its capital. The motivations here are no doubt quite diverse—the realization that Israel is here to stay, the desire to see a Palestinian state come into existence, the desire to live normal lives. Recognition of Jewish rights is clearly not the dominant factor. Indeed, only a minority of Palestinians (twenty-one percent) recognizes some Jewish rights with respect to Jerusalem.

Yet it turns out that recognition of these rights does make some people more inclined to compromise on Jerusalem. For example, among Palestinians who favor peace with Israel, proposals for divided sovereignty over the Old City, or joint sovereignty over the entire city, receive twice as much support from those who recognize some Jewish rights than from those who do not. However, less forthcoming proposals, such as giving Palestinians autonomy but not sovereignty over their neighborhoods, were thoroughly rejected by both groups.

One must be wary about reading too much into the data, but they do point to very interesting possibilities. First, regardless of whether or not people are opposed to compromise, it may be possible to get them to see that the other side does have some rights. Though not every Israeli or Palestinian will be brought to this point of view, an expanded moral discourse might well increase the number who grant the other side some legitimacy.

Second, the data suggest that if people arrive at such a recognition, it may indeed affect their willingness to compromise. Thus, in the effort to promote compromise on Jerusalem, it may make sense to engage right-wing Israelis in serious discourse with respect to Palestinian rights, and it may make sense to seriously engage the Palestinian mainstream in a parallel discourse with respect to Jewish rights.

What Is Jerusalem?

Just as it may be worthwhile to draw people into the moral complexity of the question “Whose Jerusalem is it rightfully?” so too it may be worthwhile to wrestle with a second question: “What is Jerusalem?” To see why, one must understand a bit about the geography of the city.

For the moment, I mean by “Jerusalem” that territory lying within the municipal boundaries set by the Israeli government. Jerusalem consists of two parts, East and West. This distinction dates from the end of the 1948-49 Israeli war of independence, when the armistice line—known as the green line—divided the city into two sectors. In the eastern half was included the Old City—the one square kilometer of walled city that includes the Western Wall and the Temple Mount. During the 1948-67 period, Israel was cut off from East Jerusalem; the city was physically divided by barricades and barbed wire. Then, during the Six Day War of 1967, Israeli forces “reunified” the city. Not only did they conquer East Jerusalem; they also routed the Jordanians and captured all of the West Bank. Within weeks of the reunification, Israel went on to expand Jerusalem. In particular, it redrew the municipal boundaries to include within the city a large tract of land from the West

Bank that had surrounded East Jerusalem. This "expanded East Jerusalem" was roughly ten times the size of what might be termed "Jordanian-controlled East Jerusalem." In drawing the new boundaries, the Israeli government sought to include as much land as possible, but as few Palestinians as possible. Thus the boundary lines were highly gerrymandered, weaving in, around, and sometimes through numerous Palestinian villages which lay near Jerusalem. These territories of expanded East Jerusalem are the only parts of the West Bank that the government has actually incorporated into Israel. And it is within this area that Israel launched a massive series of housing projects, creating large Jewish hilltop neighborhoods, referred to as "settlements" by the Palestinians.

Within East Jerusalem as a whole there are roughly equal numbers of Israelis and Palestinians. But almost all of the Israelis in East Jerusalem live within the areas added to the city in 1967; about half of the total 172,000 Palestinian residents of East Jerusalem also live within these areas. Within the Old City the population is approximately ninety percent Palestinian, and the urbanized areas of what had been Jordanian-controlled East Jerusalem (but not including the Old City) are almost entirely Palestinian.

In 1993 Israel again changed the boundaries, this time expanding West Jerusalem, and there are bills pending in the Knesset to expand East Jerusalem again as well, to include the large West Bank settlements of Maale Adumim and Givat Zeev, which lie a few kilometers outside the present boundaries.

In all this, what is Jerusalem? Meron Benvenisti, an Israeli expert on the city who was once deputy mayor of Jerusalem, described the halachic perspective (that is, the perspective of Jewish religious law) as follows:

> Modern-day halacha follows in the wake of administrative decisions and extends the city's sanctity accordingly. All of the territory within its municipal boundaries is regarded as "the Holy City" by the religious establishment.

If this is the halachic point of view, it seems to have its secular analogue in the government's ability to extend the symbolic power of "Jerusalem" to any area that by administrative fiat gets called "Jerusalem." Thus, for instance, the recent Israeli decision to build a new Jewish neighborhood at Har Homa is presented by the government as a matter of principle: Israel's right to build anywhere within its capital, Jerusalem. Yet Har Homa had never been "inside" Jerusalem until it was scooped up in the 1967 expansion. (In fact, it is an isolated, rural hill on the outskirts of Bethlehem.) Even Palestinians, it often appears, construe as "Jerusalem" any area that Israeli authorities so identify. Thus the planned construction at Har Homa is characterized by the Palestinian leadership as "the Judaization of Jerusalem."

Does any of this make sense? How might a rational Israeli or Palestinian reflecting on his or her own attachment to Jerusalem determine the geographic content of that commitment?

Until the latter part of the nineteenth century, Jerusalem did not extend beyond the Old City. During almost all those centuries of Jewish diaspora in which there was prayer to and about Jerusalem, the city constituted an area comprising only one percent of what is presently Jerusalem. By what process can the object of

attachment be so thoroughly transformed and yet retain its power to inspire loyalty and territorial claims?

Indeed, ancient Jerusalem cannot even be identified with the walled city. The current walls were built by the Ottoman rulers in the sixteenth century. The ancient city of David—the Jerusalem that the Bible tells us was conquered by King David from the Jebusites—was not the Old City; it was a small area less than a quarter of the size of the Old City. Today, this area, mostly ignored, lies just south of the walled city. Even the Western Wall, for Jews the most revered site in Jerusalem, is often misunderstood. It was not a wall of the ancient Jewish temple, but rather a retaining wall for the plateau on which the temple stood. But archaeologists tell us that even this is not quite correct, because at the time of the ancient temple, the plateau was much smaller than it is now. The Western Wall is a retaining wall for the plateau as it was expanded by King Herod in the first century BCE.

Even if one cares about Jerusalem, cares passionately, about exactly what should one care? In what should one reasonably invest one's concern? Assuming that Benvenisti is correct about halacha, can a rational person's emotional energies flow along that prescribed path—if the Knesset says that a settlement of 25,000 people a mile from Jerusalem is suddenly in the city, is it rational that one's feelings about that settlement suddenly change?

The more one wonders "What is Jerusalem?" the more perplexing it all becomes. Why, for instance, should Palestinians who deny that Israel has any rightful authority vis-à-vis Jerusalem or the West Bank experience "as Jerusalem" some village area in the West Bank, simply because the day before, an Israeli administrative authority defined it as part of Jerusalem? We can understand why the political leadership on both sides might want to manipulate people's feelings about what is and is not Jerusalem. But, free from manipulation, what is Jerusalem, really?

Here again we find indeterminacy. One can know the facts, but the facts don't themselves imply that something is or is not Jerusalem. To view something as Jerusalem is to have made a *decision*, or to have adopted a stance or a point of view. And such a decision can be reversed, when there are good reasons to do so.

Redefining Jerusalem

The empirical research suggests that despite official boundaries, halachic positions, and political rhetoric, we should go slowly in making any assumptions with respect to how ordinary Israelis or Palestinians define Jerusalem. It turns out that there is actually great diversity within each national community in the extent to which different parts of what is administratively defined as Jerusalem by Israel are invested with the symbolic power of Jerusalem. And there is considerable willingness, if there are good reasons, to redefine Jerusalem. For example, when Israeli Jews were asked:

> "In order to insure a Jewish majority [in Jerusalem] would you support or object to redefining the city limits so that Arab settlements and villages which are now within the borders of Jerusalem (such as Shuafat, Um Tuba, Sur Bahir) will be outside the city?"

Fifty-nine percent supported and forty-one percent opposed this redefinition of the boundaries. Moreover, of the forty-one percent opposed, only seven percent were strongly opposed. Presumably, anyone who views the boundaries of the city as a sacred line would have been very opposed. Thus, we can conclude that almost no Israeli Jews view the boundaries in this way. For purposes deemed legitimate, what is Jerusalem, especially what is East Jerusalem, can be expanded or diminished. Within limits, boundaries are a policy instrument.

When Palestinians were asked if they considered as part of Jerusalem those areas that were defined as Jerusalem for the first time when Israel expanded the boundaries in 1967, roughly forty percent said they did not and sixty percent said that they did. The result varies, however, depending on whether the question emphasizes that Israel made this specification. When simply asked about the areas by name, more people view them as part of Jerusalem. What this suggests is that calling attention to the fact that common definitions of Jerusalem implicitly accept Israel as the party who defines "Jerusalem" prompts Palestinians to assert their own definitions.

On both sides, moreover, there are major differences in the extent to which people consider various parts of the city "important as part of Jerusalem." Within each national community, there is consensus around certain areas— for instance, around the Western Wall for Israeli Jews, and around the Haram al-Sharif (the Temple Mount) for Palestinians. But then, within each national community, this consensus breaks down. Only about a third of Israeli Jews view Palestinian residential areas anywhere in the city, including those within the Old City, as "very important as Jerusalem." And only about a quarter of Palestinians view Jewish residential areas within any part of the city as "very important as Jerusalem." It turns out that once one disaggregates the Old City, only two areas in all of Jerusalem stand out as of great importance to most Palestinians *and* to most Israelis "as part of Jerusalem": the Temple Mount and the Mount of Olives.

All of this suggests that exploring what actual people experience as Jerusalem holds much promise as a key to resolving the conflict. Broadly speaking, it is possible for Israeli Jews to experience "Yerushalayim" as consisting of the Old City plus Jewish residential and commercial areas in East and West Jerusalem, and it is possible for Palestinians to experience "A1 Quds" as consisting of the Old City plus Palestinian residential and commercial areas in East Jerusalem.

When we bring together the "What is Jerusalem?" question with the "Whose is It?" question, what emerges is a path toward conflict resolution. This path leads, as it were, to two overlapping Jerusalems that have only the Old City and the Mount of Olives in common and over which there would be some form of joint administration. Were national referenda held on this approach today, it would attract greater support than most people believe. Even so, the extent and intensity of popular opposition would preclude an agreement. It is reasonable to believe, however, that if there emerged on both sides a political leadership that sought to achieve an agreement on Jerusalem, and if there were a much fuller discourse about the moral complexity of the Jerusalem question, what is not at the moment politically viable could over time emerge as the basis for lasting peace.

Appendix

In relation to beliefs about whether a peace agreement with the Palestinians will lead to true long-term peace, and whether the Palestinians have any legitimate rights in regard to Jerusalem, the percentage of Israeli Jews who seriously consider and who flatly reject each proposal.

Groups		I	II	III	IV	National Average
Will a peace agreement lead to peace?		Yes	Yes	No	No	
Do Palestinians have any sort of legitimate rights with regard to Jerusalem?		Yes	No	Yes	No	
A. Substantial Support						
Palestinian sovereignty over Arab villages in East Jerusalem	Seriously Consider	79	47	52	27	45
	Flatly Reject	10	27	30	52	36
B. Moderate Support						
Autonomy for Arab areas in East Jerusalem	Seriously Consider	55	41	41	23	35
	Flatly Reject	22	38	36	56	44
Arab areas in East Jerusalem outside Old City to Palestinian sovereignty	Seriously Consider	53	37	39	19	34
	Flatly Reject	16	38	38	59	44
Joint administration of Old City without yielding on sovereignty	Seriously Consider	54	41	40	20	34
	Flatly Reject	22	33	36	55	41
Temple mount under Wakf (Islamic Trust) as now	Seriously Consider	56	34	34	18	31
	Flatly Reject	23	44	40	62	48
C. Minimal Support						
Palestinian sovereignty over Arab neighborhoods in Old City	Seriously Consider	51	24	22	10	23
	Flatly Reject	24	52	45	70	55
Palestinian sovereignty	Seriously Consider	46	21	25	7	20
over Temple mount, Israeli over western wall	Flatly Reject	33	56	55	71	58
Palestinian sovereignty over East Jerusalem, but Jewish neighborhoods given special status under Israeli control	Seriously Consider	38	23	20	9	19
	Flatly Reject	35	59	65	73	62
Old City internationalized under UN	Seriously Consider	34	26	18	10	18
	Flatly Reject	41	58	68	74	64
Percentage of the Total Population		**21**	**12**	**18**	**49**	

Source: **Jerome M. Segal, "Is Jerusalem Negotiable?" Center for International and Security Studies, University of Maryland, 1997.**

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 17, number 4 (fall 1997).

References

Sources of data on Israeli and Palestinian attitudes: Elihu Katz, Shlomit Levy, and Jerome M. Segal, "The Status of Jerusalem in the Eyes of Israeli Jews," Center for International and Security Studies, University of Maryland, 1997; Nader Said and Jerome M. Segal, "The Status of Jerusalem in the Eyes of Palestinians," Center for International and Security Studies, University of Maryland, 1997; Jerome M. Segal, "Is Jerusalem Negotiable?" Center for International and Security Studies, University of Maryland, 1997. The study of Israeli attitudes was funded primarily by the Ford Foundation and the United States Institute of Peace. The study of Palestinian attitudes was funded by the Mac Arthur Foundation.

19

A Question of Priorities: Human Rights, Development, and "Asian Values"

Xiaorong Li

In October 1997, in a gesture timed to coincide with a state visit to Washington by Chinese President Jiang Zemin, China became a signatory to the International Covenant on Social, Economic, and Cultural Rights (ICSECR). Like much else in U.S.-China diplomacy, the decision to sign the treaty was open to multiple interpretations. On one level, Chinese leaders were conceding the existence of universal human rights, whose protection is not merely an "internal matter" or a cultural norm. But in doing so, they hoped to forestall American criticism of their human rights record—and even to embarrass the United States, which had only just signed (and has yet to ratify) the thirty-year-old treaty. Moreover, these same leaders conspicuously refused to sign the International Covenant on Civil and Political Rights (ICCPR). This allowed President Jiang to appear unyielding to outside pressure, while reaffirming his government's view that the struggle for development and socioeconomic rights should take precedence over the exercise of civil-political rights.

More recently, China has hinted that it might take a more balanced view. In an interview shortly before the March 1997 annual meeting of the U.N. Human Rights Commission, the Chinese foreign minister suggested that eventually his government *would* sign the ICCPR. In response, the United States dropped its support of a resolution criticizing China's human rights practices. But most observers doubt that the foreign minister's remarks signaled a genuine change in policy, and there has been no retreat from official statements asserting the priority of socioeconomic over civil-political rights.

China's emphasis on socioeconomic rights has been echoed by other Southeast Asian leaders, and defended as an expression of "Asian values." But this does not mean that all Asians agree with it. Prior to the International Human Rights

Conference in Bangkok in 1993, Asian human rights groups issued a joint declaration demanding "a holistic and integrated approach to human rights." In particular, they insisted that people must not be compelled to sacrifice their civil and political freedoms in exchange for promises of economic well-being. "One set of rights," they pointedly warned, "cannot be used to bargain for another."

It is not difficult to see why these Asian groups uphold the doctrine that human rights are indivisible. From their own monitoring activities, they know that serious abuses of socioeconomic rights—exploitation of workers and peasants, lack of assistance to the poor and needy, failure to provide adequate education in poor rural regions—are often committed by the very governments who claim to give priority to these rights. They are not deceived, therefore, by the claim that citizens in these countries have won protection of their socioeconomic rights by forfeiting their civil-political liberties. Moreover, these activists often campaign for civil-political freedoms that can help to expose and correct violations of socioeconomic rights. In urging governments to tolerate criticism of official policies, to safeguard freedom of expression, and to begin democratic reforms, they recognize the extent to which the two sets of rights are interrelated.

A New Challenge

By making socioeconomic rights an explicit part of their agenda, however, the Asian activists have also departed from the standard approach of the major international human rights organizations. These organizations have long recognized the distinction, embodied in the covenants, between two classes of rights. But unlike the Chinese leadership, they have appeared to assign priority to civil-political rather than socioeconomic rights. Amnesty International, for example, has campaigned to "free all prisoners of conscience," "ensure fair and prompt trials for political prisoners," "abolish the death penalty, torture and other cruel treatment of prisoners," and "end extrajudicial executions and 'disappearances'." Its members have not usually been urged to write letters to protest lack of protections of the right to food, housing, medical care, or education.

Such priorities are consistent with the founding mission of these organizations: to monitor political repression in totalitarian countries during the cold war. Human Rights Watch was created as "Helsinki Watch" in 1978 to defend "freedom of thought and expression, due process and equal protection of the law," to document and denounce "murders, disappearances, arbitrary imprisonment, exile, censorship and other abuses of internationally recognized human rights" in the Soviet Union and Eastern Europe. But as these groups have devoted greater attention to human rights violations in the developing countries of Asia, their emphasis on civil-political rights has made them vulnerable to charges of cultural imperialism. Governments of these countries have been able to dodge criticism by noting Western activists' apparent lack of interest in socioeconomic rights, and to respond that *they* are concentrating on the promotion of these rights instead.

For this reason, some human rights organizations are now asking whether they ought to adopt a more "integrated" and balanced approach. Their aim is not to retreat from advocacy for civil-political rights, but rather to address socioeconomic rights more consistently and forcefully than in the past. In exploring this option,

they must reassess one legacy of international human rights law: the idea that civil-political and socioeconomic rights are two distinct classes of rights, and that civil-political rights should take precedence since socioeconomic rights can only be progressively realized. This essay offers a historical and conceptual analysis of this legacy.

The Affordability of Rights

The two international covenants on human rights were adopted in 1966, almost twenty years after the United Nations' Universal Declaration of Human Rights. Although the covenants were a historic landmark in making international human rights standards legally binding, they also planted the seeds for much dispute about priority. The usual assumption has been that if there are two sets of rights, there must be a hierarchical relation ordering them.

In general, the language of these documents seems to recognize an *absolute* obligation to respect civil-political rights, but only an *imperfect* obligation to respect socioeconomic rights. Civil-political liberties are treated as relatively independent of economic resources, while socioeconomic rights are not. For example, the ICSECR obligates each state "to take steps ...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" (Article 2.1). In contrast, the ICCPR obligates states more stringently. Each is to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" and "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislative or other measures as may be necessary to give effect to [these] rights."

This wording gives legitimacy to the interpretation that full respect for socioeconomic rights is largely a matter of resources, whereas full respect for civil-political rights is largely a matter of self-restraint on the part of governments. When resources are simply not there, poor developing countries should not be expected to honor their obligation to protect socioeconomic rights, which often requires extensive public provision and services. Protection of civil-political rights, however, remains their absolute obligation, since such protection requires only toleration of individual liberties.

The covenants, then, assume that the two classes of human rights can be distinguished according to their affordability. But when we examine civil-political and socioeconomic rights, we do not find that the most "expensive" rights appear in one class, and the "cheap" rights in the other. Rather, there are expensive rights (as well as cheap ones) in both categories. For example, poor societies may not have the necessary resources to build legal institutions that safeguard everyone's right (as specified in the ICCPR) "to a fair and public hearing by a competent, independent and impartial tribunal established by law," "to have adequate time and facilities for the preparation of his defense," "to defend himself in person or through legal assistance of his own choosing" or "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it" (Article 14). Implementing

these rights requires large public expenditures and well-trained judges, lawyers, and law enforcement officers.

Other civil-political freedoms, it is true, are not so expensive to implement. The right to free expression can, under normal peaceful circumstances, be duly respected if a government refrains from interfering with its exercise. Likewise, the right not to be tortured and not to be held in slavery, the rights to freedom of thought, conscience, and religion, and the right to freedom of association do not need significant public expenditures to be enjoyed. Nor is the cost prohibitively high for a host of other basic civil-political rights, such as the right to liberty of movement or the right to peaceful assembly (though countries afflicted by political violence may have to spend public funds on security personnel to protect the peace when people exercise these rights).

Still, the distinction between rights that must be "progressively achieved" and those that can be immediately protected does not correspond neatly to the distinction between socioeconomic rights and civil-political rights. Certain socioeconomic rights are relatively independent of available resources and can be immediately protected. Workers' right to form autonomous unions, and the right of men and women to enter freely into marriage, are two examples.

Degrees of Urgency

Another way to support the distinction between the two classes of rights, and to justify a priority-ranking based on that distinction, is to say that violations of rights in one category are more profoundly destructive of human life and dignity than violations of rights in the other category. To judge this claim, we must consider the *range* of rights encompassed under each covenant.

As our earlier discussion indicates, the civil-political rights enumerated in the ICCPR include the right to life, the right not to be held in slavery or servitude, and the right not to be subjected to arbitrary arrest or detention; the rights to freedom of thought, conscience, and religion; and the rights to freedom of movement, expression, association, and peaceful assembly. The socioeconomic rights enumerated in the ICSECR (I have chosen not to address cultural rights here) include each person's right to work; to form and join trade unions; to enjoy an adequate standard of living, including "adequate food, clothing, and housing" and "the continuous improvement of living conditions"; the right "to the enjoyment of the highest attainable standard of physical and mental health"; and the right to education.

Now, it is hard to imagine anyone believing that *all* the civil-political rights recognized in the ICCPR should be given priority over *all* the socioeconomic rights recognized in the ICSECR, or vice versa. Human rights groups, for instance, have never contended that the right to free legal counsel is more important than the right not to be starved. Similarly, those who criticize such groups for emphasizing civil-political rights are presumably not hoping that Amnesty will abandon its campaigns against torture and capital punishment in order to lobby for health insurance reform and paid vacations for everyone. What the critics presumably have in mind is a fundamental core of socioeconomic rights (to basic subsistence, for example) that

they think should be accorded as much importance as, say, the right not to be arbitrarily detained.

All sides, I believe, should be able to accept some rough priority-rankings *within* each of the two sets of human rights. The right not to be tortured should inspire a more stringent prohibition than, say, the right of the accused to have a public hearing. But this example yields a further lesson as well. Human rights are interrelated; if an activist group is trying to prevent torture and "disappearances," one strategy is to insist on public hearings for accused persons. Some seemingly less urgent rights may thus be important because of their instrumental role in securing other, more urgent rights. In choosing their objectives and tactics, then, human rights groups cannot simply select the most urgent rights and campaign exclusively for them. Decisions about what issues to emphasize will not rely solely on judgments of how critical individual rights may be for protecting life and the dignity of the human person.

The Interdependence of Human Rights

So far, we have examined two rationales for giving priority to one class of human rights over the other. The first emphasized resources, asking how promptly a society could afford to implement particular human rights. The trouble with this approach is that the differences in affordability *within* each category are as significant as any differences between them. The second approach tried to determine which class of rights was more fundamental or necessary to human life and dignity. But here again, we found that degrees of importance vary within each category, as well as between them.

We will now consider a final approach, which may be understood as a variant of the first. Some advocates of a distinctively "Asian way" of economic modernization tend to stress that protection of human rights is contingent upon successful economic development. But then, they go on to make two further claims:

1. Any meaningful exercise of civil-political rights depends on the attainment of socioeconomic rights, and so must be deferred until the latter have been realized. In the words of one Chinese government statement: "The right to subsistence is the most important of all human rights, without which the other rights are out of the question."
2. The economic development necessary to protect socioeconomic rights can only be achieved by tightening up controls over civil-political freedom. This argument has also been made by Chinese authorities. For example, in an official statement issued two years after the Tiananmen Square crackdown in 1989, the government claimed:

> The people's right to subsistence will still be threatened in the event of a social turmoil or other disasters. Therefore it is the fundamental wish and demand of the Chinese people and a long-term, urgent task of the Chinese government to maintain national stability, concentrate their effort on developing the productive forces,... strive to rejuvenate the national economy and boost the national strength.

The statement assumes that the exercise of civil-political freedoms would disrupt "national stability" in a way that threatens economic development. It also assumes that development can be counted on to secure "the people's right to subsistence." How shall we assess these various claims?

In contemporary theories of liberal democracy, one can find strong statements suggesting that without basic socioeconomic rights, civil-political freedom is indeed out of the question. "It is true," wrote the late Isaiah Berlin, "that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom." John Rawls, no less concerned about an imbalance between liberty and equality, developed his two principles of justice to address it. The first principle governs civil-political liberties; the second guarantees the "worth of liberty," acknowledging the importance of social justice and economic well-being in determining whether the first-principle liberties have any actual value.

But liberal social democratic theory does not rest with the observation that civil-political liberties depend on the protection of socioeconomic rights; it also understands the extent to which this latter group of rights depends upon the first. At least a subset of civil-political rights is indispensable for securing basic subsistence rights (if not all socioeconomic rights) and therefore essential for human life and dignity. It is this principle of *mutual dependency* that is missing from the emphasis on the priority of socioeconomic rights over civil-political liberties.

When rapid development in an authoritarian society becomes a national priority and an end in itself, overriding civil-political liberties, those who are subjected to socioeconomic injustice (which may sometimes be hard to avoid) will have no say in policy making and no power to protect themselves. An authoritarian government will have little incentive to create even a modest "safety net" for its poorest and most vulnerable citizens. On the other hand, it will have a strong incentive to relax regulations on its labor market and employment protections, and to restrict workers' rights to bargain and to form autonomous unions, in order to exploit the country's cheap labor advantage in a global economy. Maximization of aggregate growth and neglect of the poor tend to work neatly together. Thus, it is false to assume that economic development translates *automatically* into protection of socioeconomic rights.

It is equally false to assume that suppression of civil-political rights *necessarily* enhances sustainable economic development. Without democratic accountability, the ruling elites are virtually unbound in their power to advance personal interest through their political control of bank loans, public funds, tax revenues, and vital investment information. Cronyism becomes endemic. The government-business-bank alliance in East Asia, for example, has fostered institutional corruption and nepotism, and is opposed to the fair and open dealings that are key to free trade. Bad-faith loans, inefficient resource distribution, and the control of information vital for free trade, cultivate unfairness and public distrust of the system, threatening governance and social stability in times of economic crisis.

Strategies for International Monitoring

Recently, major human rights organizations have begun testing new waters in their monitoring work to recognize the complexity of human rights violations, where socioeconomic rights and civil-political rights are often intricately entangled. Amnesty International has investigated and reported on violations arising from China's population policies, for example. The focus of such investigations remains on civil political rights violations such as violence against women and arbitrary detention. But there is also a recognition of the special vulnerability of women, given their unequal social, economic, and political status in Chinese society. Human Rights Watch/Asia has reported on child abuse in Chinese orphanages and forced relocation in the Three Gorges Dam Project, again with a focus on abuses of civil liberties and violations of the human person. Moreover, in a 1996 letter to board members, Human Rights Watch executive director Kenneth Roth proposed new policies on monitoring social, economic, and cultural rights. He sought and received approval to experiment with "a very limited incursion into the ESC [social, economic, and cultural] rights field"—that is, only "in situations in which there is a clear connection to violations already within our primary CP [civil-political] rights mandate."

In arguing for this experiment, Roth did not seek to erase the distinction between the two classes of rights. Echoing the language of the international covenants, he maintained that civil-political rights impose "a more absolute obligation," whereas socioeconomic (and cultural) rights must be "progressively realized" in accordance with available resources. Civil-political rights, he went to say, have "greater clarity," and the expertise developed by Human Rights Watch in "exposing and highlighting" rights violations is "better suited to CP rights." It was for these reasons that he favored making the incursion into socioeconomic-cultural rights a "very limited" one.

On prudential grounds, the cautious approach outlined in the letter is understandable. It would be unfair to expect a specialized organization to extend its mandate into a new area all at once. One must also remember that much of the effectiveness of human rights monitoring lies in shaming abusive governments into action by publicizing their violations through public media and international forums. Certain civil-political rights violations have the "clarity" that makes such publicity effective. In contrast, criticism of a nation's failure to provide for indigent children or the homeless may be less stigmatizing, particularly in the case of poor countries where the causes of deprivation— social, economic, and political—are numerous and complex.

However, the principled reasons for limiting the experiment are less persuasive. As we have seen, the distinction between civil-political rights and socioeconomic rights is not supported by the distinction between "absolute" and "imperfect" obligations, or between rights that can be immediately implemented and those that can only be progressively realized. Not all civil-political rights can be immediately implemented, whereas some socioeconomic rights can. Human Rights Watch confronts this reality when it monitors problems associated with prison overcrowding in poor countries, or with the devastated judicial system in Rwanda.

In such cases, it acknowledges that certain civil political rights are expensive and can only be progressively realized, at least in some contexts.

It is important for human rights groups to make a realistic assessment of their strengths and effectiveness in specific areas of civil-political rights *and* socioeconomic rights, rather than adhering to a principled partition between the two. In the process, they may decide that certain basic rights, however crucial, fall outside their mandate; the principle that human rights are indivisible does not commit activists to monitoring and protesting and seeking redress for violations of *every* right recognized by the covenants. But such decisions are best justified on prudential or strategic grounds. They do not follow from controversial categorical differences between civil-political and socioeconomic rights.

There is every reason to think that human rights organizations can gain strategically, and improve their overall effectiveness, by taking on certain socioeconomic rights abuses—restrictions on union rights, failure to eradicate child labor, failure to promote women's educational and economic opportunities, and failure to provide even minimal assistance for the poor—in carefully chosen contexts. Such a move would draw international attention to a secret well-guarded by authoritarian governments in Asia: their record of violating socioeconomic as well as civil-political rights. It would also address the concerns of Asian activists who have justly called for a more inclusive approach to human rights monitoring around the world.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 18, 1/2 (winter/spring 1998).

References

Information Office of the PRC State Council, "Human Rights in China," *Beijing Review* (November 4-10, 1991); Onuma Yasuaki, "On the Need for an Intercivilizational Approach to Evaluating Human Rights," a paper presented at the Carnegie Council on Ethics and International Affairs workshop "Human Rights Initiatives," held in Japan, Thailand, and South Korea (1994-1996); Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford, 1969); John Rawls, *A Theory of Justice* (Harvard, 1971); Kenneth Roth, "Proposed Policy on Economic, Social, and Cultural Rights," Human Rights Watch internal memo (September 12, 1996).

20

War and Sacrifice in Kosovo

Paul W. Kahn

The most striking ethical issue to arise in the aftermath of the Kosovo intervention is whether the extraordinary asymmetry of risk that characterized the NATO deployment—NATO forces were destroying and killing without themselves suffering losses—is morally defensible. The appearance of riskless war is profoundly disturbing to many, not because they believe it to be inherently wrong, but because they do not know how to think about it at all. Our moral intuitions were formed when war was a confrontation of armies on a battlefield; these intuitions may no longer be reliable sources for evaluating military conduct. Was mutual risk simply an unavoidable fact of war in the past or is mutual risk a morally compelling requirement of a just war? While the military deployment was still under way, questions about the morality of a policy of riskless warfare were framed in terms of its tactical consequences. The policy meant, for example, that the use of ground troops was ruled out. Many critics believed that without ground troops, or at least a credible threat of their use, an air campaign could not succeed. Others argued that an air campaign conducted with pilot safety as the first concern would at worst hit unintended targets, and at best take such a long time to be effective that the Serbs would have ample opportunity to accomplish their policy of ethnic cleansing. At this point, it is hard to know how effective the air campaign was on its own terms, how much the outcome of the war turned on diplomacy—particularly Russian pressure on the Serbs—or how critical was the decision to extend the air campaign to civilian targets in Serbia proper (especially the electrical grid). Nevertheless, the wartime critics' tactical concerns seem to have been substantially misdirected. It is hard to believe, for example, that NATO could have mounted a ground campaign more quickly, that such a campaign would have caused less collateral damage, or that it would have led to a military outcome more advantageous than the withdrawal of the Serbian army and the return of refugees that we have seen.The question of the morality of riskless warfare, however, persists quite independently of the debate over tactics. Indeed, the moral puzzle of riskless warfare is oddly proportional to the success of the intervention. If the intervention had not been successful, it would be

easy to agree with the critics that the failure to assume risks was a failure to adopt military means commensurate with the morally compelling task of preventing atrocity. The real puzzle is why we should continue to have any qualms even if the military intervention is judged to be a success.

A Matter of Chivalry?

Every state wants to minimize its own losses when it commits itself to the use of force. There is nothing new in this. NATO policy, however, seems to have crossed from a goal of minimizing losses to a qualitatively different goal of no losses at all. That the war lasted for several months, and included some 35,000 sorties, without the loss of a single NATO serviceman from hostile activity, tells us that this ambition may have become reality. That riskless warfare even raises a moral puzzle may seem, at first, no more than a lingering cultural remnant of a world in which battle was governed by rules of chivalry—a romantic ideal that has been out of touch with actual combat for most of this century. Conventional warfare has become a confrontation of mechanical means, in which combatants rarely see directly the targets of their actions. It is no longer far-fetched to imagine military conflicts waged by small groups of high tech warriors who select targets, push buttons, and are home for dinner. Though some commentators object to the "sanitizing" of war—leading, they warn, to moral callousness and a disregard for humanitarian norms—their worries may seem like vestiges of an ethos that has been decisively displaced. Recent experience suggests, moreover, that personal confrontation may itself exacerbate a tendency toward atrocity. Within Kosovo, a war was waged at the direct, person-to-person level: the campaign of ethnic cleansing by the Serbs. But it was hardly the case that chivalry retained a place in this context—just the opposite. The worst examples we have of genocide and ethnic cleansing in the past decade—Rwanda, Bosnia, and Kosovo—all share the element of direct personal confrontation between the violator and his victim. This double failure of the chivalrous ideal reflects a deeper moral asymmetry in the conduct of war today. One hundred years ago, war was still considered a legal means of contesting or advancing the interests of the state. That meant that each party to a conflict could confront the other on morally neutral terms. If war was "politics by other means," then there was no necessity that combatants view their opponents as the enemies of humankind or as tainted by the immorality of their ends. A morally neutral battlefield also meant that third parties did not have to take sides. Today, the international use of force is prohibited under the United Nations Charter. Increasingly, this prohibition on the use of force is thought to apply to many internal conflicts as well. We do not approach these military conflicts from the perspective of neutrality, but rather with the understanding that there is a legal and illegal, a good and bad. Chivalry lacks a foundation in such a moral universe, because it suggests that a code of personal honor may link combatants to each other over and above the difference in the ends for which they fight. Today, illegal wars tend to be fought by illegal means. When the decision to use force already amounts to a violation of a fundamental norm of international law, it is unlikely that an aggressor's choice of tactics will be constrained by international law. Earlier in this century, the opposite concern seemed no less urgent: that countries fighting for

legal ends, particularly self-defense, might put those ends at risk were they to comply with the rules of war. The refusal to accept such a risk led, for example, to the threat to use weapons of mass destruction rather than accept defeat. In all of this, the importance of the end—whether legal or illegal—seems to overwhelm the legal regulation of the means. A policy of riskless intervention indicates a similar refusal to allow the means of warfare to generate moral norms apart from the ends. Now, however, the reasoning is that if our end is virtuous, there can be no justification for suffering "unnecessarily" in its pursuit. In a confrontation between good and evil, why should the good suffer?

War as Police Action

If chivalry is dead, and we are confident in our ability to identify unjust situations perpetrated by humans who deserve to be stopped, what sort of moral position could require us to sacrifice more, rather than fewer, of our own combatants? If our end is to stop the ethnic cleansing in Kosovo, then are we not morally better off if we can manage to do so without the risk of injury to ourselves? Why should the innocent suffer to stop the guilty? From this perspective, there seems to be a moral imperative to develop forms of warfare that would allow us to do just this: to punish and deter the unjust without risk to the innocent, whether our own soldiers or civilian victims. If we could completely differentiate the guilty from the innocent, injuring only the former, would we not have perfected, or even transformed, the moral basis of war?

Indeed, in modern international law, "war" is not a term that is used. Instead, the illegal use of force is characterized as "aggression" and the response is "self defense." In Kosovo, NATO was not at war, but rather was pursuing "humanitarian intervention" in response to violations of human rights law. International actions responding to illegal use of force are "police actions." If the idea of a morally neutral war conducted under a code of chivalry is a thing of the past, and modern wars are best thought of as police actions, then perhaps we should substitute our moral intuitions about police forces for those about armies at war. Michael Walzer has suggested this in analogizing intervention in response to human rights violations to firefighters seeking to put out a fire.

Walzer's point is that we expect firefighters to take risks to save others. One cannot be a good firefighter or policeman if one thinks of saving oneself before helping others. We expect those responsible for public safety to take risks proportionate to their ends. Yet, we would not be troubled if they could accomplish their ends without risk to themselves. We don't believe that there is a moral problem with a police force that manages to respond effectively to particular crimes without exposing its own members to risk of death or injury—unless that end is accomplished by subjecting the offenders to some disproportionate use of force. If this is the appropriate analogy, then there is nothing morally troubling about riskless warfare unless it is unsuccessful or disproportionately destructive.

The moral argument in favor of elimination of risk to the innocent can even go one step further. The entire calculation of whether and when to deploy force must be recast if we can wage war without risk. What possible grounds are there not to deploy force to stop gross injustice if the cost to us can be measured in dollars, not

lives? In an age of international human rights, do we not have an obligation to intervene to vindicate and protect those rights? While the issue of whether we can ask the innocent to sacrifice their own lives to save others is morally complex, and appropriately leads to a presumption against intervention, the presumption would seem to run just the other way when there is no real risk of death or injury attached to the intervention.

If we view the NATO campaign, then, from the perspective of the intervening states, it is hard to identify a convincing set of reasons that could support the moral intuition that there is something problematic about riskless warfare. Nevertheless, there remains something disturbing in the picture of the United States responding to the next Kosovo by simply sending in cruise missiles to hit targets selected through satellite surveillance.

Morality in the Message

Warfare is not subject to a straightforward cost-benefit analysis. A community's decision to resort to force is not merely about changing the behavior of others, but about the moral character of the deciding community as well. Decisions to use force communicate messages about the community and about its views of others. In any given instance, then, we have to ask what message is being conveyed by a decision to deploy force in a particular manner. This concern with the communicative aspect of the use of force is independent of the actual consequences—the effectiveness of that use. The traditional rules of warfare did not make warfare any less dangerous, but compliance with, or violation of, those rules conveyed certain messages. The Serbs understood this when they violated the human rights of the Kosovars. There are numerous ways to encourage massive emigration; their way sent a particular message.

The morality of the risk-free use of force is not a matter of chivalrous conduct among combatants, but of the moral meaning of assuming, or failing to assume, particular risks in specific contexts. In part, what is so troubling in the Kosovo situation is the message that was sent by the endless reports of actions taken or not taken on the grounds that the risks to NATO personnel were too high. NATO focused the attack for many weeks on air defenses; its planes operated from great height; it would not risk pilots in refugee relief operations; and President Clinton announced from the beginning that there would be no ground intervention.

Wholly apart from tactical and strategic issues concerning the effectiveness of the military decisions, the moral message is this: the lives of NATO personnel are of greater value than the lives of those who might benefit from these interventions. This message is morally troubling precisely because it undermines the purported justification for the NATO operation. A humanitarian intervention, justified by appeals to universal standards of human rights, represents a commitment to a vision of the fundamental equality of all persons. This means recognition of their right to life and respect for their distinct communities. These ideals are denied by the policy of waging riskless war. The contradiction is there as soon as the policy is announced, even if it were to turn out that in the particular case the means adopted were as effective as could reasonably be expected.

We suspect that if the people on the ground had been citizens of NATO countries, we would not have heard that a pilot could not attack Serbian troops because the risk to himself was too great. Rather, we would have heard of the sacrifice demanded of and made by a pilot to save others because the risk to them was too great. A riskless war, even a successful one, is stripped of opportunities for moral heroism. Ironically, that heroism stands on a stronger ground of democratic equality than does the conduct of a war limited by the concern that casualties might disturb public opinion.

Riskless warfare in pursuit of human rights is, therefore, actually a moral contradiction. If the decision to intervene is morally compelling, it cannot be conditioned on political considerations that assume an asymmetrical valuing of human life. This contradiction will be felt more and more as we move into an era that is simultaneously characterized by a global legal and moral order, on the one hand, and the continuing presence of nation-states, on the other. What are the conditions under which states will be willing to commit their forces to advance international standards, when their own interests are not threatened? Riskless warfare by the state in pursuit of global values may be a perfect expression of this structural contradiction within which we find ourselves.

In part, then, our uneasiness about a policy of riskless intervention in Kosovo arises out of an incompatibility between the morality of the ends, which are universal, and the morality of the means, which seem to privilege a particular community. There was talk during the campaign of a crude moral-military calculus in which the life of one NATO combatant was thought to be equivalent to the lives of 20,000 Kosovars. Such talk meant that even those who supported the intervention could not know the depth of our commitment to overcoming humanitarian disasters. Is it conditioned upon the absence of risk to our own troops? If so, are such interventions merely moral disasters— like that in Somalia—waiting to happen? If the Serbs had discovered a way to inflict real costs, would there have been an abandonment of the Kosovars?

We can’t know whether a failure of the policy of avoiding risk would have led to a deeper commitment or to withdrawal. However, the very fact that the question was inevitably raised by the policy creates a perception of inequality. A willingness to sacrifice offers a form of moral assurance, an assurance that one is serious about the ends and willing to pursue those ends within a single calculus in which the lives of Kosovars count at least on the same scale, if not exactly the same amount, as the lives of NATO troops.

Risk and Democratic Legitimacy

The policy of riskless intervention may be the cost for popular support of military intervention when national interests are not threatened. But there is also a worry that popular support here is really only popular indifference. Without casualties, or the threat of casualties, the democratic process may not engage the issue very much at all.

Many fear the moral quality of the political judgments of the leadership of the West, and of the leadership of the United States in particular. It has not been that long since we pursued secret military interventions in Central America, which were

profoundly offensive to human rights norms. Secrecy in those interventions played much the same political role that risklessness plays today. Both dampen political debate by suppressing the public prominence of a use of force. A political leadership that must justify in democratic debate a policy of sacrifice is likely to be disciplined by the force of public opinion.

The puzzle today is whether such discipline is a good thing. The more we trust our political leadership, the more willing we may be to accept less public debate for the sake of advancing a human rights agenda. Public opinion may make the leadership more cautious than it would otherwise be. Caution in the pursuit of human rights is not necessarily a virtue. The Kosovo experience showed us that there can be genuine conflicts between the domestic legitimacy that arises from popular approval of political action and the moral imperative of international human rights. An executive branch that is serious about the latter may have to be satisfied with less of the former. President Clinton appears to have made such a trade-off in his policies on Kosovo. The same dynamic was visible in Russia, but working in the opposite direction: a more democratic government there may have found itself even more committed to supporting the Serbs.

For many, however, the source of concern is not an absence of American intervention, but rather the threat of unilateral intervention by the sole remaining superpower. Riskless warfare may be too easy politically. It may give too much power to an executive operating without the political legitimacy that comes from real popular support.

Policemen of the World

Alongside these worries about the message sent, the depth of the commitment, and political legitimacy, there lies a final moral complexity. We inevitably ask by what right our nation interferes in the affairs of other nations. Not just isolationists, but those genuinely concerned for others, are troubled by the widely expressed challenge: “Who made us the policemen of the world? These are not our fights, so why should we presume to determine their outcomes?” Our uneasiness about riskless intervention arises, in part, from the difficulties associated with justifying intervention of any kind.

Surely the mere existence of universal human rights norms does not in itself set the standard for permissible intervention, either as a matter of law or of morality. Just at this point the analogy to a domestic police force breaks down. On the international level, there are competing moral claims between the universal demands of human rights and each community’s right to shape its own history. This competition does not exist within a single community under law. Claims that a new global community governed by human rights law has emerged over and above nation-states seem wildly exaggerated when precisely what the world lacks is a police force willing to enforce these norms. NATO members, including the United States, certainly have not expressed a willingness to take on this role generally: they did not act in Rwanda and resisted action in Bosnia.

This tension between the national and the global is especially acute when the intervening party uses military force without the approval of that institution—the United Nations Security Council—with primary responsibility to keep international

peace. NATO may have been responding to violations of international law, but it was not authorized to act by the only global institutions that we have. Russia and China publicly took the position that the NATO intervention was illegal. Kosovo was not Serbia against the world, but Serbia against NATO.

This is the same kind of asymmetry that many find disturbing in Spain's recent legal action against former Chilean president Augusto Pinochet. Pinochet may indeed have violated universal standards of human rights, but still he is a special problem for the Chilean community to resolve. The fact of his violations may not be enough to justify judicial intervention by Spain, which has so little at stake in dealing with this ex-dictator.

Americans, in particular, stand on a complex history of self-determination, in which we have not been without moral fault but in which we have insisted on working out these faults by and for ourselves. Terrible as the Civil War was, I do not think that many Americans believe we would have been better off had some third party intervened to right our wrongs. We have not always respected a similar right of nonintervention by other states, but this has only subjected us to the charge of hypocrisy.

Sharing a History

Without taking up the complexities of this conflict between the universal morality of human rights and the moral claim to community autonomy, I want to suggest that this conflict helps explain why the possibility of riskless war is profoundly troubling. After a century of genocide, we know that there are limits to a country's right not to be interfered with: at a certain point, intervention becomes morally compelling. But a willingness to sacrifice, on the part of those who would intervene, is critical in reaching that point.

When we announce that we are willing to sacrifice for others with whom we have no bond other than a common understanding of justice, we intervene not as a moral enforcer but as a participant. We now make the oppression of others a part of our own history; the injustices that might have seemed distant become injustices against ourselves. We come to share a common history with the victims and together form a new community.

It is true that in acting to protect the Kosovars, we certainly seem like third-party interveners to the Serbs. We are not a part of their community, so why are we there? But the Serbs do not have a right to define the boundaries of the community against which they are acting. They cannot stop others from saying that they too are Kosovars.

Communities do not come with predetermined boundaries. States, for example, divide or join together as peoples come to see themselves differently. The peoples of the former Yugoslavia should know this better than anyone. When we are willing to sacrifice on the field of battle, we actively remake the boundaries of communities. The expansion of the moral community of identification is at the foundation of justified intervention.

This is not to say that a nation declaring its moral identification with others is always entitled to intervene on their behalf. We can be, and often have been, wrong in our decisions to use force; our willingness to take risks does not in itself prove

that we have intervened on the deserving side. So there is an inescapable need for moral judgment. The problem is that moral judgment is not enough. We do not have a license to intervene whenever we think one side in a conflict is right and the other is wrong.

The appeal to a community of identification as a rationale for intervention clearly places a substantial burden on the victim community, on those for whom we intervene. Their behavior must be such that it can sustain a sense of cross-cultural identification, of membership in a common community. When the victims take advantage of the intervention to carry out symmetrical violations against their enemies, they undermine this identification. The reaction of other states will rightly be moral disengagement, a sense that this is not our fight, nor should it be. We may be entering this stage in the Kosovo saga.

Standing with the Kosovars is not the same as standing on a claim to enforce universal human rights. Because we are not willing to intervene in countless places around the world in which individuals suffer injustices as great as those in Kosovo, the latter claim inevitably looks hypocritical. But the former claim is not subject to the same charge of hypocrisy. Identifying with the suffering of others and acting on their behalf is not an all-or-nothing proposition. Yet, by insisting that its intervention would only proceed in a riskless fashion, NATO placed in doubt even this more limited justification. It suggested that the pursuit of human rights may be a modern version of Clausewitz's vision of war itself: the pursuit of national policy by other means.

Riskless war seems to be without costs, but it is only at the cost of sacrifice that we build a community, of whatever extent. Outside our own community, the right to intervene, even in a good cause, is never clear.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 19, number 2/3 (spring/summer 1999).

References

Michael Walzer, "Politics and Morality in Kosovo," *Dissent*, vol. 46, no. 3 (summer 1999); Paul W. Kahn, "On Pinochet," *Boston Review*, vol. 24 (February/March 1999).

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Retribution and Reconciliation

David A. Crocker

In his recent book, *No Future Without Forgiveness,* Archbishop Desmond Tutu evaluates the successes and failures of the South African Truth and Reconciliation Commission (TRC). The chair of the TRC, Tutu defends the commission's granting of amnesty to wrongdoers who revealed the truth about their pasts, and he lauds those victims who forgave their abusers. While recognizing that a country must reckon with its past evils rather than adopt "national amnesia," Tutu nevertheless rejects what he calls the "Nuremberg trial paradigm." He believes that victims should not press charges against those who violated their rights, and the state should not make the accused "run the gauntlet of the normal judicial process" and impose punishment on those found guilty.

Tutu offers practical and moral arguments against applying the Nuremberg precedent to South Africa. On the practical side, he expresses the familiar view that if trials were the only means of reckoning with past wrongs, then proponents of apartheid would have thwarted efforts to negotiate a transition to democratic rule. The South African court system, moreover, biased as it was toward apartheid, would hardly have reached just verdicts and sentences. Tutu points out that trials are inordinately expensive, time consuming, and labor intensive—diverting valuable resources from such tasks as poverty alleviation and educational reform. In the words of legal theorist Martha Minow, prosecution is "slow, partial, and narrow." Rejecting punishment, Tutu favors the TRC's approach in which rights violators publicly confess the truth while their victims respond with forgiveness. Powerful practical reasons may explain the decision to spare oppressors from trials and criminal sanctions. But, as I shall show, no *moral* argument—at least neither of the two that Tutu provides—justifies rejection of the Nuremberg paradigm.

The Argument against Vengeance

In the first of these moral arguments, the argument against vengeance, Tutu offers three premises for the conclusion that—at least during South Africa's

transition—legal punishment of those who violate human rights is morally wrong. He asserts: (i) punishment is retribution, (ii) retribution is vengeance, and (iii) vengeance is morally wrong.

Although Tutu understands that forgiveness may be appropriate for any injury, at one point he claims that amnesty provides only a *temporary* way for South Africa to reckon with past wrongs. He provides no criteria, however, to determine at what point punishment for crimes should be reinstated, and he also offers no reasons that punishment is justified in normal times. Further, one might wonder on what grounds Tutu would deny exoneration for those who committed human rights violations *after* the fall of apartheid and who now wish to exchange full disclosure of their wrongdoing for amnesty.

Is Punishment Retribution?

Consider the first of Tutu's three premises in his argument against punishment. While Tutu assumes that punishment is no more than retribution, he fails to define what he understands by "punishment." He does not, for example, explicitly identify legal punishment as state-administered and intentional infliction of suffering or deprivation on wrongdoers. Tutu also says almost nothing about the nature and aims of legal punishment. He fails to distinguish court-mandated punishment from therapeutic treatment and social shaming, among other societal responses to criminal conduct. Tutu does not consider the various roles that punishment may play—such as to control or denounce crime, isolate the dangerous, rehabilitate perpetrators, or give them their just deserts—and whether these roles justify the criminal sanction. He does at one point say that the "chief goal" of "retributive justice" is "to be punitive." Tutu apparently takes it as a given that "punishment" means "retribution" and that the nature of legal punishment is retributive.

Tutu does at times concede that trials have two other aims, at least during South Africa's transition: vindicating the rights of victims and generating truth about the past. Again and again, Tutu states that victims of past wrongs have the right—at least a constitutional right and perhaps also a moral one— to press criminal charges against and seek restitution from those who abused them. He also extols the "magnanimity" of individuals who, like former South African President Nelson Mandela, have not exercised this right but are willing to forgive and seek harmony (*ubuntu*) with their oppressors. These statements suggest that Tutu regards legal punishment not merely as a means to retribution but also as a way to affirm and promote the rights of victims.

Tutu also endorses the credible threat of punishment as a social tool to encourage perpetrators to tell the truth about their wrongdoing. The TRC did not grant a blanket amnesty to human rights violators or pardon all those convicted of rights abuses committed during apartheid. Instead the TRC offered amnesty to *individual* perpetrators *only if* (i) their disclosures were complete and accurate, (ii) their violations were politically motivated, and (iii) their acts of wrongdoing were proportional to the ends violators hoped to achieve. According to Tutu, individuals who fail to fulfill any of the three conditions have a strong incentive to apply for amnesty and reveal the whole truth. It is precisely because violators are threatened with trial and eventual punishment that they realize that making no application for

amnesty or lying about their wrongdoing is too risky. Without such a threat of trial and punishment, the TRC is unlikely to have had the number of perpetrators who did come forward to confess gross wrongdoing.

But Tutu cannot have it both ways. He cannot both reject actual punishment and still defend the threat of punishment as efficacious in dispelling lies and generating truth. Hence, Tutu's acceptance of a "threat to punish" practically commits him to a nonretributive and consequentialist role for punishment, since without occasionally making good on the threat to punish, such a threat loses credibility.

Tutu does not bring enough precision to the term "retribution." He seems, at points, simply to identify retribution with legal punishment. Instead, one must understand retribution as one important *rationale* or *justification* for and a constraint upon punishment. Proponents of the retributive theory of punishment offer a variety of competing accounts, but all agree that any retributive theory minimally requires that punishment must be "backward looking in important respects." That is, justice requires that a crime is punishable as, in the words of lawyer and legal theorist Lawrence Crocker, "a matter of the criminal act, not the future consequences of conviction and punishment." These future consequences might comprise such good things as deterrence of crime, rehabilitation of criminals, or promotion of reconciliation. For the proponent of retributivism, however, the infliction of suffering or harm, something normally prohibited, is justified because of—and in proportion to—what the criminal *has done antecedently.* Only those found guilty should be punished, and their punishment should fit (but be no more than) their crime.

Some supporters of the retributive theory of punishment, assert, moreover, that only (and perhaps all) wrongdoers *deserve* punishment, and the amount or kind of punishment they deserve must fit the wrong done. Harvard philosopher Robert Nozick explains desert in terms of both the degree of wrongness of the act and the criminal's degree of responsibility for it. Retribution as a justification for punishment requires that wrongdoers should get no more than (and perhaps no less than) their "just deserts."

Is Retribution Vengeance?

The second premise in Tutu's argument against punishment—that retribution is (nothing but) vengeance or revenge—is flawed as well. Given Nozick's understanding of retribution as "punishment inflicted as deserved for a past wrong," is Tutu right to treat retribution and revenge or vengeance as equivalent? Both retribution and revenge share, as Nozick puts it, "a common structure." They inflict harm or deprivation for a reason. Retribution and vengeance harm those who in some sense have it coming to them. Following Nozick's brief but suggestive analysis, I propose that there are at least six ways in which retribution differs from revenge.

Retribution addresses a wrong. First, as Nozick observes, "retribution is done for a wrong, while revenge may be done for an injury or slight and need not be done for a wrong." I interpret Nozick to mean retribution metes out punishment for a crime or other wrongdoing, while revenge may be exacted for what is merely a slight, an unintended injury, an innocent gaze, or shaming in front of one's friends.

Retribution is constrained. Second, Nozick also correctly sees that in retribution there exists some "internal" upper limit to punishment while revenge is essentially unlimited. Lawrence Crocker concurs: "an absolutely central feature of criminal justice" is to place on each offense "an upper limit on the severity of just punishment." This limitation "is the soul of retributive justice." It is morally repugnant to punish the reluctant foot soldier as severely as the architects, chief implementers, or "middle management" of atrocities. Retribution provides both a sword to punish wrongdoers and a shield to protect them from more punishment than they deserve. In contrast to punishment, revenge is wild, "insatiable," unlimited. After killing his victims, an agent of revenge may mutilate them and incinerate their houses. As Nozick observes, if the avenger does restrain himself, it is done for "external" reasons having nothing to do with the rights or dignity of his victims. His rampage may cease, for instance, because he tires, runs out of victims, or intends to exact further vengeance the next day.

Notably, Martha Minow and others subscribe to a different view. Minow suggests that retribution is a *kind* of vengeance, but curbed by the intervention of neutral parties and bound by the rights of individuals and the principles of proportionality. Seen in this light, in retribution vengeful retaliation is tamed, balanced, and recast. It is now a justifiable, public response that stems from the "admirable" self-respect that resents injury by others.

While Minow's view deserves serious consideration, Nozick, I think, gives us a picture of vengeance—and its fundamental difference from retribution— that better matches our experience. Precisely *because* the agent of revenge is insatiable, limited neither by prudence nor by what the wrongdoer deserves, revenge is not something admirable that goes wrong. The person seeking revenge thirsts for injury that knows no (internal) bounds, has no principles to limit penalties. Retribution, by contrast, seeks not to tame vengeance but to excise it altogether. Retribution insists that the response not be greater than the offense; vengeance insists that it be no less and if possible more. Minow attempts to navigate "between vengeance and forgiveness," but she does so in a way that makes too many concessions to vengeance. She fails to see unequivocally that retribution has essential limits. Vengeance has no place in the courtroom or, in fact, in any venue, public or private.

Retribution is impersonal. Third, vengeance is personal in the sense that the avenger retaliates for something done antecedently to the individual or the group. In contrast, as Nozick notes, "the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution." Retribution demands impartiality and rejects personal bias, while partiality and personal animus motivate the "thirst for revenge."

The figure of justice blindfolded (so as to remove any prejudicial relation to the perpetrator or victim) embodies the commonplace that justice requires impartiality. Justice is blind—that is, impartial—in the sense that she cannot distinguish between people on the basis of familiarity or personal ties. This is not to say, however, that justice is impersonal in the sense that it neglects to consider an individual's traits or conduct relevant to the case. Oddly, Tutu suggests that the impartiality or neutrality of the state detracts from its ability to deal with the crimes of apartheid. He defends the TRC because it is able to take personal factors into account. He writes:

> One might go on to say that perhaps justice fails to be done only if the concept we entertain of justice is retributive justice, whose chief goal is to be punitive, so that the wronged party is really the state, something impersonal, which has little consideration for the real victims and almost none for the perpetrator.

Although justice eliminates bias from judicial proceedings, it may be fair only if it takes certain personal factors into account. Because Tutu confuses the impersonality or neutrality of the law with an indifference to the personal or unique aspects of a case, Tutu insists that judicial processes and penalties give little regard to "real victims" or their oppressors.

Retribution takes no satisfaction. A fourth distinction between retribution and revenge concerns the "emotional tone" that accompanies—or the feelings that motivate—the infliction of harm. Agents of revenge, claims Nozick, get pleasure, or we might say "satisfaction," from their victim's suffering. Agents of retribution may either have no emotional response at all or take "pleasure at justice being done." (Adding to Nozick's account and drawing on the work of political theorists Jeffrie Murphy and Jean Hampton, I should add that a "thirst for justice" may—but need not—arise from moral outrage over and hatred of wrongdoing.)

Retribution is principled. Fifth, Nozick claims that what he calls "generality" is essential to retribution but may be absent from revenge. By this term, Nozick means that agents of retribution who inflict deserved punishment for a wrong are "committed to (the existence of some) general principles (prima facie) mandating punishment in other similar circumstances."

Retribution rejects collective guilt. Nozick, I believe, helpfully captures the main contrasts between retribution and revenge. To these, I add a sixth distinction. Mere membership in an opposing or offending group may be the occasion of revenge, but not of retribution. Retributive justice differs from vengeance, in other words, because it extends only to individuals and not to the groups to which they belong. In response to a real or perceived injury, members of one ethnic group might, for instance, take revenge on members of another ethnic group. However, the state or international criminal court could properly mete out retribution only to those *individuals* found guilty of rights abuses, not to *all* members of the offending ethnic group. Since collective guilt has no place in an understanding of retributive justice, revenge and retribution should not be conceived as equivalent. Tutu makes precisely this mistake.

Following the Hegelian dictum "first distinguish, then unite," Nozick promptly concedes, as he should, that vengeance and retribution can come together in various ways. Particular judicial and penal institutions may combine elements of retribution and of revenge. The Nuremberg trials, arguably, were retributive in finding guilty and punishing some Nazi leaders, punishing some more than others, and acquitting those whom it found not guilty as charged. But Tutu is right to say that the Nuremberg precedent was contaminated, compromised by revenge or "victor's justice." As he notes, Nuremberg used exclusively allied judges and failed to put any allied officers in the dock. However, Tutu neglects to affirm the achievements of Nuremberg: it vindicated the notion of individual responsibility for crimes against humanity and defeated the excuse that one was "merely following orders." One reason that Nuremberg is an ambiguous legacy is that it had both good

(retributive) and bad (vengeful) elements. In no case can one accept Tutu's second premise that retribution is *nothing but* vengeance.

What of Tutu's third premise that vengeance is morally wrong? When I shift the focus from vengeance to the agent of revenge, I accept Tutu's premise. Unlike the agent of retribution, the agent of revenge does wrong, or at least is morally blameworthy. He or she retaliates and inflicts an injury without regard to what the person impartially deserves. If the penalty *happens* to fit the crime, it is by luck; the agent of revenge is still blameworthy since he or she gave no consideration to desert, impartiality, or generality. If, as is more likely given the limitless nature of revenge, the penalty is more excessive than the crime, the agent of revenge is not only culpable but also his or her act is morally wrong. Nonetheless, Tutu's overall argument against vengeance is unsound since two of its premises are not acceptable.

The Reconciliation Argument

Tutu proposes a second moral argument against the "Nuremberg trial paradigm" for South Africa's transition and others like it. Tutu rejects retributive justice on the grounds that it prevents or impedes reconciliation. He understands reconciliation as "restorative justice," the highest if not the only goal in South Africa's reckoning with past wrongs. Tutu defends amnesty and forgiveness as the best means to promote reconciliation. What does Tutu mean by the vague and not infrequently contested term "reconciliation" and its synonym "restorative justice"? Tutu explicitly defines restorative justice (in contrast to retributive justice) as reconciliation of broken relationships between perpetrators and victims:

> We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu,* the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community that he has injured by his offense.

Although Tutu in this passage uncharacteristically leaves room for punishment, he understands the "central concern" of restorative justice as the reconciliation of the wrongdoer with his or her victim and with the society he or she has injured. The wrongdoing has "ruptured" earlier relationships or failed to realize the ideal of "ubuntu." *Ubuntu*, a term from the Ngunui group of languages, refers to a kind of "social harmony" in which people are friendly, hospitable, magnanimous, compassionate, open, and nonenvious. Although Tutu recognizes the difficulty of translating the concept, it seems to combine the Western ideal of mutual beneficence, the disposition to be kind to others, with the ideal of community solidarity.

Tutu regards "social harmony" or "communal harmony" as the *summum bonum*, or highest good. He concedes that South Africa must in some way "balance" a plurality of important values—"justice, accountability, stability, peace, and reconciliation." Whatever "subverts" or corrodes social harmony, however, "is to be

avoided like the plague." Presumably, whatever maximizes social harmony is morally commendable and even obligatory.

Tutu may believe that *ubuntu* presents so lofty an ideal that no one would question its justification or importance. In any case, he offers little argument for its significance or supremacy. He does seek to support it by calling attention to its African origins. He also remarks that, while altruistic, *ubuntu* is also "the best form of self-interest," for each individual benefits when the community benefits.

As it stands, neither defense is persuasive. The moral disvalue of apartheid, also a South African concept, has nothing to do with its origins. Similarly, the geographical origin of *ubuntu* does not ensure its reasonableness. Further, although individuals often benefit from harmonious community relationships, the community also at times demands excessive sacrifices from individuals. Moreover, dissent or moral outrage may be justified even though it disrupts friendliness and social harmony.

Tutu offers practical objections—as well as moral ones—to seeking retributive justice against former oppressors. He does not consider the practicability of *ubuntu,* however, as a goal of social policy. He does not discuss, for example, what to do with those whose hearts cannot be purged of resentment or vengeance. Nor does he explain how society can test citizens for purity of mind and heart—how it can determine who has succeeded and who has failed to assist society toward this supreme good.

Tutu's concept of reconciliation can be compared to two other versions of social cooperation: (i) "nonlethal coexistence" and (ii) "democratic reciprocity." In the first, reconciliation occurs just in case former enemies no longer kill each other or routinely violate each other's basic rights. This thin sense of reconciliation, attained when ceasefires, peace accords, and negotiated settlements begin to take hold, can be a momentous achievement. Reconciliation as nonlethal coexistence demands significantly less and is easier to realize than Tutu's much "thicker" ideal that requires friendliness and forgiveness. Societies rarely, if ever, choose between harmony and mere toleration. Historically, societies have to choose between toleration among contending groups and the war of each against all. A more demanding interpretation of reconciliation—but one still significantly less robust than Tutu advocates—is "democratic reciprocity." In this conception, former enemies or former perpetrators, victims, and bystanders are reconciled insofar as they respect each other as fellow citizens. Further, all parties play a role in deliberations concerning the past, present, and future of their country. A still-divided society will surely find this ideal of democratic reciprocity difficult enough to attain—although much easier than an ideal defined by mutual compassion and the *requirement* of forgiveness. Some would argue, for instance, that there are unforgivable crimes or point out that a government should not insist on or even encourage forgiveness, since forgiveness is a matter for *victims* to decide.

Not only is Tutu's ideal of social harmony impractical, but it is also problematic because of the way it conceives the relation between the individual and the group. Tutu's formulation of *ubuntu* either threatens the autonomy of each member or unrealistically assumes that each and every individual benefits from the achievements of a larger group. Sometimes individuals do benefit from social solidarity. But life together is often one in which genuinely good things, such as communal harmony and individual freedom, my gain and your gain, conflict. In

these cases, fair public deliberation and democratic decision-making are the best means to resolve differences. A process that allows all sides to be heard—and encourages all arguments to be judged on their merits—respects public well being, individual freedom, and a plurality of values.

This analysis of alternative conceptions of reconciliation not only shows that Tutu's ideal is unrealistic but also that it pays insufficient attention to individual freedom, including the freedom to withhold forgiveness. In making social harmony the supreme good, Tutu unfortunately subordinates— without argument—other important values, such as truth, compensation, democracy, and individual accountability. In some contexts, social harmony— if it respects personal freedom and democratic deliberation—should have priority. In other contexts, society may pursue other equally important values, for example, justice, which might require a society to indict, try, sentence, and punish individuals who violated human rights. If social harmony is judged to have priority over other values, that judgment should emerge not from a cultural, theological, or philosophical theory but from the deliberation and democratic determination of citizens.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 20, number 1 (winter/spring 2000).

References

Desmond M. Tutu, *No Future Without Forgiveness* (Doubleday, 1999); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998); David A. Crocker, "Civil Society and Transitional Justice," in *Civil Society, Democracy, and Civic Renewal,* edited by Robert K. Fullinwider (Rowman & Littlefield, 1999); David A. Crocker, "Reckoning with Past Wrongs: A Normative Framework," in *Ethics & International Affairs,* vol. 13 (1999); David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society," in Robert I. Rotberg and Dennis Thompson, eds., Truth v. Justice: *The Morality of Truth Commissions* (Princeton University Press, 2000); Paul van Zyl, "Evaluating Justice and Reconciliation Efforts," *Perspectives on Ethics & International Affairs,* vol. 1 (1999); Lawrence Crocker, "The Upper Limits of Punishment," *Emory Law Journal,* vol. 41 (1992); Geoffrey Cupit, *Justice as Fittingness* (Clarendon Press, 1996); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (Times Books, 1998); Robert Nozick, "Retributive Punishment," in *Philosophical Explanations* (Belknap Press, 1981); Bill Berkeley, "Aftermath: Genocide, the Pursuit of Justice and the Future of Africa," *Washington Post Magazine* (October 11, 1998); Jean Hampton, "The Retributive Idea," and Jean Hampton and Jeffrie G. Murphy, "Hatred: A Qualified Defense," both of which appear in *Forgiveness and Mercy,* edited by Jeffrie G. Murphy and Jean Hampton (Cambridge University Press, 1988); Steve Coll, "Peace Without Justice: A Journey to the Wounded Heart of Africa," *Washington Post Magazine* (January 9, 2000); James Boh man. *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press,

1996); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996).

Part 4

Biotechnology, Genetic Research, and Health Policy

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Biotechnology and the Idea of Human Nature

Robert Wachbroit

Modern medical biotechnology has captured the public imagination like few scientific developments since the splitting of the atom. Little wonder, for the issues it raises are vivid, dramatic and directly relevant to our lives and well being. Here we have a powerful, new, some might even say revolutionary technology for detecting and treating disease. What ethical constraints, if any, should we place on its development and application? What impact will this technology have on our values, our institutions, and our general view of ourselves and the world?

There has been considerable public debate about the risks, costs, and benefits of recent developments in biotechnology. These issues, important as they are, are raised by any new technology. Perhaps the most interesting issues about biotechnology, however, are those peculiar to it, concerning the very idea of manipulating life and accelerating evolution. While these issues are less familiar and harder to articulate, they arguably lie behind much of the public concern and apprehensiveness regarding biotechnology, and often form the "subtext" for the public debate.

The Evolving Debate

When recombinant DNA techniques were first developed as tools for laboratory research, there was a great deal of concern about their safety and environmental risk. Critics described in lurid detail a "gruesome parade of horribles" that the new technologies might unleash—epidemics, ecological disasters, and "killer tomatoes." Some of the scenarios were plausible, but none of the disasters was unique to biotechnology: the roster is much the same for the discharge of industrial wastes or toxic chemicals, the introduction of exotic species into new environments, and the more mundane run of medical research. Nor does there appear to be anything novel

in evaluating biotechnological risks; as several commentators argue, biotechnology requires no special techniques for assessing overall risk.

While some critics were demanding a temporary moratorium, others were raising broader concerns about intervention in the natural order. The phrase "playing God" was often invoked, and frequent allusions were made to Dr. Frankenstein and *Brave New World*. These critics saw biotechnology as not only risky but presumptuous: they warned of the terrible price we would pay for our hubris in defying the "wisdom of evolution." Defenders of biotechnology conceded that narrow concerns about risk were reasonable, if exaggerated, and could be addressed by research and regulation. But they insisted that broader concerns about intervention were either a rearguard action against modern science and medicine, safely dismissed, or an expression of religious beliefs not widely shared in our society.

As biotechnology advanced and the worst fears of its critics failed to materialize, the tenor of the public debate changed somewhat. Ironically, as advances in biotechnology brought us closer to the ability to modify and create life, talk of playing God became less prominent. This may have been because such talk was associated with apocalyptic fears that proved unfounded, but it may also be that with greater exposure to biotechnology the public's concerns became more focused and specific.

In medical biotechnology, a standard agenda of issues has emerged during the past several years, debated in government-funded conferences and workshops, reviewed in scientific, legal, and policy journals, and reported in the popular media. This agenda focuses on the risks and social impact of biotechnology, especially issues of discrimination, privacy, and confidentiality in the use of genetic testing, screening, and therapy. While concerns about the special difficulties of altering life and accelerating evolution have not been altogether ignored, they have received comparatively less attention.

I will suggest, however, that they are never far from the surface: they are raised, explicitly or implicitly, in any setting where the proper use of biotechnology depends on a baseline of "normal human functioning."

Not Just Doctors' Dilemmas

The most widely discussed applications of biotechnology are in medicine and health care, particularly in the area of genetic testing and screening. Biotechnology already enables us to detect many genetic disorders before their onset: not only asymptomatic stages of disease but also genetic susceptibility to disease. Who should authorize the tests for such disorders? Who should have access to their results? What choices (concerning, e.g., employment or insurance) should be influenced by this information? Many commentators note the potential for abuse in genetic testing—discrimination, breaches of confidentiality, and the like—but the matter is not completely unambiguous.

Suppose an employer knows on the basis of a genetic test that one job candidate is more likely to suffer a debilitating disease than another, and so is a poorer investment from the employer's standpoint. Is the employer guilty of unfair discrimination if he or she bases a hiring decision in part on such information? Are insurers unfairly discriminating if they supplement their actuarial tables with the

results of genetic tests? In some respects, the employer and insurer would be conducting business as usual. But in other ways, they would be discriminating against the disabled.

How do we decide if genetically predisposed but asymptomatic individuals are disabled, and so protected from discrimination? In determining what counts as a disability, we appear to rely on a vague notion of normal human functioning as a baseline. But genetic testing raises questions about the meaning and coherence of that baseline, by revealing the extent to which all of us carry *potentially* lethal or debilitating genes. Are we ever healthy, or are we just asymptomatic?

Underlying this question are doubts about the very meaning of genetic susceptibility. Being genetically susceptible to a disease does not mean that one will contract that disease or even that one has a high probability of contracting it. Some philosophers argue that a claim of genetic susceptibility is really a subjunctive, or "counterfactual" conditional: if you were exposed to such-and such environments (or maintained such-and-such a lifestyle), you would contract (within a range of probabilities) such-and-such diseases. However, the details of such a conditional are not at all dear. For example, most people who have the gene for the sickle cell trait on only one chromosome do not suffer from sickle cell anemia and have a certain immunity to malaria. But we wouldn't say that those who lack the sickle cell gene have a genetic susceptibility to malaria.

As in defining disability, we appear to rely on a notion of normal human functioning as a baseline for susceptibility—here, on normal human resistance to disease. Again, biotechnology raises doubts about the standard of normality invoked to regulate its use: if we can dramatically increase human resistance to disease, what level of resistance is "normal"? This question leads us to the most dramatic medical application of biotechnology: gene therapy.

Many diseases result from defects in specific genes. By repairing the defects or replacing the genes, doctors can treat such diseases at their source. This therapy can be performed on somatic cells or germ cells. In the former, only the appropriate cells of the affected individual are treated (e.g., bone marrow cells are treated for disorders in blood cells); in the latter, the reproductive cells are treated, thus preventing the defective gene from being transmitted to that individual's offspring. Somatic cell therapy is already being performed, provoking much interest but little opposition. The medical community had begun to assimilate it to more conventional forms of intervention, treating it as a kind of in vivo drug delivery or microsurgery.

While germ cell therapy is less advanced, it is far more controversial. Because it alters the genetic code of the patient and one's offspring, it is harder to regard it as a genetic version of conventional therapy. Germ cell therapy raises the specter of eugenics, albeit in a new way.

As traditionally understood, eugenics was an effort to improve the human race by applying the wisdom of animal breeders. The twist introduced by germ cell therapy is nicely described by University of Maryland professor Thomas Schelling: whereas the old eugenics consisted in selecting parents, the new eugenics consists in selecting children. Indeed, biotechnology seems to hold out the possibility that we will be able to design our children. Who is to decide these matters, and are there any moral constraints on these decisions?

The coercion and intrusion required by the old eugenics made its program morally objectionable. But no such coercion need be part of the new eugenics.

Indeed, given the enormous authority we think parents should have in raising their children, why should we scruple over genetic manipulation? Eugenics, then, needs to be reexamined.

The philosophical discussion, however, has only begun to rise to the challenge. Most writers rely on the traditional distinction between positive and negative eugenics, between interventions to produce enhancements and interventions to correct defects. The consensus is that only the latter is appropriate medical therapy. This distinction, though, will not stand up to close scrutiny: not only is the line between enhancements and corrections unclear—When does correcting dwarfism become enhancing height?—but the concepts of health and disease on which the distinction rests needs to be more carefully examined. "Normal human functioning" cannot just simply refer to the biological status quo.

Underlying Concerns

When worries about manipulating life have been raised explicitly, they have taken the form of objections to "playing God." But the objection is at best obscure. In its religious formulation, the concern is that biotechnology gives us a God-like power whose exercise, if not an attempt to challenge God, is an attempt to interfere with God's plan. It is tempting to see secular objections to manipulating life as little more than Darwinian theology, with "God" replaced by "the wisdom of evolution." Much like God, evolution works in mysterious, complex ways. We interfere with its intricate workings at our peril; the price of our presumption may be the destruction of the human race, or planet.

But this objection must make the controversial assumption that everything in nature is a result of adaptation, a careful balance of the myriad of ecological pressures and opportunities. Only if nature is really in such delicate and precarious balance would our interference threaten monumental disaster. The reality of Darwinism is more reassuring. Evolution is chaotic, wasteful, and redundant; we do not confront a seamless web that our slightest blunder may rend. Moreover, neither the religious nor secular version of the objection can say what is so special—so specially fearsome—about biotechnology. Nearly every human activity from agriculture to sanitation can be seen as interfering with nature and evolution.

Nevertheless, it would be a mistake simply to dismiss such objections, which should be seen as poor articulations of important concerns. What are these concerns? I suggest that the worry about playing God is less a fear of apocalyptic failure than an anxiety about the implications of success. While there is no master plan in nature or evolution that our interventions may thwart, there are also no clear norms to guide our interventions. We may eventually be able to bring about radical changes in the physical and psychological capacities of human beings. What norms will guide us in deciding on these changes?

Until recently, our inability to make more than slight, incremental changes in human functioning spared us many difficult questions about how human beings should function. Our options were limited by such "basic facts" about humans as their vulnerability to a range of environmental toxins, their wide variation in natural talent and intelligence, and their three-score-and-ten year lifespan. Biotechnology is fast removing these constraints, forcing us to consider the limits of genetic

intervention: in conferring immunity to environmental toxins, in achieving "true" equality of opportunity, and in slowing or arresting the aging process.

Consider the environmental applications of biotechnology. Ordinarily, we understand by a polluted environment an environment that, as a result of our activities, is injurious to the health of the inhabitants. But this understanding of pollution turns on assumptions that cannot easily be sustained in the face of the possibilities of biotechnology. Instead of reducing the industrial discharge of dioxins and PCBs, why not modify humans so that they thrive on, or are indifferent to, these discharges? The decision about whether to alter the environment or its inhabitants would then be a purely economic one, a matter of efficiency. Of course, one might object that permitting unrestricted discharges would result in an aesthetically unpleasant environment, but that is not obvious—industrial sunsets may be more beautiful than preindustrial ones—and it does not get to the heart of what we find objectionable.

Consider next the problem of distributive justice. We want to know how the various social goods (such as power and wealth) ought to be distributed in the face of obvious inequalities in the distributed of natural goods (intelligence, vigor, beauty and the like). Until recently, we have tried to move toward fuller equality of opportunity by redistributing social goods, e.g., by progressive taxation and remedial education.

Yet natural inequalities have stood as powerful obstacles to these efforts. While we could attempt to compensate for gross disparities in natural endowment, we could not directly alter or control the "natural lottery."

How will our understanding of distributive justice change as we learn to control the distribution of natural goods? More than twenty years ago, philosopher Bernard Williams noted that a radical solution to inequality would present itself if "an individual's characteristics could be *prearranged* by interference with [its] genetic material," a possibility on whose "dizzying consequences" he declined to speculate. We may soon have to confront those consequences. As we acquire control over the natural goods of genetic endowment, do they become social goods, subject to the principles of distributive justice? Or should the distinction between natural and social goods be maintained, despite the advances of biotechnology? If so, how should that distinction be made?

Finally, consider the problem of aging. As biomedical ethicist Daniel Callahan has observed, we have long regarded seventy to eighty years as the natural life span, even when few people survived to adulthood. Most of the dramatic breakthroughs in modern health care and medicine, such as the development of antibiotics, allowed an increasing proportion of the world's people to reach their "allotted span of years" but did not push the chronological frontier much beyond what it had been in ancient times.

More recently, modern medical technology has indefinitely extended biological life through "extraordinary life support." We have come to recognize that mere biological survival is not an unmixed blessing. Biotechnology confronts us with a far more radical specter: the indefinite prolongation of conscious, active life through the control of the aging process. If we can stop or slow the genetic program for cell senescence while controlling cell growth, we may be able to increase the human lifespan dramatically But if there are no longer natural limits, how many years should we allot ourselves? How much is enough? Do ever longer lifespans

require a profound adjustment in our social institutions? These may soon be pressing policy issues.

Biotechnology raises challenging new issues for public policy. In freeing us from the constraints of "the biological status quo," it may undermine the assumptions that underlie much of the current policy debates. We will have to confront issues that were once left to philosophers and science fiction writers, and make decisions that were once thought to be God's alone.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 11, number 3 (summer 1991).

References

Among the sources discussed or cited in this article are J. Fiksel and V. Covello, "The Suitability and Applicability of Risk Assessment Methods for Environmental Applications of Biotechnology," in J. Fiksel and V. Covello, *Biotechnology and Risk Assessment* (Pergamon, 1986); Daniel Callahan, *Setting Limits: Medical Goals in an Aging Society* (Simon & Schuster, 1987); Bernard Williams, "The Idea of Equality," in Laslett and Runciman, *Philosophy, Politics, and Society* (Second Series, Blackwell, 1962); R. Wachbroit, "Making the Grade: Testing for Human Genetic Disorders," *Hofstra Law Review* 16 (spring 1988): 583-599.

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Futile Treatment and the Ethics of Medicine

Nancy S. Jecker

Ryan Nguyen was born six weeks prematurely on October 27, 1994, with a weak heartbeat and poor blood flow to his organs. His physicians at Sacred Heart Medical Center in Spokane, Washington, employed heroic measures to revive him. A few weeks after his birth, it became clear to Ryan's doctors that the aggressive medical interventions keeping him alive were futile and should be withdrawn. Ryan had multiple medical problems, including kidney failure, bowel obstruction, and brain damage. To survive, he would require kidney dialysis for approximately two years, followed by a kidney transplant, a feat most consulting experts on kidney disease agreed was "virtually impossible to pull off." According to one consultant, a professor of pediatrics and director of the kidney program at Children's Hospital and Medical Center in Seattle, "long term dialysis would not only be inappropriate, but would be immoral...it would prolong pain and agony in a child that has no likelihood of a good outcome."

As is often the case, some physicians could be found who disagreed with generally accepted practice standards. When Nghia and Darla Nguyen, Ryan's father and mother, rejected the Sacred Heart doctors' prognosis for their baby, they sought out such physicians. Denying that Ryan had brain damage and believing that his kidneys were getting better, the Nguyens approached four other medical centers requesting dialysis and other life-prolonging treatments for Ryan. Each time, they were turned down on the ground that aggressive lifesaving measures were futile.

The Nguyens' search continued. A self-described "pro-life attorney," Russell Van Camp, agreed to represent them. Mr. Van Camp accused the Sacred Heart physicians of acting from questionable motives. The doctors were withholding treatment, he charged, because Ryan's parents were unemployed and on Medicaid, and also because the baby "doesn't have blond hair and blue eyes" (Ryan's mother is an American Indian and his father is a Vietnamese refugee). In other statements, Mr. Van Camp accused the doctors of trying to kill Ryan, perhaps as a way of

covering up medical mistakes made during the baby's delivery. Through their lawyer, the Nguyens sought a permanent injunction that would force the Sacred Heart doctors to treat Ryan unless another hospital accepted him. The Nguyens obtained a temporary restraining order requiring Ryan's doctors at Sacred Heart to resume kidney dialysis, which had been stopped without the parents' consent in order to allow Ryan to die a comfortable death.

During their ordeal, Ryan's parents kept a diary of their baby's travails, depicting the medical and legal battles they overcame on their son's behalf and including signatures from television and newspaper reporters who interviewed the family. They steadfastly maintained, "He'll make it, if we can find a doctor who cares."

Eventually, a physician at Legacy Emanuel Children's Hospital in Portland, Oregon, Dr. Randall Jenkins, read news accounts of the case and agreed to admit Ryan to Emanuel's kidney program. Once at Emanuel, Ryan's condition improved. He was taken off a ventilator and began to breathe independently. He underwent surgery to correct a bowel obstruction. When doctors removed him from dialysis, he was able to urinate on his own.

As this article goes to press (in 1995), Ryan is being discharged from the hospital. According to Dr. Jenkins, the baby's kidneys are functioning at about three-fourths of normal capacity. Since, at this level of functioning, his kidneys will "wear themselves out," he will eventually require a kidney transplant. Ryan continues to rely on tube feeding, and his long-term prognosis remains unclear with regard to possible cerebral palsy, muscle impairment, and brain damage. Still, Ryan's physicians and parents are grateful that he has made enough progress to leave the hospital, and everyone hopes he will do well in the future.

Questions about Futility

The case of the so-called Spokane baby is at the heart of a larger debate now raging within medical centers around the country over the use of medically futile interventions. Among the questions Ryan's case raises are the following. In light of the uncertainty associated with any medical decision, how can members of a health care team ever justify withholding or withdrawing a futile intervention? How can society prevent the sort of situation alleged by the Nguyens' lawyer, in which claims of medical futility provide a smoke screen for invidious racial or other prejudice? How can physicians avoid "imposing" their values upon patients and families? Once doctors determine that a treatment is futile, must they find another institution willing to provide it if the patient or family insists? Finally, should it make a difference if patients have the ability to pay for futile treatment? If insurers are willing to reimburse doctors for futile interventions, is there anything wrong with doctors offering such treatments?

Dealing with Uncertainty

Public perceptions about medical futility are undoubtedly colored by the fact that the media are more likely to report rare medical successes than routine medical failures. The public is thereby encouraged to ascribe godlike powers to physicians, and to expect "medical miracles" to occur. And in Ryan's case, it is true that despite

a consensus of opinion that dialysis and other life-prolonging treatments would be futile, the patient has made considerable progress.

Most health care professionals who have practiced for any length of time are familiar with cases of this kind, where a patient with a dismal prognosis "beats the odds." Indeed, doctors and nurses learn early in their training never to say "never." Medicine, after all, is an empirical science. No matter how many times a treatment has failed in the past, there is always a *chance* that the next time it is used it will succeed. There will always be instances where a futile treatment works, just as there will always be instances where a recommended treatment fails. This hardly shows that medical judgment is worthless. Nor does it show that patients should always be treated regardless of expected outcomes. The real question health care providers face is: How many times must they observe a treatment to fail before calling it futile for a given category of patients?

In trying to address this question, we should think about the term "futility" as marking a point along a probability continuum at which the likelihood of benefiting the patient is exceedingly poor. Specifically, it has been argued that we should call a treatment *quantitatively* futile when the chance that it will benefit the patient is less than one in one-hundred. If a treatment is futile in this sense, it will occasionally succeed: Ryan, for example, did better than expected. Yet this does not establish that physicians should use life-prolonging treatments in future cases resembling Ryan's. Most babies in his situation will not do well. Moreover, institutional politics that routinely sanction futile treatments will condemn many patients to suffer needlessly. Therefore, general standards of medical practice require justifying the use of painful and invasive technologies by showing that they hold a reasonable prospect of helping the patient.

There is another way in which the term "futility" is used. Even in cases where the likelihood of benefiting the patient is relatively good, the quality of benefit may nonetheless be exceedingly poor. In such instances, treatment may be considered *qualitatively* futile. For example, the kidney specialists asked to consult on Ryan's case agreed not only that Ryan was doomed to die, but also that the quality of outcome Ryan would gain from dialysis was very bad. That is, it was widely held that Ryan was suffering greatly as a result of dialysis and other life-prolonging interventions.

Preventing Abuses

To the extent that health care providers openly discuss medical futility, and to the extent that health care institutions develop explicit policies about the withholding and withdrawal of futile interventions, abuses involving assertions of medical futility are less likely to occur. If a hospital has a policy in place carefully defining medical futility, then it cannot mean whatever the doctors in a given case decide it means. Nor can futility be invoked as a subterfuge for discrimination based on race, socioeconomic status, or other factors that should be irrelevant to medical decision-making. In short, the judgment of medical futility should not rest with individual physicians at the bedside, but should instead reflect a more general professional and societal consensus.

Such a consensus has been emerging gradually over the past several years. This is apparent in the public pronouncements of influential medical organizations, such as the American Medical Association and the American Hospital Association, among others, and in public statements from bioethical organizations, such as the Hastings Center and President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.

Local consensus is also developing in places such as Denver, where area hospitals have jointly developed criteria for deciding that a treatment is futile. Such guidelines establish, for example, that aggressive treatments, such as CPR, are futile and generally should not be provided for patients who are bedfast with metastatic cancer, or patients with HIV who have had two or more Pneumocystis carinii pneumonia episodes, or patients with multiple organ system failure with no improvement after three days of intensive care. Other institutions, such as Santa Monica Hospital Medical Center, have defined futility more broadly to refer to "any clinical circumstance in which the doctor and his or her consultants, consistent with the available medical literature, conclude that further treatment (except comfort care) cannot, within a reasonable possibility, cure, ameliorate, improve, or restore a quality of life satisfactorily to the patient." A generally worded policy can be useful so long as it specifies, as this one does, a relevant procedure or set of standards for evaluating judgments of medical futility. Here, consensus and consistency with medical literature are required, and futile treatment is carefully distinguished from caring efforts which should continue to be provided when treatment is futile. Such a policy provides institutional support to individual practitioners who face difficult choices. In addition, courts look to an institution's standards of care to determine the reasonableness of medical decisions in particular cases.

Those who oppose allowing health care providers to withhold or withdraw futile treatments may argue that such decisions are moral or ethical in nature, and that providers have no business imposing their values on patients and families. After all, medical school trains doctors only in medicine, not in ethics; therefore, physicians (and other health care providers) can claim no special expertise in ethics. In response, it can be said that value judgments are an inevitable part of practicing medicine. In Ryan's case, for example, providing dialysis as the Nguyens requested would not have enabled the medical team to escape making a value judgment. To the contrary, both *refraining from* interventions to keep Ryan alive and *employing* such interventions involved a value decision.

Referring Patients Elsewhere

Were Mr. and Mrs. Nguyen entitled to a referral? Were the Sacred Heart physicians obligated to find an institution willing to take Ryan, despite the fact that pediatric kidney experts agreed about the futility of dialysis? There are at least three different answers one might give. First, it might be argued that physicians have a duty to refer patients (and their families) to someone else who is willing to provide futile treatment. This answer implies that futile medical treatment is analogous to services such as abortion that fall within the range of ordinary medical services but which individual physicians may object to on the basis of personal conscience. The problem with this reply is that futility judgments reflect more than the personal

beliefs of individual providers. Properly understood, they reflect general professional standards of care.

Second, it might be claimed that refusing to provide futile treatments is analogous to refusing to provide lifesaving medical care to a brain-dead patient. Just as we do not say to a family who requests continued ventilator support for a brain-dead patient, "I don't treat the dead, but I know someone who does," so the Sacred Heart doctors should not say to the Nguyens, "We don't offer futile treatment at this hospital, but we know another hospital that does." According to this view, just as there is a generally accepted definition of death, so too there are generally agreed-upon standards governing medical futility. In Ryan's case, all the pediatric nephrologists Sacred Heart consulted agreed that dialysis was futile. Although there was some opposition at the margin, there is also opposition at the margin for the Uniform Death Act, and this hardly renders it invalid.

There is a final answer one might give to the question of whether physicians have a duty to refer patients elsewhere for futile treatments. It holds that although consensus about medical futility is in the process of developing, a truly stable and informed consensus takes time and builds slowly. Consensus, Daniel Yankelovich suggests, begins with dawning awareness of an issue, moves to a sense of urgency and discovery of choice, then to a more mature stage of taking a stand intellectually and integrating that stand with moral and emotional judgment. Although there may never be a national futility policy, in many areas of the country there is a fairly well-developed consensus, including explicit public guidelines governing futile treatment. In other areas, this process has hardly begun to occur. In light of this, it might be argued that to the extent that a stable consensus about the futility of a particular intervention is not forthcoming, health care professionals cannot appeal to professional standards to back the futility judgments they make. In such situations, providers are obligated to refer patients elsewhere for treatments that they cannot in good conscience provide. Ryan's case hardly fits this description, however, as there was general agreement among both the Sacred Heart doctors and medical experts across the country that dialysis was not medically indicated.

The Bottom Line

Some commentators may argue that so long as insurers are willing to pay for futile treatment, futile treatment should continue to be available. Such an argument assumes that most of the medical and ethical issues surrounding futile treatments can be resolved satisfactorily if physicians simply provide whatever services are in demand. This is an ethically dubious proposition, however. It is tantamount to saying that doctors are justified in doing anything for money.

In fact, the long-standing tradition of ethics in medicine prohibits physicians from using futile interventions. Medicine, the Greek physician Hippocrates reportedly said, exists "to do away with the sufferings of the sick, to lessen the violence of their disease," but also "to refuse to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless." Socrates apparently offered a sharp warning to doctors who were tempted by money to prescribe futile interventions. He warned that they may suffer the same fate as

Asclepius, a reputable physician who was killed by lightening after being "bribed with gold to heal a rich man who was already dying."

Although modern doctors sometimes encourage the false perception that medicine can perform miracles, the ethical standards of modern medicine are increasingly judging such actions harshly. Even if Ryan survives to lead a reasonable life, this hardly refutes the judgment made earlier by the Sacred Heart doctors. They correctly judged that the odds of dialysis benefiting Ryan were exceedingly slim and the odds of causing Ryan significant pain were overwhelming.

Caring for Patients

The Nguyens stated more than once that they longed for a physician who "cared." Yet, painful, futile treatments are a poor substitute for genuine caring. When lifesaving interventions are futile, caring is best expressed by doctors and nurses who reaffirm to patients and families that they will not be abandoned, and that everything possible will be done to minimize the patient's suffering. Undoubtedly, some families will reject these overtures and continue to insist on futile interventions. Yet far too often, demands for futile treatment arise not because the family has been offered other options and rejected them, but because the choice the medical team presents is between futile treatment or "doing nothing." By redoubling their efforts to care for patients and families, providers can make the process of acknowledging futility a more acceptable and humane prospect.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 15, number 1 (winter 1995).

Editors' note: In April 1999, at the age of four-and-one-half years, Ryan Nguyen succumbed to complications arising from his congenital abnormalities.

References

Gina Kolata, "Battle over a Baby's Future Raises Hard Ethical Issues," *New York Times* (December 27, 1994); J. Todd Foster, "Parents, Hospital Battle over Fate of Sick Infant," *Spokane Spokesman Review* (December 13, 1994); Lawrence Schneiderman, Nancy Jecker, and Albert Jonsen, "Medical Futility: Its Meaning and Ethical Implications," *Annals of Internal Medicine,* vol. 112 (1990); Daniel Yankelovich, *Coming to Public Judgment* (Syracuse University Press, 1991); Jeanette White and J. Todd Foster, "The Struggle over Baby Ryan," *Spokane Spokesman Review* (December 26, 1994); Nancy S. Jecker, "Knowing When to Stop: The Limits of Medicine," *Hastings Center Report* (May-June 1991).

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Disowning Knowledge: Issues in Genetic Testing

Robert Wachbroit

A few years ago in Chicago, at a conference sponsored by the Alzheimer's Association and the National Institute of Aging, doctors and researchers met to discuss an ethical dilemma that has grown increasingly familiar as advances in diagnostic techniques outstrip the therapeutic abilities of the medical profession. The meeting focused on the use of a medical test for a particular heart condition—a test that can also, in some cases, predict with ninety percent accuracy whether someone will develop Alzheimer's disease by the age of eighty. Should patients tested for the heart condition be told of their risk of contracting Alzheimer's disease, when there is little if anything medicine at present can do to prevent or ameliorate the condition?

Some people, including many of those attending the meeting, believe that the answer to this question is no: if the information is of little therapeutic value, it's of little value to the patient as well. It is wrong to burden the patient with troubling news when there is little or nothing that the physician can do about it.

At this stage in the history of medical practice, we may well be surprised to encounter such a response. Over the past few decades there has been an intense effort to articulate and defend a person's right to be informed of his or her medical condition. Not so long ago, this right was not widely acknowledged. Health professionals generally assumed that, in the case of certain diseases, patients didn't really want to know. Moreover, even if they did want to know, they wouldn't really understand the diagnosis; and even if they did want to know and could understand, they would be so psychologically harmed by the information that the result would likely be, if not suicide, then a clinical depression that would interfere with any sort of available care. Over the years the arguments attempting to defend this medical paternalism have been carefully examined and successfully undermined. The very idea of health professionals deciding whether a patient should know his or her medical condition is now routinely criticized in bioethics courses. Nonetheless, the

advent of genetic testing appears to have provoked a resurgence of paternalistic thinking, especially in those cases where doctors can detect the genetic condition associated with a particular disease but are as yet unable to prevent or treat that disease.

The association between a genetic condition and a disease, and so the type of information a genetic test reveals, is subject to considerable variation. With results from the test for a specific mutation at the tip of chromosome 4, we can predict with near certainty whether an individual will suffer from Huntington's disease, a severe late-onset neurological disorder, but we can't yet tell when the disease will occur. With information from the test for mutations of the BRCA1 gene, we can, in particular situations, conclude that an individual has a susceptibility to a specific type of breast cancer, but we don't yet know what other conditions must be in place to trigger this susceptibility. With information from the test discussed in Chicago—a test that detects the presence of the apolipoprotein E genotype—we can, in particular situations, conclude that an individual is at an increased risk of contracting Alzheimer's disease, but there is still some controversy about the relative importance of this risk factor.

Recent concern has largely focused on these last two tests. At the Chicago meeting, the issue was the disclosure of certain additional information from a test already administered. In other cases, professional organizations, as well as some advocacy groups, have proposed limits on the very availability of certain genetic tests. It is argued that tests for certain conditions should be restricted to research settings for the time being and not offered routinely or to all.

Are these proposals based on medical paternalism? Or can restrictions on genetic testing be defended on other grounds? I wish to examine possible justifications for limiting testing, distinguishing between those that are paternalistic and those that are not. I shall then consider the reasons and responsibilities that might influence patients in deciding whether to be tested or to receive genetic information.

Grounds for Restrictions

A discussion of reasons for restricting genetic testing should begin by acknowledging that there is no *right* to genetic testing. A right to be informed of test results (assuming that such a right exists) would not entail a right to *be* tested. And a "right to health care" (in the usual ways that phrased is understood) is not taken to include a right to have every diagnostic test, including genetic tests, performed. But though there is no right to genetic testing, a decision to withhold or restrict certain tests should be based on good public reasons (as opposed to private, economic reasons). This is especially true in the case of genetic tests, since in many cases genetic testing facilities—for instance, those connected with teaching hospitals—are supported, directly or indirectly, with public funds.

Reasons for restricting certain kinds of genetic tests can be divided into two broad categories. One set of reasons focuses on the *time* and *resources* that would be lost by the inappropriate use of genetic testing. Given the current state of knowledge, the results obtained from certain tests may include such a high number of false positives or false negatives, or be so difficult to interpret, that performing these tests would be a waste of time for the health professional or laboratory,

diverting resources from tests that are diagnostically more useful. For example, research has revealed a large number of possible mutations in BRCA1. Unless a woman's family history implicates a particular mutation in the occurrence of breast cancer, there is no point in testing her for that mutation; whatever the test result may be, it will not be interpretable. Thus, a decision not to offer BRCA1 testing to all women would be defensible on the grounds that widespread testing would needlessly draw upon society's limited resources of expertise and technology. Where the best available evidence shows that a given procedure would yield no meaningful information, it is entirely appropriate, so the argument goes, to restrict that procedure.

The second set of grounds for restricting the availability of genetic tests focuses on claims about the *social or psychological harms* that individuals might suffer from knowing their test results, where these harms are not offset by any corresponding medical benefit. Indeed, in many cases these harms are considered to be so palpable and the medical benefits so clearly nonexistent that it is assumed people would not want to know their genetic condition even if they had the opportunity.

One widely cited harm of knowing one's genetic condition arises from the prospect of discrimination in employment or insurance coverage. Someone with a known genetic condition indicating a susceptibility to breast cancer might be denied a job or a promotion, or denied health or life insurance, because she is regarded as a health risk and therefore as too great an economic risk. This concern about discrimination chiefly provides a reason why *third parties* should not be given access to an individual's genetic information. Yet an individual may well decide to forgo this information in order to maintain deniability. For example, suppose an insurance contract requires the individual to tell all she knows about her genetic condition, so that discovering that any information was withheld would constitute grounds for dismissing later claims. A person in this situation might well decide to remain ignorant, since she can't be penalized for withholding information she doesn't have.

However, a person can maintain ignorance of her genetic condition only up to a point, since genetic tests are not the only source of information about that condition. Standard family medical histories can sometimes tell a good deal, and claiming ignorance of this history may not be possible. If an individual suffers from Huntington's disease, then his or her children have a fifty percent probability of contracting it as well. If a woman's sister, mother, and aunt suffer from breast cancer, than it is likely that the woman is at greater risk than the general population of contracting breast cancer herself. Furthermore, genetic information is not always bad news. Someone who appears to be at risk for a certain disease because of her family history could discover, and so presumably assure an employer or insurer, that she is in fact not a risk because her test result was negative. Nevertheless, we should acknowledge that there can be perverse incentives to be ignorant, especially in the absence of appropriate laws regarding "genetic discrimination" or regulations regarding insurance and preexisting conditions.

A completely different harm that is associated with genetic information has to do with the psychological burden of knowing. Indeed, one writer refers to such information as "toxic knowledge." Unlike concerns about employment discrimination or insurance, fears about the burden of knowing speak directly to the

question of the desirability of self-knowledge. For some people, the discovery that they have a genetic condition that places them at an especially high risk of suffering certain diseases could so depress them that the quality, joy, and purpose of their lives would evaporate. Moreover, even if the results of a genetic test were negative, some people might experience the reaction commonly known as "survivor's guilt," as they contemplate the prospects of their less fortunate siblings or other relatives.

The applicability of this reason will vary from person to person. Some people might be able to handle bad news calmly and move on, while others might become irrevocably incapacitated. We are individuals in how we each deal with the disappointments and tragedies in our lives. Genetic knowledge might be extremely toxic for one individual but less so for another. Presumably, however, if a person does raise this issue in his or her own case, it probably applies.

Deciding for the Patient

It is this last set of reasons, when invoked to justify limits on the availability of genetic testing, that suggests a resurgent paternalism with respect to medical information. They involve explicit judgments by medical professionals about what would be good for the patient, where the "good" (i.e., the avoidance of certain social and psychological harms) extends beyond matters of medical expertise. Whatever force they may have as reasons an *individual* might give for not wanting to know genetic information, their persuasiveness weakens considerably when they are offered by third parties as reasons for restrictions on genetic testing. While certain people might be psychologically devastated by their test results, there is no evidence to support the assumption that most people will be so devastated. Indeed, such an assumption flies in the face of our commonsense knowledge of people's differences. Similarly, the likelihood that people will confront employment discrimination or insurance problems, and the seriousness with which they regard such a prospect, will vary with circumstances. It is therefore paternalistic to cite these concerns as grounds for restricting genetic testing.

The same can be said of arguments that the results of genetic tests are too complex or ambiguous for patients to understand. Test results may identify risk factors rather than yield predictions; the information may consist of probabilities rather than certainties. In other medical contexts, however, the complexity of information is not accepted as an excuse for taking decisions out of the patient's hands. For example, we require physicians to obtain informed consent before they engage in an intervention. However complex the relevant information might be, usefully communicating it to the patient is a challenge to which the professional must rise.

A rejection of the paternalistic arguments does not yield the conclusion that all genetic tests should be available to the public. As we have seen, restrictions on the availability of certain genetic tests, or of any medical procedure, need not be based on paternalism. For example, none of these comments affects the legitimacy or persuasiveness of the scientific reasons for restricting certain tests.

Unfortunately, some of the professional organizations and advocacy groups seeking to restrict genetic testing have allowed an admixture of paternalism to enter into what would otherwise be sound scientific arguments. Instead of simply

pointing out that a test for BRCA1 mutations can yield no useful information about most women, they express worries about the "fear" and "panic" that widespread testing might provoke. The first objection to indiscriminate testing is valid; the second is not. By including arguments that would in other contexts be rejected as unwarranted medical paternalism, these organizations have inadvertently ceded the moral high ground to the for-profit laboratories that have rushed in to perform these tests. Whether the labs can provide testing with the appropriate care and counseling is an open question. But efforts to regulate or even comment upon their services are likely to be ineffectual so long as the laboratories can self-righteously affirm the patient's "right to know" against the paternalism of their critics.

Similarly, when the researchers in Chicago tried to formulate a policy regarding the disclosure of test results, paternalistic assumptions clouded the issue. It was agreed that a cardiac test yielding information about the risk of Alzheimer's disease poses an ethical problem for the physician, who must either inform patients of their condition or withhold that information. But there is another alternative: the physician can tell patients, before testing for one condition, that information about another condition will be available. Whether or not to be informed becomes the patient's decision. Indeed, this option is standard in communicating the results of various medical tests, including results where disease is not at issue. The obstetrician performing amniocentesis doesn't typically agonize over whether to inform the couple of the fetus's sex. The couple are simply asked whether they want to know. And in our society at this time, that patient's desire to know or not to know is taken to settle the matter.

A Responsibility to Know

It is mainly those who wish to know their genetic condition who are likely to object to paternalistic restrictions on genetic testing. We cannot assume, however, that most people would fall into this category. In one recent study, only forty-three percent of research subjects who were offered the BRCA1 test agreed to have it performed. Many who refused the test cited the concerns about employment and insurance that I have already described, while others pointed to the psychological distress that knowledge might bring.

If the challenge to medical paternalism is based on the notion that people should be free to make their own choices with respect to information, then in general the decision not to know should be as fully respected as the decision to know. No one would be in favor of frog-marching people to a genetics lab, having them tested, and then compelling them to listen to the results. The widely acknowledged right people have to refuse treatment surely includes a right to refuse diagnostic tests. If some people simply don't want their decisions about how they live their lives to depend upon genetic information, it would seem that they have no reason, and certainly no obligation, to know.

Nevertheless, there are many circumstances in which people might have a moral responsibility to know—a responsibility that grows out of their professional or personal obligations. The case for professional obligations, though limited, is fairly clear. The same reasoning that supports drug testing of individuals in particular professions—air traffic controller, train conductor, airline pilot—also supports

claiming that these individuals have an obligation to know their genetic information. If an individual might have a condition that, if manifested, would interfere with his or her job performance in such a way as to endanger other people, that person has an obligation to know and monitor that condition, whether he or she wants to or not.

Since most of us are not employed in such professions, however, this obligation attaches to relatively few people. Moreover, most genetic conditions are unlikely to have an impact on the safety of other people. It is difficult to argue that an airline pilot's refusal to know whether she is at special risk of contracting breast cancer would endanger the lives of the passengers.

The ways in which personal obligations may generate a responsibility to know one's genetic condition have not been given comparable attention, even though they are more widely applicable. Most of us are enmeshed in a network of personal obligations and commitments—to families, dependents, loved ones. In many cases, with information about our medical condition, we can more effectively discharge our obligations, or at least avoid measures that, under circumstances, may be futile. Consider the case of a fifty-year-old parent of minor children who refuses to know whether he is at high risk of contracting Alzheimer's disease within the next ten years. His refusal to know might be irresponsible; it might amount to a failure to engage fully in the (not just financial) planning that is part of a parent's commitment to his children. Whether one has a moral responsibility to know one's genetic condition, and the strength of that responsibility, will depend upon the particulars of the situation. In all likelihood, however, a person's *responsibility* to know will not depend upon the strength of his or her *desire* to know or not to know.

The idea of having a responsibility to know can seem jarring at first. We are drawn to a picture of an individual, faced with the prospect of knowing, weighing how that knowledge would affect him personally. The thought that someone ought to know seems to go against our cultural assumptions, as if such an obligation were an unwelcome interference in the private relationship a person has with his own life. The problem with this picture of solitary individuals contemplating whether to know about their future is that it fits so few of us.

How should the responsibility of knowing be balanced against the possible burden and cost of knowing? There is probably little of use that can be said at this level of generality, since much will depend on the circumstances. The fifty-year-old who has minor children, by birth or adoption, is in a different situation from the footloose twenty-year-old. In any event it should be clear that if we are to make responsible decisions about accepting or refusing medical information, we must begin by acknowledging that these decisions affect others as well as ourselves.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 16, number 3/4 (spring/fall 1996).

References

Gina Kolata, "If Tests Hint Alzheimer's, Should a Patient be Told?" *New York Times* (Oct. 24, 1995); Ricks Weiss, "Tests' Availability Tangles Ethical and Genetic Codes," *Washington Post* (May 26, 1996); American College of

Medical Genetics/American Society of Human Genetics Working Group On ApoE and Alzheimer Disease, "Statement on Use of Apolipoprotiein E Testing for Alzheimer Disease," *JAMA*, vol. 274, no. 20 (1995); National Advisory Council for Human Genome Research, "Statement on Use of DNA Testing for Presymptomatic Identification of Cancer Risk," *JAMA*, vol. 271, no. 10 (1994); Charles Siebert, "The DNA We've Been Dealt," *New York Times Magazine* (Sept. 17, 1995); Caryn Lerman et al., "BRCA1 Testing in Families with Hereditary Breast-Ovarian Center," *JAMA*, vol. 275, no. 24 (June 26, 1996).

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Genetic Encores: The Ethics of Human Cloning

Robert Wachbroit

The successful cloning of an adult sheep, announced in Scotland in February of 1997, is one of the most dramatic recent examples of a scientific discovery becoming a public issue. In the months following the discovery, various commentators—scientists and theologians, physicians and legal experts, talk-radio hosts and editorial writers—have been busily responding to the news, some calming fears, other raising alarms about the prospect of cloning a human being. At the request of the president, the National Bioethics Advisory Commission (NBAC) held hearings and prepared a report on the religious, ethical, and legal issues surrounding human cloning. While declining to call for a permanent ban on the practice, the commission recommended a moratorium on efforts to clone human beings, and emphasized the importance of further public deliberation on the subject.

An interesting tension is at work in the NBAC report. Commission members were well aware of "the widespread public discomfort, even revulsion, about cloning human beings." Perhaps recalling the images of Dolly the ewe that were featured on the covers of national news magazines, they noted that "the impact of these most recent developments on our national psyche has been quite remarkable." Accordingly, they felt that one of their tasks was to articulate, as fully and sympathetically as possible, the range of concerns that the prospect of human cloning had elicited.

Yet it seems clear that some of these concerns, at least, are based on false beliefs about genetic influence and the nature of the individuals that would be produced through cloning. Consider, for instance, the fear that a clone would not be an "individual" but merely a "carbon copy" of someone else— an automaton of the sort familiar from science fiction. As many scientists have pointed out, a clone would not in fact be an identical *copy*, but more like a delayed identical *twin.* And just as identical twins are two separate people— biologically, psychologically, morally, and legally, though not genetically— so, too, a clone would be a separate

person from her or his non-contemporaneous twin. To think otherwise is to embrace a belief in genetic determinism—the view that genes determine everything about us, and that environmental factors or the random events in human development are insignificant.

The overwhelming scientific consensus is that genetic determinism is false. In coming to understand the ways in which genes operate, biologists have also become aware of the myriad ways in which the environment affects their "expression." The genetic contribution to the simplest physical traits, such as height and hair color, is significantly mediated by environmental factors (and possibly by stochastic events as well). And the genetic contribution to the traits we value most deeply, from intelligence to compassion, is conceded by even the most enthusiastic genetic researchers to be limited and indirect.

It is difficult to gauge the extent to which "repugnance" toward cloning generally rests on a belief in genetic determinism. Hoping to account for the fact that people "instinctively recoil" from the prospect of cloning, political analyst James Q. Wilson wrote, "There is a natural sentiment that is offended by the mental picture of identical babies being produced in some biological factory." Which raises the question: once people learn that this picture is mere science fiction, does the offense that cloning presents to "natural sentiment" attenuate, or even disappear? University of Chicago professor Jean Bethke Elshtain cited the nightmare scenarios of "the man and woman on the street," who imagine a future populated by "a veritable army of Hitlers, ruthless and remorseless bigots who kept reproducing themselves until they had finished what the historic Hitler failed to do: annihilate us." What happens, though, to the "pity and terror" evoked by the topic of cloning when such scenarios are deprived (as they deserve to be) of all credibility?

Harvard biologist Richard Lewontin has argued that the critics' fears—or at least, those fears that merit consideration in formulating public policy— dissolve once genetic determinism is refuted. He criticizes the NBAC report for excessive deference to opponents of human cloning, and calls for greater public education on the scientific issues. (The commission in fact makes the same recommendation, but Lewontin seems unimpressed.) Yet even if a public education campaign succeeded in eliminating the most egregious misconceptions about genetic influence, that wouldn't settle the matter. People might continue to express concerns about the interests and rights of human clones, about the social and moral consequences of the cloning process, and about the possible motivations for creating children in this way.

Interests and Rights

One set of ethical concerns about human clones involves the risks and uncertainties associated with the current state of cloning technology. This technology has not yet been tested with human subjects, and scientists cannot rule out the possibility of mutation or other biological damage. Accordingly, the NBAC report concluded that "at this time, it is morally unacceptable for anyone in the public or private sector, whether in a research or clinical setting, to attempt to create a child using somatic cell nuclear transfer cloning." Such efforts, it said, would pose "unacceptable risks to the fetus and/or potential child."

The ethical issues of greatest importance in the cloning debate, however, do not involve possible failures of cloning technology, but rather the consequences of its success. Assuming that scientists were able to clone human beings without incurring the risks mentioned above, what concerns might there be about the welfare of clones?

Some opponents of cloning believe that such individuals would be wronged in morally significant ways. Many of these wrongs involve the denial of what political philosopher Joel Feinberg has called "the right to an open future." For example, a child might be constantly compared to the adult from whom he was cloned, and thereby burdened with oppressive expectations. Even worse, the parents might actually limit the child's opportunities for growth and development: a child cloned from a basketball player, for instance, might be denied any educational opportunities that were not in line with a career in basketball. Finally, regardless of his parents' conduct or attitudes, a child might be burdened by the *thought* that he or she is a copy and not an "original." The child's sense of self-worth or individuality or dignity, so some have argued, would thus be difficult to sustain.

How should we respond to these concerns? On the one hand, the existence of a right to an open future has a strong intuitive appeal. We are troubled by parents who radically constrict their children's possibilities for growth and development. Obviously, we would condemn a cloning parent for crushing a child with oppressive expectations, just as we might condemn fundamentalist parents for utterly isolating their children from the modern world, or the parents of twins for inflicting matching wardrobes and rhyming names. But this is not enough to sustain an objection to cloning itself. Unless the claim is that cloned parents cannot help but be oppressive, we would have cause to say they had wronged their children only because of their subsequent, and avoidable, sins of bad parenting—not because they had chosen to create the child in the first place. (The possible reasons for making this choice will be discussed below.)

We must also remember that children are often born in the midst of all sorts of hopes and expectations. The idea that there is a special burden associated with the thought "there is someone who is genetically just like me" is necessarily speculative. Moreover, given the falsity of genetic determinism, any conclusions a child might draw from observing the person from whom he or she was cloned would be uncertain at best. His or her knowledge of his future would differ only in degree from what many children already know once they begin to learn parts of their family's (medical) history. Some of us knew that we would be bald, or to what diseases we might be susceptible. To be sure, the cloned individual might know more about what he or she could become. But because our knowledge of the effect of environment on development is so incomplete, the clone would certainly be in for some surprises.

Finally, even if we were convinced that clones are likely to suffer particular burdens, that would not be enough to show that it is wrong to create them. The child of a poor family can be expected to suffer specific hardships and burdens, but we don't thereby conclude that such children shouldn't be born. Despite the hardships, poor children can experience parental love and many of the joys of being alive: the deprivations of poverty, however painful, are not decisive. More generally, no one's life is entirely free of some difficulties or burdens. In order for these considerations to have decisive weight, we have to be able to say that life doesn't offer any

compensating benefits. Concerns expressed about the welfare of human clones do not appear to justify such a bleak assessment. Most such children can be expected to have lives well worth living; many of the imagined harms are no worse than those faced by children acceptably produced by more conventional means. If there is something deeply objectionable about cloning, it is more likely to be found by examining implications of the cloning process itself, or the reasons people might have for availing themselves of it.

Concerns about Process

Human cloning falls conceptually between two other technologies. At one end we have the assisted reproductive technologies, such as in vitro fertilization, whose primary purpose is to enable couples to produce a child with whom they have a biological connection. At the other end we have the emerging technologies of genetic engineering—specifically, gene transplantation technologies—whose primary purpose is to produce a child that has certain traits. Many proponents of cloning see it as part of the first technology: cloning is just another way of providing a couple with a biological child they might otherwise be unable to have. Since this goal and these other technologies are acceptable, cloning should be acceptable as well. On the other hand, many opponents of cloning see it as part of the second technology: even though cloning is a transplantation of an entire nucleus and not of specific genes, it is nevertheless an attempt to produce a child with certain traits. The deep misgivings we may have about the genetic manipulation of offspring should apply to cloning as well.

The debate cannot be resolved, however, simply by determining which technology to assimilate cloning to. For example, some opponents of human cloning see it as continuous with assisted reproductive technologies; but since they find those technologies objectionable as well, the assimilation does not indicate approval. Rather than argue for grouping cloning with one technology or another, I wish to suggest that we can best understand the significance of the cloning process by comparing it with these other technologies, and thus broadening the debate.

To see what can be learned from such a comparative approach, let us consider a central argument that has been made against cloning—that it undermines the structure of the family by making identities and lineages unclear. On the one hand, the relationship between an adult and the child cloned from her or him could be described as that between a parent and offspring. Indeed, some commentators have called cloning "asexual reproduction," which clearly suggests that cloning is a way of generating *descendants.* The clone, on this view, has only one biological parent. On the other hand, from the point of view of genetics, the clone is a *sibling*, so that cloning is more accurately described as "delayed twinning" rather than as asexual reproduction. The clone, on this view, has two biological parents, not one—they are the same parents as those of the person from whom that individual was cloned.

Cloning thus results in ambiguities. Is the clone an offspring or a sibling? Does the clone have one biological parent or two? The moral significance of these ambiguities lies in the fact that in many societies, including our own, lineage identifies responsibilities. Typically, the parent, not the sibling, is responsible for the child. But if no one is unambiguously the parent, so the worry might go, who is

responsible for the clone? Insofar as social identity is based on biological ties, won't this identity be blurred or confounded?

Some assisted reproductive technologies have raised similar questions about lineage and identity. An anonymous sperm donor is thought to have no parental obligations towards his biological child. A surrogate mother may be required to relinquish all parental claims to the child she bears. In these cases, the social and legal determination of "who is the parent" may appear to proceed in defiance of profound biological facts, and to subvert attachments that we as a society are ordinarily committed to upholding. Thus, while the *aim* of assisted reproductive technologies is to allow people to produce or raise a child to whom they are biologically connected, such technologies may also involve the creation of social ties that are permitted to override biological ones.

In the case of cloning, however, ambiguous lineages would seem to be less problematic, precisely because no one is being asked to relinquish a claim on a child to whom he or she might otherwise acknowledge a biological connection. What, then, are the critics afraid of? It does not seem plausible that someone would have herself cloned and then hand the child over to the parents, saying, "You take care of her! She's *your* daughter!" Nor is it likely that, if the cloned individual did raise the child, she would suddenly refuse to pay for college on the grounds that this was not a sister's responsibility. Of course, policymakers should address any confusion in the social or legal assignment of responsibility resulting from cloning. But there are reasons to think that this would be *less* difficult than in the case of other reproductive technologies.

Similarly, when we compare cloning with genetic engineering, cloning may prove to be the less troubling of the two technologies. This is true even though the dark futures to which they are often alleged to lead are broadly alike. For example, a 1997 *Washington Post* article examined fears that the development of genetic enhancement technologies might "create a market in preferred physical traits." The reporter asked, "Might it lead to a society of DNA haves and have-nots, and the creation of a new underclass of people unable to keep up with the genetically fortified Joneses?" Similarly, a member of the National Bioethics Advisory Commission expressed concern that cloning might become "almost a preferred practice," taking its place "on the continuum of providing the best for your child." As a consequence, parents who chose to "play the lottery of old-fashioned reproduction would be considered irresponsible."

Such fears, however, seem more warranted with respect to genetic engineering than to cloning. By offering some people—in all probability, members of the upper classes—the opportunity to acquire desired traits through genetic manipulation, genetic engineering could bring about a biological reinforcement (or accentuation) of existing social divisions. It is hard enough already for disadvantaged children to compete with their more affluent counterparts, given the material resources and intellectual opportunities that are often available only to children of privilege. This unfairness would almost certainly be compounded if genetic manipulation came into the picture. In contrast, cloning does not bring about "improvements" in the genome: it is, rather, a way of *duplicating* the genome—with all its imperfections. It wouldn't enable certain groups of people to keep getting better and better along some valued dimension.

To some critics, admittedly, this difference will not seem terribly important. Theologian Gilbert Meilaender, Jr. objects to cloning on the grounds that children created through this technology would be "designed as a product" rather than "welcomed as a gift." The fact that the design process would be more selective and nuanced in the case of genetic engineering would, from this perspective, have no moral significance. To the extent that this objection reflects a concern about the commodification of human life, we can address it in part when we consider people's reasons for engaging in cloning.

Reasons for Cloning

This final area of contention in the cloning debate is as much psychological as it is scientific or philosophical. If human cloning technology were safe and widely available, what use would people make of it? What reasons would they have to engage in cloning?

In its report to the president, the commission imagined a few situations in which people might avail themselves of cloning. In one scenario, a husband and wife who wish to have children are both carriers of a lethal recessive gene:

> Rather than risk the one in four chance of conceiving a child who will suffer a short and painful existence, the couple considers the alternatives: to forgo rearing children; to adopt; to use prenatal diagnosis and selective abortion; to use donor gametes free of the recessive trait; or to use the cells of one of the adults and attempt to clone a child. To avoid donor gametes and selective abortion, while maintaining a genetic tie to their child, they opt for cloning.

In another scenario, the parents of a terminally ill child are told that only a bone marrow transplant can save the child's life. "With no other donor available, the parents attempt to clone a human being from the cells of the dying child. If successful, the new child will be a perfect match for bone marrow transplant, and can be used as a donor without significant risk or discomfort. The net result: two healthy children, loved by their parents, who happen [sic] to be identical twins of different ages."

The commission was particularly impressed by the second example. That scenario, said the NBAC report, "makes what is probably the strongest possible case for cloning a human being, as it demonstrates how this technology could be used for lifesaving purposes." Indeed, the report suggests that it would be a "tragedy" to allow "the sick child to die because of a moral or political objection to such cloning." Nevertheless, we should note that many people would be morally uneasy about the use of a minor as a donor, regardless of whether the child were a result of cloning. Even if this unease is justifiably overridden by other concerns, the "transplant scenario" may not present a more compelling case for cloning than that of the infertile couple desperately seeking a biological child.

Most critics, in fact, decline to engage the specifics of such tragic (and presumably rare) situations. Instead, they bolster their case by imagining very different scenarios. Potential users of the technology, they suggest, are narcissists or control freaks—people who will regard their children not as free, original selves but as products intended to meet more or less rigid specifications. Even if such people

are not genetic determinists, their recourse to cloning will indicate a desire to exert all possible influence over the "kind" of child they produce.

The critics' alarm at this prospect has in part to do, as we have seen, with concerns about the psychological burdens such a desire would impose on the clone. But it also reflects a broader concern about the values expressed, and promoted, by a society's reproductive policies. Critics argue that a society that enables people to clone themselves thereby endorses the most narcissistic reason for having children —to perpetuate oneself through a genetic encore. The demonstrable falsity of genetic determinism may detract little, if at all, from the strength of this motive. Whether or not clones will have a grievance against their parents for producing them with this motivation, the societal indulgence of that motivation is improper and harmful.

It can be argued, however, that the critics have simply misunderstood the social meaning of a policy that would permit people to clone themselves even in the absence of the heartrending exigencies described in the NBAC report. This country has developed a strong commitment to reproductive autonomy. (This commitment emerged in response to the dismal history of eugenics—the very history that is sometimes invoked to support restrictions on cloning.) With the exception of practices that risk coercion and exploitation—notably baby-selling and commercial surrogacy—we do not interfere with people's freedom to create and acquire children by almost any means, for almost any reason. This policy does not reflect a dogmatic libertarianism. Rather, it recognizes the extraordinary personal importance and private character of reproductive decisions, even those with significant social repercussions.

Our willingness to sustain such a policy also reflects a recognition of the moral complexities of parenting. For example, we know that the motives people have for bringing a child into the world do not necessarily determine the manner in which they raise the child. Even when parents start out as narcissists, the experience of childrearing will sometimes transform their initial impulses, making them caring, respectful, and even self sacrificing. Seeing their child grow and develop, they learn that she or he is not merely an extension of themselves. Of course, some parents never make this discovery ; others, having done so, never forgive their children for it. The pace and extent of moral development among parents (no less than among children) is infinitely variable. Still, we are justified in saying that those who engage in cloning will not, by virtue of this fact, be immune to the transformative effects of parenthood—even if it is the case (and it won't always be) that they begin with more problematic motives than those of parents who engage in the "genetic lottery."

Moreover, the nature of parental motivation is itself more complex than the critics often allow. Though we can agree that narcissism is a vice not to be encouraged, we lack a clear notion of where pride in one's children ends and narcissism begins. When, for example, is it unseemly to bask in the reflected glory of a child's achievements? Imagine a champion gymnast who takes delight in her daughter's athletic prowess. Now imagine that the child was actually cloned from one of the gymnast's somatic cells. Would we have to revise our moral assessment of her pleasure in her daughter's success? Or suppose a man wanted to be cloned and to give his child opportunities he himself had never enjoyed. And suppose that, rightly or wrongly, the man took the child's success as a measure of his own

untapped potential—an indication of the flourishing life he might have had. Is *this* sentiment blamable? And is it all that different from what many natural parents feel?

Conclusion

Until recently, there were few ethical, social, or legal discussions about human cloning via nuclear transplantation, since the scientific consensus was that such a procedure was not biologically possible. With the appearance of Dolly, the situation has changed. But although it now seems more likely that human cloning will become feasible, we may doubt that the practice will come into widespread use.

I suspect it will not, but my reasons will not offer much comfort to the critics of cloning. While the technology for nuclear transplantation advances, other technologies—notably the technology of genetic engineering—will be progressing as well. Human genetic engineering will be applicable to a wide variety of traits; it will be more powerful than cloning, and hence more attractive to more people. It will also, as I have suggested, raise more troubling questions than the prospect of cloning has thus far.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy,* volume 17, number 4 (fall 1997).

References

National Bioethics Advisory Commission, "Cloning Human Beings: Report and Recommendations" (June 9, 1997); James Q. Wilson, "The Paradox of Cloning," *Weekly Standard* (May 26, 1997); Jean Bethke Elshtain, "Ewegenics," *New Republic* (March 31, 1997); R. C. Lewontin, "The Confusion over Cloning," *New York Review of Books* (October 23, 1997); Leon Kass, "The Wisdom of Repugnance," *New Republic* (June 2, 1997); Susan Cohen, "What is a Baby? Inside America's Unresolved Debate about the Ethics of Cloning," *Washington Post Magazine* (October 12, 1997); Rick Weiss, "Genetic Enhancements' Thorny Ethical Traits," *Washington Post* (October 12, 1997).

26

One Pill Makes You Smarter: An Ethical Appraisal of the Rise of Ritalin

Claudia Mills

The statistics at least *seem* alarming. The production of Ritalin, an amphetamine derivative used for the treatment of attention deficit disorder in children (and, lately, in adults as well), has risen a whopping 700 percent since 1990. According to figures given by physician Lawrence Diller in *Running on Ritalin*, over the decade, the number of Americans using Ritalin has soared from 900,000 to almost five million—the vast majority children from the ages of five to twelve, although there is a significant rise in Ritalin use among teens and adults as well. No comparable rise is reported in other countries, although a much smaller surge has taken place in Canada and Australia. In Virginia Beach, VA (perhaps the most egregious example), seventeen percent of fifth-grade boys were taking Ritalin in 1996 to control behavior problems and improve school performance. (Boys on Ritalin outnumber girls in a ratio of 3.5 to 1; when I was recently complaining to another mother about my own son's academic difficulties, she said simply, "Welcome to the world of boys.")

Stimulants have been used to treat behavior problems in children since 1937; Ritalin itself appeared on the market in the 1960s to treat what was then called "hyperactivity"—impulsive, disruptive behavior by children who just "couldn't sit still." In recent years, however, the root problem has been identified as "attention deficit disorder" (ADD), either with or without attendant hyperactivity.

Symptoms of ADD, according to the standard survey used in its diagnosis, include: "often fails to give close attention to details or makes careless mistakes in schoolwork," "often has difficulty organizing tasks and activities," and "often avoids, dislikes, or is reluctant to engage in tasks that require mental effort (such as schoolwork or homework)." Symptoms of ADD-H (the variant with hyperactivity) include: "often fidgets with hands or feet or squirms in seat" and "often has difficulty playing or engaging in leisure activities quietly." Ritalin, by most accounts, is remarkably effective in getting such children to settle down and pay

attention, with resultant (at least short-term) gains in parental sanity and academic achievement.

The fear, stated quite baldly, is that as a society we are drugging our children in ever larger numbers to get them to conform to adult expectations. Dislikes homework? Makes careless mistakes? Squirms in seat? To many it seems that we are drugging our children to get them to stop being *children*. I myself feel profoundly troubled by the rise of Ritalin—and by my own temptation to use it for my child, who, yes, makes careless mistakes and has been known to fidget. But, I will argue, it is surprisingly difficult to pinpoint any justifiable sources of discomfort here—both harder than one might think, and more illuminating. The effort to do so will lead us into an exploration of a range of issues about how we view our children and ourselves.

Here, then, are some possible responses to our concerns about the rise of Ritalin, followed by some speculations about the deeper—and legitimate— fears that fuel these concerns.

Rationales for Treatment

On some accounts, the rise in Ritalin simply reflects our commendably growing willingness to treat a serious and common disorder that has too long been left untreated. That there is soaring use of any drug is not itself a problem, if the drug is treating a genuine medical condition that responds favorably to treatment. If there is some real disorder in the area of children's brains that controls their ability to pay attention (current research is focusing on the prefrontal cortex), and this disorder is causing problems in school and home, and it can be easily treated, *shouldn't* it be treated? Why should children have to struggle with their schoolwork, and parents struggle with discipline, if the root cause of disappointing academic performance and poor behavior is a medical one that can be easily treated? On one expert's estimate, attention deficient disorder is even now underdiagnosed, and so we should expect— and welcome—a further doubling of Ritalin use in response.

However, it is unclear that there really is any one, clearly identified "thing" that "is" attention deficit disorder. Dr. Diller argues persuasively that when parents or doctors speak of a child as "having" ADD, this tends to mean only that the child in fact scored positively on a certain number of questions on the kind of survey described earlier. Certainly diagnosis of ADD is inexact, to say the least—often based largely on reported frustration by parents and teachers, sometimes made (as admitted by some teachers I've spoken to in my own local schools) by prescribing Ritalin on a trial basis and seeing if it works.

The trouble with the latter approach is that Ritalin almost always "works," in that it almost always enhances performance, at least in the short term (Diller reports that there is no evidence of long-term improvement in children taking Ritalin). According to one study cited by Diller, "stimulants had essentially the same effects on normal children as on children with attention or behavior problems." Diller notes an increasing amount of what has been called "diagnostic bracket creep," as the criteria for diagnosis become ever more loose and generous, allowing more borderline ADD children to benefit from drug treatment.

Now, it can be argued that it shouldn't matter whether children receiving Ritalin have some underlying "brain disorder" that causes inattention, or whether they are inattentive for other, less physiologically based reasons. Why is the *cause* of a condition relevant to whether or not we have reason to try to treat it? For example, if parents are debating whether or not to treat an abnormally short child with growth hormone, physicians David B. Allen and Norman Fost have argued that it shouldn't matter whether the child's height is caused by a hormone deficiency or by his or her genetic endowment: What should matter is whether this is causing a problem for him, and whether it can be successfully treated.

With the diagnosis of attention deficit disorder so elastic, however, one begins to wonder whether the "disorder" in question is simply that the child places at the lower end of the spectrum for behavior or achievement—that is, that parents, clinging stubbornly to Lake Wobegon fantasies, insist that all children generally and their own children in particular should be "above average," or certainly not below average. (I have discovered from my own experience that teachers are also quick to suggest an ADD evaluation for a child with any academic difficulties.) If attention or behavior problems interfere with a child's achieving his or her "full potential," parents and teachers may be increasingly tempted to turn to medication, even where this can mean not just allowing their children to perform "normally," but raising them significantly above the norm. Diller mentions one student whose use of Ritalin allowed him to become his high school's valedictorian: off the drug, he still performed well, but his grades slipped, from straight As, to As intermingled with Bs.

Some of us will be troubled by using Ritalin in such cases. But why shouldn't every child be able to use whatever means are available to improve his or her performance, whatever his or her starting point? If we were to raise poor performers to the mean, but refuse to raise average performers above the mean, this could seem unfair to the superior performers. Why shouldn't they have a chance at enhancement, too?

Ritalin as a Means of Enhancement

As ethics professor Ronald Cole-Turner points out, in his article in this issue, most of us are already "enhancement enthusiasts." We not only strive to improve our children all the time, but would criticize parents who neglected to do so. If we give children Ritalin to enhance their academic performance— well, don't we send them to school in the first place for the same reason? It doesn't seem all that problematic to want our children to be more attentive, more responsive, better behaved, better able to learn: isn't better, by definition, *betterl* Cole-Turner argues, however, that while the goal of enhancement may be a legitimate one (I will raise doubts about this below), we need also to look at the means. Means *do* matter.

First, some means may be problematic in themselves, including the use of drugs. A friend with whom I was discussing the rise in Ritalin use voiced the reactions of many in saying, "Putting kids on drugs? Uh-uh." Now, drugs of any kind are often attended with a myriad of negative (and perhaps not yet discovered) side effects. But stimulants like Ritalin have been used to treat behavior problems in children for six decades with few observed ill effects. Ritalin causes insomnia, which can be

avoided by not taking it in the evening; some children experience suppressed appetite. But the vast majority experience no distressing side effects at all.

The term "drugs" generally carries with it a stigma: when we think of "children on drugs," we think first of illegal drug use; when we talk about "drugging our children," we visualize children wandering through the day in a dopey, feel-good haze. It is important to free Ritalin from such unwarranted associations. Its use is legal, although controlled, and, far from inducing a fuzzy "drugged" state, it works to increase the ability to pay attention. With Ritalin, children don't "tune out," but "tune in." Or so we might claim.

Second, as Cole-Turner argues, some means to an end may be valued for their own sake and in their own right—either because they also represent ends that we value, or because we value reaching the end only after an experience of striving and struggle. If we choose a "quick fix" to solve our problems and achieve our goals, we may end up achieving different goals altogether, or, at the least, give up the long and ultimately more rewarding journey to our destination.

In the case of Ritalin, the fear is that we will be content to give "problem children" a couple of little pills every day, rather than put in the extra effort as parents and teachers to reach them and teach them, to help them learn and grow in a more messy and non-medicalized way. Specifically, the fear is that we will see Ritalin as a means of bypassing tough and loving parental discipline or real (and expensive) commitments to shouldering the rising costs of effective public education.

Now, clearly we value parental love and discipline, and the long journey of education as ends in themselves, not just as means to producing more successful children. Focusing for the moment on education, we don't send children to school simply to get them to acquire a certain body of knowledge and master a certain body of skills, but because the process of learning is itself valuable. I still remember the thrill the first time I really "got" long division. Or the shock of joy with which I first learned, from my high school American history teacher, that there really are two sides to every question. We may worry that Ritalin provides an easy way out of facing the challenge—and reward—of truly educating our children. For teachers who can teach and classroom environments in which children can learn cost vastly more than daily doses of Ritalin.

To this concern about Ritalin, I have two responses. First, Ritalin could be defended as a means, not of bypassing the journey of education, but of permitting certain children to engage in the journey more fully, to pay attention to the journey in all its richness. Ritalin doesn't substitute for learning; it at best assists in providing one of the preconditions for learning—the ability to pay attention to what is being taught. Ritalin or no Ritalin, we will still need to teach our children, both how to behave and how to learn, in the most creative ways possible.

This suggests, second, that when it comes to parents and to teaching, we do not need to fear that we will take the easy way out, because, quite simply, there *is* no easy way out. Cole-Turner points out correctly that while new means "may relocate our human struggle, they do not eliminate it." Even if we are what physician Gerald Klerman has called "pharmacological calvinists," who reject drug-based solutions as too easy, who value the hard way just because it's hard, this gives us no reason to resist Ritalin. Anyone who is a parent or teacher knows that there will be no shortage of hard work in raising and educating children. If hard is what we want,

we're home free: however hard we want parenting and teaching to be, it will be hard enough.

Equality and Competitiveness

As I approach what I take to be the most serious worry about Ritalin, let me mention one other objection that is sometimes raised to it and other programs of medical enhancement. This objection concedes that Ritalin can provide genuine and legitimate advantages for those who use it, but charges that these advantages are not distributed fairly. Responsible diagnoses of attention deficit disorder are expensive and beyond the budget of many families, who are already poorly served by an inadequate health care system. With the rise of Ritalin, whose use is concentrated among white, upper-middle-class families, the children of the rich get cognitively richer, and the children of the poor fall ever further behind.

This objection, if it stands on its merits, could be met by efforts to equalize provision of Ritalin (as well as access to medical care generally). If racial or class disparities in Ritalin use were our chief concern, the solution would be obvious. But in my view, the biggest problem with Ritalin lies not with the kids who don't get it, but with (at least some of) those who do.

The real reason that I remain uncomfortable with the rise of Ritalin concerns not the means of enhancement, but the goal itself—what our motives are for seeking enhancement so diligently and desperately, and, even more, what we as a society are currently counting as enhancement. What, in the end, are we trying to gain?

Now, there are clear advantages to being able to pay attention, clear advantages to being able to learn. Philosophy professor Dan Brock notes that often our efforts at enhancement are meant to provide us with "intrinsic goods" that we value for their own sake. If these are what we are seeking in putting our children on Ritalin, this doesn't seem particularly troubling. But it seems to me, chiefly as an observer of my own life in one white, upper-middle-class American neighborhood, that many of us want more than this. We don't want to be better than our own imperfect selves; we want to be better than somebody else. We don't want Garrison Keillor's vision of a world where all the children are above average—we want a world where our own children are more above average than anybody else's. A friend of mine who is a principal in an affluent suburban elementary school says that in his school there are only three kinds of children: gifted, very gifted, and extremely gifted. We have grade inflation because so many students and parents insist on getting top grades that now teachers give top grades to almost everybody. And we give our children Ritalin in part because we cannot bear that they be below average; indeed, we cannot bear that they not be above average. This goal itself is troubling to me, independent of any questions about the means to achieve it.

Of course, as Brock observes, such a goal is ultimately self-defeating: once everyone achieves the same relative enhancement, the competitive benefit of the enhancement disappears. But it may be a long time before we figure this out. And in the meantime we have to live in the world that we have been creating.

The concerns that I am raising now are targeted not only against Ritalin use, but against other, more familiar and widely accepted means of enhancement as well. For I don't think that our non-pharmaceutical strategies to produce better, brighter

children are themselves beyond reproach. When I compare my own childhood experiences with those of my children, I feel a sorrow that I think runs deeper than mere nostalgia for a sentimentalized version of one's own past.

When I was a child, competitive sports didn't begin until fairly late in elementary school; now they begin for some children in kindergarten or even preschool. Children who wait until third or fourth grade to join a soccer or basketball team find themselves at an insuperable competitive disadvantage. In fact, in my neighborhood, a number of the children have already burned out on a sport and decided to drop it by the age at which children a generation ago were just beginning. I began piano lessons in third grade; my own children began in kindergarten. How else can they keep up with everyone else's children who have also been studying music from the cradle—indeed, with children who listened to tapes of Mozart in utero?

And so middle-class children have childhoods in which they are chauffeured by their ever more frantic parents from one enrichment activity to another: two sports, two musical instruments, Scouts, Odyssey of the Mind, after-school language programs, science discovery programs, theater workshops. Parents who have a different vision of what childhood might be are reluctant to pursue it, for fear that their children will be left too far behind. One parenting magazine recently published an article about a family that actually chose not to participate in any after-school activities, where this was considered sufficiently unusual to merit a feature article in a national magazine.

The irony in all this is that Ritalin is prescribed for attention deficit disorder. Yet as we struggle to enhance our children faster than our neighbors manage to enhance theirs, we fill our lives with an even greater level of distractions. Diller speculates that if Huck Finn and Tom Sawyer walked out of Twain's pages and into a suburban American school today, they might well find themselves on Ritalin. He worries about our inability to tolerate and appreciate a range of temperaments and personality styles. I worry about this, too, but more about whether we are losing the ability to let children be children—or at least to let them be average children, not gifted, very gifted, or extremely gifted, savoring childhood as it slips by all too quickly.

If we want our kids to pay attention, maybe we have to begin paying attention to what it is that's worth paying attention *to.*

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 18, number 4 (fall 1998).

References

Lawrence H. Diller, *Running on Ritalin: A Physician Reflects on Children, Society, and Performance in a Pill* (Bantam Books, 1998), and "The Run on Ritalin: Attention Deficit Disorder and Stimulant Treatment in the 1990s," *Hastings Center Report,* vol. 26, no. 2 (1996); Erik Parens, "Is Better Always Good? The Enhancement Project," *Hastings Center Report,* vol. 28, no. 1 (1998) (Parens quotes Dan Brock and David B. Allen and Norman Fost); Peter J. Whitehouse, Eric Juengst, Maxwell Mehlman, and Thomas H. Murray,

"Enhancing Cognition in the Intellectually Intact," *Hastings Center Report,* vol. 27, no. 3 (1997) (this article cites Gerald Klerman on "pharmacological Calvinism").

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Trials on Trial

Deborah Heilman

Research ethics generally fails to capture public attention and scrutiny. But a debate over clinical trials in developing countries moved suddenly into the public domain last fall, when an editorial in the *New England Journal of Medicine* criticized studies designed to test the efficacy of antiretroviral drugs in reducing mother-to-infant transmission of HIV. The editorial objected to the trials because they included placebo-control groups, in which HIV-infected pregnant women were given a dummy pill rather than the drug zidovudine (AZT). The criticism was especially pointed because in nine of the fifteen trials then under way, funding had been provided by U.S. health agencies—the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC).

In 1998, the CDC announced that it was stopping a placebo-controlled trial in Thailand, not because of ethical objections, but because the question under study had now been answered to the agency's satisfaction. Data from the trial showed that short courses of AZT, administered prenatally and during delivery, reduce mother-to-infant transmission of HIV by one half. As a result, other trials supported by the NIH and CDC will no longer treat HIV-infected pregnant women with placebos. Both critics and defenders of the trials are pleased with this development; the critics because use of placebos has been halted, the defenders because the trials produced decisive, reliable data that policymakers in developing countries can use.

The Basic Dilemma

The research that sparked the controversy presents the classic conflict inherent in all studies of promising new therapies carried out on human subjects. As we shall see, the fact that these trials were conducted in developing countries does add complexity to the issue. But the basic dilemma of appropriate research design is familiar.

All clinical research on human subjects strives to balance the interest of the study subjects in receiving the best available treatment for their illnesses against the

interests of society in acquiring the most dependable information at the earliest time. One can grasp this tension by thinking about one's own experience *as a patient.* When ill or in pain, the patient wants the best available treatment. Since a controlled clinical trial requires the random assignment of patients to two or more arms of the study offering different therapies, it is only when there is no reason to believe that one therapy is superior that it is not against the patient's interest to participate. If one treatment is better, why should a patient take a chance of not getting it? At the same time, *as a patient* one depends on the doctor having reliable information about what treatments are useful. One hopes that prior patients have participated in studies that show clearly and decisively what treatment is best.

The AZT trials in developing countries replay this classic dilemma. The HIV-infected woman wants the therapy most likely to prevent transmission of the disease to her infant. The community (including its public health policymakers) wants reliable information about the effectiveness of treatment so that it can implement programs to help the many other infected pregnant women and their babies.

Several facts about these trials heighten the familiar conflict, however. HIV infection is a deadly disease. Hence, the use of a placebo in the case of HIV especially compromises the interests of the study subject (here, the baby). Since the subject in these trials cannot provide consent, participation requires consent by surrogate (the mother). Yet in cases involving surrogate consent, researchers generally have a special responsibility to safeguard the well-being of the dependent.

The interests of the community are also substantial. HIV infection rates in many developing countries are extremely high. For example, in Kampala, Uganda, one-sixth of the adult population is infected. In addition, most developing countries have few resources available for public health. It is thus imperative to know whether a treatment is effective before diverting extremely scarce resources from other health programs.

The use of a placebo was especially controversial because an effective means of reducing the likelihood of transmission has been identified. In 1994 the results of a study carried out in the U.S. and France demonstrated that administering AZT to the mother pre- and perinatally, and to the infant after delivery, dramatically reduced transmission. This regimen, known as the ACTG 076 protocol, cut the incidence of HIV transmission from mother to child by two-thirds. As a result of the clear benefit of the 076 regimen, it is the recommended treatment for HIV-infected pregnant women in the developed world.

Unfortunately, 076 is not practical for developing countries. Women in these countries usually do not seek prenatal care as early as the regimen envisioned. Many of these countries lack intravenous equipment used to deliver AZT perinatally. The drug-related cost of the 076 regimen, and of the requisite health care delivery systems, is too high for most developing countries. Moreover, 076 required that women not breast-feed their children, since breast-feeding increases the likelihood of HIV transmission. This is no small matter in countries where polluted water may make formula dangerous and the increased immunity provided by breast milk is especially valuable.

These two facts—the dramatic success of 076 and its impracticability for developing countries—led researchers to the following question: Would a different regimen of antiretroviral drugs be effective and useful in the developing world? Researchers created several different shorter courses of treatment that did not

depend on the use of IVs and did not require that women refrain from breast-feeding. Next, they needed to design studies to evaluate these courses of treatment. With the exception of one Harvard-NIH study in Ethiopia, all the original NIH- and CDC-sponsored research tested a particular short course regimen against a placebo. The controversy turned on whether this research design was ethically permissible.

The Equipoise Standard

According to the generally accepted standard, clinical research on human subjects is only permissible when scientists don't know what therapy is best. The state of medical knowledge must rest in "equipoise." Placebo-controlled trials are permitted, therefore, only if scientists don't know whether the new therapy is better than nothing. Actually the standard is slightly more complex, in that side effects and other harms are considered along with anticipated benefits. But the basic principle remains. A placebo-controlled trial is permissible when it is unclear whether a new therapy is better, counting burdens as well as benefits, than no treatment.

The equipoise standard offers a resolution of the tension between individual and communal interests inherent in all clinical trials. On its face, the standard seems to rank the interest of the individual in treatment above the interest of the community in knowledge. Only when the patient has nothing personally to lose by getting one therapy rather than another are researchers permitted to use the patient to advance the common good.

However, this preference for the individual over the community is only apparent. In practice, communal interests trump individual interests. The equipoise standard requires that no patient in a trial get a treatment *known* to be inferior. If we don't *know* that a new therapy is better than the old until we have tested it in a rigorous clinical trial, then patient interest is not sacrificed by participating in such a trial. Until the results are in, we have equipoise. But this argument neglects the patient's perspective. For the patient, well-grounded *belief* is also valuable. If a new therapy is probably better than the old, the patient's interests are sacrificed in a trial where there is a chance she or he won't receive it.

So, while the articulated standards place the interests of the individual above those of the community, this commitment is eviscerated by the manner in which the equipoise standard is actually employed. The level of certainty required to unsettle equipoise is key. Today, the research scientist's standard of knowledge prevails. For the scientist, a hypothesis is proved on the basis of a randomized clinical trial. Moreover, the probability that the results of the trial are due to chance must be less than one in twenty. These are stringent criteria. By importing this certainty standard into the ethicist's understanding of equipoise, we undermine it. Since the patient wants whichever therapy is *believed* best, she sacrifices in joining a trial to establish, for others, that the therapy really is best.

As Samuel Hellman and I have argued elsewhere, clinical research is often ethically problematic because of a conflation of roles. In doing clinical research, the doctor acts simultaneously as a physician and as a scientist. Each of these roles rightly requires a different degree of certainty before action can be taken. In the AZT trials, there is yet a third role in the picture, that of the public health official.

The ethical quagmire of these trials is the result of the conflict between these three roles.

Medical researchers rightly aim at knowledge in itself and therefore correctly employ very stringent criteria. Before closing a question and moving on, the research scientist must be very sure to have the right answer. Public health officials aim at communal well-being. Because they are under time pressure that the scientist is not, a public health official may employ a slightly less rigorous standard for considering a hypothesis proved. But as public health decisions affect large numbers of people and require the expenditure of often very limited societal resources, communal interest demands a still quite rigorous standard for medical knowledge. The physician treating an individual patient works toward the health of that patient. As a result, the degree of certainty a physician requires before acting is considerably lower. From the perspective of patient health, the doctor ought to provide that treatment which is most likely to be best.

The articulated standards for ethical research on human subjects command that the role of the physician must predominate. For example, the World Health Organization's Declaration of Helsinki, which is widely recognized as authoritative, provides that "the interests of the subject must always prevail over the interests of science and society." However, this public commitment to put the interests of the individual over those of the community is but empty rhetoric unless researchers interpret the equipoise standard in a way that supports it. For the interests of the study subject to trump communal concerns, the equipoise standard must incorporate the physician's understanding of when information is valuable to the patient.

Ranking individual over communal well-being will have its costs. For example, to test the efficacy of short course AZT therapies, researchers must adopt a study design without a placebo control. Critics of the trials suggested testing short courses against the 076 regimen. But this design may not be helpful. If the short course therapy proved less effective than 076, as is likely, investigators would still not know whether the short course was more effective than no treatment at all. Alternatively, one could give all study participants short course therapy. Researchers would then evaluate how the results compare with background data on transmission rates from the particular country. The information gathered in this way would be useful and informative, but less certain and reliable than information attained with a placebo control. Differences between the study population and the general population would not be controlled for, and might be relevant. Moreover, data on general rates of transmission within a country may vary. What this means in practice is that studies using such data may have to be repeated before public policy can be based on the results. This lost time may well cost lives as we wait for more certainty before taking action.

Were These Trials Ethical?

The controversial NIH and CDC trials randomly assigned HIV-infected women to either a short course of AZT or to a placebo. To assess whether these trials were ethical, we need to answer two questions. First, how strong were the reasons, pre-trial, to believe that the short course therapies would be more effective than no therapy at all? Second, was that belief strong enough to disturb equipoise?

Prior to the trials, scientists knew that the 076 regimen had been extremely successful in the U.S. and France. They also knew that some participants in the 076 study hadn't received the full regimen but showed some benefit nonetheless. Still, a short course administered in developing countries might be less effective. Oral intake of the drug might not work as well as IVs. Breastfeeding might destroy the gain of treatment. And, finally, other background health and nutrition problems might make AZT simply less effective in the developing world than it proved to be in Western countries. In part, the debate about these trials is over the significance of these differences.

But that is only a part of the disagreement. Given that researchers have *reason to believe* that the short course will decrease the likelihood of transmission—as they must, or there would be no incentive to conduct the trials in the first place—what follows? For the study's defenders, the fact that the therapy shows promise provides a reason to do the trial, but no more. For the critics, the belief that the therapy will work means that randomization to placebo is unethical. In this disagreement we see the two issues (familiar from introductory philosophy classes everywhere) that I have been discussing.

First, critics and defenders disagree about the appropriate balance between individual interest and communal well-being. Peter Lurie and Sidney Wolfe of Public Citizen, joined by Marcia Angell of the *New England Journal*, condemned the use of babies born to women in the control group for the benefit of babies to be born tomorrow. Study defenders Harold Varmus (NIH director) and David Satcher (then CDC director, and, since 1998, surgeon general) emphasized the enormous devastation wrought by HIV in these countries and the great need for a decisive answer to an important research question.

The second familiar philosophical issue is epistemological. Critics and defenders of the trials disagree about the value of information not yet validated by a randomized trial. Research scientists, steeped in the values of science, rightly assert that before a trial we don't know whether a new therapy is valuable. Patient advocates assert that we don't need to *know.* Of course, the scientist doesn't really know that the trial-validated conclusion is accurate, either. The standard of a clinical trial (less than a one-in-twenty probability of a chance result) itself reflects a judgment about the usefulness of this information and the costs of demanding more. Since scientific information is produced by induction, we deal always in degrees of certainty.

The real question that these and other trials raise is: How certain must the physician scientist be that a new therapy is valuable before a randomized trial becomes unethical? There is a continuum stretching from a doctor's hunch to reasonable belief to solid conviction. Instead of asking when we know that the new therapy is better than the old, we should ask how much certainty it makes sense to demand, given the intended purpose. In practice, even the defenders of the trials recognize this. On the basis of the Thai study, the CDC is stopping the placebo arm of a trial in the Ivory Coast, and NIH is stopping the placebo arms of all its studies. But there is an important difference between the women enrolled in the CDC-Thai study and in these others: the Thai women did not breast-feed. So, should we say that we still don't know whether short course will be effective in other countries where breast-feeding is the norm? In stopping the other trials on the basis of the Thai study, the CDC and NIH demonstrate that they too recognize that we make a

moral judgment when we decide whether randomization to placebo may continue. As the level of our confidence in the effectiveness of short course increases, the interests of the babies in that therapy become more insistent, and thus it becomes harder and harder to sacrifice their welfare for the welfare of other babies born tomorrow.

Thus, the two philosophical questions are intertwined. If our aim is community welfare, we need a fairly high level of certainty before taking action. The actor must have a solid conviction that short course therapy will reduce transmission rates significantly in order to justify spending scarce resources and treating thousands of people. But if our purpose is to treat the individual patient, a well-grounded belief is enough. Each HIV infected woman wants the best chance for her baby to be HIV-free. Research results prior to the controversial trials surely gave her and her doctor good reason to believe that short course therapy would be of value.

In order to fulfill our commitment, as stated in the Helsinki Declaration, to placing individual interests over communal well-being, the physician's certainty standard must prevail. If a doctor would recommend short course therapy over no treatment, then randomization to placebo is unethical.

The Clash of Worlds

These trials also raise a special problem, however. Their aim is not the usual aim of clinical research: a medically superior therapy. Instead, their goal is to find an effective therapy practical for general use in countries where health resources are extremely limited. The equipoise standard is built to handle a different kind of case. In general, researchers look for new therapies that will produce better results: more health, fewer side effects, less pain. In that context, one can only test such a therapy in a randomized trial if the physician does not have good reason to believe that one therapy will offer more to the individual patient. But in the trials under discussion, scientists are looking for a regimen that will work for a specific population. They recognize that such a therapy might not work as well as 076 works in a different population. Given this research goal, equipoise (in its usual sense) is impossible. The researcher simply cannot say she or he does not have good reasons to believe one treatment (here 076) is superior. The best known therapy for the individual, however, is not practical for general use.

This same paradox explains the debate over the ethical requirement that all study subjects "be assured of the best proven diagnostic and therapeutic method," as the Helsinki Declaration requires. The trials have been criticized on the grounds that use of placebo denied participants the "standard of care" established for HIV-infected pregnant women. But this argument may prove too much. If the principle articulated in the Helsinki Declaration requires that all study participants get the standard of care in the developed world, then trials of short course therapy against a control arm getting 076 are also unethical. While short course therapies may be highly effective, there are still good reasons to believe they may be less effective than 076. Therefore, participants getting short course would get less than the standard of care.

An ethical requirement that each study participant get as good as is offered in the developed countries would make it impossible to test new therapies in any manner.

Each participant would be required to receive 076. This counterintuitive result should make us reconsider the argument that produced it. Where the research goal is to find a practical therapy for general use that may be less effective than treatment available elsewhere, the usual interpretations of both the equipoise principle and the standard of care principle are inapt. Surely we do not wish rigid adherence to these principles to entail that no testing of the much needed short course therapies is permissible at all. This result would serve neither individual nor communal interests.

Rightly understood, these standards require researchers to put the individual patient's interest ahead of the community's need for medical information. In the special case where adherence to the letter of the standards would frustrate the interests of both the individual and the group, we ought to adhere to the principle from which these standards emanate, rather than to the standards themselves. We can suspend the standards, but not the core principle. Here that principle would clearly prohibit randomization to placebo. The commitment to individual well-being entails that the investigator treat the research subject simultaneously as a patient. In practice, such a standard does not require that researchers give each woman the best therapy available anywhere in the world. But it does require that researchers studying transmission rates also treat the patient (woman and infant) in a manner designed to reduce transmission.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 18 1/2 (winter/spring 1998).

References

Marcia Angell, "The Ethics of Clinical Research in the Third World," *New England Journal of Medicine,* vol. 337, no. 12 (September 18, 1997); Peter Lurie and Sidney N. Wolfe, "Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries," *New England Journal of Medicine,* vol. 337, no. 12 (September 18, 1997); Harold Varmus and David Satcher, "Ethical Complexities of Conducting Research in Developing Countries," *New England Journal of Medicine,* vol. 337, no. 14 (October 2, 1997); Danstan Bagenda and Philippa Musoke-Mudido, "We're Trying to Help Our Sickest People, Not Exploit Them," *Washington Post* (September 28, 1997); Samuel Hellman and Deborah S. Hellman, "Of Mice but Not Men: Problems of the Randomized Clinical Trial," *New England Journal of Medicine,* vol. 324, no. 22 (May 30, 1991).

Part 5

Natural Environments, Human Communities

28

Valuing Nature: Assessing Damages for Oil Spills

Alan Strudler

On March 24, 1989 the *Exxon Valdez*, an oil supertanker, ran aground on Bligh Reef in Alaska's Prince William Sound. Eleven million gallons of oil poured through its cracked hull, fouling the sound, contaminating thousands of miles of coastline, and destroying fish and wildlife. As noted in a draft restoration plan prepared in 1993, the oiled areas included "a national forest, four national wildlife refuges, three national parks, five state parks, four state critical habitat areas, and a state game sanctuary."

The courts have held Exxon liable for the harm it caused in Prince William Sound. In a 1991 civil settlement, for example, the corporation agreed to pay $900 million in damages to the federal government and the state of Alaska. A criminal plea agreement required additional restitution. More recently, a federal jury in Anchorage, having found that Exxon and the tanker captain had acted recklessly, ordered the company to pay five billion dollars in punitive damages. This award went to thousands of fishermen and other Alaskans who claimed to have suffered losses from the spill. In an earlier phase of the trial, the same jury awarded the plaintiffs $286 million in compensatory damages.

In press accounts of the trial, evidence that Exxon and its agents engaged in morally wrongful conduct received considerable attention. Without minimizing the significance of Exxon's wrongs, however, it is important to be clear that if we require Exxon to take responsibility for the oil that leaks from its tankers, we need not rely on the idea that the company deserves to be punished. There may be reasons for holding Exxon liable apart from its moral wrongs. This is important because, unfortunately, we can expect oil spills to continue occurring, and they may not occur only in connection with morally wrongful conduct. An oil spill will sometimes happen as a mere accident, the outcome of comparatively innocent sloppiness—behavior that may not deserve punishment. If we set aside, for purposes of this discussion, the wrongful aspect of Exxon's conduct, we may then

focus on the important policy issue of how we, as a society, should respond when environmental disasters are merely accidental. We may, that is, consider the grounds for imposing liability. In this discussion, the relevant moral ideas will be those underlying the law of tort rather than those underlying the law of crime.

Principles of Tort Law

Tort law requires those who in certain circumstances harm others to provide compensation to those who are harmed. Tort suits may arise from comparatively innocent incidents of a sort common in modern life: one motorist nods off and accidentally collides into another; a customer slips and falls on a poorly maintained floor in a grocery store. Tort law requires people or corporations to pay for harm they cause even when the harmful action is not criminal.

Tort law is common law. It exists largely as a matter of judicial tradition and not legislative action. In this country, much of the law of oil spills has been formalized and made part of federal code. But the underlying moral idea is the same. Sometimes harmdoers must pay for the consequences of their actions even when these consequences do not arise from behavior so evil as to deserve punishment.

There is, however, one problem with using the model of tort law to understand the moral basis of liability in the case of oil spills. Liability for an oil spill, like any liability imposed in law, must be fair, not whimsical or arbitrary. In the event that liability consists in a demand for a specific amount of money, there must be a reason for fixing on that particular amount. Difficulties in fixing damages for oil spills distinguish oil spill cases from garden-variety tort cases. In the case of accidents involving only damage to personal property, we can often base damages on the cost of repairing or replacing the damaged property. But in the case of damage to nature, the loss is not definable in economic terms alone. The harm done to Prince William Sound, for example, cannot be understood solely in terms of the commercial losses resulting from the spill; the impact of the *Valdez* disaster does not seem reducible to the lost revenues of fisheries or the tourist industry. Nor does the lost pleasure of the few tourists who might have visited the sound appear to exhaust the spill's impact. But if we don't measure the harm in these ways, what alternatives do we have?

One possibility is to measure the damage in terms of the cost of *restoring* the Sound. Indeed, in actions against oil companies for spills, restoration is a commonly discussed remedy. Yet there are limits on how much the concept of restoration can explain. Once humans cause a catastrophe in nature, we lose our grip on what it means to "restore" it in any standard sense of that term.

The concept of restoration is most often used in art. One might restore a damaged painting, for example, or a sculpture from which some parts have broken off. But it is not clear what it might mean to restore a scene in nature. The concept of nature refers etymologically to that which is born, which arises independently of human manipulation, which is not in any sense artificial. One appeal of nature is its independence from our will, its confirmation of the magnificence of things beyond us. In this respect, restoring nature differs from restoring art. Because it has no life of its own, a broken sculpture might be reassembled in ways that preserve its

distinctive value. A natural setting, however, involves a life of its own in ways that resist application of the idea of restoration.

If the value of nature lies in its independence from us, then restoring it must be understood as an act of reinvigoration by which a natural scene regains the vitality to evolve according to its own character. It does not follow that we should eschew the aim of restoring nature, but rather that this aim must involve helping nature to take its own course or heal itself, and not simply fixing broken parts. Perhaps that is why much of the restoration effort actually undertaken at Prince William Sound seems misguided. As an article in *Time* explains, Exxon "squandered" vast sums of money on "ill-conceived cleanup techniques and heroic rescues." These included the cleaning of several hundred otters, "many of which died anyway," at a cost of $80,000 each, and the "use of scalding hot, pressurized seawater to hose down beaches"—a tactic which left the beaches "almost sterile, empty of the limpets and other intertidal creatures" whose existence is essential to the local ecosystem.

If we often do best by merely aiding nature in the process of self-healing and if vigorous cleanup measures risk slowing the ecological process, then "restoration" by the oil companies may prove comparatively modest and inexpensive. Yet even if this form of restoration is the most appropriate, it only mitigates the harm to nature; it does not undo it. Once a magnificent natural setting has been fouled, the "insult" remains even after the injury has been repaired.

Nonuse Values

Much oil company lobbying has been directed at limiting corporate liability for disasters such as the *Valdez* spill. The effort has been not so much to limit liability for commercial loss, or the lost pleasure of tourists, or the costs of restoration, but instead to limit or eliminate liability for what economists call nonuse or existence values. Nonuse values, it may seem, have the potential to be valued at a staggeringly and unpredictably high dollar amount.

Nonuse value is a peculiar category, invented by economists in the 1970s as a response to complaints that the analysis of value in purely commercial or hedonic terms leaves out something important. Nonuse value is easy to define in the negative: it is the value that something has apart from its commercial value and apart from the pleasure produced by viewing it; in its positive sense, nonuse value is the value of knowing that a particular thing or place exists.

Some economists have developed a technique for attaching an economic interpretation or dollar amount to nonuse value and nonmarket goods more generally: contingent valuation. In rough terms, contingent valuation proceeds by surveying people about how much they would be willing to pay for a specific improvement or protection of a good, and then multiplying the average amount a person is willing to pay by the number of people in the population. One might conduct a contingent valuation study of damage to Prince William Sound, then, by first determining how much people would have been willing to pay to prevent the damage, and multiplying this number by the number of people in some relevant population. Some courts have found contingent valuation useful in measuring damage to nature. After all, to assign monetary damages, one needs numbers, and contingent valuation apparently lacks competition as a number generator. Yet

writers have long been skeptical about contingent valuation, and the attack from the social science community is increasingly pronounced.

Some of the nation's most distinguished economists and psychologists recently released a set of papers arguing that contingent valuation is methodologically unsound and lacks scientific validity. Indeed, many of these scientists argue that the flaws in contingent valuation are so deep that no amount of improvement in the technique will salvage it. People lack meaningful preferences regarding how much they would be willing to pay to protect nature from disaster. They concoct arbitrary answers to contingent valuation survey questions, and their answers to these questions are mere artifacts of the surveys. Thus, these scientists argue, judges who rely on the surveys to produce numbers measuring damages to oil spills would do just as well to spin a roulette wheel. Of course, not all scientists agree that contingent valuation is hopeless. For example, the Department of Commerce, through one of its agencies, the National Oceanic and Atmospheric Administration, recently asked a panel of economists to develop recommendations for making contingent valuation studies valid. But no argument shows that following their recommendations will salvage contingent valuation.

If the case the social scientists make against contingent valuation seems cogent, the policy implications of their work remain open to dispute. Their studies were sponsored by a consortium of oil companies, and when the oil lobby reprinted them in a packet made available to legislators and lawyers, the packet included a paper by one of it lawyers. He suggests that in the face of the impossibility of measuring the nonuse values we should be satisfied with requiring oil companies to pay for what we can measure—things such as commercial loss and restoration costs. That is, we should cease holding oil firms responsible for nonuse harm in oil spill cases.

Yet there are grounds for resisting the oil lobby's suggestion that we cease making oil companies pay for nonuse harm. The fact that economists have trouble with nonuse value provides little reason for doubting the importance of nonuse value but some reason for doubting that we should look to economics to answer all our social policy conundrums or to explain all that matters to us as a society.

There are plenty of things in common experience whose value seems primarily what economists call a nonuse value but whose character falls outside the economist's net. Indeed, the value of a scene of natural beauty like Prince William Sound lies neither in the amount of money we might produce by exploiting it commercially nor in the amount of happiness that we get from viewing it. Rather, its value lies in its cultural and aesthetic identity. All this means, in practical terms, is that when we try to articulate to one another why the sound matters, facts about its market value have far less explanatory force than facts about its role in our history and its magnificence as a piece of wilderness.

The economically recalcitrant character of nonuse value may seem even more obvious in another kind of example. The mere discussion of this example, I fear, may seem offensive. But this only helps to establish a point I wish to make, that some of the values most important to us are independent from and even at odds with the market values that paradigmatically concern economists.

Consider the body of a dead national hero—say, John F. Kennedy—resting in its grave. Now suppose that groundskeepers inadvertently destroy it. Something terrible has happened. How should we understand it? How should we gauge our loss? Restoration value gets us nowhere; it is abhorrent to consider restoring the

decayed pieces of a corpse. Nonetheless, there is no commercial loss, since we didn't charge people to look at the Kennedy corpse or gravesite, and the loss to concessionaires in the vicinity of Arlington National Cemetery is irrelevant. What we lose in the workmen's error verges on the sacred, and we do not mourn it because of any commercial setbacks. Nonuse values are real. If the body were destroyed, we would suffer a loss and economists would be right to worry about it. It remains an open question whether they can analyze the loss.

Nonuse values, then, may be compromised in tragic accidents like the destruction of a gravesite. Such accidents are therefore events that possess moral significance apart from issues of economic loss and apart from issues of the evil of the people who cause the accidents. Failing to acknowledge this significance is a sign of moral insensitivity. That there is nothing we can do about the destruction of the corpse in our example does not imply that we should ignore it and feel nothing. Admittedly, though, it remains a hard problem to determine what the accident means or what is required of us if we are to take this accident seriously.

Consider a more mundane example of an accident that causes noneconomic harm but which nonetheless must be taken seriously. Imagine that you are standing in the aisle of a bus when it comes unexpectedly to a stop. You lose your balance and fall on a person seated nearby. Even if you learned that you had not harmed him, bodily or economically, it would be insensitive of you to make no gesture of apology or regret for what had happened. Your fall, even though unintentional, compromises the sanctity of his person. Common decency suggests feeling some responsibility for this. You would therefore apologize even though the fall was not your fault. To stand up silently and walk off constitutes a failure to acknowledge the significance of what you have done to your fellow passenger. It announces that the sanctity of his person means little to you; it is a direct insult to him.

The ritual of apologizing or expressing regret is an important device for acknowledging the moral significance of accidents. The bus accident may be a comparatively trivial example of this phenomenon, but the reliability of human responses in such cases seems a prerequisite for the existence of a moral community. If we had no disposition to make such responses, it would demonstrate a lack of mutual concern and respect.

Payment of damages is a socially compelled ritual for the expression of regret; forcing a harmdoer to pay is symbolic recognition of the importance of the suffering of accident victims. Forcing persons to pay doesn't mean that they actually feel regret, but it does mean that we as a society refuse to acquiesce in a failure to feel regret. A forced apology is an apology even if an unfelt one.

It may seem that expressing regret by paying money is needlessly tacky and expensive. But in a society like ours, in which relations are largely and necessarily impersonal, we lack obvious alternatives. Requiring the payment of money as acknowledgment of the moral significance of causing harm seems better than simply ignoring the harm.

It may be important that we as a society recognize the significance of tragic accidents like the oil spill in Prince William Sound. The system of accident law provides a mechanism for expressing the seriousness of this concern. People often characterize what matter most to them as priceless. A scene of beauty in nature, such as Prince William Sound, is an example. When the priceless is compromised, it seems hard to specify a particular sum of money payment which expresses decent

concern for the harm done—even though that is what court-imposed liability for accidents ordinarily requires.

What conclusions can we draw from the elusiveness of determining dollar amounts commensurate to nonuse values? It may seem that this elusiveness implies that any dollar amount imposed by a court will be arbitrary and thus violate the basic requirement that a law applied against someone be fair. But this would be a rash conclusion. Arbitrariness in this variety of case can be limited by judges who review damage awards to assure their consistency with comparable cases. It can be further limited by assuring that the level of damages is not ordinarily so high as to pose a threat to the vitality of a normally functioning firm.

Even if we limit arbitrariness in oil spill cases, we cannot eliminate it. Attaching monetary value to nonmarket goods will always have some measure of arbitrariness. But it would be presumptuous to suppose that all arbitrariness can be removed from the law. Adopting any legal rule involves settling on a convention and sticking with it, a process that necessarily contains an arbitrary component. Moreover, even if burdens imposed by law contain a degree of arbitrariness, they may nonetheless serve to limit the arbitrariness of other burdens people confront. Accidents themselves are deeply arbitrary, instances of bad luck to their victims and of things gone wrong in ways outside the plans of people who cause them. In the case of oil spills, there is no reason that the weight of the arbitrary should fall entirely on the shoulders of the public. By imposing liability for compromising nonuse values on firms like the Exxon Corporation, we do not mete out an excessive burden, and the burden of arbitrariness is more fairly shared.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 15, number 1 (winter 1995).

References

Exxon Valdez Oil Spill Trust Council, *Draft* Exxon Valdez *Oil Spill Restoration Plan* (November 1993); Keith Schneider, "Exxon is Ordered to Pay $5 Billion for Alaska Spill," *New York Times* (September 17, 1994); *Reuters Business Report* (November 6, 1994); *The Economist* (August 17, 1991); Thomas A. Campbell, "Natural Resource Damage Assessments: A Glance Backward and a Look Forward," *Baylor Law Review*, vol. 45 (Spring 1993); Peter A. Diamond and Jerry Hausman, "Contingent Valuation: Is Some Number Better than No Number?," *Journal of Economic Perspectives,* vol. 8, no. 4 (Fall 1994); Michael Lemonick, "Alaska's Billion-Dollar Quandary," *Time* (September 28, 1992); Jerry A. Hausman, ed., *Contingent Valuation: A Critical Assessment* (North Holland, 1993); *Federal Register,* vol. 58, no. 10 (January 15, 1993).

29

Alternatives to the Mass Consumption Society

Jerome M. Segal

Critiques of American consumerism abound, and are often directed at the quantities of useless things we consume. But often the real objection seems to be not that we consume too much, but that we consume the wrong things for the wrong reasons. For instance, arguments that Americans are too materialistic, or too wrapped up in gadgetry, are not best characterized as calls for lower levels of consumption. Rather, the critics are expressing a desire for a radically different *pattern* of consumption—one that reflects a nonconsumerist orientation or that embodies a richer form of life.

The distinction is critical because changes in consumption patterns do not necessarily entail reductions in consumption levels. Suppose, for example, that we were to trade in our TV sets for harpsichords, and that rather than spend our income on expensive cars, motorboats, or clothes, we instead sought out tutors who would help us cultivate our talents in a wide range of artistic and intellectual pursuits. We might employ a vast army of instructors in cooking, in painting, in art appreciation, literature, and music; we could devote hours to seeking out new knowledge, taking courses in archeology and astronomy. Now of course, harpsichords and personal libraries, field trips and telescopes all cost money, and the production of them represents new economic growth that might bring new problems of sustainability. Yet there are few social or cultural critics who would take issue with a major expansion in the mass consumption of goods and services to promote these life-enhancing studies.

Another way of making this point is to say that limiting or reducing *consumption levels* must be distinguished from reducing *consumerism*. Though reduced consumption and increased sustainability may be compatible with a major shift toward more humanly satisfying patterns of consumption, they are not the inevitable result of such a transformation. We might ask, however, whether

alternative conceptions of the economic realm might lead to more sustainable and more satisfying consumption patterns.

Other Conceptions

There are many possible conceptions of the economic realm, each of which incorporates an image of the good life, a view of how the economy is related to the good life, criteria for assessing economic performance, and an understanding of what it is to live at a high economic standard. For example, in the prevailing vision —which we may call the "mass consumption" orientation— the economy contributes to the good life primarily through the goods and services it provides for our consumption and from which we gain pleasure, utility, or want-satisfaction. Economic performance is assessed primarily by the level and growth of real output per person. Employment is perceived as a necessary means to attain the income necessary for consumption, both individually and in aggregate terms.

Viewed from this perspective, the United States, as compared to other societies and other times, is a relatively successful mass consumption society. Yet throughout the history of thinking about the economic realm, and certainly at different points in American history, there have been advocates of a different orientation altogether. One alternative, which I term "graceful simplicity," rejects open-ended acquisition and intense careerism in favor of an unharried, harmonious existence centered on the unchanging essentials of human life. This conception does not insist upon austerity and self-denial, but argues that the primary role of the economy is to satisfy those basic needs that must be met if we are to enjoy a healthy and secure existence. As in the mass consumption model, employment is a means to an end, providing us with the income required to meet our needs. But from the perspective of graceful simplicity, economic progress enhances the good life insofar as it eliminates work and expands our leisure time. Income above the level required for meeting material needs is relatively unimportant and a sign that we are working too much. The amount of true leisure time—time not at work or performing personal household tasks—is a major index of economic performance. The ideal use of this time is to engage in relatively simple activities that require little by way of income and leisure commodities, but that are rich in contact with friends and loved ones.

A second alternative to the mass consumption society, one that focuses not on leisure and its use but on work itself, may be called "the life of creative work." Though related to the work-centered ethos of early Protestantism, the life of creative work proceeds on the assumption that work is potentially rewarding in itself, rather than either a means to success or a sign in relation to life in the hereafter. On this view, the economy is above all the realm in which work lives are created and shaped, and our enjoyment of the good life depends on the intrinsic satisfaction and social respect associated with the work we perform.

Economic performance is measured primarily by the extent to which most people have jobs that are intrinsically rewarding and a source of social esteem. In this understanding of what it is to live at a high economic standard, income levels are secondary; the key factor is work, and work is to be assessed by whether it enhances or stifles human creativity, development, and mental health. From this perspective, consumption levels have relatively little to do with living at a high

economic standard. The goods and services we purchase are seen largely as inputs; the real outputs of an economy are the forms of life activity it creates.

The two alternatives just delineated, graceful simplicity and creative work, offer models of society in which individuals would be less concerned with their or others' levels of consumption. Each alternative holds that seeking ever higher levels of consumption should not be the motive for the individual's economic activity. Intellectually, they offer alternative criteria for assessing the performance of an economy. In principle, at least, the societies that these alternatives could be achieved without high levels of consumption on the household level, though this issue is more complex than may at first appear.

Productivity and Economic Growth

We might imagine that only the mass consumption orientation favors technological advancement and the growth of productivity, and that graceful simplicity and the life of creative work dismiss productivity gains as unimportant or even harmful. But this is incorrect. Growth in productivity is critical for all three orientations; the differences lie in how they deal with productivity and economic growth. In order to promote a life of graceful simplicity, productivity growth can be used in a variety of ways: (1) to enable people to work fewer hours while maintaining a constant level of output; (2) to support public investments and policies which promote simple living; and (3) to expand the private consumption of time-saving and life-simplifying technologies while keeping hours of employment and other consumption unchanged.

The work-centered alternative, a life of creative work, uses productivity growth to increase the direct satisfaction that people receive from their work life (or to decrease the dissatisfaction associated with it, thus transforming work from a burden to a central positive activity that directly embodies the good life. Productivity-increasing advances are offset by justified productivity decreases; these decreases are changes that increase the direct satisfaction of work at the expense of output. Suppose a company achieves a productivity gain in one aspect of its operations by adopting new computer technologies. Such a gain might then be used to offset a "productivity loss" elsewhere. For instance, the company might forgo some of the advantages of uniform service delivery so that workers can give some individuality to their work effort, or it might sacrifice some degree of "efficiency" so that service employees can treat their customers as human beings.

In some respects, graceful simplicity is compatible with a work-centered life. One might view the two as mutually reinforcing. A person whose life centers on a meaningful productive task is not apt to be consumerist. Yet the two orientations are distinct and can easily diverge. For example, each gives a different answer to the question of how to respond to productivity gains. The first says, "Expand leisure;" the second says, "Transform work."

Both alternatives envision a world in which personal consumption is relatively stable at a moderate level. In neither case is the good life thought of as a matter of acquiring consumer goods. Rather, goods and services are required to meet certain core needs; once these needs are met, the good life is not pursued by channeling productivity growth into increased consumption.

Directions for Social Policy

As a social ideal, graceful simplicity can only be achieved through an interaction of changes on the personal level—changes in how we live—and changes in social policy. In broad terms, the social policy component chiefly involves the reduction of working hours, and a process of simplification which creates the possibility of an unharried, quieter space within which individuals and families can find the good life. The specific elements of a leisure-expansion policy agenda might include reduction of overtime work, expansion of part-time options, and establishment of a legal right of workers to decide how much of productivity gains they will take as reduced time.

The changes required by a life of graceful simplicity—in the amount of time we work, in the quantity of household goods we consume, and in the extent to which we are burdened by an overload of demands we cannot meet— are all quantitative matters, matters of more and less. Essentially, graceful simplicity is a pole toward which we can move if we choose to do so, both individually and collectively. For this purpose, we do not have to agree collectively on a specific income level or amount of leisure necessary for the good life. What is required is a rough vision of our objective and a program for change which makes sense for the majority of the population—an approach that not only meets our private needs but also addresses our public needs.

Moving toward an economy of creative work, however, would be a much more complex, comprehensive, and problematic task, involving as it does a radically new conception of economic life. In the familiar paradigm, labor is an input, and goods and services are the output; consumer goods and services produce utility, or preference satisfaction, and thus the good life. In the new conception, the good life is the active life, and the central output of the economy is rewarding work lives. Goods and services are now understood as inputs which allow individuals to attain the degree of physical and mental well-being necessary to live those lives, and economic performance is assessed not by the quantity of goods and services produced, but by the quality of the jobs it gives rise to. By this standard, there are at present no successful economies in the world; in virtually all countries, there is a shortage of "good"—that is, inherently rewarding—jobs.

The ultimate goal of a transformation of work lives, as Frithjof Bergmann has noted, is to elevate work to the level of a "calling"—a change that goes to the heart of our culture. John Dewey said that the happiest day of his life was the day he discovered that it was possible to make a living doing what he most loved to do. A work-centered economy would seek to develop work activities that engage our creative energies and are directly life enhancing rather than life-depleting. Such an economy would take as its *productive objective* the expansion of the supply of jobs involving such activities, and the progressive reduction and elimination of jobs that are not or cannot be inherently satisfying. It would take as its central *distributional objective* ensuring that all members of the society have some degree of calling within their work lives, and that the remaining mundane and arduous work tasks are equitably shared.

Several points should be made about such a transformation:

1. Equitable distribution of work that is not highly esteemed or inherently rewarding would have a very powerful impact. No one needs to be engaged in creative activity at all times, and there is nothing inherently destructive about work that is routine or purely physical, so long as it is a limited part of what people do and does not serve as the basis for their social identity. Just as the more mundane aspects of housework must be shared, so too should other tasks necessary to a functioning economy.
2. The redefinition of an economy's ultimate output as work itself carries with it the objective of the radical redirection of technology. The old Utopians believed that once workers were no longer made to bear the brunt of the social cost of technological transformation, automation would be viewed as a blessing that eliminated the worst kinds of work. Today, however, there is a need for technologies that will re-create the work experience itself. That is to say, we need *tools* that allow individuals to impart their aesthetic values into their work product, and not just *machines* that restrict the qualitative range of labor inputs.
3. If there is to be radical transformation of the supply side (the qualitative nature of work activity), then this requires a transformation on the demand side. For instance, cooking and everything associated with restaurants has a different meaning in France than its does in the United States. The reason that quality cooking is a central part of the work life of those employed in French restaurants (and that French chefs are regarded as members of a profession) is that the French consumer of food is very different from his American counterpart—more discerning, more selective.

Generally, we can say that moving toward a work-focused conception of the good life requires the aesthetic, moral, and intellectual enrichment of everyday existence. In order to change the modes of production and service delivery so as to allow for individual value input into goods and services, we must enhance the consumer's aesthetic interest in the goods and services themselves. We cannot have an economy which employs people in making beautifully crafted goods if the consumer is incapable of appreciating them; small farmers who take pride in growing genuinely tasteful and healthful fruits and vegetables cannot maintain a viable market share if few consumers care about the difference. The extent to which the labor force contains teachers and artists, poets and potters depends on the magnitude of the demand for what they produce.

Placing the inherent value of work activity at the core of our economic life is one way of moving beyond a consumption-oriented society. And yet, this alternative actually requires a new interest in what we consume. We might even speak of it as a true materialism, in which we would actually taste what we eat, and perceive what we buy. Thus understood, consumption would involve a value revolution within ourselves—an awakening of aesthetic, moral, and intellectual interest, a change in the way we see and hear and taste and feel.

Appendix

Rethinking Human Welfare

In modern industrial economies such as ours, it may seem perfectly rational to accept a philosophy of consumerism. People have little opportunity to choose meaningful work, because the nature of jobs is determined by competitive pressures. The demand for labor mobility disrupts a satisfying sense of community. And the enjoyment of nature is attenuated by urbanization and environmental degradation. Thus, the only thing left under the individual's control is consumption. And it is true that consumption can substitute, however inadequately, for the loss of meaningful work, community, and a decent environment. With enough income people can take long vacations, place their children in private schools, or buy bottled water and a mountain cabin.

Nonetheless, human welfare cannot be measured solely by the ability to acquire goods and services. In addition to consumer sovereignty, our conception of human welfare must be expanded to include *worker sovereignty* and *citizen sovereignty* as well. Worker sovereignty means that people have a choice of jobs—jobs they find meaningful and that enhance their human capacities. Citizen sovereignty means that people can act to create the kind of community and environment they want.

Unfortunately, our present economic system makes it difficult to achieve human welfare in the broad sense. Let me take the provision of meaningful work as an example.

Because of competition, one firm cannot improve working conditions, raise wages, or democratize the workplace if the result is an increase in production costs. Since competition is now worldwide, even a whole country faces difficulties in mandating workplace improvements. It turns out that what people want as consumers—lower prices—makes what they prefer as workers —better working conditions and wages, more meaningful work—less obtainable. This bifurcation is the result of relying on the market as the primary decision-making mechanism.

As a society, we can devise mechanisms for expanding worker and citizen sovereignty. Economists can suggest tools, such as market incentives and taxation schemes, to influence consumption practices. But the first challenge is to expand our view of human welfare, so that we no longer define the individual as a simple consumer of goods and consumer sovereignty as the goal of economic life.

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This article originally appeared in the *Report from the Institute for Philosophy and Public Policy,* volume 15, number 4 (fall 1995).

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Can We Put a Price on Nature's Services?

Mark Sagoff

In 1962, the Drifters, a popular rock V roll group, sang:

> At night the stars put on a show for free,
>
> And darling, you can share it all with me . . .
> Up on the roof...

Nature provides many goods and services which we, like the Drifters, enjoy for free. But, as Thomas Paine said about liberty, "What we obtain too cheap, we esteem too lightly." A group of ecological economists led by Robert Costanza of the University of Maryland has argued that if the importance of nature's free benefits could be adequately quantified in economic terms, policy decisions could "better reflect the value of ecosystem services and natural capital." Drawing upon earlier studies that have "aimed at estimating the value of a wide variety" of ecosystem goods and services—from waste assimilation and the renewal of soil fertility to climate stabilization and the tempering of floods and droughts—the research team has estimated the "current economic value" of the entire biosphere at between sixteen and fifty-four trillion dollars per year. Its "average" value, according to Costanza and colleagues, is about thirty-three trillion dollars per year.

So tremendous an estimate—especially when presented in a lead article in the British science journal *Nature*—was bound to attract public attention. In feature stories with titles like, "How Much Is Nature Worth? For You, $33 Trillion," and "What Has Mother Nature Done for You Lately?" dozens of newspapers and magazines, including the *New York Times, Newsweek*, and *U.S. News and World Report*, covered the Costanza study. "What is the natural environment worth in cold cash?" asked a story in the *San Francisco Chronicle.* "No one knows for sure, but a team of economists and scientists figures $33 trillion, more or less, for such 'free' goods and services as water, air, crop pollination, fish, pollution control and

splendid scenery....For comparison, the gross national product of all the world's countries put together is around $18 trillion."

Costanza and colleagues acknowledge that their estimates are fraught with uncertainties; their study, they say, provides only "a first approximation of the relative magnitude of global ecosystem services." Their caution is understandable. No one can doubt that "ecological systems...contribute to human welfare, both directly and indirectly," or that the world's economies depend on the "ecological life-support systems" that nature provides. "Once explained, the importance of ecosystem services is typically quickly appreciated," writes Gretchen Daily, an ecologist at Stanford University who has edited a collection of papers on this theme. And yet, as Daily goes on to say, "the actual assigning of value to ecosystem services may arouse great suspicion." This is because "valuation involves resolving fundamental philosophical issues"—about the role of economic values in the policy process, and about the relation between economic value and human welfare. Methodological problems also haunt any attempt to impute prices to the services of nature.

Even so, Daily concludes that "nothing could matter more" than attaching economic values to ecological services. "The way our decisions are made today is based almost entirely on economic values," she told the *Chronicle.* "We have to completely rethink how we deal with the environment, and we should put a price on it." This essay will review critically the attempt to set prices for the benefits that nature provides "for free."

Calculating Values

Environmentalists have long noted that many of natures gifts, such as the show the stars put on at night, are "public goods"; in other words, they are not traded in commercial markets, no one can be excluded from using them, and one person's use does not limit another's, at least up to some congestion point. "Because ecosystem services are not fully 'captured' in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions," Costanza and colleagues argue. Public goods notoriously have no market prices. If prices could be imputed to ecosystem services, wouldn't these prices help us better to appreciate their worth?

The many studies which Costanza and colleagues have assembled use a great variety of methods by which to impute economic value to ecosystem services. Some employ experimental techniques, including "contingent valuation," to estimate the aesthetic or "nonuse" value of natural settings. The large majority of studies, however, estimate either the value of ecosystem *outputs,* such as fish, fiber, and food, or the costs of *replicating* ecosystem services. Costanza and colleagues use estimates of these two kinds—output values and replacement costs—to account for most of the $33 trillion price tag they impute to ecosystem services. As we will see, however, neither kind of estimate can serve as a basis for measuring the economic value of ecosystem services, even though those services are essential to human well-being.

Costanza and colleagues gathered data reporting the market value of the outputs of the world's fisheries, forests, and farms. To calculate the contribution of

ecosystem services to the oceans' fisheries, for example, the Costanza team multiplied the world's fish catch in kilograms by an average market price per kilogram. In other words, they used "price times quantity as a proxy for the economic value of the service." They apparently reasoned that since there would be no fish harvests if not for ecosystem services, the economic value of these services should include the value of those harvests. They then used data about the value of the total harvest to calculate what they identify as "the 'incremental' or "marginal' value of ecosystem services." To arrive at a "marginal" or "unit" price in fisheries, they divided the overall value of fish harvests by the number of hectares of ocean to reach an estimated ecosystem service contribution of fifteen dollars per hectare.

The researchers used a slightly different approach to measure the value of ecosystem services in forestry and agriculture. Timber values "were estimated from global value of production, adjusted for average harvest cost...assumed to be 20% of revenues." In this instance, the researchers used "the net rent (or producer surplus)"—that is, proceeds to producers minus their costs—to estimate the overall value of ecosystem services. They used rents to farmers— that is, the value of crops less production costs—to compute the value of ecosystem services to agriculture. To obtain a "per unit" value for ecosystem services in forestry and agriculture, the researchers divided the resulting timber values and crop values by the number of hectares of forests and farmland.

We can see one problem in reasoning from the value of an output to that of an input if we assume that several different ecosystem services, such as climate stabilization or nutrient cycling, are each essential to production in fisheries, forests, and farms. If so, each of these services would possess individually a value commensurate with the output of fishing, forestry, or agriculture. This same difficulty arises with respect to inputs other than ecosystem services that may also be essential to production. Ships are indispensable for fisheries, saws for forestry, and tractors for farming. If we were to use the Costanza team's approach to estimate the value of these inputs, we would infer a price for each of them by dividing the number used into the value of the proceeds or profits of the industry. In the aggregate, ships would be worth just as much as ecosystem services to fishing, saws to forestry, and tractors to farming. Labor, being essential, would also have the same price as ecosystem services collectively and individually in all these industries.

It is understandable that Costanza and colleagues would want the economic value of ecosystem services to reflect the values of the industries to which they are essential. It is a mistake to assume, however, that if x is essential to the production of y, the price of x can be inferred from that of y. Rather, prices for inputs—or "factors"—of production are determined by market forces, that is, by supply and demand. The marginal economic value of a ship, for example, equals the amount it fetches in a market in which shipwrights compete for buyers on the basis of quality and price. Ships are essential to the fishing industry, to be sure, but this does not suggest that the price of ships can be inferred from the price of fish.

If the costs of providing ecosystem services are zero—if Mother Nature supplies them free—then the prices (and, in that sense, the economic value) of these services must approach zero as well. This is true because competition among suppliers for buyers tends to drive prices down to costs. If we fantasize that Mother Nature is a monopoly provider of ecosystem services, she may charge whatever the market will

bear, gouging consumers for all they are willing to pay and extracting whatever profits producers might otherwise obtain. This seems to be the situation that Costanza and colleagues envision. Monopoly prices, however, do not represent fair marginal value. Prices, to be meaningful at all, must arise in competitive markets. If Nature sought to operate as a monopoly, the government would rightfully either set the price of an ecosystem service at a small percentage above costs (as it does with utilities) or break up Ma Nature into competing units (as it did Ma Bell).

Substitution and Replication

Costanza and colleagues also use the costs of creating technological substitutes for ecosystem services as a basis for inferring their incremental or marginal value. In an accompanying article in *Nature*, Stuart Pimm illustrates this process by explaining how the researchers determined that the nutrient-cycling services of the world's oceans are worth seventeen trillion dollars:

> If the oceans were not there, re-creating their nutrient cycling would require removing the nutrients from the land's runoff and returning them. The estimate of this service's $17 trillion value is arrived at by multiplying the cost of removing phosphorus and nitrogen from a liter of waste water by the 40,000 cubic kilometers of water that flow from the land each year.

Similarly, Costanza and colleagues estimate what it would cost to re-create, with levees and other structures, natural flood control and storm protection ($1.8 trillion); to replicate artificially the pollination of plants ($1.8 trillion); to provide technological substitutes for natural waste treatment and breakdown of toxins ($2.7 trillion); and to replace the outdoor recreation and "esthetic, artistic, educational, spiritual, and/or scientific" benefits people find in natural places ($3.83 trillion).

When economists speak about substitution, they do not generally refer to alternative and sometimes more costly methods of providing some good or service. Rather, they refer to consumer indifference between alternatives at given prices. For example, the economic value of a beefsteak will be determined in part by the price at which consumers will switch to some other item on the menu instead. In the absence of cattle, it would be very expensive to produce beef. This fact suggests nothing, however, about the goods or services people would substitute for beef when beef prices increase.

Plainly, it would cost a great deal to replicate technologically the experience the Drifters enjoy up on the roof, where "it's peaceful as can be" and "the air is fresh and sweet." One cannot meaningfully impute an economic value to the rooftop experience, however, by determining how much it would cost to replicate it technologically—for example, by building an air-conditioned planetarium. Rather, to get at the economic value of the rooftop experience, one would ask the Drifters at what price they would choose a different activity—to venture under the boardwalk down by the sea, for example, or to spend Saturday night at the movies. No matter how much it might cost to replicate an ecosystem service technologically, that amount does not tell us the economic value of that service.

To impute economic value, one would have to determine the price at which people would cease to demand that service and spend their money on some other

source of satisfaction instead. A seventeen trillion dollar price tag on the oceans' work of "pure ablution round earth's human shores" (as the poet John Keats described it) would price these services out of the market. According to Pimm, people would not think these services are worth that kind of money: "In the short term, many would not notice (and perhaps not care) what happens to the elements as they flow into the ocean."

In a much-cited article that appeared in *Nature* in 1998, Graciela Chichilinsky and Geoffrey Heal provide an example of the purchase of nature's cleansing services. They write that New York City, to ensure its water supply, was faced with the choice of restoring the integrity of the Catskill ecosystems or of building a filtration plant at enormous cost. "In other words, New York had to invest in natural capital or in physical capital. Which was more attractive?"

In the 1997 Memorandum of Agreement to which these authors refer, New York City agreed to spend about $1.5 billion to improve water quality in the Catskill aquifer primarily by investing in physical capital—sewage and water treatment plants—but also by committing $260 million to buy land to protect it from development. Many commentators hailed this commitment as proof that it makes sense to invest in natural capital to preserve nature's services, in this case, the ability of land to filter water. According to a Midcourse Review issued in 2000 by the Environmental Protection Agency (EPA), however, the City actually invested hundreds of millions of dollars in technology but very little in land acquisition. The "City has only purchased 17 acres," EPA complained, "around the Kensico Reservoir, where nearly all of the water from the Catski11/Delaware systems flows before it enters the distribution system." A National Research Council Report the same year lamented that the City had spent only about $40 million in its land acquisition program. Despite pressure by EPA and others to vindicate the value of natural capital, the City may reasonably find that it gets much more filtration per dollar by investing in waste treatment and septic systems than in undeveloped land. If the City does not spend even half the funds it proposed for land acquisition, this example may undercut rather than support the economic case for nature's services.

The Basis of Decision-Making

The issue of determining economic prices for ecological services, Costanza and colleagues write, is inseparable from the choices and decisions we have to make about ecological systems:

> Some argue that valuation of ecosystems is either impossible or unwise, that we cannot place a value on such "intangibles" as human life, environmental aesthetics, or long-term ecological benefits. But, in fact, we do so every day. When we set construction standards for highways, bridges and the like, we value human life (acknowledged or not) because spending more money on construction would save lives.

Many people share the suspicion that public policy is often based on implicit valuations that have never been articulated or defended. Part of the appeal of the Costanza study lies in its insistence that these matters of valuation be confronted directly.

Contrary to what Costanza and colleagues suggest, however, risk regulation does not necessarily imply an implicit economic valuation of "intangibles" such as human life. Decisions in this area more typically respond to public attitudes, statutory guidance, and relevant legal history. This is why our society protects human life and the environment much more stringently in some moral contexts than in others. We do not seek to save lives up to some predetermined economic value. Rather, we control risk more or less strictly on a number of moral grounds—for example, insofar as risks are involuntary or coerced, connected to dreaded events such as cancer, associated with industry and the workplace, unfamiliar, unnatural, and so on.

To be sure, one can infer an imputed or implicit economic value for human life from any of thousands of governmental regulations. Mandatory seat belt laws cost sixty-nine dollars per year of life saved, while laws requiring uranium fuel-cycle facilities to purchase radionuclide emission-control technology cost an estimated thirty-four billion dollars for every year of life saved. Safety controls involving chloroform at paper mills weigh in at ninety-nine billion dollars cost/life-year. For any number you pick between twenty dollars (motorcycle helmet requirements) and twenty billion dollars (benzene emission control at rubber-tire manufacturing plants), there is a governmental program from which that number can be inferred as the value of a statistical year of life.

Every situation—every regulatory decision—responds to different ethical, economic, political, historical, and other conditions. A national speed limit of fifty-five miles per hour on highways and interstates would save a statistical year of life at a cost of only sixty-six hundred dollars, but it is politically unpopular. Strict enforcement of such a speed limit, even more unpopular, would save an additional life/year at a cost of sixteen thousand dollars. Still more unpopular are random motor-vehicle inspections—but these could save lives at even less expense. Can we infer that people value their lives at only a few thousand dollars? No; it is simply that people fear and resent some risks less than others, and least of all those risks they control themselves. These moral factors affect private and public decisions about risk. To impute a value-per-life/year to any regulation or policy, such as highway construction, is to create an epiphenomenon, a statistical abstraction, or descriptive convention, relevant at most to that particular program. This abstraction would tell us nothing about the value of life in general or, indeed, about the particular values that informed the specific policy.

Value in Exchange and Value in Use

The interest among academics and others in "green accounting," of which the Costanza study is a model, seeks to serve an important political purpose namely, to restrain the commercial juggernaut that is destroying the health, beauty, and integrity of the natural world. The *Nature* article urges us to recognize the benefits ecosystems provide for free, in the hope that this will prompt us to defend these systems from relentless exploitation and destruction.

Whatever the study's political uses, however, it is difficult to see what it would mean for researchers to "get the prices right." In a competitive market, suppliers continually lower prices down to costs in order to attract buyers— particularly the

"marginal" purchaser who, at any higher price, would forgo the item or purchase it from a lower-cost supplier. The price at which a good or service trades hands reflects the cost to the producer plus whatever profit he can get in a competitive market. The price does not reflect the benefit a good or service provides to anyone except, perhaps, to the marginal consumer who is able to drive the hardest bargain because he or she benefits from the object the least. Everyone else then insists upon and gets the same low price.

The easiest and most obvious criticism to make of the Costanza study is that it conflates marginal and absolute benefit. The price at which goods and services trade hands represents marginal benefit, i.e., the amount a person is willing to pay who wants and benefits from an item the least but still enough to buy it. Absolute benefit is nothing one can measure in economic terms. In other words, one can measure the amount one can get in exchange for a good or service given market conditions. One cannot measure, however, the utility or use that good or service provides.

The classic articulation of this view is in Adam Smith's *Wealth of Nations:*

> The word VALUE, it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one may be called "value in use"; the other, "value in exchange." The things which have the greatest value in use have frequently little or no value in exchange; and on the contrary, those which have the greatest value in exchange have frequently little or no value in use. Nothing is more useful than water: but it will purchase scarce any thing; scarce any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it.

Cigarettes illustrate the difference between value in exchange and in use. The price of cigarettes reflects the costs of production, competition among suppliers, and levels of demand. The price has no relation to human well-being as society judges it. As a society, we have reached a judgment that cigarettes have a negative welfare value—a deleterious effect on actual human well-being. The more consumers are willing to pay to smoke, the worse off they are, according to doctors and other respected social authorities. Cigarettes, therefore, have a positive exchange value but a negative value in use.

Suppose a well-meaning team of economists, seeing that cigarettes are bad for health, wished to correct the price of cigarettes to make it better reflect their negative welfare effect. If these economists thought—as the Costanza team apparently does—that prices should rise with contribution to welfare, they would recommend lowering the price of tobacco. In fact, society may set tobacco prices higher, not to reflect its great contribution to human welfare but to discourage its use.

To achieve social goals and values, including human well-being, we may adjust the prices of goods and services—for example, by taxing tobacco products. This kind of price-fixing, although often justifiable in terms of human welfare, does not reflect "true" or "correct" market value. To bring prices into line with societal goals, values, and judgments is not to embrace but to reject market exchange as a

criterion or basis for social valuation. It is to recognize that market or exchange value bears no necessary connection to human well-being, that is, value in use.

Growth v. Development

In important and insightful earlier essays, Robert Costanza and other ecological economists have criticized GNP as a measure of human welfare and economic growth as a goal of public policy. Improvements in the quality of human life, these analysts have argued, are not to be confused with increases in the size of the economy. Costanza has written elsewhere that economic growth "cannot be sustainable indefinitely on a finite planet." Economic development, in contrast, "which is an improvement in the quality of life ... may be sustainable."

In these writings, Costanza and others insist on a distinction similar to the one that Adam Smith draws between "value in exchange" and "value in use." Economic growth is measured in terms of value in exchange; it is the rate of increase of GNP, which is to say, the total market value of all goods and services produced or consumed as measured in current prices. Development has to do with value in use —true human flourishing, including happiness and contentment—and is measured in terms of indices of human welfare such as nutrition, education, and longevity. In these earlier writings, Costanza and other ecological economists did not try to "correct" the exchange or economic value of goods and services to make them better reflect their "true" contribution to human well-being. For example, they would not have imputed a higher exchange value to water and a lower one to diamonds to make the prices of these goods more commensurate with their importance to human survival.

The *Nature* article, in contrast, seeks to "correct" market prices "to better reflect the value of ecosystem services and natural capital." The article concludes that world "GNP would be very different in both magnitude and composition if it adequately incorporated ecosystem services." In seeking to get the prices right, however, Costanza and colleagues discard the earlier insight that measures of economic value, which arise from the play of market forces, have no clear relation to human welfare or well-being in any substantive sense. The effort to correct the prices of ecological services and natural capital confuses value in exchange with value in use, or, in contemporary terms, measures of economic growth with indices of human development.

The Drifters recognized the importance of nature to their well-being even though its services are free. Like the Drifters, Costanza and colleagues understand the abiding importance of nature's services to the quality of our lives. Our dependence on ecosystem services cannot be overstated, and our efforts to sustain them can never be too great. To try to "get the prices right" as a way to protect nature, however, is to lend support to economic measures of welfare, such as economic growth and GNP, ecological economists rightly reject. The effort Costanza and colleagues undertake to "estimate the 'incremental' or 'marginal' value of ecosystem services" should be seen as an aberration within the program of ecological economics. It can succeed only in lowering the credibility of that discipline while increasing the legitimacy of the standard cost-benefit policy framework most likely to defeat attempts to protect the natural environment.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 17, number 3 (summer 1997).

References

Robert Costanza et al., "The Value of the World's Ecosystem Services and Natural Capital," *Nature*, vol. 387, no. 6230 (May 15, 1997); William K. Stevens, "How Much Is Nature Worth? For You, $33 Trillion," *New York Times* (May 20, 1997); Charles Petit, "Natural Environment Gets a Price Tag —$33 Trillion," *San Francisco Chronicle* (May 15, 1997); *Nature's Services: Societal Dependence on Natural Ecosystems*, edited by Gretchen C. Daily (Island Press, 1997); Stuart L. Pimm, "The Value of Everything," *Nature*, vol. 387, no. 6230 (May 15, 1997); Graciela Chichilinsky and Geoffrey Heal, "Economic Returns from Biosphere," *Nature*, vol. 391 (Feb. 12, 1998): 629-630; Mid Course Review http://www.epa.gov/region02/epd/00111 .htm; "Watershed Management for Potable Water Supply: Assessing the New York City Strategy" (2000); http://books.nap.edu/books/0309067774/html/index.html. Andrew C. Revkin, "Watershed Protection Agreement Is Praised," *New York Times*, September 11, 1996, Al 8; Robert Costanza, Herman E. Daly, and Joy A. Bartholomew, "Goals, Agenda and Policy Recommendations for Ecological Economics," in *Ecological Economics: The Science and Management of Sustainability,* edited by Robert Costanza (Columbia University Press, 1991).

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Preserving the Waterman's Way of Life

David Wasserman and Mick Womersley

The town of Solomons, on the western shore of the Chesapeake Bay in Calvert County, MD, was once the center of a flourishing community based on commercial fishing and boat-building. Over the last thirty years, however, development has greatly altered the structure of the region's economy. An influx of suburbanites who live in the county and commute to jobs in Baltimore, Annapolis, and Washington, D.C., has driven up prices and created a "conflict of cultures" between new residents and old. Pollution has contributed to a decline in the productivity of the bay and its tributaries, forcing many watermen out of business. In the words of one old-time fisherman, the heart of a "real watertown" has been converted into "two blocks of nothing but solid junk shops." Today, there are probably fewer than twenty working watermen in Calvert County.

On Maryland's Eastern Shore, small-scale commercial fishing is still viable and watertowns are, relatively speaking, intact. Most of the Eastern Shore is too far from major metropolitan areas to be transformed into the next suburban frontier. Yet the region faces intense development pressures, from second-home construction and recreational tourism, at a time when many of the traditional uses of the land and the bay have become less viable economically. As one waterman predicted, "We're going the way of the whaling fleets of North America."

Americans are used to paying bittersweet homage to occupations rendered obsolete by advancing technology and changing tastes. But while communities sometimes rally to keep the last shoeshine men or arabbers in business, such efforts are usually ad hoc attempts to hold onto a dying past a little longer, and rarely the harbinger of a deliberate policy of preservation.

Similarly, Americans cherish their rural land- and seascapes, yet until recently they have surrendered them to the onslaught of progress and development. Unlike magnificent and supposedly "pristine" natural areas, such as the Grand Canyon and Yosemite Valley, farmland and coastal fisheries were not set aside in preserves.

While local communities would often resist the loss of farms or working harbors to subdivisions or waterfront condos, these protests, too, had an ad hoc character; in the absence of any principled basis for preservation, they appeared to be little more than futile, self-interested pleas to be spared from the development that was occurring everywhere else.

Over the past two decades, however, the environmental movement has come to recognize that some rural landscapes, especially farmland, have a beauty and harmony distinct from, but not inferior to, that of wilderness areas (the historic focus of preservation efforts). At the same time, environmentalists have developed a new appreciation for rural vocations. Such vocations are instrumentally valuable in protecting landscapes that bear the stamp of human habitation; there may be no more effective way to preserve open space in developing areas than to preserve farming. Just as influential, though perhaps less explicitly, is a belief that these vocations are intrinsically valuable, an inherent part of the landscape that environmentalists seek to preserve. If tilled fields and terraced hillsides have significant aesthetic, cultural, and moral value, so do the activities of tilling, planting, and harvesting.

Several jurisdictions, including Maryland, have recently adopted a host of legal and regulatory mechanisms, many borrowed from Great Britain, to protect farmers' holdings and thus preserve the rural landscape. Under Smart Growth and Rural Legacy legislation, the state attempts to slow development in rural areas and redirect it to older urban and suburban areas. These laws empower state and local authorities to purchase conservation easements from farmers and allow third parties to purchase farmers' development rights for use elsewhere. In both cases, the laws limit the subdivision of farmland while providing capital for farming operations.

Smart Growth and Rural Legacy policies have not yet been directed toward watermen. In part, this is because the watermen's relationship with valued environments is more ambiguous and complex than that of farmers. What constitutes a waterman's holding? The stretch of the bay or the tributary he uses most frequently? His boats, rigging, traps, and docks? His share of watertown life and community? All three seem necessary to maintain watermen on the bay, but it isn't clear which of these can or should be the focus of preservation efforts. Moreover, watermen cannot be made into conservators of the rural landscape by the same means as farmers. For example, watermen rarely have land or other real property that is coveted by developers—assets that can be preserved by easements or transferred development rights.

The watermen's work has long been subject to a regulatory regime, but one with a very different orientation. These regulations are informed by a conservationist ethic that seeks to maintain natural resources for human sustenance and convenience; their goal is to enhance the long-term productivity of watermen through limits on their catch size and fishing seasons. (Many watermen have, perhaps shortsightedly, opposed such regulations.) The new policies, in contrast, express a preservationist ethic: they seek to maintain rural livelihoods not for their economic yield, but for the way of life they represent.

Although these policies haven't yet been adapted to commercial fishing, there is a growing recognition that the watermen's livelihood is an integral part of what is worth preserving in America's coastal areas. "To me," writes Bill Goldsborough, the principal fisheries scientist from the Chesapeake Bay Foundation, "one of the

main reasons that you want to save the bay is to maintain the watermen's culture, the watermen's way of life....Without them, if you just imagine Chesapeake Bay without any commercial fishing activity, it's really kind of a sterile body of water." In much the same spirit, Tom Horton worries that "much faster, and more irreversibly than we are losing our water quality on the Chesapeake, we are losing our human diversity."

Horton's remark suggests another source of the impulse to preserve traditional livelihoods: a concern for diversity that encompasses watermen as much as farmers. The lives and work of watermen would seem to possess several qualities that have become increasingly rare in postindustrial America: an intimate involvement with the natural features of the landscape, a direct connection between work and sustenance, and a high degree of personal autonomy. If, however, we seek to preserve commercial fishing for the sake of human diversity, we need to examine whether the watermen really do possess a distinctive culture, or whether the portrait of watermen as hardy, self-reliant subsistence workers is merely a romantic anachronism. We must ask, too, whether any qualities and attitudes that set the watermen apart are likely to conflict with a preservationist agenda. It may be that the relevant tools of public policy are ones that the watermen themselves are reluctant to employ even for their own apparent benefit, or that policies intended to sustain the watermen's culture would in fact subvert it.

This essay offers a sketch of some of the values and experiences that appear central to the watermen's self-conception, drawing on recent interviews and focus-group meetings in Calvert and St. Mary's counties. Its purpose is to provide some understanding of how the watermen see themselves, what they cherish in their work, and how they understand the forces that threaten it. Combining ethnography with environmental ethics, we have tried to see whether the differences in perspective and lifestyle between watermen and the dominant culture are really as large, and as important, as one might suppose, and whether certain legislative and regulatory strategies are appropriate for preserving what is truly distinctive in their way of life.

Nature and Human Activity

It is their interactions with nature that would seem most likely to distinguish the watermen from their new neighbors and, more generally, from those in the economic mainstream of late twentieth-century America. Watermen on the Chesapeake typically begin their involvement with the bay and the shoreside environment at a very early age. Many of their earliest memories have to do with the past abundance of various fish species in the bay, and the clarity of the water before the effects of pollution began to be felt in the 1960s. Fishing for both profit and food was much easier then; children could take part and keep some or all of the money they earned. (From the watermen's point of view, the children of newcomers to the Chesapeake region seem strangely disconnected from the adult world—unable to share in the work that their parents do, and acquainted hardly at all with the life of the bay.)

The sources of value in the watermen's work and memories are not limited to the material gain they enjoy from their fishing activities, nor to the romantic experience

of communing with nature. Instead, the watermen's scheme of valuation combines the two. One of the men we met remembers seeing so many eels on a river bottom "that they look[ed] like wheat grass in the field out there." With equal acuity, another recalls rising at four in the morning to catch the eels, which were then shipped to Baltimore in "great big giant wooden barrels." Aesthetic and practical interests are unself-consciously conjoined. Similarly, when the watermen talk of the simple beauty of caught fish and shellfish, tied into this beauty is their knowledge that the catch is commercially valuable.

While acknowledging the physical demands of their vocation, the watermen also express an appreciation for the peace and quiet of work on the bay. These aesthetic satisfactions of fishing are closely linked to the independence of the job. As one focus-group member explained, "You have nobody there with a hatchet over your head, telling you when you've got to do this, when you've got to do that." Nor is one bothered by co-workers "whining" that they aren't paid enough for their labor. Instead, there is a shared understanding that the harder watermen work, the more they earn: "Look, you swing these shafts, or you pull that net a little bit harder, and you'll make a little bit more money." A fishing party that catches some bluefish can "see the gains right there."

Speaking more abstractly, we can say that the watermen make little distinction between beauty and utility, or even between nature and human activity. They value the bay not only as a source of bounty and delight, but also as a source of independence; its beauty is closely linked with their own sense of autonomy and agency as they wrest their living from it. Many environmentalists also value interaction with nature, but they tend to see themselves as respectful outsiders, venturing into alien territory and leaving nothing but footprints. The watermen are considerably more familiar, and less constrained. Yet they are never guilty of seeing the bay merely as an exploitable resource.

Vernacular Libertarianism

For all their concern about new threats to their way of life, watermen are reluctant even to discuss policies to control development and in-migration. They cherish their own freedom and are reluctant to consider government restrictions on individual economic activity (although they often accept *social* restrictions on other individual activities—for example, on the amount of time spent each day fishing, on children's behavior, or, on Smith Island, on drinking in some settings.) This deep libertarian streak makes watermen suspicious of government intervention of any kind. They regard government oversight as a "hatchet" which they are reluctant to wield against anyone else, even those whose affluence and greed threaten their survival. Americans are often libertarian when it comes to their own liberty interests; what is striking about the watermen is the consistency with which they apply their philosophy.

This vernacular libertarianism is reinforced by a strong fatalism, which sees both the decline of the fisheries and the spread of development as inevitable. "There's a lot of stuff you can't do nothing about," one waterman explained. Development "is just like a big shark....It's got a big mouth on it and it just keeps eating up anybody in its way." In general, watermen do not perceive development as a direct or

indirect effect of government policy; they do not recognize the state's hand in the proliferation of new homes on the land and leisure craft on the water. Thus, they tend to view curbs on development as a simple denial of access to the bay, which they oppose, rather than as an effort to undo or redress the effects of past government intervention on behalf of development, which they might find easier to accept. In their view, restricting the influx of tourists and migrants would not only be unfair, but futile as well.

Historically, there is one threat—pollution—against which the watermen have been willing to support regulation. Tom Horton notes that in the 1880s, during their industry's prime, Chesapeake oystermen used their political clout to force Baltimore to construct the nation's most modern sewage treatment plant to protect water quality in the bay. Today, however, less and less of the bay's pollution comes from point sources like the Baltimore municipal sewer system, more and more from the sediment and chemical run-off of an increasingly developed, impermeable watershed. But while the watermen clearly recognize the connection between development and pollution, they do not seize on that connection to justify restrictions on the former.

Status and Authenticity

Each of the watermen we met was intensely aware of his relative standing in his own community. Status comes with age and experience, and long residence in the place one was born to. A tone of formality and mutual respect pervades their conversations; for instance, absent or deceased watermen are often referred to as "captain," the title given by watermen to the working owner of a fishing vessel. In a gathering of watermen from a county such as St. Mary's, all the participants know each other well. In speaking of difficult issues, they look to one another for support and confirmation.

In the communities of the Chesapeake, there is a clear sense of what it means to be a "real" waterman. In conversation, the men are exceedingly careful in describing their lineage and work experience, always mentioning any feature of their history that might qualify their right to the title of waterman. (One focus-group participant had migrated to the area as a young man, and so couldn't claim a familial tie to the trade; another had grown up on a farm.) Although at least two of the men had been to college, neither touched on that part of his life, except once in passing.

To be sure, being a genuine waterman isn't the only path to status and respect. The oldest participant in the group had "taken to the shipyards" in his youth and become a master carver. At times he sounded apologetic about this, admitting that he had never had the physical stamina for life on the water. But he also made sure to mention that he had operated a charter boat for two summers and thus "got to know what the bay was all about." The other members deferred to him and acknowledged his seniority in their community. Another participant, the one with the widest experience of the world outside the bay, gave a full account of his working life, as if to establish his authority to speak on various matters. He became the unofficial leader of the group, and the majority of questions and comments by the other watermen were directed to him.

The watermen's notions of status and authenticity help to explain why they are so offended at the assertiveness of wealthy professionals who have moved into the bay region. For example, in the live-and-let-live watertown economy of the past, the untidiness of commercial fishing operations troubled no one. The nets and rusty gear that lay around the yards and landings were taken for granted; so was the noise of boats and trucks starting up in the early morning. But the newcomers often arrive with the expectation that they have purchased a kind of idyllic rural serenity, and complain to local authorities when this is diminished. They may also expect to catch oysters and crabs for recreation, and blame local watermen for "overfishing"—a phrase the watermen detest—when these are found to be scarce. Some of the new residents may actually be motivated by a kind of preservationist sentiment. But to the "real" watermen, the newcomers' sense of what is worth preserving is hopelessly sanitized and inauthentic. Moreover, the fact that some new residents have rapidly gained sufficient political power to impose their ideas of rurality on the watermen and their operations violates a traditional understanding of how authority is acquired and exercised in these communities.

The Preservationist Challenge

This sketch of the watermen's lifestyle and self-understanding suggests that their culture is indeed distinctive. But it also suggests that their culture is highly vulnerable, and that the very qualities that set it apart may also make it resistant to preservationist strategies.

Preserving livelihoods is a more complicated business than preserving natural landscapes. Ecologists have long cautioned that even the simplest interventions in nature have complex and often unanticipated effects. The complexity and uncertainty are greater when the object of preservation is a human activity. The agents may not accept the preservationists' means or share their values; alternatively, the very attempt at preservation may transform the character of their work in ways inconsistent with what they value in it.

We have noted that the watermen are reluctant even to discuss, let alone request, government restrictions on the kind of development they see as threatening their way of life. Admittedly, their cooperation would not be necessary to impose limits on development. But a culture that values personal freedom so highly might be compromised if it were heavily dependent on coercive state action for its survival.

Subsidies may be even more subversive than restrictions. Many watermen understand the worth of their vocation as inhering in their confrontation with the hardships and caprices of nature; its beauty and dignity lie in the watermen's struggle to sustain themselves and their families from the life forms around them. As we have seen, the aesthetic satisfactions of their work are conjoined with a sense of the immediate benefits they derive from the bay. A program of subsidies would attenuate the connection between nature and subsistence. The result might be what Erving Goffman calls the "keying" of an activity from one frame to another—from natural to social, from hunting-gathering to performance. A waterman kept in business by protectors of his vocation may be doing something of value, but he is no longer wresting a living from the sea.

Some environmental ethicists argue that the very decision to preserve or designate a wilderness area renders it an artifact. This seems a bit overstated— after all, the rocks and rivers go about their business despite the designation, and so do the animals, as long as the tourists resist feeding them. But preserving a community's way of life is a different matter, and the claim that the act of preservation is self-defeating seems far more plausible for culture than for nature. When the state keeps watermen in business because it values their activity rather than their catch, those watermen are no longer working for themselves or their customers, but for a broader public.

Of course, any new policies would seek to keep farmers and watermen in business as producers, not performers. But if a dwindling proportion of their income actually comes from the sale of crops or catch, and if the purpose of the subsidies that make up the difference is not to yield larger harvests or catches but to maintain the activity of farming or fishing, then the transformation from producer to performer may be inevitable. The farmers and millers at restored "colonial" villages may actually sell their products to tourists, but they do not make a living from those sales. A person paid to engage in a traditional activity that can no longer be justified in economic terms, by a society that values the activity itself, has arguably become a re-enactor, even if it is his own past life he is re-enacting. Given the watermen's intense concern with authenticity, such a performance might seem particularly demeaning.

Yet the transformation of watermen into performers has already begun without direct state intervention to preserve their communities and livelihoods. Although the watermen speak of themselves as a dying breed, insisting that they would rather move on or retire than change their way of living, they have adapted to new circumstances. One waterman we met has turned his skipjack into a floating classroom; others crew on charter boats. In one respect, this transformation is encouraging. It will keep some of the more enterprising watermen on the bay, whatever the state of the fishery or the local economy. Moreover, the transformation of watermen into educators may well give future generations a deeper appreciation of their natural and social history than they would otherwise have. But museum talks and educational boat trips offer no opportunity for the kind of grueling, exhilarating encounters with nature that have enriched the watermen's own lives.

Some might draw a harsher conclusion—that the preservation of watermen on these terms would be a fraud, an historical-restoration-without-walls that owed much of its appeal to ignorance or self-deception about what the watermen were actually up to. It may show more respect for the watermen to let them die out, as they often threaten to do; a living memorial may be less dignified.

Perhaps, however, there are less subversive ways of preserving the livelihoods of watermen, ways that would maintain the connection to hunting and gathering on which the integrity of their work depends. Price supports for local fish harvested by traditional methods might well offend the watermen's sense of independence, but by placing added value directly on the catch, they might preserve the character of the watermen's work as resource extraction, while evincing a social recognition of its dignity and worth. Perhaps the state could also support the watermen less directly, by promoting the kind of consumer demand for traditionally produced local products that has created a cottage industry in organic and boutique farming.

This demand could be met by a new generation of "craft" fishermen whose catch would be sold at premium prices at upscale markets. While the demand for the local may express a patronizing enthusiasm for the yield of an idealized rural economy, it might sustain some watermen in their traditional vocations without the heavy hand of direct government subsidy.

Finally, greater efforts at pollution control offer the possibility of enhancing the productivity of the Chesapeake Bay, and of restoring some of the abundance that figured so prominently in the watermen's attachment to the environment of their youth. Such a policy would advance the conservationist tradition while addressing more recent preservationist concerns. Environmental protection—the end that was to be served by maintaining rural vocations—would itself become a means of keeping those vocations alive.

This article first appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 17, number 4 (fall 1997).

References

Tom Horton, *An Island Out of Time: A Memoir of Smith Island in the Chesapeake* (W.W. Norton, 1996); Carolyn Ellis, *Fisher Folk: Two Communities on Chesapeake Bay* (University Press of Kentucky, 1986); Todd Shields, "Bay's Toxic Contributors: Survey Says Smaller Sources Playing a Bigger Role," *Washington Post* (April 10, 1997); Erving Goffman, *Frame Analysis* (Harper & Row, 1974). The research described in this article was funded by Maryland Sea Grant and the National Science Foundation.

Acknowledgment

The authors are grateful to Jack Greer, Merrill Leffler, and Michael Fincham of Maryland Sea Grant for their support and guidance; to Larissa Grunnig for conducting the focus groups with great skill and sensitivity; and to Sara Gottlieb for her valuable contribution to the early stages of this project.

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Controlling Global Climate: The Debate over Pollution Trading

Mark Sagoff

In November 1998, delegates from 160 nations met in Buenos Aires to negotiate implementation of the global climate treaty signed in Kyoto in 1997. That treaty seeks to stabilize atmospheric concentrations of carbon dioxide (produced by burning fossil fuels) and other heat-trapping gases that may contribute to global warming. Industrialized nations, including Japan, the United States, and members of the European Union, promised at Kyoto that they would cut and permanently limit their production of these "greenhouse gases." Taking 1990 pollution levels as a baseline, these countries agreed to reduce their emissions by 6 to 8 percent by the year 2012.

Developing nations did not sign on to the Kyoto accords, and efforts to secure their cooperation in Buenos Aires were largely a failure. This was hardly surprising. Countries such as China, India, Indonesia, and Malaysia want to make sure they are not saddled with emissions limits that impede their industrial development. They take the plausible view that the welfare of their people depends more on the growth of their economies than on the stability of the atmosphere. Accordingly, they insist that wealthy countries should take the lead in reducing their own emissions, rather than try to limit the energy use (and thus the economic growth) of poorer nations.

If developing countries do not join in efforts to control greenhouse pollution, however, these efforts will be futile. Developing countries, as a result of rapid economic and population growth, are likely to surpass the industrialized countries in their emissions levels within about fifteen years. If they accept no restrictions, they will by themselves emit more than enough greenhouse gases to destabilize the atmosphere. The greenhouse emissions of China alone are increasing so fast that they are likely to exceed those of the United States in a decade or so. Partly for this reason, the leadership of the U.S. Senate has insisted that it will never ratify the climate treaty unless developing nations commit to "substantial participation" in an international emissions-control regime.

Might there still be a way to draw developing countries into a global agreement to reduce greenhouse emissions? One approach—pollution trading—has been endorsed by many economists and energetically promoted by U.S. negotiators. This essay seeks to clarify the economic and moral issues raised by this approach, and then to recommend an alternative strategy to be pursued in future negotiations with the developing world.

How Trading Would Work

At the insistence of the United States, delegates at Kyoto accepted a trading provision that rewards countries willing to reduce greenhouse emissions further than the treaty requires. These countries are allowed to sell credits for their "excess" reductions to other nations, who would then count them toward meeting their own targets. The U.S., for example, might choose to assist the Russians in converting their inefficient coal-burning electric utilities to cleaner and more efficient gas-fired power plants. The Russians would receive the new technology at little or no cost, and the U.S. would be able to take credit for the reduction in emissions from the Russian plants.

William Nordhaus, a Yale University economist, has estimated that developed nations would cut the costs of meeting their treaty obligations by at least eighty-five percent if they could apply to their own targets credits earned by reducing emissions in other nations. The reason is simple: It costs much less to achieve a fifty percent reduction in pollution from the dirtiest industries in Russia or India than to achieve a ten or twenty percent reduction in European or U.S. industries that are already technologically advanced. Controlling pollution and increasing energy efficiency generally become incrementally more expensive as industry gets cleaner and leaner.

Because poorer and developing countries offer so many opportunities for the cheapest pollution reduction, the case for pollution trading appears to be obvious and persuasive. In an article published by Resources for the Future, a Washington policy think tank, economist and law professor Jonathan Weiner notes that a "world market for 'greenhouse gas' emissions abatement services could lower the costs of preventing global climate change, widen the availability of climate-friendly technology, and engage more countries in emission reduction efforts."

Nonetheless, developing countries have rejected the idea of pollution trading. Weiner speculates that their opposition may result from a "misunderstanding," implying that these countries do not appreciate the wisdom of economic theory. Alternatively, he suggests that developing nations may be acting out of self interest rather than ignorance: Their rejection of pollution trading, he writes, may "mask a desire to gain leverage" in the negotiations to set emissions limits. Others point to a concern among developing countries that trading will enable the U.S. and other wealthy nations to buy their way out of their obligations to reduce greenhouse emissions at home.

This last concern has been raised by critics in industrialized countries as well as the developing world. Michael Sandel, a professor of government at Harvard, has argued that although the trading scheme certainly makes economic sense, it fails to make moral or political sense. Specifically, Sandel argues that pollution trading, in spite of its obvious efficiency, confronts major ethical objections. We shall see that

none of the ethical concerns Sandel raises withstand scrutiny. Yet a different moral problem may pose an insuperable obstacle to the trading of pollution credits as a way to control greenhouse emissions.

Removing a Stigma

First, Sandel contends that emissions trading "turns pollution into a commodity to be bought and sold," and thereby "removes the moral stigma that is properly associated with it." If nations that do not meet their targets are allowed to purchase credits abroad, they will, in effect, be paying a fee for the right to pollute. And a fee —unlike a fine—implies no moral stigma. Instead, it "makes pollution just another cost of doing business, like wages, benefits, and rent."

Sandel notes that our efforts to prevent despoliation of the environment generally depend on preserving the distinction between a fee and a fine. Imagine a wealthy hiker who tosses a beer can into the Grand Canyon. He would not escape moral censure simply because he was willing to pay a $100 fine for littering. Indeed, by treating the fine as if it were merely "an expensive dumping charge," he would be guilty of undermining the shared ethic on which our laws against littering rest. In Sandel's view, the Kyoto treaty is intended to promote a similar ethic by stigmatizing practices that contribute to global warming. Emissions trading, he suggests, subverts that ethic when it allows nations that do not meet their targets to purchase credits abroad.

If Sandel's argument seems persuasive, that may be because many of us do think of pollution in moral terms: We condemn it as a kind of invasion or assault that has to be minimized if not eliminated. No one, we say, has a right to deposit his or her effluents on the persons or property of others. From this perspective, pollution constitutes a tort or nuisance—like a punch in the nose.

We may accept this principled argument about pollution in general, however, and yet question whether we should regard greenhouse emissions in the same way. In some measure, greenhouse emissions are the inevitable and unavoidable consequence of economic activity. Thus, it is difficult to argue that they are objectionable in themselves. What is more, within limits, greenhouse emissions are safe for the global environment, since ecological systems, especially vegetation in the oceans and forests, can absorb them. Accordingly, it is not clear why society should condemn or stigmatize greenhouse gases as it does toxic emissions.

Some environmentalists may reply that no one knows exactly how far greenhouse emissions must be reduced to avoid the risks associated with global warming. Indeed, the idea of a sharp line between safety and danger may make no sense in this context. But experts believe that capping aggregate emissions at 1990 levels worldwide will greatly slow or lower projected warming (while no action at all may well be catastrophic). It is reasonable to regard global emissions under the 1990 cap as posing an acceptable risk, given where we are now, what actions are feasible, and where the world is otherwise headed.

The trading provision of Kyoto accord, while not stigmatizing greenhouse pollution as Sandel would like, seeks to control it when it poses unacceptable risks. Emissions, even when traded, would count neither as unacceptably harmful nor as disrespectful to others so long as the aggregate levels of gases did not exceed the

stringent global limit or cap. The basic problem is one of allocating a scarce resource (the ability of the atmosphere to process emissions), not one of penalizing inherently wrongful acts. The point of pollution trading, or any control strategy, is to maximize economic production while curtailing threats to the stability of the atmosphere. By driving down the costs of reducing pollution, and by providing an incentive for countries and industries to create cleaner technology, trading strategies allow nations to pursue economic growth while bringing global emissions within tolerable limits. Thus, pollution trading—at least for greenhouse gases—would seem to pass moral muster.

Evading Responsibility

This response to Sandel may not fully address one element of his critique: his concern that wealthy nations, by purchasing permits rather than reducing their own emissions, would express a callousness toward norms that govern or ought to govern the global commons. Emissions trading among nations, he writes, may "undermine the sense of shared responsibility that increased global cooperation requires." At first glance, it may not be obvious how the United States, Sweden, and other wealthy countries would undermine global cooperation if they enabled Russia, Poland, and other poorer countries to make their industries cleaner and more energy-efficient. To inform our intuitions on this matter, Sandel offers another analogy.

He asks us to imagine a neighborhood in which each family is permitted a single bonfire each year to burn unwanted leaves but can sell that permit and take the leaves instead to a community compost heap. When a wealthy family buys up the permits, perhaps for its own use or to clean the air, the "market works, and pollution is reduced, but without the spirit of shared sacrifice that might have been produced had no market intervened." The bonfires will be seen "less as an offense against clean air than as a luxury, a status symbol that can be bought and sold." Countries like the United States, which can enjoy bonfires by purchasing the necessary pollution credits, will seem privileged, while those who cannot afford these luxuries may grow to resent this difference.

In the context of global warming, bonfires are in fact a problem. In many developing countries, impoverished peasants burn forests to clear land for farming. These fires cause far more deforestation than all commercial uses of forests combined. Tropical deforestation, of which slash-and-burn farming is a principal cause, accounts for about twenty percent of total carbon emissions to the atmosphere. In addition, most of the wood from trees harvested in tropical forests—that is, those not cleared for farms—is used locally for fuel.

It seems plausible that wealthy countries, to reduce carbon emissions globally, might provide peasants with the technology they need to increase yields on land better suited to farming than to forest. Wealthy nations might also help these peasants purchase food and fuel. In these ways, wealthy countries in a sense may "buy up" bonfires, as Sandel's example suggests. Why, though, should an effort like this—to help poorer nations develop a sustainable agriculture—engender their resentment? It is not as if the United States wants to buy pollution credits so that it may torch its own forests.

One may object that pollution trading would permit Americans to persist in their wasteful ways—driving gas-guzzling automobiles, for example— while purchasing compensating credits abroad. This objection misses a key point. If the United States were to take no action under the Kyoto treaty, its greenhouse emissions would increase by about thirty percent by the year 2012 (once again taking 1990 levels as the baseline). By agreeing to cut these emissions by seven percent, the U.S. has undertaken a massive commitment—one that cannot be fulfilled through pollution trading alone. According to an American diplomat who negotiated the original climate treaty in Rio de Janeiro in 1992, the United States simply cannot find enough cheap pollution reductions abroad to reach the target. It will have to make politically unpopular improvements at home, even if it supplements these actions with purchased credits. Thus, it is inaccurate to compare the United States to the wealthy family burning all the bonfires it wishes. Developed countries will have every incentive to adopt at home the same efficiencies that they subsidize abroad.

An Insurmountable Objection

If one accepts the argument thus far, it may seem a matter for profound regret that emissions trading was not implemented in Buenos Aires. In rejecting such a scheme, the developing countries may appear to be alarmingly short-sighted. Such an assessment, however, would be unfair. This is because the defenders of pollution trading have glossed over a fundamental ethical problem—though not one that Sandel mentions.

If a system of pollution credits is to work, nations have to agree to a method of distributing initial allowances among themselves. Each nation has to accept a meaningful limit on its own emissions to provide a baseline from which it can sell or purchase credits. A global cap or limit on greenhouse gases, in other words, must be translated into an initial set of permits which nations can use or trade. Thomas Schelling, who teaches public policy at the University of Maryland, has expressed skepticism about the ability of nations to agree on this initial distribution. “Global emissions trading is an elegant idea,” he has written, “but I cannot seriously envision national representatives sitting down to divide up rights in perpetuity worth a trillion dollars.”

Advocates of pollution trading often seem oblivious to this issue. They observe that once nations have accepted an initial allocation of permits, targets, or limits, they will be able to take advantage of emissions trading. But this is like saying that if nations had a can opener, they could use it to open a can. In fact, many developing nations have refused to participate in the Kyoto accords not because they oppose pollution trading as such—its advantages are perfectly plain—but because no one has suggested a sensible or fair principle on which to divide up initial emissions allowances under the global cap. Weiner does acknowledge “that it would be difficult to allocate emissions allowances.” But, he goes on to say, “this problem is unavoidable in any climate agreement; emissions trading just makes allocations explicit.” One would be hard pressed to find a plainer example of assuming the can opener.

Sandel is correct in believing that pollution trading, while economically efficient, fails to make moral and political sense. The reason, though, does not appear among

the ones he mentions. The real problem—the intractable one—lies in identifying a principle on which to base an initial system of allowances. None is even under consideration. For this reason, pollution trading, while a no-brainer, is also a nonstarter. China, India, and other developing countries have to wonder why they are called upon to cap their emissions at their 1990 baseline, say, at one ton per person, while Americans, who polluted twenty times as much in 1990, are rewarded with a twenty-ton per-person cap. These and most other developing nations have refused to accept any limits, even voluntary ones, until their emissions come to equal, on a per capita basis, those of wealthier countries.

Is there a nonarbitrary, morally attractive basis on which to distribute pollution allowances under a cap? People in colder climates may reasonably claim greater need than those in more temperate ones; those who produce necessary goods such as food (agriculture is fuel-intensive) may demand larger allotments than those that produce, say, entertainment. National boundaries seem arbitrary as a basis for distribution, since differences in per capita emissions within countries may be as great as the differences between them. Even if some sense of what justice demands could emerge in this context, moreover, it may not carry the day against powerful interests which, as Schelling suggests, see a trillion dollars' worth of rights at stake.

Aiming for Efficiency

A way out of this impasse suggests itself. Developing nations will not accept overall limits on their greenhouse emissions. They may recognize, however, that the strongest economies, such as Germany and Switzerland, also have the cleanest, most energy-efficient technologies, and that it is in their interest to obtain such technologies for themselves.

Consider the comparative data on $C0_2$ emissions. In 1995, Russia managed a per capita GDP of only $4,820, yet its $C0_2$ emissions per capita exceeded twelve tons. Compare this performance with that of Switzerland, which achieved a per capita GDP of about $25,000, while emitting per capita only 5.5 tons of $C0_2$. Falling between these two extremes, Germany, with a per capita GDP of $20,120, produced per capita emissions of 10.3 tons; this works out to about one dollar GDP per pound of $C0_2$. If Russia had the benefit of German technology and know-how, it could more than quadruple its economic performance with no additional pollution. With Swiss technology and organization, it could enjoy a twelvefold growth in its economy.

Industrialized and developing countries alike, then, should be able to accept as a target *a ratio between a country's per capita GDP and its emissions.* Wealthy countries would assist poorer ones to reach, say, the German ratio of one dollar GDP per pound of $C0_2$. This target, a distant but eventually achievable goal in developing nations, would constitute a minimum for the wealthier countries, which could promise to improve their own GDP/$C0_2$ ratios well beyond targets set for the developing world. Under this regime, all countries would move toward making their economies less dependent on fuels that produce greenhouse gases.

It is reasonable to hope that developing nations will sign on to a protocol that requires wealthy countries to subsidize their progress toward greater efficiency and

productivity—so long as that protocol does not impose emissions limits inimical to economic growth. The Global Environment Facility (GEF) already operates as a mechanism for nations to cooperate in providing grant and concessional funding for investments in pollution abatement. In exchange for the cooperation of the developing countries, wealthy nations could agree to increase GEF funding for competitive proposals from the developing world.

The Real Choice

It is true that by seeking to improve GDP/emissions ratios, the world may not achieve the goal, envisioned at Kyoto, of stabilizing global greenhouse loadings at or below 1990 levels. But so long as developing countries refuse to freeze their own emissions at those levels, the goal cannot be achieved in any event. Despite the best efforts of the climate treaty negotiators, there is every reason to think that in 2012 or even 2020 the world will be emitting more greenhouse gases than it is today. The question we must ask about any proposed policy is not whether it will stabilize the atmosphere within the next fifteen or twenty years, but whether it will lead to less pollution than we would have under some other policy or in the absence of an agreement.

A worldwide attempt to make economies less and less carbon-intensive has the best likelihood of success. Insistence on pollution trading, in contrast, makes theoretical perfection the enemy of practical progress. As Peter J. Wilcoxen of the Brookings Institution observes, "The real choice is not between a sharp reduction in emissions and a more modest policy, but between a modest policy and no policy at all."

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 19, number 1 (winter 1999).

References

Hermann Ott, "The Kyoto Protocol to the UN Framework Convention on Climate Change—Finished and Unfinished Business." Publication of the Wuppertal Institute for Climate, Environment, and Energy, available at http://www.wupperinst.org/Publikationen/Kyoto_Protokoll.html (1998); Calvin Sims, "Poor Nations Reject Role on Warming," *New York Times* (December 13, 1997); Henry D. Facoby, Ronald G. Prinn, and Richard Schmalensee, "Kyoto's Unfinished Business," *Foreign Affairs* (July-August 1998); Jonathan B. Weiner, "Global Trade in Greenhouse Gas Control: Market Merits and Critics' Concerns," *Resources,* vol. 129 (fall 1997); Michael J. Sandel, "It's Immoral to Buy the Right to Pollute," *New York Times* (December 15, 1997); Thomas Schelling, "The Costs of Global Warming: Facing the Trade-offs," *Foreign Affairs* (November/December 1997); Michael McCarthy, "Why Hot Air Is Stopping the World from Doing a Deal on Global Warming," *The Independent* (London) (November 14, 1998) (quoting the American diplomat at the Kyoto talks who argued that pollution trading credits alone would not enable the United States to meet its treaty obligations); Eileen

Claussen and Lisa McNeilly, “Equity and Global Climate Change: The Complex Elements of Global Fairness,” Pew Center on Global Climate Change (October 29, 1998), available at http://www.pewclimate.org/report2.html; Peter Passed, “Trading on the Pollution Exchange: Global Warming Plan Would Make Emissions a Commodity,” *New York Times* (October 24, 1997)(quoting William Nordhaus and Peter Wilcoxen).

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Are We Simple Creatures?

Jerome M. Segal

In the philosophical traditions of both the East and the West, one encounters the idea that human beings may attain the good life by satisfying a small number of basic needs. Often this belief finds expression in myths of a golden age that we have lost by allowing our needs and desires to multiply. The Roman author Seneca invokes a simpler past in his articulation of Stoic philosophy:

> Was it not enough for man to provide himself a roof of any chance covering and to contrive for himself some natural retreat without the help of art and without trouble? Believe me, that was a happy age, before the days of architects, before the days of builders!

And further:

> For the limit everywhere corresponded to the need; it is we that have made all other things valuable, we that have made them admired, we that have caused them to be sought for by extensive and manifold devices....That moderation which nature prescribes, which limits our desires by resources restricted to our needs, has abandoned the field.

The biblical story of the Garden of Eden is, on one level, a story about the incompatibility of the simple life and overreaching human desires. God tells Adam and Eve not to eat from the tree of knowledge of good and evil, but beguiled by the serpent, first Eve and then Adam eat the forbidden fruit. Adopting the perspective of modern critics of consumer culture, we might say that Adam and Eve were seduced by the serpent who is history's first huckster, suckering them into overconsumption. When they had limited desires, they were content. Then the serpent intervened and flashed the shiny fruit; he induced new desires, and with that they got into trouble.

But the story is really more interesting than that. If we read carefully, we see that after the serpent tells Eve that by eating the fruit "your eyes will be opened," and

after he assures her that this is really a safe product to consume, Eve comes to her own conclusion: “When the woman saw that the tree was good for eating and a delight to the eyes, and that the tree was desirable as a source of wisdom, she took of its fruit and ate.”

Why should Eve have been moved by the tree’s being a source of wisdom, and why should she have perceived it thus? The answer is clear. Even in the Garden of Eden, from the very first, as part of the inherent motivation of humanity, Eve, if not Adam, was a seeker of wisdom. Moreover, it would seem that Eve desired wisdom for its own sake, and not for any instrumental purpose, since, in the garden, everything was taken care of. Thus we find, within our central myth of our original condition, the image of an interesting and complex human being.

For today’s advocates of a less consumption-oriented way of life, it is a question of some importance whether we are, in fact, simple creatures or complex ones. Many people assume that the case for simple living depends on the notion that our *needs* are simple. Are they right? When our desires proliferate, is the process a distortion or an expression of human nature?

Consumption and Self-Esteem

One account of why we consume—an account indebted to Thorstein Veblen’s theory of conspicuous consumption—postulates a set of core psychological needs to explain the emergence of our desires for specific commodities. This account calls attention to three features of our psychological and cultural experience.

First, part of what it is to be a person is to be the object of one’s own perception; over time, we develop a stake in seeing ourselves in particular ways. Second, how we see ourselves is to a considerable extent typically affected by how others see us. And third, to varying degrees in human cultures, how others see us is partially determined by aspects of our involvement in the economy—how we consume, what we earn, what we do for a living.

Clearly, the three features are closely related. The satisfaction of the need to see oneself in a certain way is dependent on how one is seen by others, and the considerations that determine how others will see any individual are to some extent cultural givens. If one internalizes these cultural norms, then even the actual perceptions of others may drop out of the equation, as one perceives oneself through the eyes of the culture or subculture. And finally, to the extent that these norms include particular consumption choices, the underlying need for self-esteem will be transformed into desires for specific marketplace commodities.

Table 33.1

Need	Psychological/Social Conditions
Level 1: Adam has an underlying need for self-esteem.	
	Context: His self-esteem, like that of most people, is highly dependent on how he is seen by others.
Level 2: His underlying need for self-esteem thus emerges as a need to be seen by others as valuable.	
	Context: A specific group of people emerges for him as the reference group whose judgment really matters (e.g., parents, colleagues, peers).
Level 3: His underlying need for self-esteem now emerges as a need to be seen as valuable by this select group.	
	Context: The reference group has certain norms with respect to consumption, such that the failure to meet these norms symbolizes failure, lack of decency, inadequacy.
Level 4: His need for self-esteem now emerges as a need to satisfy the consumption norms of the reference group.	
	Context: The reference group's definition of "decency" and "adequacy" mandates living in houses with certain minimal conditions (e.g., a "good" neighborhood, at least two baths, a bedroom for each child, and a large kitchen).
Level 5: His need for self-esteem is now expressed as a desire for a specific kind of house and style of life.	
	Context: Market conditions price such houses at $200,000 or more. His ability

to attain these financial resources is dependent on his employment.

Level 6: His need for self-esteem is now expressed as a desire for employment that yields income sufficient to have a $200,000 house.

The accompanying diagram illustrates this process for a modern-day Adam, portraying the context in which the need for self-esteem will be transformed. If we retrace the stages of the process from Adam's perspective, we can say that his need for self-esteem first emerges as a need to have others see him as valuable. Once these "others" become identified with a select reference group, the need for self-esteem emerges as a need to satisfy the consumption norms of that group, and then as a desire for a specific kind of house and style of life. In our example, the process reaches a (temporary) culmination when Adam's need for self-esteem is expressed as a desire for employment that yields income sufficient to have a $200,000 house.

My description of this process does not at first mention desires; the starting point is the need or drive for self-esteem. The individual typically is not conscious of such a need, and its existence is not dependent on his awareness of it. To say that Adam has a need for self-esteem is to say that, on a very basic level, something will go seriously wrong in his life if he fails to develop it. How this fundamental, and perhaps universal, need gets transformed into a desire for certain kinds of jobs, or for a multiplicity of consumer goods, is a matter of social and economic context.

As the underlying need becomes more concretely related to actions that Adam can actually take to satisfy it (or that he believes will satisfy it), it emerges more fully as a conscious desire. And this desire may now be expressed in plans and intentions. For instance, in order to obtain a particular kind of job, Adam may seek to go to law school, and in order to get into law school he may seek to do well as an undergraduate. This desire, in turn, may proliferate into a thousand more concrete desires—to do well on a test, to get to class on time, to finish his assignments, and so on.

This account of transformations in the human need for self-esteem leaves many questions unanswered. Still, it is useful in allowing us to distinguish among the levels at which different anticonsumerist orientations throughout history have tried to intervene in the process by which desires for money and commodities shape human life. Thus, the Stoic tradition, with its emphasis on individual self-sufficiency, might be understood as an effort to prevent the general need for self-esteem from becoming a need for the approval of others (level 2). Buddhism might be thought of as intervening on an even more basic level, whereby the sense of self is so utterly changed that the need for self-esteem is itself extinguished (level 1). And the creation of utopian communities, including nineteenth-century experiments such as Brook Farm, might be thought of as an attempt to substitute a different subculture as the reference group (level 3).

As these examples suggest, the recognition that deep needs may be transformed into desires for goods and services has a long history. Nonetheless, there are reasons to doubt that the need for self-esteem is *the* basis for consumer culture. When people adopt the consumption patterns of their reference group, they are not always motivated by status considerations. As Judith Lichtenberg has noted, our peers may simply be sources of information about new products, and these products may

satisfy legitimate needs that are entirely distinct from our need for self-esteem. In thinking about whether we are complex or simple creatures, we must now ask what some of these other needs might be.

The Marketeers

I will begin with a book that was written explicitly for what the authors call "marketeers"—that is, people who specialize in getting consumers to want to buy specific products. In *Why They Buy: American Consumers Inside and Out*, the authors take a remarkably fine-grained approach to human psychology, identifying some sixty specific needs. These include: to be visible to others, to accomplish difficult tasks, to give care, to play, to establish one's sexual identity, to exercise one's talents, to win over adversaries, to see living things thrive, to learn new skills, to be amazed. Having presented this list, the authors then identify the kinds of goods that "serve each kind of need." Their advice is that if you want to succeed in marketing, it is essential to know your consumer, to understand what his needs are, and to know what needs your product serves. The marketeers are told that it is important for them to "instill purchase incentives in the minds of potential buyers" by "teaching consumers about what they will get" from a product in terms of need fulfillment.

Although one might want to challenge either the legitimacy or the very existence of some of the needs on the list, for the most part they do seem real, important, and valid. Moreover, even this enumeration, which is the most extensive I have seen, is clearly not exhaustive. For example, the authors do not include a need for insight into oneself, or the need for meaningful work, nor do they include a need for beauty or adventure, or a need for a comprehensive vision of life.

Considering a list of this kind, whatever its source, is very instructive. For one thing, it may prompt us to realize that, independent of market manipulations, we do have abundant and diverse needs and desires, and that certain of these needs can be met by goods and services that the marketeers promote.

In saying this, I do not mean to suggest that marketeers are not guilty of manipulation. Advertisers typically encourage us to satisfy some needs at the expense of others. They exaggerate their product's capacity to meet a legitimate need, and frequently make use of nonrational processes to induce us to associate their product with a desired outcome. But for our purposes here, the critical point is that the marketeers are surely right to assert the existence of a varied, substantial set of legitimate human needs. Given this fact, how should advocates of simpler living respond?

Arguments for Simple Living

There are a number of persuasive responses, none of which rests on viewing human beings as simple creatures.

First, when it comes to our most fundamental needs—for love, meaning, friendship, self-expression, understanding—commodities may, in the marketeers' terms, be "of service," but they rarely supply the genuine article. Often enough, they merely divert us from the fact that the essential need is not being fulfilled, or

else provide a spurious compensation for it. At best, commodities may offer a symbolic or false taste of the real thing.

To say this, though, is not to deny their importance. Finding genuine satisfaction for our needs is not easy, and most people are at best only partially successful in this search. In a world where much depends upon chance, and in which not everyone develops the human capabilities to attain the genuine article, the second-best fulfillments that money provides may be of substantial value. On the other hand, once we recognize the second best nature of the comforts that the marketplace provides, we can insist that these should not be the objects of our ultimate aspirations.

Second, even when the purchase of goods and services can satisfy our needs, the fulfillment may come at an extremely high personal and social cost. Consumption requires income—which in turn, for most of us, requires labor. And labor is costly in two ways. For many people, labor beyond a certain point is unpleasant, painful, unhealthy, or boring. And even where it is not, labor takes time—time to prepare for, time to get to, time to perform, time to return from, and time to recover from. Yet the amount of time we have is relatively fixed. Time we devote to acquiring the means of consumption is time that we do not have for other aspects of life. This fact alone makes the case for simple living enormously compelling. If we have a choice between high-consumption and low-consumption ways of meeting our legitimate needs, it makes sense for us, individually and collectively, to pursue the latter course.

This leads to my final point. Once we recognize the variety of human needs, we can begin to imagine lives that partake of diverse forms of richness: material, intellectual, spiritual, aesthetic, and social. In other words, we can see that genuine wealth resides in an extraordinarily broad range of "assets," the possession of which determines whether our abundant needs will be fulfilled.

- *social relationships*: our friendships, loves, and families
- *psychological capabilities*: our ability to build relationships, to find meaning, to take aesthetic pleasure
- *cognitive capabilities*: our ability to read, to understand, to learn, to reason
- *creative capabilities*: our ability to make something beautiful, to contribute something different
- *political rights*: our ability to be a citizen of one country rather than another, to build our own lives according to our own lights
- *historical and cultural legacy*: the riches of insight and experience that have been preserved from previous human lives and that are embodied in the great achievements of human culture
- *natural and manmade physical environments*: the beauty of great cities, of the wilderness, of the view from one's back porch

Material wealth is not irrelevant, but its role in the good life is largely to facilitate our access to these other forms of wealth. As the great philosophers have long told us, excessive concern with consumption often thwarts our efforts to realize the multiple possibilities of our nature. Advocates of simple living best advance their cause when they remind us of those possibilities, not when they ask us to believe that human beings are simple creatures.

This article originally appeared in the *Report from the Institute for Philosophy*

and Public Policy, volume 19, number 2/3 (spring/summer 1999), and is drawn from *Graceful Simplicity: Toward a Philosophy and Politics of Simple Living* (Henry Holt and Company LLC, 1999).

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What's Wrong with Exotic Species?

Mark Sagoff

On the morning of December 19, 1997, Isabel, Yoyo, and Sydney—three young trumpeter swans following two ultralight aircraft across the Chesapeake Bay—landed near the Blackwater National Wildlife Refuge on Maryland's Eastern Shore. The three cygnets had adopted the French-made Cosmos ultralights as "mothers" to learn a 102-mile migration route to the Bay from a facility near Warrenton, VA, where the swans had hatched from eggs brought in from Canada. Defenders of Wildlife, using the "imprinting" technique made famous in the movie *Fly Away Home*, hoped to lure trumpeters to the Chesapeake region, where they had not been seen for nearly 200 years. About a year later, Defenders of Wildlife, an environmental group, using the same technique, attempted to lead seventeen young trumpeters from western New York to the Eastern Shore. A spokesman for the group said that trumpeter swans would "help increase diversity" in the "critically important wetlands of the Chesapeake Bay."

While Defenders of Wildlife tempted trumpeters to the Chesapeake, wildlife officials in the region were trying to eradicate or at least to control over 2,000 mute swans that had proliferated there since 1960, when a few escaped from a private preserve. Because the State of Maryland lists swans as a protected species, wildlife officials use humane ways to control mutes, for example, vigorously shaking (or "addling") their eggs. "The potential for reproduction is out of control," said Doug Forsell, a biologist who works for the Chesapeake Bay office of the U.S. Fish and Wildlife Service. "The mute is a varmint species that we're going to have to spend a lot of money controlling."

It costs a lot of money to bring trumpeter swans to the bay and to get rid of mute swans already there. What is the difference between the two breeds? Actually, they have much in common. Mute and trumpeter swans are usually monogamous and breed annually after reaching maturity. Clutch sizes vary but may average about five eggs. From March to May, during breeding and brooding season, both kinds of swans become fiercely territorial, chasing away any bird larger than a swallow and defending their eggs against predators. Swans are voracious vegetarians, often

overgrazing marshlands. Unlike certain fish, such as striped bass, but like many waterfowl, such as Canada geese, swans have no natural instinct to migrate. Both mute and trumpeter swans will take up year-round residence in a pleasant environment unless their parents teach them a migration route—and even then, they sometimes stay put. At least eight states are home to significant nonmigratory populations of trumpeters, which in some instances have displaced mute swans from nesting places. Mutes and trumpeters occasionally interbreed and hybrids have been observed.

How do mute swans differ from trumpeters? The orange bill of the mute swan provides an easy way to tell the birds apart; a black fleshy knob extending from the base of its bill is another. Trumpeters are slightly larger—the males or cobs can weigh as much as thirty pounds and their wingspans measure up to seven feet. The mute grunts while the trumpeter trumpets. From the perspective of environmental policy, though, the crucial difference may be historical. Mute swans hail from Eurasia, where they were domesticated by royalty, while trumpeters are native to North America.

Does this historical fact, however, justify efforts to rid the bay of the interloper and to restore the ancestral breed? Suppose that fossil or other records were suddenly to reveal that mutes, rather than trumpeters, inhabited the Chesapeake region centuries ago. (In fact, there is evidence of mutes as early as 1600 in the Chesapeake.) Would volunteers then addle the eggs of trumpeters while ultralights helped mute swans fly home to the Chesapeake Bay?

What's Wrong with Exotic Species?

In February 1999 President Clinton signed an "Invasive Species Executive Order" directing federal agencies to begin what agriculture secretary Dan Glickman called "a unified, all-out battle" against the spread of alien species in the United States. Praising the order, Interior Secretary Bruce Babbitt observed, "There are a lot of global bioinvasive hitchhikers, and now is the time to take action. The costs to habitat and the economy are racing out of control." Federal agencies require enormous budget increases to fight alien species. "New resources are needed now," Babbitt declared, "and this order opens the door to accomplish just that."

Critics often accuse federal agencies, such as the Department of Defense, of exaggerating threats in order to increase budgets. During this century, the Forest Service requested and received tens of billions of dollars to fight forest fires. Today, scientists regard fire as a natural and necessary part of forest ecology and suspect that Smokey Bear has done more harm than good. Federal agencies could spend as many billions to control alien species as they have spent to control forest fires. Yet, the movement of species has been a constant occurrence in natural history—like the occurrence of fire. Before we commit a lot of (taxpayer) money to controlling exotic species, it might be helpful to understand why we should treat alien species any differently than we treat native ones.

Those who call for additional resources to fight exotic species typically defend their position by pointing to examples of non-native species, such as the zebra mussel, that have had costly or disruptive effects. Examples, however, are not arguments. Every barrel contains bad apples. One cannot condemn an entire group

because of the offensive qualities of a few individuals. To justify a generalization one has to show that the bad apples are characteristic or representative of the group —for example, that exotic species are much more likely than native ones to cause ecological damage or economic harm.

In fact, native species can be every bit as harmful economically as nonnative ones. Throughout the Chesapeake region, annoying mosquitoes have served as vectors of disease. Mosquitoes were active when Captain John Smith explored the area. A nasty jellyfish, ubiquitous in the Chesapeake Bay from June through September, stings anyone foolhardy enough to enter the water, which is the reason few swim in the bay during the hot summer months. This horrid creature, albeit native, seems to have no important function, ecological or otherwise, other than stinging people. The dinoflagellate *Pfiesteria Piscicida* metamorphoses into a vegetative life form, which spreads toxins responsible for killing millions of fish. Then this strange plant-life organism again transforms into a large amoeba to eat the fish. Dubbed the "cell from Hell," *Pfiesteria* does not hail from Dante's Inferno but has lived for millennia at the bottoms of rivers such as Maryland's Pokomoke.

While it is easy to accuse alien species of causing economic and ecological harm, it may be harder to make the case against them in comparison with native species that fill a similar niche. Mute swans, which are exotic to North America, may indeed destroy by overgrazing wetland grasses in the spring and summer months. They overgraze these grasses, however, not because they are mutes but because they are nonmigrating swans. Trumpeter swans, albeit native, pose much the same problems of overgrazing and territoriality when they are year-round residents of temperate environments. When the trumpeters introduced to the bay by the ultralights failed to migrate in the spring—the first group back to Virginia and the second group back to western New York—wildlife authorities became concerned. These swans were all put on trucks and driven to those destinations.

Non-native species, like native ones, can be harmful, beneficial, or both. The most notorious invader, the zebra mussel, which apparently immigrated to the United States by way of Europe from the Caspian Sea, after remaining unnoticed possibly for decades, started to spread prodigiously in the 1980s in the shallower waters of Midwestern lakes, including the Great Lakes, and in tributaries of the Mississippi. Industries have to take expensive steps to keep these creatures from colonizing intake pipes used for water works and power plants. On the other side of the ledger, the zebra mussel, a filter feeder, is credited with clearing the water column of excess nutrients and associated algae resulting from municipal waste discharge and agricultural runoff. Lake Erie, which had once been given up as dead by eutrophication, is now clear of the organic matter that had been choking it, largely because of the mussel.

Biologist Douglas Hunter has noted that the mussel gathers excess nutrients into particles it deposits at the bottom of lakes and rivers to form excellent habitat for insect larvae, leeches, snails, and other invertebrates that larger fish, such as yellow perch, feed upon. As a result, the charter fishery in Michigan's Lake St. Claire, for example, saw the catch of yellow perch increase five-fold from 1990 to 1996. The work this mussel performs in clearing the water column and enhancing benthic invertebrate communities seems little less than miraculous. The benefits of zebra mussels are ignored, however, because it is an "alien" species.

Many fish, such as Pacific salmon in the Great Lakes, and several aquatic plants, such as purple loosestrife, were introduced into lakes and estuaries for economic and ornamental purposes. (Loosestrife provides honeybees, which are also exotic, with high-quality nectar for honey.) The common carp, released into the Chesapeake watershed by the Fish and Wildlife Service in 1876, now abounds in the tributaries. On a summer evening, you can join hundreds of residents of the District of Columbia fishing at Haines Point on the Potomac River. It is largely the carp that you will catch. Similarly, brown trout were successfully introduced to establish a sports fishery in the upper bay and its tributaries. The Office of Technology Assessment reports that the effects of a species can also vary with the eye of the beholder: "While many State fish and wildlife managers firmly support stocking with certain nonindigenous fish, some experts consider the practice detrimental."

Many alien—as well as native—species can be easily and cheaply controlled when a use is found for them and they are hunted or harvested for that use. Swans are valuable for their feathers. In Virginia, which does not list mute swans as a protected species, wildlife officials do not regard them as a problem. "Mutes that wander there probably get shot during the hunting season," Doug Forsell has acknowledged. Hunters drove the trumpeter into local extinction in the eighteenth century. The rule in Maryland against hunting swans—more than their fecundity—may result in the need (or, for wildlife officials, the opportunity) to spend taxpayer money to control them in other ways, such as by addling their eggs.

Uses could be found for other invasive aliens. Consider the recently arrived green crab that overflows lobster traps in New England. This creature is abundant in the Sea of Japan, where people harvest it as a delicacy, thus keeping its numbers in check. "The green crab isn't a pest in Japan, where they put it in miso soup," Armand Kuris, a zoologist at the University of California in Santa Barbara, has pointed out. The problem with green crabs in New England is not necessarily that this species is alien to our ecosystem; the problem may be that it is alien to our cuisine.

The rapa whelk, also native to Japan, has been found in the saline Virginian waters of the Chesapeake, where it competes with local whelks—including the knobbed whelk, the lightning whelk (which is left-handed), and the channeled whelk—and may prey upon the remaining populations of native oysters. In Asia, the rapa whelk is hunted as a delicacy. "Rapa whelks are harvested for their meat and shells in Korea; indeed, they are considered overfished there," wrote Scott Harper of the *Virginia-Pilot.* "While smaller, native whelks also are caught by Virginia fishermen, it remains unclear if... Americans would take to the larger species as a seafood." To control the green crab and the rapa whelk, executive orders may be less effective than recipes.

An Analogy with Human Immigration

Throughout our history, nativists have sought to close the door on foreigners who wanted to migrate to the United States. Typically, nativist groups support their xenophobia with examples of individual immigrants who turned out to be criminals or who went on public welfare. The anti-immigrationists may tolerate migratory

workers who do not become permanent residents and may also allow admission of a few newcomers with special talents and abilities who will assimilate into existing cultural and social systems. Xenophobes argue, however, that liberal immigration policies allow an influx of uncontrollable foreign elements that threaten the integrity of our American way of life. Immigrants may even marry into established communities and thus, according to racist sentiment, degrade native stock.

One would reply to nativists that we are a nation of immigrants. Only Amerindians count as indigenous peoples—and even their ancestors, by some accounts, immigrated across the Bering Straits about 10,000 years ago, which is recent in evolutionary terms. One would also point out to the nativist that while a few members of Irish, Italian, Jewish, and other immigrant groups have been bad apples, the vast preponderance have contributed to the well-being—political, economic, and cultural—of this nation. One can hardly imagine what the United States would be like—or indeed, imagine it existing at all—without immigration.

Likewise, in many places one can hardly imagine the landscape without alien species. Virtually everything down on the farm is an exotic: of all crops, only sunflowers, cranberries, and Jerusalem artichokes evolved in North America. Corn, soybeans, wheat, and cotton have been imported from some other land. Cattle came from Europe. Rockfish—or striped bass as they are known outside Maryland—are native to the bay but have been introduced up and down the Atlantic and Pacific coasts for sport and commercial fishing. More than ninety percent of all oysters sold in the world are produced by aquaculture, and almost the entire oyster industry on the west coast is based on a species imported from Japan.

Our culture assimilates foreign influences—who would live in a community without pizza or a Chinese restaurant? Our landscape likewise has assimilated and benefited from foreign ecological influences. Kentucky identifies itself as the "Bluegrass State," for example, but bluegrass emigrated from England. On occasion, alien species outcompete and thus replace native ones, but in the vast majority of instances, newcomers contribute in the sense that they add to the species richness and in that sense to the diversity of local ecosystems.

Those of us who support liberal immigration policies concede that some newcomers have been undesirable, e.g., thieves, murderers, arsonists, or vagrants. However, from the premise that a person is no good *and* an immigrant, it does not follow that a person is no good *because* he or she is an immigrant. One still has to show a connection between the characteristic of being a foreigner and the characteristic of being a nuisance.

To make this connection in the ecological context, those who seek funds to exclude or eradicate non-native species often attribute to them the same disreputable qualities that xenophobes have attributed to immigrant groups. According to an account in the journal *BioScience*, "traditional anecdotal descriptions of the traits of successful invaders" include "higher fecundity, less parental care," predatory behavior, and greater tolerance for degraded conditions. Biologist Daniel Simberloff has argued that "what remains of our country's biological heritage" is "being degraded and diminished by nonindigenous species invasions." He pointed out, for example, that at least "three of the twenty-four known extinctions of species listed under the Endangered Species Act were wholly or partially caused by hybridization between closely related exotic and native species."

The concept of a "biological heritage" may be as problematic in non-human as in human populations. The species concept itself is so controversial and ambiguous as to be nearly useless; for example, if the native and exotic are so closely related that they hybridize, in what sense are they different species? Simberloff observed that the spread of "invasive exotic plants in southern Florida could undermine the 1.5-billion effort to return the Everglades to a more natural state." What counts as "natural," however, depends on moral, aesthetic, and cultural preferences. From a strictly logical and scientific perspective, anything that conforms to the laws of physics—i.e., everything that is not supernatural—belongs to nature and is completely natural.

The kind of pejorative stereotyping that considers exotics as likely to degrade, corrupt, or contaminate "natural" systems may be no more true in the ecological than in the social context. Plainly, pests, whether exotic or native, should be controlled, just as criminals, whether native born or foreign, should be arrested. The preference for the native over the exotic, although entirely familiar, may be no more defensible in the environment than in human societies. A belief that native species are better because they are native—and ecosystems better if they have fewer recent arrivals—has to be explained; it cannot simply be assumed. The "profiling" of exotic species as especially suspect—as "guilty until proven innocent"—is not justified.

Immigration and Ecological Disintegration

About forty years ago, Charles Elton, a British ecologist, published the influential book *The Ecology of Invasions by Animals and Plants.* There he argued that "we are living in a period of the world's history when the mingling of thousands of kinds of organisms from different parts of the world is setting up terrific dislocations in nature." This statement is true in the most literal sense: species that migrate are dislocated. Elton thought that this kind of dislocation produced disorder in the ecosystems in which "mingling" occurs. Ecologists following Elton have accused immigrant and invasive species of upsetting, disrupting, and destroying ecosystems. Biologist Michael Soule, for example, has said that invasive species may soon exceed habitat loss and fragmentation as the principal cause of "ecological disintegration." Three ecologists have recently written, "Symptoms of degrading ecosystem conditions include the prevalence of exotic species."

If the presence of exotics constitutes a criterion of environmental degradation, then it is not surprising that they should be seen as its cause. But the statement that exotics cause degradation amounts to no more than a trivial tautology if "deteriorated" means "infested by exotics." Similarly, ecosystems that have already become "degraded" may be more prone to be invaded. Once again, the presence of exotic species cannot be taken as a cause but only as a consequence (and perhaps a good consequence) of "deterioration." What is needed is a criterion for ecological degradation that allows one to test (rather than logically deduce) the general statement that colonization causes it. The science of ecology, as we shall see, cannot provide such a criterion because it cannot invoke a purpose or goal in terms of which to evaluate ecosystem structure or function.

Some scientists have suggested that ecosystems have a general purpose or goal, for example, to remain in balance—one species checking another—and will remain in equilibrium in the absence of invasions and other disruptions often caused by human activity. On a Web site about "Marine Bioinvaders," for example, the MIT Sea Grant Program declares of marine species: "In their home environments, these organisms live in balance with their predators, and are controlled by diseases and other ecosystem interactions." MIT Sea Grant warns that in their adopted ecosystems, "controls may not exist to keep populations in check." A "fact sheet" issued by the Maryland Sea Grant Program reiterates that species can "move out of their natural ecological fabric— where eons of evolution have established a balance, for example, between predator and prey—to an area where they may have no natural competitors or other controls, and may therefore reproduce unchecked."

However, the fear that a species, native or nonnative, can "reproduce unchecked" is a false one. Even zebra mussels are controlled in some ways— such as the availability of clinging space. Drum and diving ducks feed on these newcomer bivalves. Exotics often bring their predators with them. Thus, round gobies feed on zebra mussels in the Great Lakes as in the Caspian; gobies themselves are food for larger, native fish, such as bass and perch. There are many native species—for example, the wild grapevine that gives Martha's Vineyard its name—that spread around a lot. It seems odd to include pervasive native species as part of the "balance" of local ecosystems while describing pervasive aliens, which may behave the same way, as reproducing "unchecked."

Many ecologists, in any case, scoff at the idea that nature has a "balance" exotics can upset. A new generation, having been unable to observe any pattern or design in nature but only a flux of organism and environment associations undergoing constant change, has become skeptical of any integrative concepts that may be applied to the hodgepodge of creatures in an environment or ecosystem. Summing up the emerging view, a *New York Times* article carried the title, "New Eye on Nature: The Real Constant is Eternal Turmoil." The article quotes ecologist Steward Pickett, who argued that the balance-of-nature concept "makes nice poetry but it's not such great science." In its traditional formulation, the balance-of-nature theory contends that an ecosystem maintains a dynamic equilibrium to which it returns after being disturbed if it retains the resources for resilience. "We can say that's dead for most people in the scientific community," said Peter Chesson, a theoretical ecologist.

"Certainly, the idea that species live in integrated communities is a myth," Soule acknowledged, thus apparently contradicting his own thought that exotics cause "ecological disintegration." He wrote, "So-called biotic communities, a misleading term, are constantly changing in membership ... Moreover, living nature is not equilibrial—at least not on a scale that is relevant to the persistence of species." Soule perceptively noted:

> the science of ecology has been hoisted on its own petard by maintaining, as many did during the middle of this century, that natural communities tended toward equilibrium. Current ecological thinking argues that nature at the level of biotic assemblages has never been homeostatic. Therefore, any serious attempt to

define the original state of a community or ecosystem leads to a logical or scientific maze.

A Test of the Value or Disvalue of Invasions

Do biological invasions damage ecological communities at particular sites? Do they cause the flora and fauna in particular places to deteriorate, for example, by becoming less productive or diverse? To ask this question is to suggest a way to test an answer. Take two marine sites—two estuaries, for example—one of which has been immune to invasions by alien species at least recently and relatively, while the other is a mecca for them. Can ecologists tell which is which simply by examining the two systems and their species without knowledge of their history? Is there any biological, as distinct from historical, fact that would tip off the ecologist that he or she is studying a colonized and, in that way, corrupted or disrupted ecosystem?

Another test would be to compare descriptions of the same ecosystem before and after invasions, such as the Chesapeake with trumpeters and then with mute swans, for example, or with native whelks and then with the rapa whelk. Is there any way to tell from biological inspection which whelk is the invader and which is native, or which ecosystem has been colonized and which remains in a prelapsarian state? One could hypothesize that the ecosystem with more species is the one that has been colonized—but this would suggest that colonization, by increasing diversity, improves ecosystems. The striped bass—introduced from the Chesapeake—is the most abundant game fish in the Sacramento-San Joaquin estuary. Is there anything about the striped bass that suggests its provenance? Is there anything about its effects that indicates how long it has been there? Can one tell from inspecting these creatures or these systems whether the striper went east or west?

If we take seriously the suggestion that bioinvaders cause ecosystems to deteriorate or decline, then ecologists should have no difficulty telling which systems have been invaded; they can simply observe which have deteriorated or declined. Yet they cannot do this. Biologists cannot observe any differences—including signs of imbalance or deterioration—that tell them what proportion of species in an ecosystem have colonized it recently and what proportion have been there for a long time. Nor can they correlate invasion with any negative impact over time—such as loss of biodiversity—since invasions typically add to the richness and in that sense to local species diversity. To be sure, one is more likely to find alien species in disturbed areas, like those near harbors, than in undisturbed areas off unfrequented coasts. This shows only that disturbance leads to colonization, however, not that colonization causes disturbance. At most, ecologists may argue that new arrivals compete with those species that are already there, but they cannot tell us why competition of this sort is ecologically a bad thing, even if native species are outnumbered or decline. Why aren’t the non-native ones just as good in general? In economic life, competition is regarded as a good thing— even if Toyota sells a lot of cars in America.

Discrimination without Xenophobia

Charles Elton concluded his study *The Ecology of Invasions by Animals and Plants* with a chapter titled "The Reasons for Conservation." He gave three that he regarded as grounds for excluding alien species: "The first, which is not usually put first, is really religious." Before Darwin, a religious argument for exclusion might have asserted that humans must not disturb the distribution of species present at creation. We now know that species had been evolving, dispersing, and commingling for billions of years—indeed, more than ninety-nine percent of all species created had become extinct— before human beings arrived on the scene. In order to domesticate nature—to turn wilderness areas into places where humans can comfortably live—we have had to rearrange nature's course, including the distribution of plants and animals. The religious objection that seems most plausible today is one also lodged against genetic engineering—that our assertion of control over nature has become excessive. Rather than acting as stewards of creation, we usurp God's role as creator.

The second kind of reason, Elton wrote, "can be called aesthetic and intellectual. You can say that nature—wild life of all kinds and its surroundings— is interesting, and usually exciting and beautiful as well." Native and indigenous species, which share a long and fascinating natural history with neighboring human communities, may reward study and appreciation. Moreover, many of us feel bound to particular places because of their unique characteristics, especially their flora and fauna. By coming to appreciate, care about, and conserve flora and fauna, we, too, become native to a place.

Aesthetic and intellectual values attach to species which have become associated with a place—part of its natural and human history. These species, however, need not have evolved in situ; they need only have settled in for a long enough time. Many of the alien species among us have become an integral part of our community and our cuisine—cattle, cotton, corn, and striped bass are surely as American as sunflower seeds, cranberries, and Jerusalem artichokes. The importance of shared history does not favor the native over the alien, but settled denizens of both types over the most recent arrivals. We need not be ashamed of our loyalty to the flora and fauna who have become our neighbors over those that aspire to do so; nothing compels us to treat newcomers on equal terms. But many or most of the once-alien species we encounter are not newcomers, and we have as much reason to be partial to the long-resident alien as to the truly native.

As a third reason for excluding or removing alien species, Elton mentioned economic costs involving "crops, forests, water, sea fisheries, disease, and the like." These reasons are perhaps the most familiar, since they are invoked so often in the contemporary debate. Of course, just as economic reasons justify excluding some human immigrants—for example, those known to be criminals—so they justify efforts to exclude known pathogens and other disease organisms. It should be obvious by now, however, that economic reasons cannot sustain the generalizations about alien species that ecological nativists are wont to make. Indeed, many of the most highly regarded species are or were once aliens, and many of the worst nuisances are native residents.

In the Chesapeake, for example, many biologists argue for the introduction of a non-native oyster to restore the commercial oyster fishery. A tasty and disease-resistant oyster native to Japan has been introduced successfully in bays across the world, from Australia to France to Washington state, where it supports profitable fisheries. This oyster as well as another from China seem suited to the temperature, salinity, sediment loads, and dissolved oxygen concentrations of the bay. Why not introduce an exotic oyster to the Chesapeake, where it could assume the ecological and economic functions of the nearly defunct native oyster?

Typically, people worry that an exotic will "take over" or spread without control. "I'm afraid of the new oyster," said Larry Simns of the Maryland Watermen's Association. "What if it takes over everything?" It might be a good thing, however, if the oyster did "take over everything": Imagine how rich watermen might become —and how soon the bay would return to its prelapsarian clarity—if the new oyster, a filter feeder like the zebra mussel, transformed the excess nutrients now choking the bay into food for the invertebrates that feed fish.

If we decline to replace the native oyster with the Japanese or Chinese variety, we should recognize that we are making an ethical, aesthetic, or spiritual decision, not primarily an ecological one. We may wish to respect the attachment of bay residents to the indigenous oyster, as an intrinsic part of their local historical and cultural heritage. We may fear that we would be "playing God" if we allowed the alien oyster to drive the native variety into extinction, and, perhaps, that we would offend God if we treated the bay only as a resource for commercial exploitation. In any case, we should acknowledge the moral or religious reasons that may justify a decision to give up what could be the economic and even ecological advantages of a disease-resistant exotic oyster.

Biological and ecological science, to some extent, can describe what may happen if nonnative oysters, swans, and so on are allowed to prosper in the Chesapeake Bay, but these sciences cannot evaluate the results. For example, biologists might tell us whether it is easier to teach mute swans or trumpeters to migrate, or whether they will coexist or even interbreed. We may then argue on aesthetic or historical grounds—E. B. White's wonderful book about a trumpeter swan might be relevant —for eradicating the mute and reintroducing the trumpeter. The argument, however, must be explicitly an aesthetic or historical one. Ecology should not attempt to become a normative science.

Afterword

Alien Species and Altered Genes

While we Americans busily seek to keep exotic species from our shores— and to eradicate those already here—Europeans apply the same energy to excluding genetically modified (GM) crops, largely from America, from their fields and foods. European cosmopolitanism tolerates porous borders for the flora and fauna of different regions. The European Union, however, has established a de facto moratorium on planting GM crops. Americans, in comparison, declare war on alien species but regard with near indifference the conversion of the nation's farmland to

GM corn and soybeans. Efforts by activists like Jeremy Rifkin to lead a consumer revolt against "Frankenfoods," while largely successful in Europe, have had little effect in the United States.

Can we explain the different attitudes of the New and Old Worlds to exotic and to engineered species?

The two worlds—Old and New—differ in their images or archetypes of nature. At first, Europeans who remained at home and those who came to America shared an antipathy toward the wild. When William Bradford stepped from the Mayflower into a "hideous and desolate wilderness," the attitude of the European settler in America was, to quote historian Roderick Nash, "hostile and his dominant criteria utilitarian. The conquest of wilderness was his major concern."

As pioneers, traders, and farmers subdued the wilderness, however, they began to think of it less in utilitarian than in aesthetic terms. As historian Perry Miller explained, "The more rapidly, the more voraciously, the primordial forests were felled, the more desperately poets and painters—and also preachers—strove to identify the personality of this republic with the virtues of pristine and untarnished, or 'romantic,' Nature." Writers like James Fenimore Cooper made wilderness a romantic icon in the United States. The idea of wilderness, William Cronon observed, has become that of a pristine sanctuary where "still transcendent nature can for at least a little while longer be encountered without the contaminating taint of civilization."

In America, Cronon argued, the idea of wilderness, by placing the human outside the natural, leads environmentalists to abdicate responsibility for the nature that actually surrounds and sustains them. While Americans zealously protect indigenous species as part of pristine nature, they appear less concerned about the degradation of areas they do not consider natural, such as farms, cities, suburbs, and other places where people live.

In Europe, the idea of a pristine nature has little spiritual or cultural force. The European image of Nature encompasses Wordsworth's Lake district and Monet's garden at Giverny. This image presents a bucolic landscape in which farmers gently till their land and care for their livestock while living in peace with their surroundings. In this pastoral setting, wildflowers, trees, and shrubs grow harmoniously with crops; indeed, sheep graze upon and thus maintain "natural" pastures. The natural landscape is a worked landscape, but one not worked too hard; there is a respect for nature's own rhythms and a willingness to adapt to its spontaneous course.

For Americans, farms do not belong to Nature but to commerce and industry. Americans have sought to conquer—to control utterly—nature in the sense of natural resources, even while fairly worshiping nature in the sense of the wild. The boundless domestication, indeed, industrialization of agriculture has been accompanied by the fervent protection of wilderness. Despite the lingering force of the Jeffersonian ideal of the "yeoman farmer" and the sentimental appeal of the family farm, Americans are now inured to the idea that agriculture is an industry as technologically driven as any other. American agronomists, infused with the idea of wilderness, wonder whether genetic engineering will so increase yields that agribusiness can feed the world with less acreage and so leave more land for "Nature."

The "technological treadmill" in agriculture, far from being accepted in Europe as business as usual, threatens the very idea of nature—the pastoral farm as depicted, say, in the paintings of Constable. The hatred of agrotechnology as an assault on nature is not new with genetic engineering. Over a century ago, John Stuart Mill condemned a landscape in which "every natural pasture is ploughed up, and scarcely a place left where a wild shrub or flower could grow without being eradicated as a weed in the name of improved agriculture."

Europeans regard GM crops as the last stage in this process: the eradication of nature, or everything lovely and worth protecting about it, in the name of improved agriculture. The same economic and technological forces that destroy nature as wild and pristine landscape in the United States seem poised to destroy Nature as pastoral landscape in Europe. As Americans try to parry the threat exotic species pose to our image of nature, so the Europeans respond to the threat GM crops pose to their conception of what is natural.

This article originally appeared in the *Report from the Institute for Philosophy and Public Policy*, volume 19, number 4 (fall 1999).

References

Ken Goldman and Bob Ferris, "Fly Away Home, Part II," news release from Defenders of Wildlife, June 30, 1997 (http://198.240.72.81/pr063097.html); Pat Durkin,"Big Immigrant Swans Drive Native Species from Feeding Grounds," *Buffalo News,* April 9, 1995 (quoting Doug Forsell); *The Birds of North America* (American Ornithologists' Union, 1992), no. 105 ("Trumpeter Swan") and no. 273 ("Mute Swan"); Karl Blankenship, "A Swan Song with a Happy Ending?" *Bay Journal* (published by the Alliance for the Chesapeake Bay), vol. 7, no. 6, September 1997 (http://www.bayjoumal.com/97-09/swans.htm); The Trumpeter Swan Society Web site (http://www.taiga.net/swans/); "President Clinton Expands Federal Effort to Combat Invasive Species," February 3,1999, White House news release (http://www.whitehouse.gov/CEQ/020599.html); Peter S. Goodman, "Pfiesteria Found in Two More Rivers," *Washington Post,* February 26,1999; Lidija Milic, "Zebra Mussels Beneficial," *Oakland Post*, February 18, 1998 (http://www.acs.oakland.edu/post/winter98/980218/n5.htm); U.S. Congress, Office of Technology Assessment, "Harmful Non-Indigenous Species in the United States" (OTA-F-565), 1993; Lori Valigra, "Alien Marine Life Eats Locals for Lunch," *Christian Science Monitor,* February 11,1999 (quoting Armand Kuris); Scott Harper, "Predators Are Breeding in the Bay," *Virginian Pilot,* September 22, 1998 (http://www.fishingnj.org/artrapawhelk.htm); Yvonne Baskin, "Winners and Losers in a Changing World," *BioScience,* vol. 48, no. 10,1998 (quoting David Lodge, a biologist at the University of Notre Dame, who attributes to alien species such qualities as higher fecundity, less parental care, and greater tolerance of degraded conditions); Daniel Simberloff, "Biological Invasions: A Growing Threat," *Issues in Science and Technology,* vol. 13, no. 4 (summer 1997); Gordon Orians, "Site Characteristics Favoring Invasions," in *Ecology of Biological Invasions of*

North America and Hawaii, edited by Harold A. Mooney and James Drake (Ecological Studies no. 58. Springer-Verlag, New York, 1986) (criticizing the stereotype of alien species) ; David Quammen, "The Weeds Shall Inherit the Earth," *The Independent,* November 22, 1998 (quoting Michael Soule on "ecological disintegration"); D. J. Rapport, R. Costanza, and A. J. McMichael, "Assessing Ecosystem Health," *Trends in Ecology and Evolution,* vol. 13, 1998 (on symptoms of ecosystem degradation); MIT Web site (http://massbay.mit.edu/exoticspecies/invaders/index.html); Maryland Sea Grant Fact Sheets (http://www.mdsg.umd.edu/exotics/index.html); William K. Stevens, "New Eye on Nature: The Real Constant Is Eternal Turmoil," *New York Times,* July 31,1990 at Cl (quoting Steward Pickett); Donald Worster, "The Ecology of Order and Chaos," *Environmental History and Review,* vol. 14, no. 1-2, spring/summer 1990; Michael Soule, "The Social Siege of Nature," in *Reinventing Nature: Responses to Postmodern Deconstruction,* edited by Michael Soule and Gary Lease (Island Press, 1995); Beth Baker, "Botcher of the Bay or Economic Boon?" *BioScience,* vol. 42, no. 10, Nov. 1992 (quoting Larry Simns).

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